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THOMPSON v. ADAMS et al.

(Supreme Court of Illinois. Dec. 18, 1903.)

WILLS—LIFE TENANT AS TRUSTEE—REMAIN-
DER—LIFE TENANT—POWER OF SALE—
COURTS—RIGHT TO ORDER SALE.

1. Where a will gave testator's widow the sole use and benefit of the property so long as she lived and remained unmarried, and on her death or remarriage possession and title were to unite at once in the same persons, provisions of the will making her a "trustee" were inoperative.

2. A will gave testator's widow the sole use and benefit of all the property during her life and while unmarried, and provided that on her marriage a certain distribution should be made, and also provided that at her death unmarried there should be a certain distribution of the estate "then remaining." The will directed payment of debts and certain expenses, and the assets included quite an amount of live stock. *Held*, that the use of the phrase "then remaining" did not show an intention to authorize the widow to sell real estate.

3. The widow had no right to use the corpus of the estate, either real or personal, without accounting for the same to those who, upon her death or remarriage, should become entitled to the fee.

4. Testator's will provided that the widow should have the sole use of all the property during her life, save in case of her remarriage, when the estate was to be divided between her and her children or the survivors of them, their heirs, and legal representatives, and on her death unmarried it was to be divided between the children, or the survivors of them, etc. *Held*, that the remainders were contingent.

5. Where, in a suit for the construction of a will, it is decreed that remainders to grandchildren are contingent, and the one living grandchild is a party to the suit, the decree is binding on such other grandchildren as may be born.

6. Although a will creates a life estate in all the property without giving any power of sale of real estate, a court of equity, for the purpose of preserving the property to the life tenant and remaindermen, may order a sale of real estate, though there is no trust, and it is contrary to testator's instruction.

7. Testator's will gave his widow a life estate in all the property, but no power of sale was given, and the will showed that it was testator's intention that the real estate should not be sold until the death or remarriage of the widow, when the remainders would vest. On a bill filed by the widow and executrix seeking an order for a sale of real estate it appeared that certain real estate was entirely unproductive; that a farm was highly improved, and could have been sold for \$40,000 could title have been given, and that there was a ranch worth about \$50,000 that had been conducted in an experi-

mental manner, and at a loss; that there were about 700 head of cattle on the ranch, and a large quantity of grain on the farm, and it did not appear that the widow had the experience or business ability to conduct them to good advantage. The amount of personalty belonging to the estate did not appear. *Held* that, as it did not appear that the farm and ranch could not be rented for amount exceeding the cost of their maintenance, a sale would not be decreed.

Error to Superior Court, Cook County; Jesse Holdom, Judge.

Suit by Elizabeth Adams, as executrix, etc., of the will of George Adams, deceased, against Elizabeth Adams Thompson and others, for a construction of the will, etc. From the decree, defendant Elizabeth Adams Thompson brings error. Reversed in part.

F. S. Loomis, for plaintiff in error. Deferees, Brace & Ritter, for defendants in error.

SCOTT, J. George Adams, a resident of Cook county, Ill., died testate on the 24th day of May, 1901. His last will and testament was executed on May 13, 1899, and admitted to probate on June 6, 1901. By that instrument he first directed the payment of his debts and funeral and testamentary expenses, and then made the following provisions:

"Second—And as to all of the residue and remainder of my estate by me owned and possessed at the date of my decease, after the payment therefrom of all my just and legal obligations by me owing at the time of my decease, as fully set forth in the last preceding clause hereof, I hereby give, devise and bequeath the same, and every part thereof, in trust to my trustee hereinafter named, for the sole use and benefit of my wife, Elizabeth Adams, so long as she shall live and remain my widow.

"Third—In case my said wife, Elizabeth Adams, shall marry again, after my decease, then and in that event it is my will, and I hereby order and direct, that all of my said estate, both real and personal, shall then be at once divided equally between my said wife, Elizabeth Adams, and my two daughters, Elizabeth Rebecca Adams and Emma Matilda Thompson, wife of Charles Francis

Thompson, or the survivor or survivors of them, their heirs and legal representatives, share and share alike.

"Fourth—And upon the death of my said wife, Elizabeth Adams, while she remains my widow, then and in that event it is my will, and I hereby order and direct, that my said estate, both real and personal, then remaining, be then equally divided between my said two daughters, Elizabeth Rebecca Adams and Emma Matilda Thompson, wife of said Charles Francis Thompson, or the survivor of them, their heirs and legal representatives, share and share alike.

"Fifth—In the event of the death of either one of my said daughters, leaving a child or children her surviving, during the lifetime of my said wife, Elizabeth Adams, then the entire distributive share so bequeathed to such deceased daughter hereunder shall at once, upon the death of my said wife, Elizabeth Adams, descend and pass to the surviving child or children of such deceased daughter forever, share and share alike.

"Sixth—It is my desire and request that my said daughter Elizabeth Rebecca Adams shall remain and have a home with my said wife, Elizabeth Adams, so long as my said wife shall remain my widow after my decease and my said daughter Elizabeth Rebecca Adams shall remain single and unmarried.

"Seventh—I do hereby nominate and appoint my said wife, Elizabeth Adams, to be the sole executrix of this my last will and testament, and I hereby waive the giving of any bond or security by her as such executrix, and request that she be not required by the court to give or furnish any bond other than that of her individual bond, as such executrix hereof.

"And I hereby also nominate and appoint my said wife, Elizabeth Adams, to be the sole trustee of my said estate for the purpose of carrying out the terms and conditions of the trusts established and declared by me relating to the control, management and disposition of my said estate, and the interest and income therefrom, under this will, and in the event of her death, absence, resignation, refusal or inability to act as such trustee, then I hereby authorize and request that the then judge of the probate court of Cook county do appoint a proper, suitable and discreet person as such trustee in lieu of my said wife, for the purpose of carrying to a final conclusion the terms and conditions of the trusts by me in this will established and declared regarding the control and management hereunder of my said estate, and the interest and income therefrom, as hereinbefore stated and set forth."

The testator left a valuable estate. He owned at the time of his decease a large amount of real estate in the city of Chicago, about 600 acres of land in Will county, Ill., and a ranch in Custer county, Neb., containing 5,360 acres of land. The widow, Eliza-

beth Adams, qualified as executrix, and in October, 1902, filed her bill in her own right, as devisee under, trustee named in, and executor of the last will and testament of the deceased, in the superior court of Cook county, against Elizabeth Rebecca Adams and Emma Matilda Thompson, the daughters named in the will, Charles F. Thompson, the son-in-law named in the will, and Elizabeth Adams Thompson, the only child of Charles F. and Matilda Thompson, who is a minor of the age of 12 years; the two daughters and the grandchild being the only descendants of the deceased. The bill prayed a construction of the will, the matters for determination being, first, whether the widow holds as a trustee or in her own right, and whether the trust attempted to be created by said will is effective, or whether that portion of the will devising and bequeathing said estate to the said widow in trust is inoperative; second, whether the daughters of the testator, under said will, take a vested or contingent remainder in his estate; third, whether the grandchild of the testator, together with other grandchildren, if any, which may hereafter be born, take, under said will, a contingent remainder, or take as heirs, and not as devisees, under that instrument; fourth, whether the widow, in any capacity, has power to sell and convey the real estate devised by the will, and to convert the same into money, and invest and reinvest moneys arising therefrom, during her lifetime, and whether she is accountable to the children and descendants of the deceased for any portion of the principal of the estate that she may consume.

The adult defendants jointly answered the bill, admitting the material averments thereof and expressing a desire that the real estate, other than the homestead, be sold, and the proceeds reinvested. Bernard F. Clettenberg was appointed guardian ad litem for the minor, and answered for her. The cause was referred to a master, who, in accordance with the decree of reference, took the proofs, and reported them, together with his findings, to the court. A decree was thereupon entered in conformity with the master's findings, construing said will and approving said report. The minor, by her guardian ad litem, sues out this writ of error to review that decree.

The superior court adjudged that the words creating the trust were ineffective; that the widow took a life estate in all the property, real and personal, subject to determination by her remarriage; that the testator's descendants took contingent remainders; and that the widow was vested with power to sell and convey all the estate, both real and personal, of which the testator died seised, and that she could not be required to account to the children or descendants of testator for the proceeds.

No trust is created by this will. The widow is to have the sole use and benefit of the

real and personal property so long as she lives and remains unmarried, and upon her death or remarriage possession and the title in fee simple will unite at once in the same persons. The provision of the will creating her a trustee is therefore inoperative. "A trusteeship cannot be predicated of one who holds for life only, and for his or her own sole use and benefit, and the instrument which gives the life estate also gives the remainder to others in their own right, and no duty other than those that grow out of their legal relation is imposed upon the life tenant." *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136. The rights, duties, and obligations of the widow under this will, so long as she remains unmarried, are those of a life tenant only. The words used for the purpose of creating a trust may be rejected as surplusage.

The only language contained in this will which can be held to indicate any purpose on the part of the testator to authorize the widow to sell the real estate is that found in the fourth clause, which directs that at the death of the widow "my said estate, both real and personal, then remaining," be distributed; and it is argued that the remainder which the testator had in contemplation was that portion of his estate which should remain after such sales of real estate had been made by the widow as she might see fit to make during her lifetime. In this connection it may be observed that the preceding section of the will, which provides for the contingency of the widow's remarriage, directs the distribution of all the estate, both real and personal, and does not qualify this description of the property by the words "then remaining." Words of similar import used by testators have been considered by this court in *Markille v. Ragland*, 77 Ill. 98; *In re Estate of Cashman*, 134 Ill. 88, 24 N. E. 963; *Skinner v. McDowell*, 169 Ill. 365, 48 N. E. 310, 61 Am. St. Rep. 183; and *Saeger v. Bode*, 181 Ill. 514, 55 N. E. 129; and in each of these cases the words were regarded as important in determining the meaning of words that preceded them in the instrument, it being doubtful from such preceding words whether a power of sale was given. Words devising that which should remain at the death of the life tenant were held to be decisive, showing that the testator intended to give a power of sale, and to devise, at the termination of the life estate, only that which should remain unsold. But in the will before us there is no provision, either preceding or following the words "then remaining," which indicates any purpose of the testator to vest the widow with a power of sale. There is here no doubtful power of sale which can be made a certain one by the consideration of these words in this will. The testator, by the first clause of his will, directed the payment of his debts and certain expenses. He owned a large amount of live stock at the time of his death. Some loss

or diminution thereof might be expected in the administration of the estate. These matters he may well have had in mind when he used the term now under discussion.

We therefore conclude that the widow has no authority, in any capacity, to dispose of the fee in the real estate; and from what we have said it also follows that she has no right to use the corpus of the estate, either real or personal, without accounting for the same to those who, upon her death or remarriage, shall become entitled to the fee. "A contingent remainder is one limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event. 2 Blackstone's Com. 168." *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120. So far as the devise of the remainder is concerned, which is to take effect upon the remarriage of the widow, it is a remainder which is to take effect upon a dubious and uncertain event, because the widow may not remarry. So far as the remainder is concerned, which is devised to take effect upon her death, it is to "dubious and uncertain persons." If the daughters survive the mother, they become entitled to the estate. Their title is conditional upon their being alive at the time of their mother's decease. The title of the grandchild now in esse, together with any others that may be born, is conditional upon the grandchild surviving the parent, upon that parent not surviving the grandparent, and upon the grandparent dying without remarrying. There is another view to be taken of the matter. It will be observed that the will contains no words devising or bequeathing property to any of the descendants of the testator, except words directing distribution to them upon the remarriage or death of the widow. This is an indication that the testator did not intend the title to the property in remainder to vest until the death or remarriage of the widow. *Ebey v. Adams*, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162. In *Haward v. Peavey*, supra, the testator devised his estate to his executor in trust for the use of his widow so long as she should live and remain unmarried, with remainder to such of his children as should be alive at the time of the widow's death or remarriage, or to the lawful issue of such of them as might be dead leaving such issue. It was held that the estate devised to the children was a contingent remainder, because a child would not take unless he or she were alive at the time of the death or remarriage of the widow. We regard that case as decisive of this question.

The superior court correctly decreed that the remainders taken by the descendants of the testator were contingent in their character, and the decree of that court, in so far as it is affirmed by this court, is binding upon the parties thereto and upon any grandchildren of the testator who may hereafter be born. The grandchild defendant to the

bill herein, Elizabeth Adams Thompson, is a representative of the class that will be composed of herself and other grandchildren, should others be born, and the decree, being binding upon her, is likewise binding upon them. *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776.

The bill, however, avers that certain real estate in the city of Chicago was occupied by the testator and his family in his lifetime, and by his widow since, as a homestead, and it is stated that the other real estate in the city of Chicago, except two lots, is vacant and unoccupied; that those two lots are improved with a frame house and barn, and that the rentals therefrom are barely enough to pay the expense of maintenance, and that the other real property in Cook county, aside from the homestead, yields no income whatever; that the taxes and costs of maintenance thereof are a burden upon the personality of the deceased, and that this realty is liable to be specially assessed in the near future for the purpose of making local improvements in the city of Chicago, which will increase the burden upon the widow's income; that the property in Will county consists of two tracts—one an 80-acre tract, which is unimproved, and the other a tract of 521 acres, which is highly improved, and is known as the "Custer Park Farm"; that the land in Nebraska is known as the "Deer Creek Ranch"; and that neither of these two properties last mentioned is self-sustaining. The bill then avers "that the retention of said real estate and continued operation of said farm and ranch will be such a continuous drain upon the personal estate that oratrix fears that in time the same may be exhausted, thus necessitating an abandonment of said properties, and in all probabilities eventually subjecting them to a forced sale, resulting in a great sacrifice." The bill contained an alternative prayer asking, in event the court should find that the widow did not have the power to sell and convey the real estate of the deceased, that a trustee be appointed with authority to sell and convey all the real estate of which the testator died seised, excepting the homestead property. Proof was taken in support of these averments, and the master recommended that a trustee be appointed to sell the real property if the widow was without power to dispose of and convey the same.

It is within the jurisdiction and power of a court of equity to grant the alternative relief asked by this bill against the express wish of the donor or testator where the facts warrant, even where no trust exists (*Gavin v. Curtin*, supra); but, in order to authorize the court to enter such decree, it must appear to be necessary to do so, where no trust exists, for the purpose of preserving the property to the life tenant and the remaindermen (*Gavin v. Curtin*, supra; *Baldrige v. Coffey*, 184 Ill. 73, 56 N. E. 411). We are

asked by defendants in error, in case we reach the conclusion that the widow is without a power of sale, and reverse the decree for that reason, to remand the cause, with directions to the superior court to enter a decree providing for a sale of the property through the intervention of a trustee to be appointed. We are not satisfied that the proof in this case warrants us in pursuing this course. It is evident from the will that the testator intended that the real estate should be held together, and not sold until the death or remarriage of his widow. The evidence taken as a basis for the relief now under discussion was that of Charles F. Thompson, the son-in-law, and Clarence H. Callender, who was the financial agent of Mr. Adams for many years. It appears from the testimony of these men that the Custer Park farm is highly improved, and had been sold by the executrix for \$40,000, but the sale was not consummated because the purchaser questioned her right to convey, and that the Nebraska ranch is well improved, and is of the value of about \$50,000; that Adams, in his lifetime, conducted both in an experimental manner, and at a loss; that he did not rent any part of either property, but had them fully equipped with implements and live stock of his own, and operated each through a superintendent and other employes hired by him, both the farm and the ranch being devoted largely to the business of raising and preparing live stock for market, and both seem to have been conducted more for the pleasure which the owner derived from their operation than with a view to realizing any profit therefrom; that Mr. Adams referred to the Custer Park farm as "Adams' folly"; that the executrix has continued to manage these properties in the same way that the testator did, reducing the expenses somewhat, and the witnesses expressed the opinion that neither property could be readily rented, for the reason that it was difficult to find renters who could rent and handle such large tracts, and that the Custer Park improvements were too valuable to be rented. We fail to find any evidence in the record at all in regard to the 80-acre tract in Will county. The bill avers that it was rented to a tenant by the testator in his lifetime, and that the widow has pursued the same course since his death. So far as the real estate in Cook county is concerned, the averments of the bill regarding its condition and its unproductiveness are amply sustained by the proof. There is no evidence in this record at all showing the extent of the testator's personal property. It appears that he had 600 or 700 head of cattle on the Nebraska ranch, and several hundred head of live stock and a large quantity of grain on the Custer Park farm. What his possessions in personalty were, aside from this, the record does not disclose. His real estate was unincumbered. He owned it all in fee except one section of land included

in the Deer Creek ranch, which the witnesses stated was school land.

We think it apparent from the proof that the widow has not the experience and knowledge of business that will enable her to conduct either the ranch or the Custer Park farm through a superintendent, stocking them and operating them with her own means, to good advantage; but we are not disposed to hold from this record that those two properties cannot be rented for amounts that will exceed the cost of their maintenance. No necessity appears for the sale of any of the real estate. The income from the personal estate of the deceased may be far greater than is necessary to support the widow in the abundance to which she has been accustomed and pay any deficiency that may exist in the cost of maintaining the real estate after the application of its income to that purpose, if there should be any such deficiency hereafter.

The motives animating the adult members of the family of George Adams appear from the testimony of Mr. Thompson. He says: "In my opinion, it would be to the best interests of the estate if the real estate, other than the homestead—possibly with the exception of the ranch—should be sold and disposed of. By that I mean the Nebraska ranch. Outside of that there is none of the property that is self-supporting. It is my opinion that it is to the best interests of the estate that provision be made for the sale of all real estate, including the ranch, so that, in the event sales can be made, the estate will be in a position to carry them into effect. That is the opinion and judgment of all parties interested. I have conversed with them, and know." It is evident that what is sought by the complainant in the bill is simply a better investment—one that will yield her a greater income; and, however prudent and commendable that may be from a business standpoint, it is not within the contemplation of the will. The case of *Johns v. Johns*, 172 Ill. 472, 50 N. E. 337, was a case where there was a trust. So far as the necessity or the propriety of a court of chancery directing the sale of the fee in the real estate, that case is much akin to the one at bar. There this court said (page 485, 172 Ill., and page 342, 50 N. E.): "The mere fact that a sale of the land might benefit the beneficiaries more than the compliance with the terms of the trust does not furnish a reason for a decree ordering the title of the land to be disposed of in opposition to the manifest wish of the donor. The duty of the court in dealing with such a trust is to observe and carry out the purposes and plans of the donor, unless the preservation of the subject-matter of the trust, or some other like necessity, demands interference with his will and intention. The evidence does not disclose a condition of such urgency or necessity. The decree is grounded solely upon the interest and convenience of the immediate beneficiaries."

The judgment which we will enter in this case, and the decree of the court below so far as affirmed by this court, will not prejudice the right of the life tenant, or other persons interested, to hereafter apply to a court of chancery for a decree directing the sale of the real estate, or any part thereof, through a trustee or otherwise, for any reason arising after the date of the filing of the bill herein.

The decree of the superior court, in so far as it adjudges that Elizabeth Adams has power to sell and convey any of the real estate of George Adams, deceased, in fee, and in so far as it adjudges that she cannot be required to account to his children or descendants for any portion of the corpus of his estate, real or personal, consumed by her, is reversed. In all other respects that decree is affirmed. The cause will not be remanded.

Decree reversed in part.

(205 Ill. 564)

PEOPLE ex rel. DENEEN v. BELINSKI.

(Supreme Court of Illinois. Dec. 16, 1903.)

ATTORNEYS—MISCONDUCT—DISBARMENT.

1. P. applied to defendant, an attorney, to obtain a divorce for him, and paid defendant \$50 for his services. Thereafter defendant falsely represented to P. that a bill had been filed and a decree entered in his favor, and gave P. a copy of a fictitious decree. Relying on defendant's statements and such pretended decree, P. remarried, and was subsequently indicted for bigamy, but before his arrest defendant went to his house and on a false representation obtained possession of the copy of the decree, and refused to return it. The mother of P.'s second wife testified that before her daughter's marriage to P. witness called on defendant and inquired if P. was divorced, and that defendant informed her that he was divorced and had the right to remarry. *Held*, that such facts showed defendant guilty of misconduct warranting his disbarment.

Information by the people, on relation of Charles S. Deneen, for the disbarment of Clement J. Belinski, an attorney. Rule for disbarment absolute.

Willard M. McEwen, David S. Geer, John T. Richards, and Frank B. Pease (Fred H. Atwood and Louis B. Dorr, of counsel), for relator. Darrow & Masters, for respondent.

HAND, C. J. This is an information filed in this court by the state's attorney of Cook county, at the instance of the grievance committee of the Chicago Bar Association for the disbarment of Clement J. Belinski, an attorney admitted to practice by this court on June 15, 1894, and who since that time has been engaged in practicing his profession in the courts of Cook county. The respondent filed an answer denying the charges contained in the information, and the testimony has been taken and reported to this court by a master in chancery.

The questions arising upon this record are questions of fact, and not of law. It clearly

appears from the pleadings and proofs that the professional conduct of the respondent has been most reprehensible. He is a foreigner by birth, and his victims who have testified against him are people of his nationality. The evidence shows that in the fall of 1900 the respondent was retained by Joseph Plotrowski to procure for him a divorce; that, without taking any legal steps towards procuring his divorce, the respondent falsely and willfully represented to him that he had filed a bill and a decree had been entered in his favor, and gave to him a copy of a fictitious decree; that Plotrowski, relying upon his statements and said copy of a pretended decree for a divorce, thereafter remarried; that he was subsequently arrested, and afterwards indicted for bigamy; that soon after the remarriage of Plotrowski, but before his arrest, the respondent went to his house and represented to him that the number upon the copy of the decree which he had given him was wrong, and obtained the possession thereof with a view to have it corrected, and upon obtaining possession thereof refused to return the same to Plotrowski. The evidence further shows that respondent received \$50 as fees for his services from Plotrowski. The respondent admits he was retained by Plotrowski to obtain for him a divorce, but denies that he ever represented to him that he had filed a bill and that a decree of divorce had been entered, or ever gave to him a paper purporting to be a copy of the decree. His statement is uncorroborated, and he is contradicted by the testimony of two witnesses (in addition to that of Plotrowski), who testified they went with Plotrowski to the office of the respondent to give evidence in the divorce case; that they accompanied the respondent and Plotrowski to the courthouse in Chicago; that they waited for a time, when the respondent said to Plotrowski that he and his witnesses could go home and he would get the divorce. Several witnesses also testified that Plotrowski exhibited to them a copy of a decree for a divorce from his first wife, and that the respondent's name appeared thereon as solicitor; and the mother of the second wife testified that before her daughter's marriage to Plotrowski she called upon the respondent and inquired of him if Plotrowski was divorced and had the right to remarry, and he informed her that he had been divorced from his first wife and had the right to remarry. Several witnesses also testified they were present when the respondent called at the house of Plotrowski and procured the copy of the decree, at which time he said he desired to have the court correct the number thereon, when he would return the same. A number of the neighbors of the respondent also testified that his general reputation for truth and veracity was bad, and that they would not believe him under oath.

It is impossible for this court to conceive

of more unprofessional conduct upon the part of an attorney than for him to represent to an ignorant man, who had employed him to obtain for him a divorce, that he had filed a bill and obtained a decree of divorce, and to mislead and deceive him by delivering to him a copy of a fictitious decree, and to represent to the mother of the woman whom he was about to make his second wife that her prospective son-in-law was divorced, when he had not filed a bill or taken any steps toward obtaining for his client a divorce, and when he had not been divorced. The obtaining of money from a client under such circumstances is a gross fraud, and is little better than larceny of the money thus obtained. The harmful results, however, which may follow such misconduct are far more serious than that of thus fraudulently obtaining money from a client. The victim of such misconduct is apt to remarry and subject himself to a criminal prosecution for bigamy and to conviction and incarceration in the penitentiary, and an innocent woman might find herself, as the result of such conduct, living in an open state of adultery with a man whom she supposed to be her lawful husband, while the children of such union would be illegitimates. An attorney who would practice such a fraud upon a client and upon society is devoid of all principle, and is unworthy to belong to the legal profession, and should be immediately disbarred by the court that conferred upon him a privilege which made it possible for him to perpetrate so great a wrong, upon such misconduct being brought to its attention.

The evidence shows that the respondent has been guilty of other unprofessional conduct. The wrong, however, done Plotrowski is of so grave a character as to warrant the disbarment of the respondent, and in view of that fact we have not deemed it necessary to review the evidence in the record, which establishes beyond doubt the other specific charges against the respondent contained in the information.

The rule heretofore entered against the respondent will be made absolute, and an order will be entered striking his name from the roll of attorneys of this court. Rule made absolute.

(206 Ill. 272)

NORTH CHICAGO ST. R. CO. v. WELLNER.

(Supreme Court of Illinois. Dec. 16, 1903.)

INSTRUCTIONS — WITNESSES — CREDIBILITY — ARGUMENT OF COUNSEL.

1. An instruction that it is the duty of the jury to find and determine the facts of the case from the evidence, and, having done so, then to apply to such facts the law as stated in the instructions, is not objectionable as leading the jury to believe that it is independent of the court and its instructions in forming conclusions of fact, and would not need to consider the instructions until after they had made their finding on the facts.

2. An instruction that if, in putting in the evidence or in argument counsel has made any statement not based upon the evidence, the jury should wholly disregard such statement, is not objectionable for failure to distinctly say that the statements of counsel referred to were statements in reference to the facts in the case, the instruction not amounting to a direction to disregard the arguments of counsel.

3. Error in giving an instruction claimed to have authorized the jury to disregard the arguments of counsel, cannot be regarded as prejudicial to appellants where it does not appear that appellant's counsel made any argument.

4. In an action for personal injuries by a married woman, in which plaintiff's husband testified in her behalf, an instruction that a husband is a competent witness to testify in behalf of his wife, and that, if the testimony given by him appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, the jury have no right to disregard the testimony of such witness merely from the fact that he is related by marriage to the plaintiff, was not erroneous as tending to give undue emphasis to his testimony.

5. An instruction that the credibility of the witness is a question exclusively for the jury, and that they have a right to determine from the appearance of witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, is not objectionable on the ground that it instructs the jury that an intelligent witness is more credible than an ignorant one.

Appeal from Appellate Court, First District.

Action by Leah Wellner against the North Chicago Street Railway Company. From a judgment of the Appellate Court (105 Ill. App. 652) affirming a judgment for plaintiff, defendant appeals. Affirmed.

John A. Rose and Louis Bolsot (W. W. Gurley, of counsel), for appellant. E. B. Esher and Wm. Ritchie, for appellee.

SCOTT, J. The appellant is engaged in operating a street railway system in the city of Chicago. On June 2, 1899, appellee, with her husband, was a passenger upon one of its cars. She sustained a personal injury, for which this suit is brought, while endeavoring to alight from the car on that day at the corner of La Salle and Monroe streets. She brought suit to the September term, 1899, of the superior court of Cook county. The evidence on her part in reference to the manner in which the injury was received, being the testimony of herself, her husband, and one other person, was to the effect that after the car stopped she attempted to get off, and that while she was getting off the car, but before she had had time to alight, the car started with a sudden jerk, which caused her to fall, and occasioned the injury complained of. The defendant introduced the testimony of a greater number of witnesses showing that the car stopped, and then started ahead again without any jerk whatever, and that after the car had started the plaintiff and her husband arose from

their seats, and attempted to leave the car, and that the plaintiff fell to the ground in so doing. There was verdict and judgment for \$5,000. The railroad company appealed to the Appellate Court for the First District, and from a judgment of affirmance there prosecutes a further appeal to this court.

The only errors assigned to which our attention has been called question the action of the court in giving each of four instructions, numbered respectively 3, 5, 8, and 9, the first two of which were given by the court of its own motion, and the last two of which were given at the request of appellee. Instruction numbered 3 is as follows: "It is the duty of the jury to find and determine the facts of this case from the evidence, and, having done so, then to apply to such facts the law as stated in these instructions." It is objected that this instruction is misleading; that it should have directed the jury to find and determine the facts from the evidence, and that in finding and determining the facts they should proceed as directed by the instructions. It is urged that under this instruction, as given, the jury would be impressed with the idea that they were independent of the court and its instructions in forming their conclusions of fact, and that they would not need to consider the instructions until after they had made their finding on the facts. An instruction containing the same direction to the jury was approved by this court in *North Chicago Street Railway Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849. We do not think the instruction could be construed by the jury to mean that they should not consider those instructions stating the law in reference to the tests to be used in determining the credibility of witnesses and in reference to other matters which would assist them in determining where lies the preponderance of the evidence.

The instruction numbered 5 is as follows: "If, in putting in the evidence, or in argument, counsel for either party has made any statement not based upon the evidence, the jury should wholly disregard such statement." The objection to this instruction is that the word "statement," where it first appears therein, should be followed by the words "in reference to the facts in this case," or other words of similar import, and that the instruction as given virtually tells the jury to disregard the arguments of counsel. The instruction would have stated the law with greater accuracy had it been modified as above indicated, but we do not think its effect could be as suggested by appellant. The jury possessing the statutory qualifications would have sufficient intelligence to understand that illustrations used by counsel in argument and his statements of his view of the law could not, in the nature of things, be based upon the evidence. Appellant refers us, under this branch of his argument, to *Jansen v. Grimshaw*, 125 Ill. 468, 17 N. E.

850, which holds that counsel have the right to state to the jury the propositions of law involved in the case upon which they rely. It does not sustain the objections made to this instruction. Further, it does not appear from this record that counsel for appellant made any argument to the jury, and, unless that fact appeared, we could not hold that the instruction was harmful, however erroneous it was in the respect complained of.

The instruction numbered 8 is as follows: "The jury are instructed that under the law of this state a husband is a competent witness to testify in behalf of his wife in a suit brought by the latter for personal injuries alleged to have been sustained by the wife. You are instructed that if the testimony of the husband appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then you have no right to disregard the testimony of such a witness merely from the fact that he is related by marriage to the plaintiff in the case." This is said to be erroneous because it singles out a particular witness, and tends to give emphasis to his testimony. The practice of naming or otherwise identifying a witness in an instruction of this character, when it can be avoided, is bad. *Phenix Ins. Co. v. La Pointe*, 118 Ill. 384, 8 N. E. 353; *City of Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416. Instructions stating the law by which the jury is to be guided in determining the credibility of witnesses should be in the most general terms, so that the jury may not infer that the court had any particular witness in mind in giving the instruction. Where, however, it must be apparent to the jury that the law stated in the instruction could apply to but one witness in the case, no matter how general its statements were, as here no husband testified in behalf of his wife except Mr. Wellner, and, no difference how the instruction was worded, the jury would know that it applied to him alone, and where, under such circumstances, the witness is not named in the instruction, we think the fact that he or she is identified in the instruction does not constitute reversible error. Instructions subject to the same criticism that appellant makes of this one have been given from time immemorial in criminal cases, advising the jury in reference to the law to be applied by them in determining the weight to be given to the testimony of the defendant. It is also objected that the instruction should not have been given because it was useless, as the fact that the court permitted the husband to testify showed to the jury that he was competent. In view of the history of our law in reference to the competency of the husband to testify for the wife, known to some extent among all the people from whom the jury are drawn, we think an instruction on this subject proper.

The instruction numbered 9 was as follows: "The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is that, where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced merely because of numbers. The jury have a right to determine, from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give them credit accordingly." The use of the words, "their apparent intelligence or lack of intelligence," in this instruction, is said to be a statement from the court that an intelligent witness is more credible than an unintelligent one, and that for this reason the instruction states that which is not the law. We are referred to *Chicago West Division Railway Co. v. Bert*, 69 Ill. 388. The instruction which was held erroneous there advised the jury that a witness may be just as effectually impeached by "his want of intelligence" as by the direct testimony of other witnesses. That instruction was wrong, because, among other reasons, it is for the jury, and not for the court, to determine what sort of an impeachment is effectual, or how effectual any particular impeachment is. While the jury has the right to take into consideration a witness' intelligence or lack of intelligence in determining the credit to be given his testimony, it is not upon the basis that an intelligent witness is more truthful than an unintelligent witness, but upon the theory that the witness of greater intelligence may observe more closely, remember more exactly, and relate more accurately that which transpired in his presence than the witness of lesser intelligence. In the consideration of the instruction now before us we are referred to *Eastman v. West Chicago Street Railroad Co.*, 79 Ill. App. 585; *Barron v. Burke*, 82 Ill. App. 116; *Hope v. West Chicago Street Railroad Co.*, Id. 311; *Chicago City Railway Co. v. Keenan*, 85 Ill. App. 367; and *Morton v. O'Connor*, Id. 273. The instruction passed upon in each of those cases, as will be observed by an examination thereof, is plainly distinguishable from the one now before us. It is unnecessary to enter upon a detailed discussion of each of them. In *City of La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72, an instruction was approved which told the jury that in weighing the testimony of the witnesses they had a right to take into consideration the apparent intelligence or lack of intelligence of the witnesses, and an instruction of substantially the same import was approved in *Chicago & Alton Railroad Co. v. Winters*, 175 Ill. 293, 51 N. E. 901.

Finding no error in the action of the court

in giving either of the four instructions to which objection is made, the judgment of the Appellate Court will be affirmed. Judgment affirmed.

(206 Ill. 301)

RANKIN v. SHARPLES.

(Supreme Court of Illinois. Dec. 16, 1903.)

SALES—PATENTED ARTICLES—INDEMNITY TO BUYER—REPAYMENT—CONSTRUCTION OF CONTRACT—TERMINATION OF LITIGATION—RELEASE—LICENSE—LEGAL SUFFICIENCY—EXPERT TESTIMONY—EVIDENCE—EXCLUSION—TRIAL—REMARKS BY COURT.

1. In an action to recover on a contract under which plaintiff sold certain patented articles to defendant, defendant retaining 15 per cent. of the price thereof to indemnify him from the consequences of infringement suits, which 15 per cent. was to be repaid at the expiration of a year from the termination of all such suits, admissions of defendant that plaintiff might have tendered him 26 licenses, one for each machine purchased, and evidence that defendant had paid plaintiff one year's interest on 15 per cent. of the value of 24 machines, was sufficient to warrant a finding that defendant had in his hands an amount of money belonging to plaintiff equal to said 15 per cent., on which sum interest was due.

2. In an action to recover a balance retained by defendant, the buyer of certain patented articles, to indemnify him from the consequences of infringement suits, which balance was to be paid to plaintiff, the seller, after the termination of all suits against defendant, an instruction assuming that defendant purchased 26 of the patented articles, instead of 24, was harmless, where the verdict by its amount showed that the jury computed the damages on the basis of 24 of the articles.

3. Under a contract for the sale of certain patented articles alleged to be infringements, by which the buyer was to retain 15 per cent. of the value of the articles purchased as indemnity for any suits brought against him; of which suits he was to give the seller immediate notice, in the absence of any such notice the jury, in an action by the seller to recover the 15 per cent. as provided in the contract, were justified in finding that no suits of which notice should have been given were ever instituted.

4. Under a contract for the sale of certain patented articles, by which the buyer was to retain 15 per cent. of the value of the articles to indemnify him for loss "caused by any guaranty given to any person in case any suit should be instituted against any person on account of using" such articles, and which indemnity was to be returned to the seller at the expiration of a year from the termination of all suits, the seller could recover, though suits had been instituted against purchasers from the buyer, where the buyer gave no guaranty to such purchasers.

5. Under a contract for the sale of certain patented articles by which the buyer was to retain 15 per cent. of the value of the articles to indemnify him from the consequences of suits brought against him, or purchasers from him on account of their use until a year after the termination of such suits, suits instituted against other persons than such buyer or purchasers from him did not affect the seller's right to recover the indemnity.

6. In an action to recover the balance reserved by a buyer of patented articles to protect him from the consequences of any suits instituted against him on account of their being infringements of other patents, which indemnity fund was to be returned to the seller at the expiration of a year from the termination of all

such suits, evidence of a release to the seller and his vendees from the owner of one of the patents alleged to be infringed, and of licenses for each article purchased from the seller, from the owner of the other patent, both of which were given some years before the institution of the action, was sufficient to justify a finding that all litigation affecting the rights of the seller had ceased and determined more than a year prior to the commencement of the action.

7. A ruling of the court to the effect that he would admit certain evidence for what it was worth, but it was not going to be read to the jury, was, for all practical purposes, an exclusion of the evidence.

8. In an action to recover the balance retained by the buyer of certain patented articles to indemnify him for suits on account of their being infringements of other patents, which balance was to be returned at the end of a year from the termination of all suits concerning the same, error of the court in admitting in evidence copies of docket entries and opinions in certain infringement suits was harmless, where defendant was saved from the consequences of all suits by releases and licenses from the persons whose patents were claimed to be infringed.

9. In an action to recover an indemnity fund retained by the buyer of certain patented articles to protect him from the consequences of their being infringements of other articles, which fund was to be returned at the expiration of a year from the termination of all suits against the buyer or purchasers from him, defendant cannot avail himself of an objection to a remark of the court, on cross-examination of plaintiff, that he would let him answer a question, but it was not pertinent, where the examination was as to a suit which was based upon the use of an article in which defendant was not interested.

10. A patent lawyer is not a competent witness on the legal sufficiency of a patent license, but the question as to its sufficiency is one for the court.

11. To recover the balance due on a contract for the sale of certain patented articles, which balance was to be retained by the buyer until a year from the termination of all suits instituted against him or his vendees on account of such patents being infringements, and further providing that at the expiration of one year after all litigation has been finally settled the buyer shall pay over to the seller the money retained, provided he shall not have been required to pay the same for the purposes of the indemnity, it is not necessary for the seller to show that all litigation existing at the time of the contract, or subsequently commenced, which might affect the rights of the buyer, had been finally settled.

Appeal from Appellate Court, First District.

Action by Philip M. Sharples against Thomas Rankin. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an appeal from the Appellate Court for the First District to bring in review a judgment of that court affirming a judgment of the circuit court of Cook county in an action brought by appellee against appellant.

The Appellate Court fairly and fully stated the case as follows: "December 12, 1895, appellee brought an assumpsit against appellant upon a contract executed by and between Sharples and appellant and his partner, Davis, dated March 24, 1890, to the following effect: That Sharples is engaged in the manufacture of Sharples cream separators, which

are alleged to be infringements of certain patents; that Davis & Rankin wish to be protected against loss by reason of purchasing and selling said separators, and to be indemnified upon any guaranty they may give to any person or persons purchasing from them and using such separators. It is agreed that Sharples will sell Davis & Rankin his separators at 25 per cent. below list price, and that Davis & Rankin shall retain 15 per cent. of the list price to secure and indemnify them against loss and damage in defending any suit brought against them because of their purchase or sale of such separators; also to protect and indemnify them against loss caused by any guaranty given to any person or persons in case any suit should be instituted against any person or persons on account of using such separators purchased from Davis & Rankin. It is agreed that Davis & Rankin shall retain said 15 per cent. of separators already purchased by them, as well as those hereafter purchased, to secure and indemnify them against loss, as above set forth. It is agreed that Davis & Rankin, at the expiration of one year after all litigation has been finally settled which in any way affects the right of said Davis & Rankin to purchase and sell said separators, or in any way affects the right of any person or persons in using said separators which they have purchased from said Davis & Rankin, shall pay over to said Sharples said 15 per cent. retained for the purposes herein set forth, provided that they shall not be required to pay the same, at the expiration of said year or thereafter, unless said Sharples shall make good to them any loss or damage suffered on account of any suit or suits instituted against them because of their purchase or sale of said separators. It is agreed that Davis & Rankin shall give Sharples immediate notice of any suit instituted against them or against any person or persons purchasing from them. The bill of particulars filed with the declaration shows the sale of 9 Sharples separators to the firm of appellant in 1889, and of 15 during the first three months of 1890, and it also states that 15 per cent. of the price of these 24 separators was retained by such firm, amounting to \$1,443.75, to which sum interest should be added from April 3, 1891. Issue was joined and a trial had, in which a verdict was rendered against appellant for \$1,970.50, and judgment was entered thereon. From that judgment this appeal was taken."

Defrees, Brace & Ritter, for appellant. Arthur W. Underwood, for appellee.

PER CURIAM. Appellant, in his brief in this court, in speaking of the opinion of the Appellate Court as to the amount found to be due from appellant, says: "We have never made any point in that court or the trial court as to the amounts in the hands of Davis & Rankin or the amount of the recovery. The

question is, can there be any recovery? And, secondly, was the case properly tried—that is, was it fairly presented to the jury under the rulings and instructions of the trial judge?"

The Appellate Court, in considering the case, said in part:

"An examination of the contract shows that this 15 per cent. was retained by Davis & Rankin to indemnify them against any loss, expenses, or damages that might come to them (1) 'in defending any suit brought against Davis & Rankin because of their purchasing or selling said separators'; (2) and also to protect and indemnify them against any loss, expenses, or damages that may be caused them 'by reason of any guaranty given by said Davis & Rankin to any person or persons * * * to indemnify said persons from damages recovered * * * in any fully litigated case * * * instituted against said persons on account of their using said separators purchased of said Davis & Rankin.' Said contract further provides 'that Davis & Rankin shall give immediate notice to said Philip M. Sharples of any and all suits instituted against Davis & Rankin on account of their purchasing or selling said separators, and also shall give immediate notice of any and all suits instituted against any person or persons on account of said person or persons using said separators which were sold to said person or persons by said Davis & Rankin.' It is further stipulated therein 'that said Davis & Rankin, at the expiration of one year after all litigation has been finally settled which in any way affects the right of said Davis & Rankin to purchase or sell said separators, or in any way affects the rights of any person or persons in using any of said separators, which said person or persons have purchased of said Davis & Rankin, they shall pay over to said Philip M. Sharples said fifteen per cent. of said list price retained by them, with interest, for the purposes herein set forth.' Then follows a proviso that such payment need not be made unless Sharples shall first make good to Davis & Rankin all loss, expense, and damage, if any, which they have suffered by reason of any such suits instituted against them or on account of any such suits brought against persons to whom Davis & Rankin have sold said separators.

"There is apparently no dispute but that Davis & Rankin purchased 26 separators from appellee prior to 1891, and retained in their hands 15 per cent. of the list price thereof. The bill of particulars filed with the declaration sets forth the sale of 24 Sharples separators from appellee to Davis & Rankin in the years 1889 and 1890 for the sum of \$9,625, 15 per cent. of which amounts to \$1,443.75—the principal sum claimed in this action. * * *

"When appellant was on the stand he was asked as to certain licenses, and the number of them, tendered to him by appellee. He answered: 'Later he brought in some, 1

would say eight or nine documents; that purported—or there might have been twenty-six of them, so far as I know now—showing and purporting to be an individual license for each machine we had purchased.'

"Interest for the term of one year upon the sum claimed herein was paid by appellant, and credit was given therefor by appellee. The jury were therefore fully justified in finding that Davis & Rankin, at the time this suit was begun, had in their hands \$1,443.75 of the money of appellant, and that upon this sum interest was due from April 3, 1891.

"The court instructed the jury upon the assumption that the number of Sharples separators sold to Davis & Rankin was 26. The foregoing evidence tends to support the instruction in that particular, and it is beyond question that the number of separators so sold, and from the price of which Davis & Rankin had retained 15 per cent. was at least 24. Upon the assumption that the instruction should have stated the number of such separators at 24 instead of at 26, that error did no harm, as the damages found by the jury were confined to 15 per cent. upon the selling price of 24 separators.

"The question remaining is, was this sum of \$1,443.75 due and owing at the time suit was brought? The evidence shows no notice given to appellee by Davis & Rankin, at any time, of any suit or suits brought against them or against any person to whom they had sold a separator. It was the duty, under the contract, of Davis & Rankin to 'give immediate notice' to appellee of such suit or suits. Without the giving of such notice Davis & Rankin would have no right to be protected from or to be indemnified for any loss, expenses, or damages that might be caused to them by the bringing or the prosecution of such suit or suits. In the absence of the notice thus required the jury were justified in the finding, which is inherent in their verdict, that no suit or suits, of which notice should have been given, were ever instituted. Again, this record does not show that Davis & Rankin ever gave 'any guaranty' to any person to whom they sold a Sharples separator. If they sold a separator to any one without giving to the purchaser their guaranty to indemnify him 'from damages recovered * * * in any fully litigated case * * * instituted' against him on account of his using such separator, appellee is not concerned therein. The beginning or the existence of such a suit would not bar recovery in this action.

"Appellant, to show that this suit was prematurely brought, interposes the records, or partial records, in seven suits concerning separators. But none of these suits were against Davis & Rankin or against any person to whom they had sold a separator; hence such litigation did not affect 'the right of Davis & Rankin to purchase and sell said separators,' nor did it affect 'the right of

any person or persons in using said separators' purchased from Davis & Rankin.

"There were but two patents which are said to be infringed upon by appellee involved in these suits. They are No. 293,314, granted February 12, 1884, owned by the Aktiebolaget Separator Company, of which the De Laval Separator Company was the sole licensee. December 24, 1891, such owner and sole licensee of the one part, and appellee of the other part, entered into an agreement whereby appellee and his vendees were released from all liability, whether for past or future infringement under said patent. As to the Thomson-Houston patent No. 239,659, owned by Serena Berger, and of which the Philadelphia Creamery Supply Company was the sole licensee, the latter company, on December 31, 1892, on the request of appellee, released Davis & Rankin 'from all liability of every kind whatsoever,' by reason of the 'sale, use, or ownership of twenty-six' separators sold by appellee to them prior to March 24, 1890. This release was offered to appellant not later than the year 1892. When offered to him, the appellant refused to accept it, either in its then form, or when, shortly afterwards, it was presented to him in the shape of individual licenses covering each machine he had purchased from appellee. David T. Sharples says that when he tendered the license to appellant the latter wanted to know what evidence appellee had used to settle the suit, and when told that such evidence cost money, and it would not be divulged to him, he said if he could not have the evidence he would not pay this 15 per cent., and 'that he could stand us off for a good many years upon technicalities.'

"In our opinion there is ample evidence in this record to justify the jury in finding that all litigation, if any there had been, affecting the rights of Davis & Rankin or of any of their customers holding their guaranty, had ceased and determined more than one year next prior to the commencement of this cause.

"Appellant complains that the trial court let in, over his objection, copies of docket entries and opinions in certain infringement suits. In so doing he misinterprets the ruling of the court, which was: 'I will let these go in for whatever they are worth; you can save an exception, but they are not going to be read to the jury.' For all practical purposes this was an exclusion of the evidence. Even if they had been admitted, such action is not reversible error, for the reason that the release in the one case and the license in the other rendered such evidence immaterial.

"The objection to the remark of the court, during the cross-examination of David T. Sharples as to the suit against Buchanan, that 'I will let him answer the question, but it is not pertinent,' cannot avail appellant, because the suit against Buchanan was bas-

ed upon the use of a separator neither bought nor sold by Davis & Rankin. Moreover, the question then asked was not proper in cross-examination.

"Appellant called one Pierce, a patent lawyer, and offered to show by him that he (Pierce) gave Davis & Rankin an opinion upon the legal sufficiency of the license tendered to them, signed by the Philadelphia Creamery Supply Company. It is not necessary to quote authorities to sustain the proposition that the legal sufficiency of documents in evidence is for the court, and that it cannot be testified to by witnesses, however learned. To state the proposition is to argue it. The other question asked of the witness Pierce and ruled out by the court called for hearsay evidence, and for that reason the ruling was proper.

"Appellant objects to certain instructions given or refused. The first instruction given for appellee is not subject to the criticism set forth. Appellee, under the terms of the contract in this case, was not bound to show that all litigation existing at the time of the contract, or subsequently commenced, which might in any way affect the rights of Davis & Rankin, or their vendees, to sell and use the separators, had been finally settled. Appellee did, however, show prima facie that no suits had been brought against Davis & Rankin or against their vendors, and that all suits in which they could be in any wise properly concerned had been ended by dismissal, decree, release, or license for more than one year next prior to the beginning of this suit.

"In our opinion, appellee's instruction No. 2 does not call upon the jury to determine a question which the court should have passed upon. It left to them to find, from all the evidence, whether or not the litigation named had been settled in time. The contract in question did not require appellee to reveal to Davis & Rankin the terms of any settlement he might make, but does require them to pay over this money at the expiration of one year after all litigation had been settled.

"Appellant's third instruction was properly refused. It was not based upon the evidence. In addition thereto, the records referred to in that instruction, and also in Nos. 4, 5, and 6 of appellant's refused instructions, were not before the jury. It may also be said that as to refused instruction No. 4 there is no evidence that the separators described in the case named therein 'are the same separators' purchased by Davis & Rankin from appellee.

"The fifth and sixth refused instructions are bad in this: that each is wholly immaterial, since the suit therein named is in no wise connected with the issue involved in this action. Refused instruction No. 10 is covered fully by instruction No. 9 as given.

"It was not error to refuse appellant's twelfth instruction, because it is abstract, and is not to the issue. The thirteenth refused instruction is subject to the same criti-

cism. The seventeenth refused instruction is based upon a misconception of the contract, and its refusal was therefore not error."

We have carefully gone over the abstract, briefs, and arguments as presented to this court, and regard the remarks of the Appellate Court, as above set forth, as entirely covering the case and the conclusions of that court as in harmony with the facts and the law. We concur in and adopt what is there said, and as the opinion of this court is that the judgment of the Appellate Court, which is in conformity with this opinion, is right, and that in the record there is no reversible error, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(206 Ill. 145)

MISSOURI MALLEABLE IRON CO. v. DILLON.

(Supreme Court of Illinois. Dec. 16, 1903.)

MASTER-INJURIES TO SERVANT—SAFE PLACE TO WORK—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY—FELLOW SERVANTS—PROXIMATE CAUSE.

1. A motion to instruct the jury to find for defendant admits the truth of all opposing evidence, and inferences which may be drawn therefrom, and, if such evidence fairly tends to support the plaintiff's case, it must be submitted to the jury.

2. A company engaged in the manufacture of iron castings maintained a room through which it was necessary to draw trucks loaded with hot castings, the floor of the room being composed of iron plates one of which was broken at the corner, so that one wheel of a truck, pushed by a number of employees, dropped into the hole, causing castings piled on the truck to upset, injuring one of the men. *Held*, that the company was guilty of negligence in failing to provide a safe place to work.

3. The duty of a master to provide a safe place to work includes the duty to make an inspection to ascertain the existence of defects, so that a master is liable for injuries caused to a servant by the unsafe condition of the place in which the servant is required to work if he might have known of the unsafe condition by the exercise of due care, although he had no actual knowledge.

4. A foreman employed by the master to take control of a particular branch of the business is not a fellow servant of the employees under his control, but is a vice principal, so that his negligence is imputable to the master.

5. The existence of the relation of fellow servants is, where the evidence on the point is conflicting, a question of fact for the jury.

6. Where an injury to a servant is the effect of the combined negligence of the master and of a fellow servant, the master is liable.

7. In an action by a servant for personal injuries it appeared that the injuries were caused by the fall of iron from a truck on which it was loaded, and that the accident occurred immediately after one of the wheels of the truck had dropped into a hole in the floor, which existed through the negligence of the master. The person in charge of the men with whom plaintiff was working directed them to stop the truck and pull it backwards to get the wheel out of the hole, and the accident occurred as they were doing so. *Held*, that as the dropping of the wheel into the hole and the direction of the foreman to pull the truck backwards were

practically identical in point of time, and one the necessary result of the other, the existence of the defect in the floor was the proximate cause of the injuries.

Appeal from Appellate Court, Fourth District.

Action by John T. Dillon against the Missouri Malleable Iron Company. From a judgment of the Appellate Court (106 Ill. App. 649) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of trespass on the case brought to the August term, 1901, of the city court of East St. Louis by appellee against appellant to recover damages for personal injuries received by appellee while in the service of appellant, by reason of the alleged negligence of the appellant. The appellant filed a plea of not guilty. The case was tried before the court and a jury, and resulted in verdict and judgment in favor of appellee for \$1,500. Upon appeal to the Appellate Court for the Fourth District the judgment was affirmed, and the present appeal is from such judgment of affirmance.

The declaration avers, in substance, that the Missouri Malleable Iron Company is a corporation operating a large manufacturing plant in East St. Louis, Ill., in which it manufactures various kinds of castings and iron and steel products for sale, and in conducting its business uses and operates a large building 100 feet long by 100 feet wide, containing a room called the "annealing room"; that various kinds of machinery, tools, pots, furnaces, and ovens are used in said room; that appellee was employed therein as a laborer and packer, and on February 22, 1900, was so employed by appellant in said annealing room, where the iron castings are taken after being turned out at the foundry, and the packers place the castings in pots in iron dust called "packing," and the pots are placed in hot ovens, where they are allowed to remain for a week or more to toughen the iron; that when the pots are severally taken out they are put on a long two-wheeled truck, and wheeled to another and distant part of the building, where the pot is taken from the truck and placed on the iron floor and left to cool; that it was the duty of packers to assist in putting pots in the oven, in taking them out, and placing them in position to cool, as stated; that it was the duty of appellant to use ordinary care to see that the floor on which appellee worked in said building was properly constructed, in good repair, and safe condition for use and travel thereon in said work required of him by appellant, and to see that said truck and machinery and appliances for use therein were properly constructed, in good repair, and safe condition for use by the appellee and his co-servants in performing the work required of them by the appellant in conducting its business; that appellant negligently failed to exercise ordinary care to see that the floor on which appellee worked was properly con-

structed and in good repair and safe condition for appellee to work thereon, but appellant negligently permitted the said floor to be and remain in a defective, broken, and unsafe condition, with holes and uneven places therein and in the surface thereof; that the appellant negligently failed to use ordinary care to see that the said truck, and the appliances thereof, were properly constructed, in good repair and safe condition, for use by the appellee in the performance of his work; that said truck and appliances were defective in construction—out of repair; that the same were defective and unfit for use in said work, in this: that the said truck had no brace, side piece, arm, or railing to stay, hold, or prevent said red hot pot or rings thereof from sliding down upon the appellee and his co-workers, who were pushing or pulling the truck with said pot thereon, and injuring them in case a wheel should break or the floor give way under it, which premises the appellant had notice of prior to and on the day aforesaid, or by the exercise of ordinary care would have had notice, and of which the appellee had no notice; that on February 22, 1900, appellee and his co-laborers were, with ordinary care and diligence for their own safety, pushing or pulling the said truck with one of the pots thereon, packed as aforesaid, from the oven to a distant part of the room, to be placed there to cool, and before reaching said place one wheel of the said truck, by reason of the negligence of the appellant by furnishing a defective and insufficient floor as aforesaid, ran into a hole in the floor, and in consequence of such negligence, and also in consequence of the negligence of the appellant in furnishing a defective, insufficient, and unsafe truck as aforesaid, the top two and a half rings of said redhot pot, packed with iron castings as aforesaid, were then and there jerked or thrown off, and fell down on appellee's left arm, and pinioned it to the handle or pole of said truck, and broke or crushed his said arm from the elbow to the hand, and he was so held by the great weight of hot iron on his arm till his fellows with handspikes or poles lifted it off his arm, and sent him to the hospital, where he remained five months, and suffered much pain of body and mind from said injury; that much of the flesh and muscles of his arm came off, and parts of the bones were crushed and broken and removed by the doctor in charge; that said arm and hand, in consequence of the injury aforesaid, have been wholly disabled, and their strength and usefulness as an arm and hand for all kinds of labor have been wholly destroyed, by reason of which the appellee is permanently disabled from performing all kinds of manual labor; that prior to his injury he was a strong, healthy man, earning \$9 a week; that he is now permanently injured and disabled for life; that he has expended \$500 for medical treatment, medicines, etc., endeavoring to be cured of his injuries.

The evidence shows that the floor of the annealing room is constructed by first making a bed of concrete about six inches thick; that on top of this, laid in cement, are hard cast-iron plates, three-fourths of an inch thick and about two feet square; that the scales or packing files all over the room, and covers the floor; that the truck with which the pots are wheeled has two wheels 20 inches in diameter with a 4-inch face; that the truck has a tongue or pole, by which it is pushed or pulled, 20 feet long; that the prongs of the truck, which project under the pots, are 20 inches long; that from the prongs to the body of the truck the distance is 18 inches, and from the wheels to the end of the handle or lever is about 20 feet; that a part of appellee's duties was to pack and help build these pots, and to help haul them on the truck to and from the oven; that the load consisted of boxes of hot castings, resting one upon another to the height of 6 feet; that these boxes were each about 12 inches high, 21 inches long, and 18 inches wide, and the load of them weighed from 2,000 to 2,500 pounds; that "in the construction of the truck there was no railing or other device to prevent the stack of boxes composing the load from toppling over; that the truck, when in operation, was manned by a crew of ten men, five on each side of the tongue or pole to propel and guide the truck. On the occasion of the injury the men were pushing the truck when one wheel ran into a hole in the floor, and the man steering the truck said, 'We've got to get out of here,' and the men all turned and went to pulling out; that appellee was near the wheel, and when they started to pulling the stack toppled over and fell on him, and very seriously injured him."

Wise & McNulty (R. A. Holland, Jr., of counsel), for appellant. Freels & Joyce, for appellee.

MAGRUDER, J. (after stating the facts). The evidence tends to prove such allegations in the declaration set forth in the statement preceding this opinion as are necessary to a recovery. No error is assigned by counsel for appellant as to the rulings of the trial court in the admission or exclusion of evidence. One instruction was given by the trial court on behalf of the appellee, the plaintiff below, but no error in this instruction is pointed out by counsel for the appellant in their brief or argument. The court gave 16 instructions in behalf of the appellant, as requested by it. The appellant complains that the court refused, at the close of the evidence, to exclude the evidence from the jury, and to give to the jury a written instruction instructing them to find the defendant not guilty. Appellant also complains that the court refused to give in its behalf two instructions asked by it, numbered, respectively, 17 and 18. The points and objections hereafter discussed grow out of the refusal of the court

to give the three instructions so asked by the appellant.

The refusal of the court to instruct the jury to find the appellant not guilty raises the question whether there is any evidence in the record fairly tending to support appellee's action. *Chicago City Railway Co. v. Loomis*, 201 Ill. 118, 66 N. E. 348; *Chicago City Railway Co. v. Martensen*, 198 Ill. 511, 64 N. E. 1017. Where there is evidence tending to establish a cause of action the case is one for the determination of the jury, and it is error in such case for the court to instruct the jury to find for the defendant. *Graver Tank Works v. O'Donnell*, 191 Ill. 236, 60 N. E. 831; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 63 N. E. 671, 89 Am. St. Rep. 319; *Martin v. Chicago & Northwestern Railway Co.*, 194 Ill. 138, 62 N. E. 599; *Central Railway Co. v. Knowles*, 191 Ill. 241, 60 N. E. 829; *Union Bridge Co. v. Teehan*, 190 Ill. 374, 60 N. E. 533; *Hartrich v. Hawes*, 202 Ill. 334, 67 N. E. 13. Inasmuch as there is evidence tending to establish the cause of action in this case, it was not error for the court to refuse a peremptory instruction to the jury to find the defendant not guilty. *Chicago & Alton Railroad Co. v. Eaton*, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161. Where a motion is made to take the case from the jury and to instruct the jury to find for the defendant, the maker of such motion admits the truth of all opposing evidence, and all inferences which may be fairly and rationally drawn from it. *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Chicago & Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *McGregor v. Reid, Murdoch & Co.*, 178 Ill. 464, 53 N. E. 323, 69 Am. St. Rep. 332; *Martin v. Chicago & Northwestern Railway Co.*, 194 Ill. 138, 62 N. E. 599. Where there is evidence which fairly tends to support the plaintiff's case it must be submitted to the jury, and the plaintiff is entitled to have his case considered by the jury if the evidence tends to prove ordinary care on his part and negligence on the part of the defendant. *Ide v. Fratcher*, 194 Ill. 552, 62 N. E. 814; *National Linseed Oil Co. v. McBlaine*, 164 Ill. 597, 45 N. E. 1015; *Chicago & Alton Railroad Co. v. Eaton*, *supra*.

Counsel for appellant urge various reasons, suggested by the evidence and by the alleged application of the refused instructions to the evidence, why the appellant was not guilty of negligence, and the appellee was not in the exercise of ordinary care for his safety.

It is well settled that the master must use reasonable care to furnish his servants with a reasonably safe place for the performance of their work, and he is liable for the negligent performance of such duty, whether he undertakes its performance personally or through another person. *Western Stone Co. v. Muscial*, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 63 N. E. 671, 89 Am. St. Rep. 319; *Himrod Coal Co. v. Clark*, 197 Ill. 514,

64 N. E. 232; Pioneer Construction Co. v. Howell, 139 Ill. 123, 59 N. E. 535; Armour v. Golkowska, 202 Ill. 144, 68 N. E. 1037; City of La Salle v. Kostka, 190 Ill. 130, 60 N. E. 72; Norton v. Volzke, 158 Ill. 402, 41 N. E. 1085, 49 Am. St. Rep. 167. The evidence tends to show that appellee, with other employes of appellant, was pushing the truck over the floor towards the place where the pot, consisting of five and a half rings or boxes of hot castings piled one upon the other, was to be set in position and left to cool. The evidence also tends to show that these hot pots, filled with hot iron, weigh from 2,000 to 2,500 pounds, and are taken on the truck over this floor. The evidence also tends to show that the corner of one of the cast-iron plates, of which the annealing floor was constructed, said plate being two feet square, had been broken off and removed before appellee was engaged in the work which resulted in the injury to him, and that there had thereby been left in the floor a hole, into which one of the wheels of the truck ran while appellee and the others were pushing the truck. It is unnecessary to consider the question whether this hole in the floor was large or small. The hole was large enough to obstruct the progress of the truck, and to cause the pot or pile of boxes, containing hot castings, to tip or tilt, and it became necessary to get the wheel out of the hole, in order to continue the movement of the truck, with its load, to the place where it was necessary to place it, in order that the castings might be cooled. It was a part of the duty of the appellee to push the truck over the floor, and, in view of the fact that this hole was in the floor, the appellant did not furnish a safe place for the appellee to work in or upon. The evidence is clear and conclusive that the appellee had no knowledge of this hole in the floor while he was so at work, or prior to his entering upon the work. The evidence tends to show there were scales or packing upon the floor of the room, which covered the same and concealed the hole from view.

Counsel for appellant claim that appellant cannot be held liable, because it had no notice of the existence of the hole in the floor prior to the happening of the accident. The rule in such cases is that the master is liable where the circumstances are such that he ought to have had notice of the defective condition of the cause of the injury, whether he had actual notice or knowledge or not. The master cannot screen himself from liability upon the ground that he did not know of the defects in his appliances if he might have known of them by the exercise of due care. "The law will imply and infer notice of any defect which by the use of ordinary care might have been known to the master." *Metcalf Co. v. Nystedt*, 203 Ill. 333, 67 N. E. 764; *Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162. It was the duty of the appellant to see that the floor was

clean and free from such obstructions as concealed the plates of the floor. It was the duty of the appellant to see that the iron plates in the floor were unbroken, and that the floor was in good repair and safe condition for use by its servants in the performance of the work required of them. In such cases the employer is negligent if he fails in the duty of inspection. Here it certainly was the duty of the appellant to inspect the floor, and, upon discovery of the hole by means of such inspection, it was its duty to repair the broken plate.

In *Armour v. Brazeau*, 191 Ill. 117, 60 N. E. 904, and in *Wrisley Co. v. Burke*, 203 Ill. 250, 67 N. E. 818, we held that "the servant is not to be deemed as having notice or knowledge of such defects and insufficiencies as can be ascertained only by investigation and inspection, for the purpose of ascertaining that there is no danger," and in those cases we said: "While there is no absolute duty to keep appliances in safe condition, there is a duty to use reasonable care to keep them fit, and this duty may require inspection at reasonable intervals, and the employment of such tests as will reveal the condition of the machinery or appliances. This duty of inspection rests upon the employer, and not upon the employe, and depends upon the character of the machine or appliance, since ordinary care may require an inspection oftener in one case than in another."

The evidence being undisputed that the defect in the floor existed, we are unable to say that appellant could not have known of the existence of the defect by the exercise of due care.

The truck, while being moved over the floor, was attended by ten men. One of these men, named Bolton, was intrusted with the duty of controlling and guiding the movement of the truck. There is evidence tending to show that Bolton was the foreman of the truck, and that he ordered the other men engaged in moving it what to do and how to perform their work. There is evidence tending to show that the other nine men were under Bolton's charge, and that he had charge of the truck, and was steering the truck. One of appellant's own witnesses says that Bolton was the man who handled the truck, and told the other men what they were to do. When the wheel of the truck was caught in the hole while the men were pushing the truck, Bolton gave an order that they should pull the truck out. The evidence shows that they then all turned around, and began to pull in pursuance of his order, instead of pushing, as they had theretofore done. While they were thus endeavoring to pull the wheel out of the hole, the pot fell over and injured appellee. There is evidence tending to show that it would not have fallen if the wheel had not gone into the hole. It is claimed on the part of the appellant that the injury resulted from the act of Bolton in directing the men to pull the truck

instead of pushing it. If Bolton stood to the appellant in the relation of a vice principal, his negligence, if he was guilty of negligence, could not be imputed to the appellee. If, as some of the testimony tends to prove, he was appellant's foreman, his negligence was the negligence of appellant. "Where a master confers authority upon one of his employes to take charge and control of a certain class of workmen in carrying on some particular branch of his business, such employe, in governing and directing the movements of the men under his charge with respect to that branch of the business, is the direct representative of the master, and not a mere fellow servant, and all commands given by him within the scope of his authority are in law the commands of the master." *City of La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72, and cases there cited.

It is claimed, however, on the part of appellant that Bolton and the appellee were mere fellow servants, and that, therefore, appellee cannot recover on account of the negligence of Bolton, if Bolton was guilty of negligence. Whether or not Bolton and appellee were fellow servants was a question of fact to be determined by the jury, and was submitted to the jury under the instructions of the court, and upon this issue the jury found against the appellant. "The definition of fellow servants is for the court. Whether employes of the common master fall within that definition is a question of fact; hence whether or not the relation exists is a mixed question of law and fact. * * * The burden of proof to establish the relation is upon the defendant, and that, even though the plaintiff alleges the negative in his declaration." *Hartley v. Chicago & Alton Railroad Co.*, 197 Ill. 440, 64 N. E. 382. Where the facts are conceded, or where there is no dispute whatever as to the facts, and they show beyond question that the relation of fellow servant exists, then the question may become one of law. *Chicago & Eastern Illinois Railroad Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921; *Hartley v. Chicago & Alton Railroad Co.*, supra. In the case at bar, however, the question as to whether the relation of fellow servants existed between Bolton and appellee was a disputed question. The facts in relation to the same were not conceded. Three witnesses testifying for appellee and one for appellant swore, in substance, that Bolton was a foreman in charge of the other men, and invested with authority to direct their actions and their work, and this contention was contradicted by testimony offered by the appellant. There was here, therefore, a conflict in the evidence as to the existence of the relation of fellow servants, and therefore it was properly submitted to the jury.

Even if, however, the relation of fellow servants did exist between Bolton and the appellee, there is another principle, well settled by the decisions of this court, which has application to the facts shown by the record in

this case. The law is that where an injury to a servant is the combined effect of the negligence of the master and of a fellow servant the servant may recover. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Chicago & Northwestern Railway Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117; *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66; *American Express Co. v. Risley*, 179 Ill. 295, 53 N. E. 558. In the recent case of *Armour v. Golkowska*, 202 Ill. 144, 66 N. E. 1037, we said: "If an injury result from the negligence of the master combined with that of a fellow servant, and the injury would not have happened had the master observed due care for the safety of the injured servant, the master is liable." In the case at bar the appellant company was guilty of negligence in failing to keep the floor in a good and safe condition, as was evident by the existence of a hole into which one of the wheels of the truck sank; and if Bolton, regarded as a fellow servant with appellee, was also guilty of negligence in ordering the men to pull the truck out of the hole, instead of resorting to some other method of extricating it, or if Bolton was guilty of negligence in moving the pole or tongue of the truck up and down, it cannot be said that the injury was not caused by a combination of the negligence of appellant and of Bolton. Therefore appellant is liable. One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for an injury caused entirely by his own negligence. Here there is evidence tending to show that if appellant's negligence was not the sole cause of the injury to appellee he was injured by the concurring negligence of appellant and Bolton.

It is said, however, that the existence of the defect in the floor was not the proximate cause of the injury to appellee. The position of appellant upon this branch of the case is that the pot, consisting of the boxes loaded with hot castings, did not fall when the wheel entered the hole in the floor, but that it fell after the wheel was in the hole, and in consequence of the efforts of the men to pull the wheel out of the hole. It is therefore contended that the proximate cause of the injury was the effort to extricate the wheel from the hole, and not the existence of the hole itself. It is charged that there is a variance between the declaration and the proof upon the alleged ground that, according to the averment in the declaration, appellee was injured in consequence of the truck running into the hole, while the proof, it is said, shows that the pot broke while the men were in the act of pulling, in a vain endeavor to extricate the wheel of the truck from the hole. It is to be observed that no appreciable time elapsed between the falling of the wheel into the hole and the breaking of the pot. The testimony tends to show that, as soon as the wheel of the truck ran into the hole in the

floor, the foreman of the truck gave the order to "pull out," and that the men all turned around and pulled, and as soon as they started to pull the pot broke in two and fell over upon appellee's arm. It is thus evident that the entry of the wheel into the hole, and the act of pulling in pursuance of Bolton's order, were all parts of one transaction; and it cannot be denied that but for the running of the wheel of the truck into the hole the appellee would not have been injured. Had not the truck run into the hole there would have been no necessity to attempt to pull it out, and appellee would not have been injured. One of the witnesses says that the pot would not have fallen if the truck had not gone into the hole.

The question whether or not the negligence of appellant was the proximate cause of the injury was a question of fact for the jury, and they have settled it against appellant. Pullman Palace Car Co. v. Laack, supra; City of Rock Falls v. Wells, 169 Ill. 224, 48 N. E. 440; Chicago & Eastern Illinois Railroad Co. v. Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318; Chicago & Alton Railroad Co. v. Harrington, 192 Ill. 9, 61 N. E. 622; True & True Co. v. Woda, 201 Ill. 315, 66 N. E. 369; Armour v. Golkowska, supra.

"The general test as to whether negligence is the proximate cause of an accident is therefore said to be whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby. Proximate cause is therefore probable cause, and remote cause is improbable cause." 1 Thompson on Negligence, § 50; Armour v. Golkowska, supra. In Village of Carterville v. Cook, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248, it was charged as negligence that the city had constructed a sidewalk at an elevation of some six feet above the surface of the ground, and had not provided a railing for the protection of pedestrians. In commenting upon the latter case in Armour v. Golkowska, 202 Ill. 144, 66 N. E. 1037, we said (page 149, 202 Ill., and page 1039, 66 N. E.): "The plaintiff, a boy, was, by the inadvertent or negligent act of another boy, pushed from the sidewalk, and, there being no railing, fell to the ground and was injured, and we held that, although the primary cause of the injury was the act of the other boy, still that as the village was negligent in failing to protect the walk, and the injury was such as common prudence could have foreseen, the negligence of the village was to be regarded as the proximate cause of the injury, and the village was held liable to respond in damages. The same principle was announced and applied by this court in City of Joliet v. Verley, 35 Ill. 58, 85 Am. Dec. 342." If, in the case thus referred to, where the elevated sidewalk had no railing, the act of one boy in pushing another from the sidewalk was not the proximate cause of the injury, but the act of the village in failing to put a railing upon the sidewalk was the prox-

69 N.E.—2

imate cause of the injury, then, in the case at bar, it can with equal truth be said that the act of trying to extricate the truck from the hole in question by pulling was not the proximate cause of the injury, but the act of the appellant in permitting the floor to become defective by the removal of the broken plate, which caused the existence of the hole, was the proximate cause of the injury.

In view of the observations above made, we are unable to say that the court committed any error in refusing to take the case from the jury, or in refusing to give the two instructions asked by the appellant in relation to fellow servants and variance.

Accordingly the judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 9)

HOME SAVINGS & STATE BANK v.
PEORIA AGRICULTURAL &
TROTting SOC.

(Supreme Court of Illinois. Dec. 16, 1903.)

DEEDS — UNRECORDED TRUST — PURCHASER
WITHOUT NOTICE—TITLE—WHAT
CONSTITUTES NOTICE.

1. Under 1 Starr & C. Ann. St. 1896, c. 30, par. 31, providing that conveyances take effect only from the filing of the same for record as to creditors and subsequent purchasers without notice, a purchaser of land from the holder of the legal title thereto is protected against an unrecorded declaration of trust executed by the holder of the legal title of which he had no notice.

2. Though, as between a grantor and a grantee, a dry trust is created in favor of the former, a purchaser at an execution sale under judgment against the grantee takes the land free from the trust of which he had no notice.

3. A conveyance by an agricultural society by a warranty deed, for a stated consideration of \$1, reciting that the conveyance is made pursuant to a resolution of the directors of the society, does not constitute notice to third persons that the grantee holds the land in trust.

4. The holding of a public meeting in a city, at which a society allotted its lots to purchasers, does not constitute notice to a bank in the city, none of its officers being present, that the purchasers were trustees.

5. Knowledge of a director of a bank that a grantee holds land as trustee is not notice to the bank.

Error to Circuit Court, Peoria County; L. D. Puterbaugh, Judge.

Suit by the Peoria Agricultural & Trotting Society against the Home Savings & State Bank. Decree for plaintiff, and defendants bring error. Reversed.

Dan F. Raum, for plaintiffs in error. W. T. Whiting, for defendant in error.

WILKIN, J. This is a bill in equity filed in the circuit court of Peoria county, in which the defendant in error seeks to have set aside two sheriff's deeds issued to the plaintiffs in error.

The facts are as follows: The defendant in error was desirous of subdividing a certain tract of land into lots and selling the same to raise money to carry out the object

for which the association was organized. It was the owner of one of the three pieces of land constituting said tract, and by its warranty deed, for a consideration of \$1, conveyed the same to one John B. Samuel. The other two pieces of the tract were purchased by the association, and by its directions also conveyed to the said Samuel. The three deeds of conveyance were absolute, without any limitations or conditions whatever appearing upon the face of any of them, and conveyed the fee-simple title to the grantee, John B. Samuel. After these deeds of conveyance had been made, the land was divided into lots, known as the "Fair Ground Subdivision," and on May 15, 1895, the plat of said subdivision was filed for record in the recorder's office of Peoria county, which plat was executed and acknowledged by the said Samuel as proprietor and owner. On the same day he executed his declaration of trust, in writing, to the association, in which he certified that he held the title of record in his name to the lots described in the Fair Ground Subdivision in trust for the Peoria Agricultural & Trotting Association, but this declaration of trust was never filed for record. As to plaintiffs in error it never took effect, unless the evidence shows that they had actual notice of its existence. 1 Starr & C. Ann. St. 1896, p. 944, c. 30, par. 31; Robins v. Moore, 129 Ill. 30, 21 N. E. 934. In that case we said (page 43, 129 Ill., page 938, 21 N. E.): "The law is well settled that a bona fide purchaser of the legal estate will be protected against the prior equitable title of another, of which he had no notice. 2 Pomeroy's Eq. 740. This court has frequently announced this rule and applied it." And again, on page 44: "So, a purchaser of land who has no notice that his grantor's deed is but a mortgage will be protected"—citing *Jenkins v. Rosenberg*, 105 Ill. 157. So, although the grantor in a deed may hold the legal title in trust for another, a third person may acquire the title from the trustee, if he has no notice of the trust and acts in good faith. *Emmons v. Moore*, 85 Ill. 304; 2 Pomeroy's Eq. 770. See, also, *Peck v. Arehart*, 95 Ill. 113; *McDaid v. Call*, 111 Ill. 298; *Bradley v. Luce*, 99 Ill. 234. It is not claimed that there was any actual possession of the property in question by the defendant in error. As lots were sold, Samuel executed deeds of conveyance to the purchasers, and if all the purchase price was not paid in cash he took mortgages, as trustee, for the deferred payments.

On April 28, 1898, the plaintiffs in error recovered a personal judgment against the said Samuel for \$1,066.50, upon which judgment execution was duly issued, and on April 14, 1899, regularly levied by the sheriff of Peoria county upon all the right, title, and interest of the said John B. Samuel in and to the lots in controversy in this case, and by virtue of said levy, on June 7, 1899, all of the right, title, and interest of said John

B. Samuel in and to said lots was sold to the plaintiffs in error herein, and a certificate of purchase issued therefor. On April 28, 1899, one Charles E. Ulrich, one of the officers of the plaintiff in error bank, sued out a writ of attachment against the said Samuel, and levied the same upon all of the right, title, and interest of the said Samuel in and to certain other of the lots in controversy. A judgment was obtained, special execution issued, and all of the right, title, and interest of the said John B. Samuel in and to said lots was sold, and the certificate of purchase afterwards assigned to the plaintiffs in error herein, and, the equity of redemption having expired upon both sales, the sheriff executed to the plaintiffs in error his deeds for said lots, which said deeds specifically stated that they conveyed all the right, title, and interest of the said John B. Samuel. On March 1, 1901, the defendant in error filed this its bill for relief, and upon the hearing the court decreed that at the time of the levy and sales made by said sheriff the said Samuel had no right, title, or interest in said lots in the Fair Ground Subdivision, except as trustee, and that said interest of said Samuel was not subject to levy and sale under said executions, and that the plaintiffs in error acquired no title or interest in said lots by virtue of said sales and said certificates and deeds, and that said sheriff's deeds were clouds upon the title of said defendant in error, and they were accordingly set aside and declared null and void. From this decree a writ of error has been prosecuted to this court.

In support of the decree as entered by the circuit court, the defendant in error claims that under the declaration of trust as made by Samuel, and under the deeds of conveyance to him, a mere dry or naked trust was created, and by reason of such dry trust the legal title to the land never vested in the said Samuel at all, but went instantaneously to the cestui que trust as soon as the use was declared, and for this reason, at the time of the sale by the sheriff, the said Samuel had no right, title, or interest in said lots in question, and that the sheriff's deeds did not give plaintiffs in error any title. We are of the opinion that this claim of defendant in error is not sustained by the law under the evidence in this record. *Robins v. Moore*, supra. Conceding that, as between defendant in error and Samuel a dry trust was created, it does not follow that innocent purchasers or judgment creditors without notice are concluded thereby. As to such purchasers or creditors the right, title, and interest of John B. Samuel was the absolute fee-simple title. From time to time, as the lots were sold, he made deeds conveying the fee to the purchasers, receiving mortgages to secure deferred payments. It is not disputed that he was vested with the legal title for the purpose of making these conveyances. If the contention of defendant in error is cor-

rect, then there was no title in him at the time of such conveyances, and his deeds conveyed no title whatever to purchasers. If he was vested with sufficient title to make conveyances to the purchasers, he was also vested with the title, to be subject to a sale on a judgment against him, obtained in good faith and without any notice of the alleged trust.

It is contended, however, that plaintiffs in error had notice of such trust, and three reasons are given for such contention: First, because the conveyance from defendant in error to Samuel was by a warranty deed, for a stated consideration of \$1, which contained the following recital: "This conveyance is made and executed pursuant to a resolution of the board of directors of the Peoria Agricultural & Trotting Society;" second, for the reason that at a meeting, in the city hall in Peoria, of citizens and contract holders, the lots were allotted to the purchasers, which meeting was so public in its nature as to constitute notice to plaintiffs in error; third, for the reason that one Fred L. Block, who was vice president of the Schipper & Block Dry Goods Company, and at the time a director of the plaintiff in error bank, negotiated with defendant in error for the purchase of a lot, and thereby learned that it owned said lots. We do not think any of these reasons are sufficient to charge plaintiffs in error with notice of the alleged trust, either actual or constructive. The deed in question does not show that the conveyance was less than a conveyance of the fee. Nor do we think that the meeting referred to even tends to prove a trust relation between the parties. There is nothing in the evidence tending to show that any of the officers of the plaintiff in error bank were at the public meeting claimed to have been held in the city hall, or that they had any notice thereof. It can scarcely be contended that every citizen in a city like Peoria is charged with notice, etc. There is no presumption of law that the director, Block, communicated to plaintiffs in error any knowledge he may have had as to the character of Samuel's title, and he was under no legal obligations so to do. 4 Thompson on Corporations, §§ 5204, 5219, 5221.

From a careful examination of all the evidence we are of the opinion that it entirely fails to show notice to plaintiffs in error, either actual or constructive. For over three years defendant in error permitted the fee-simple title to appear of record in Samuel. The declaration of trust, as already stated, was never placed upon record, and there is no claim that it was ever brought to the knowledge of plaintiffs in error; nor is there evidence of notice to them, of any kind or character, of the conditions or circumstances under which he (Samuel) held the title to the premises. We are therefore of the opinion that the said Samuel, at the time of the levy and sale under said executions, held

the title of said lots, and that the same were subject to levy and sale, and that by reason of such sales and said deeds the plaintiffs in error acquired title to the lots in controversy, and that for this reason the circuit court had no power or authority to set aside said deeds.

For the reasons above stated the decree of the circuit court will be reversed, and the cause will be remanded for further proceedings in accordance with the opinion herein expressed. Reversed and remanded.

(206 Ill. 174)

CHICAGO CITY RY. CO. v. MEAD.

(Supreme Court of Illinois. Dec. 16, 1903.)

PERSONAL INJURIES—MEASURE OF DAMAGES—INSTRUCTIONS—HARMLESS ERROR—SUFFICIENCY OF EVIDENCE—JUDGMENT OF APPELLATE COURT—CONCLUSIVENESS.

1. In an action for personal injuries, an instruction that in estimating plaintiff's damages it was proper to consider the effect of the injury upon the plaintiff, and also the bodily pain and suffering which she sustained, and all damages charged in the declaration, and which, from the evidence, were shown to be the necessary and direct result of the injury, was, in view of evidence that plaintiff had sold out her business after the accident, erroneous, because allowing the jury to consider bodily pain and suffering, and the effect of the injury on plaintiff, in addition to damages charged in the declaration and shown by the evidence.

2. In view, however, of a number of other instructions stating that it was the duty of the jury to decide the case solely from the evidence under the instructions, the error was harmless.

3. On appeal from a judgment of the Appellate Court affirming a judgment on a verdict, it must be presumed that that court found the judgment not to be against the weight of the evidence, though in the opinion it stated that the weight of the evidence seemed to be with the defeated party.

Appeal from Appellate Court, First District.

Action by Anna Mead against the Chicago City Railway Company. From a judgment of the Appellate Court (107 Ill. App. 649) affirming a judgment for plaintiff, defendant appeals. Affirmed.

William J. Hynes and Sears, Meagher & Whitney (Nathaniel C. Sears and Mason B. Starring, of counsel), for appellant. James O. McShane and F. A. Rockhold, for appellee.

CARTWRIGHT, J. Appellee was a passenger on a west-bound Sixty-Third street car belonging to appellant in the evening of June 28, 1900. The car had crossed Cottage Grove avenue, and had stopped at the west side of the street, when an east-bound car collided with it. It was an open car with reversible seats, and appellee, seeing there was about to be a collision, arose in her seat. When the collision occurred she was thrown forward against the back of the seat in front of her, and then back to the seat upon which she had been sitting. She brought this suit in the superior court of Cook county to recover damages for injuries alleged to have been occasioned by the collision. Upon a

trial she obtained a verdict for \$3,500, upon which judgment was entered, and the judgment was affirmed by the Branch Appellate Court for the First District.

The accident was clearly due to the negligence of the defendant, and there was no evidence tending to show the contrary. There was practically no question at the trial about the liability of the company for such damages as were the proximate result of the collision, and the controverted questions in the case related to the extent of plaintiff's injuries. The evidence showed that she had neurasthenia, and was pale, anæmic, and in a weak condition. This was not denied, and plaintiff attributed her condition to the accident, while defendant offered evidence tending to show that she had been pale, thin, and delicate looking, and that her condition had been about the same before the accident as afterward. She testified that after the accident she went across the street to the office of a doctor, who discovered that her tenth rib was broken. That doctor testified that she complained of pain in that region, and he thought at the time that there was a fractured rib. Another doctor, who was present at the office, and made the examination, failed to detect any injuries or bruises, and testified that the rib was not fractured, but, owing to her complaint, he applied some adhesive strips. Two other doctors, who saw her that night after she got home, and the next day, and examined her, one of whom continued to treat her, testified that there was no fracture of any rib, or any contusion, bruises, marks, or swelling upon her. There was other evidence tending to show that the rib was not fractured. About five weeks after the accident an examination was made, when it appeared that she had retroversion of the uterus, and there was some evidence that it might have come from a fall or injury. On the other hand, there was evidence that such a displacement could not result from outside violence, and the physicians, generally, who were examined on the trial, testified that such a condition could not be produced by the accident which she described. In the opinion filed, the Branch Appellate Court stated that the question whether the amount awarded was excessive depended largely upon whether the retroversion of the uterus was due to the accident or causes that antedated it, and said that the decided weight of the evidence was that none of plaintiff's ribs were fractured by the accident, and that as to the retroversion the testimony was contradictory, with, as it appeared to them, the weight thereof with the defendant. That court, however, affirmed the judgment.

The only error assigned which we can consider is that the trial court erred in giving the sixth instruction to the jury, concerning the elements of damage which they might properly consider. That instruction is as follows: "The court instructs the jury that if, under the evidence and instructions of the

court, the jury find the defendant guilty, then in estimating the plaintiff's damages, if any, it will be proper for the jury to consider the effect, if any, of the injury upon the plaintiff, and also the bodily pain and suffering, if any, she sustained, and all damages, if any, charged in the declaration, and which, from the evidence, are shown to be the necessary and direct result of the injury complained of." The case was of such a nature as to require accurate instructions, and it must be conceded that this instruction, standing alone, would have been objectionable. The last part of the instruction, by which the jury were to allow to plaintiff all damages, if any, charged in the declaration, and which, from the evidence, were shown to be the necessary and direct result of the injury complained of, covered all that plaintiff was entitled to recover. In cases of this character the damages are to be determined by the jury from the evidence, viewed in the light of their judgment and experience in the affairs of life, and they should be restricted by the instructions to the evidence in the case and to proper elements of damage. By the instruction the jury were to consider all damages which were charged in the declaration and shown by the evidence, and were also to consider the bodily pain and suffering of the plaintiff, and also the effect, if any, of the injury upon her. There was evidence that she had sold out her business as a milliner subsequent to the accident, and the first clause of the instruction gave to the jury great latitude for conjecture and speculation, which might include that fact and some supposed injury to her business.

It is insisted that this instruction was approved in *Chicago, Burlington and Quincy Railroad Co. v. Warner*, 108 Ill. 538. But that is a misapprehension. The instructions are materially different, and in that case all the objections to the instruction were placed upon the common ground that there was no evidence upon which to base it. The court being unable to agree with counsel that there was no evidence of the several elements of damage mentioned in the instruction, the objections were not sustained. It is, however, a settled rule that the instructions to the jury shall be regarded as a connected series, constituting a single charge, and, when they are so considered, if it is clear that the jury could not have been misled or have drawn an improper inference from a single instruction, the judgment ought not to be reversed. In this case there were a number of instructions given at the instance of defendant relating to the duty of the jury to consider and decide the case solely from the evidence, under the instructions of the court as to the law. The ninth instruction told them that in considering and deciding the case they should look solely to the evidence for the facts. By the tenth they were told that the plaintiff could not recover unless they believed, from a preponderance of the evidence, that she was ex-

ercising ordinary care, that the defendant was negligent, and that the negligence was the proximate, direct cause of her injuries. By the nineteenth they were advised that, if they were unable to say that the plaintiff had proved, by a preponderance of the evidence, that the defendant was guilty of negligence as alleged in the declaration, and that said negligence was the proximate, direct cause of the plaintiff's injuries, the jury should find the defendant not guilty. The twenty-third stated that if the jury believed, from the evidence, that plaintiff's condition was the result of nervous disorders or physical infirmities that existed prior to the accident in question, she could not recover damages for such condition, and could not recover damages for any condition existing prior to the accident. By the twenty-fourth instruction the jury were told that the questions of liability and damages were matters to be determined from the evidence, under the instructions of the court. In view of all the instructions given, we do not think the jury could have been misled by the sixth.

The determination of the question of law raised in this court cannot be made to depend upon what the Appellate Court said respecting the controverted questions of fact in the opinion filed in the case. The statute requires the Appellate Court to file an opinion giving the reasons for the decision, but it is the judgment of the court, and not the opinion, which is reviewed on appeal to this court. The law has confided to Appellate Courts the duty of determining whether a judgment is against the weight of the evidence, and we must presume that the court in this case found that the verdict and judgment were not against the weight of the evidence. On that subject it may not be amiss to repeat what this court, speaking through Mr. Justice Baker, said in *Chicago and Alton Railroad Co. v. Heinrich*, 157 Ill. 388, 41 N. E. 860, as follows (page 394, 157 Ill., page 862, 41 N. E.): "But the Appellate Court is not bound by the judgment of the trial court, or by the verdict of the jury. It is true, all questions of fact are for the jury, but the trial court has a supervisory power over their verdict. At common law, and under the law as it was in this state prior to the act of July 21, 1837 (Laws 1837, p. 109), the granting or refusing a new trial rested in the discretion of the court before which the case was tried, and could not be assigned for error; but by that act it was provided that exceptions should be allowed to opinions or decisions overruling motions for new trials, and that 'the party excepting may assign for error any opinion so excepted to, any usage to the contrary notwithstanding.' And under that act, the substance of which has been retained in section 61 of the present practice act, it has always been held that the court of review may inquire whether the judgment should be reversed upon the ground that the verdict is against the weight of evi-

dence. *Hill v. Ward*, 2 Gilman, 285. Of course, this rule is modified, as to this court, in certain classes of cases, by sections 88 and 90 of the practice act, but it has in no way been modified or changed as to the Appellate Courts. It is the right and duty of the Appellate Courts, under the law as it exists in this state, to reverse the judgments of trial courts and the verdicts of juries, where, upon consideration of the testimony, they find that such judgments or verdicts are clearly against the weight of evidence. We must presume, however, that in this case the Appellate Court has faithfully performed that duty, and has found that the evidence sustains the verdict and judgment." Again, in *Chicago and Erie Railroad Co. v. Meech*, 163 Ill. 305, 45 N. E. 290, the court, repeating the duty of Appellate Courts under the law, said (page 308, 163 Ill., page 291, 45 N. E.): "A performance of this duty is absolutely essential for the preservation of the rights of citizens and property owners in all those classes of cases where the judgments of the Appellate Courts are final and conclusive upon all questions of fact;" but it was also said, as in the previous case, that we must presume that the Appellate Court found that the evidence properly sustains the verdict and judgment. It is good ground of a motion for a new trial that the verdict is manifestly against the weight of the evidence, or that the damages awarded are excessive, and the motion for new trial in this case contained both.

Section 61 of the practice act provides that exceptions taken to the decision of the court overruling a motion for a new trial shall be allowed, and the party excepting may assign for error any decision so excepted to. The duty of considering and deciding upon any error so assigned is intrusted to the Appellate Court. Those courts are a part of the judicial system of the state equally with the jury and the trial judge, and must discharge their duty not according to the judgment of others, but according to their own judgment. The law commits to the sound judgment of the Appellate Court the question whether the trial court erred in overruling a motion for a new trial on the ground that the verdict is against the weight of the evidence. At the common law the trial of an issue of fact was by judge and jury, the judge stating to the jury the issues, and what evidence had been given in support of them, and summing up the whole case. Section 51 of the practice act provides that the court shall only instruct as to the law of the case; but trial by jury does not imply a trial without a judge having a supervisory power over the verdict, or without a court of review guided and controlled by its own conscience and judgment in passing upon questions committed to it by the law. If a verdict and judgment are clearly against the weight of the evidence, a new trial should be awarded by the Appellate Court, and the issues submitted to another jury. But the functions of this court in

cases of this kind are entirely different in that respect. The judgment of the Appellate Court in this case is conclusive upon the facts, regardless of what is said in the opinion, and there is no error appearing which would justify a reversal of its judgment.

Accordingly, the judgment of the Appellate Court is affirmed. Judgment affirmed.

(205 Ill. 618)

SOULE et al. v. PEOPLE ex rel. CULLEN,
State's Atty.

(Supreme Court of Illinois. Dec. 16, 1903.)

VILLAGES—INCORPORATION—QUO WARRANTO
—PLEAS—LACHES—APPEAL—ORIGINAL DOCUMENTS—TRANSMISSION TO SUPREME COURT.

1. City & Village Act 1872 (Laws 1871-72, p. 218), providing for the organization of villages, requires the holding of a mass meeting and voting on the question whether or not the inhabitants shall incorporate as a town, and declares that, if two-thirds of the votes are in favor of the incorporation, the organization shall proceed. The act also authorizes the submission to the voters of an incorporated town of the question whether it shall become a village under the act on petition of any 30 voters of the town. *Held*, that a plea to a writ of quo warranto to oust a village, alleged to have been organized under such act, from the use of corporate franchises, which fails to show either that a mass meeting was held for the organization of the town or that 30 voters of the town petitioned for the submission of the question whether defendant village should be organized, is insufficient.

2. Where for more than 28 years a municipality exercised the functions of a legally incorporated village in various ways, and the people of the village and the public authorities during all that period acquiesced in its exercise of corporate powers, the state was barred by laches from maintaining quo warranto to oust it from such powers on account of irregularities occurring in the original organization proceedings which prevented a strictly legal village organization.

3. Where certain original documents received by the state's attorney were filed in the Supreme Court and submitted with a cause then pending, but such documents were not shown by the transcript of the record, and were not transmitted by virtue of an order of the judge of the trial court, as authorized by Sup. Ct. Rule 12 (47 N. E. vi), such documents will be stricken from the files.

Error to Circuit Court, La Salle County;
Chas. Blanchard, Judge.

Quo warranto by the people, on the relation of Charles S. Cullen, state's attorney, against Charles E. Soule and others. From a judgment in favor of relator, respondents bring error. Reversed.

John H. Armstrong and Browne & Wiley, for plaintiffs in error. Charles S. Cullen, for defendant in error.

SCOTT, J. This was an information in the nature of a quo warranto, filed in the circuit court of La Salle county on March 5, 1902, in accordance with an order of the court granting leave which had been entered on that day. It questions the right of Charles E. Soule to hold the office of president, and the right of J. W. Carr, William Callagan, M. L. Court-

right, Louis Dondanville, L. M. Eaton, and August Girolt to hold the offices of trustees of the village of Sheridan, in that county, and these seven persons were made respondents. The petition is in the usual form, but it appears from the petition for leave to file that the charge of the usurpation of the offices in question is based upon the alleged fact that the village of Sheridan is not legally organized, and is without a valid franchise. The respondents entered their appearance and filed two pleas to the information. To these pleas the people demurred. The demurrer was sustained to both pleas. The respondents abided their pleas, judgment of ouster was entered at the March term, 1902, of that court, and Soule alone sues out of this court a writ of error to review the judgment.

The only question is whether either of the pleas presented a good defense. The first plea seeks to show a valid organization of the village of Sheridan, and avers that on June 24, 1872, the inhabitants of the territory which is now within the limits of the alleged village of Sheridan organized such territory and the inhabitants thereof into a corporation or body politic by the name and style of "President and Trustees of the Town of Sheridan," under the act of March 3, 1845, and that thereafter, on July 26, 1873, an election was held in the said town of Sheridan for the purpose of organizing as a village under the city and village act of 1872 (Laws 1871-72, p. 218), and the plea contains averments intended to show an organization under that act. This plea was insufficient. The act of 1845 (Rev. St. 1845, p. 111, c. 25, § 1) provided for the inhabitants of a territory, upon proper notice, holding a mass meeting and voting upon the question whether or not they would incorporate as a town. The second section of the act provided that, if two-thirds of the votes were in favor of incorporation, the organization of the town should proceed. The plea fails to show that such proportion of the votes was in favor of incorporating. The attempt to organize a village was under the statute of 1872. Rev. St. 1874, p. 242, c. 24, § 178. Provision was made by that act for the submission to the voters of any incorporated town, by the president and trustees thereof, on the petition of any 30 voters in such town, of the question whether such town shall become organized as a village under that act. This plea does not aver that 30 voters of the town of Sheridan petitioned for the submission of this question, and therefore fails to show a legal organization of the village of Sheridan.

The second plea proceeds upon a different theory. It avers that at all times after the organization of the village on July 26, 1873, said village of Sheridan has been represented by a president and board of six trustees duly elected in accordance with the law; that during all that time the officers and authorities of said village have annually levied and collected village taxes and expended the same

for municipal purposes, have duly passed, published and enforced village ordinances, and have erected and maintained a village hall and a prison; that public parks have been dedicated to said village, and are owned, improved, and maintained by it; that a bridge had been erected within the limits of said village across the Fox river, and has been owned, maintained, and repaired by said village since its construction, in 1874, with village taxes levied and collected for that purpose; that bonds and other evidence of indebtedness were issued by said village to obtain money to build said bridge, which bonds and evidence of indebtedness were paid by said village, acting as a body politic under the name and style of "The Village of Sheridan"; that by said name and style it has been sued in the circuit court of said La Salle county, and by that name and style a judgment in that court was entered against it as a municipal corporation; that it has, by its name and as a municipal corporation, purchased valuable lands in said county, the deed conveying the same to it being of record in said county; that on November 1, 1874, the authorities of said village, acting as such, purchased lands within the limits of said village for a cemetery; that said lands were surveyed and platted into burial lots, and the plat recorded in the proper office in La Salle county; that on January 10, 1895, the authorities of said village made an addition to said cemetery, and caused the same to be platted, and the plat thereof to be recorded in the proper office in said county. The plea avers that the respective state's attorneys of said county had notice of such suit, deeds, and plats. It further avers that since the establishment of such cemetery the same has been maintained by the village, and used exclusively for burial purposes; that the authorities of such village, acting as such, have sold to private parties numerous lots, which have been used for burial purposes in said cemetery; that the titles to said lots have been derived from the village of Sheridan; that by reason of the great laches in the commencement of this suit and the great injury and injustice which will result to private individuals who have acquired valuable property rights and interests from said village of Sheridan, and by reason of the great injury and injustice which will result to the inhabitants of said village, who have collected and expended large sums of money in maintaining said village as a body politic or corporate under the well founded belief that the same was duly and legally incorporated as such, as well they might infer from the actions and laches of the respective state's attorneys of said county during the period since July 26, 1873, and by reason of the premises, plaintiff should be barred from the further prosecution of the suit, and avers the election and qualification of the respondents to the respective offices with the usurpation of which they are charged by the information.

In *State v. Leatherman*, 38 Ark. 81, it was said: "The state herself may, by long acquiescence and by continued recognition through her own officers, state and county, of a municipal corporation, be precluded from an information to deprive it of franchises long exercised in accordance with the general law."

Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304, was a quo warranto, instituted in 1855, to test the organization of the town of Oquawka, on the ground that the vote on the question of organization at the mass meeting held in April, 1851, was by ballot, instead of viva voce. The organization of that town had been recognized by two acts of the Legislature, and it was shown that after the mass meeting in 1851 the electors proceeded with the organization of the corporation; that town officers were thereafter elected from year to year; that it was generally recognized as a public municipal corporation; that it exercised the franchises and powers conferred upon such corporations by law, passed and enforced ordinances, levied and collected taxes, and made contracts and incurred liabilities. This court there said: "Were we to hold, after this acquiescence of the public and these recognitions of the Legislature, that the town remains unincorporated on account of some defect in its original organization as a corporation, what confidence could individuals have in the validity of securities emanating from these local authorities? * * * It would seem incompatible with good faith and against public policy, although irregularities may have intervened in the organization of the town, now to hold that it is not a body corporate, and we do not think the law requires us to do so."

People v. Boyd, 132 Ill. 60, 23 N. E. 342, was an information for quo warranto against school directors, the charge being that the school district was not properly organized. In that case the school district had been exercising corporate powers as such for a period of five years. This court denied the remedy on account of the lapse of time, and it was said, after a discussion of authorities and a reference to the great public inconvenience that would result from a judgment of ouster, that "it would seem to us that this case ought to fall within that class of cases where the statute of limitations should apply, and even the right to file the information should be refused on the grounds of public policy, even before the lapse of five years, if the time elapsed were such as a wrong would be done by granting the writ."

In *Chicago and Northwestern Railway Co. v. West Chicago Park Com'rs*, 151 Ill. 204, 37 N. E. 1079, 25 L. R. A. 300, the right of the park commissioners to exercise corporate powers over a certain street was in question, the objection being to the validity of the proceeding under which they came into control of the street. The commissioners had been in control thereof for over 12 years, and during that time the public authorities of the city of

Chicago exercised no jurisdiction over the street, but, together with the general public, acquiesced in the control thereof by the commissioners; and this court said (page 216, 151 Ill., page 1083, 37 N. E., 25 L. R. A. 300): "Whatever irregularity or informality may have intervened, such as is shown upon this record, has been cured by the long-continued concurrent acquiescence of the city, the park commissioners, and of the general public."

In *People v. Hanker*, 197 Ill. 409, 64 N. E. 253, this court held leave to file an information in the nature of a quo warranto to oust respondents as trustees of a village was properly refused, where the village had exercised, without question, the powers and functions of a municipal corporation for a period of 20 years, because of the long delay of the relator, and because of his acquiescence in the organization and acts of the village, of which he was an inhabitant; and it was said, quoting with approval from *People v. Schnepf*, 179 Ill. 305, 53 N. E. 632: "An unreasonable delay or an acquiescence on the part of the persons complaining, as well as consideration of the public interest or convenience, will justify a refusal to grant leave to file the information or to proceed to judgment, although no statute of limitations has intervened."

In *People v. Pike*, 197 Ill. 449, 64 N. E. 393, it was held that, where a territory has exercised all the functions of a municipal government, with the acquiescence of the public, throughout a period of 20 years, strict proof of its legal organization will not be required in quo warranto.

Here it appears that for more than 28 years, in multitudinous ways, as specified above, the functions of a legally incorporated village have been exercised by the persons composing this so-called village. Public authorities, the people of the village, and those with whom it dealt, during all that period have acquiesced in its exercise of corporate powers. To permit the state now to oust it from the exercise of those powers on account of the irregularities which intervened more than a quarter of a century ago, and which prevented a strictly legal organization of the village, would be to work a great wrong to the inhabitants of the village and to those who have acquired property rights on the basis that there was a proper organization of the municipality. To permit such a judgment would be against the public policy of our commonwealth. The acquiescence of the general public and the public authorities in the corporate acts of this village, and the laches of the state in instituting this proceeding, as these matters are averred by the second plea, constitute a meritorious defense to this action.

Counsel for defendant in error has transmitted to the clerk of this court, for presentation to us, two letters addressed to him, signed by certain of the respondents, and a petition addressed to him, signed by residents of the village of Sheridan, and a certificate of the clerk

of La Salle county showing certain proceedings had in the village of Sheridan subsequent to the entry of the judgment in the court below in this cause, and, based on these, prints with his brief what he calls "Addenda and Personal Statement of the State's Attorney." None of the documents in question are shown by the transcript of record, and they are not transmitted by virtue of an order of the judge of the lower court, made in accordance with rule 12 of this court (47 N. E. vi), which is the only method by which original documents can be presented for our inspection. Submitting these documents was a violation of the rules of this court. This is a court of review. Counsel must be content with the presentation of such facts as appear from the record. No others will be considered here. The letters, the petition and the certificate so transmitted will be stricken from the files.

The judgment of the circuit court will be reversed as to all the respondents, and the cause will be remanded, with directions to the circuit court to sustain the demurrer as to the first plea and to overrule the demurrer as to the second plea.

Reversed and remanded, with directions.

(206 Ill. 417)

BRUEN v. PEOPLE.

(Supreme Court of Illinois. Dec. 16, 1903.)

BURGLARY—WORDS AND PHRASES—INDICTMENT—VARIANCE—EVIDENCE—ERROR—EXCEPTIONS—RECORD.

1. Under Cr. Code, § 36 (Hurd's Rev. St. 1899, c. 38), defining burglary generally, and fixing the punishment at imprisonment from 1 to 20 years, with a proviso that when it is committed at night the punishment shall be imprisonment from 5 to 20 years, there is no variance between an indictment which does not state when a burglary was committed and proof that it was committed at night.

2. On a trial for burglary, where the indictment charged the breaking and entering into the hotel of P. & S., partners therein, evidence of a witness that he knew the owners of the hotel and that they were P. & S., "Washington Porter and Nate Salisbury," and that of certain employees of the hotel that they were in the service of P. & S. in the management of the hotel, sufficiently shows the partnership.

3. A hotel is a building within Cr. Code, § 36 (Hurd's Rev. St. 1899, c. 38), defining burglary as breaking or entering a dwelling house "or other building."

4. Where one was accused of burglary of a hotel, evidence of the discovery on his person of keys belonging to two other hotels, together with one which would open the room he had entered, was admissible.

5. Objections to the mode of summoning the grand and petit juries can only be taken by challenge of the array or motion to quash the indictment.

6. Irregularities in making up the record in a criminal case are waived by failure to enter any objections or exceptions in the trial court.

7. A recital in the record that "the grand jurors aforesaid were duly sworn" is sufficient to show a compliance with 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 2396, c. 78, par. 17, providing that an oath shall be administered to the foreman, and also an oath to the other grand jurors.

8. Where the court instructed the jury orally, by consent of the state's attorneys and defendant and his counsel, expressed in open court, the defendant cannot complain that the instructions were oral, though the statute requires them to be in writing.

9. A plaintiff in error cannot question the correctness of instructions to which he took no exceptions on the trial.

10. While drunkenness is no excuse for crime, yet, where it is necessary to prove a specific intent in order to convict, it is competent to prove that the accused was at the time incapable, from intoxication, of forming such intent.

11. An order overruling a motion for a new trial cannot be reviewed where the bill of exceptions shows no exception thereto, though the record contains a recital that such an exception was taken.

Error to Criminal Court, Cook County; O. H. Horton, Judge.

George Bruen was convicted of burglary, and brings error. Affirmed.

This is an indictment for burglary, found by the grand jury of Cook county against the plaintiff in error. The jury returned a verdict finding plaintiff in error guilty of burglary in manner and form as charged in the indictment, and fixed his punishment at imprisonment in the penitentiary. At the March term, 1903, of the criminal court of Cook county, judgment was rendered upon the verdict, and sentence was pronounced in accordance therewith. The present appeal is prosecuted from such judgment of conviction.

The material facts, shown by the evidence, are as follows: About 12 o'clock at night on January 23, 1903, a bell boy at the Hotel Majestic, 22 Quincy street, in Chicago, conducted a guest of the hotel to the room assigned to him, to wit, room K64, which is on the third floor of said hotel. On arriving at the entrance of the room the bell boy found the door unlocked and pushed it open. The door struck against plaintiff in error, who was standing behind it, with his overcoat on and his shoes unlaced. The room was perfectly dark. The bell boy asked plaintiff in error if that was his room, and plaintiff in error answered "Yes." The bell boy requested the elevator man to send up the porter. The porter ran and caught plaintiff in error, just after he had left the room, and started towards the stairs. The porter took the plaintiff in error to the office of the hotel, and there he was seen by the night clerk and the manager of the hotel. The night clerk testified that, when he saw plaintiff in error, the latter seemed to be sober, and also that no room in the house had been assigned to plaintiff in error, as the room in which he was found, K64, had been assigned to another party during the day. The manager testified that plaintiff in error stated to him at that time that he (the plaintiff in error) did not know what he was doing, but that he had become intoxicated, and went into the hotel, and did not know where he was. Plaintiff in error asked the manager where he was, and the manager told him. Plaintiff in error gave no excuse for being there. The

manager asked plaintiff in error if he had one of the hotel keys, and plaintiff in error answered, "No, he did not have any keys." A policeman was sent for through the telephone, and searched plaintiff in error in the presence of the hotel manager, and found on his person three keys belonging to the Great Northern Hotel, and two from the Lexington Hotel, and another key which opened the lock of room K64 in the Hotel Majestic. The policeman stated that he considered plaintiff in error sober. The proof showed that the Hotel Majestic was owned by Porter & Salisbury—Washington Porter and Nate Salisbury.

Ivy Elmer Rogers, for plaintiff in error. H. J. Hamlin, Atty. Gen., Charles S. Deneen, State's Atty., and Fred L. Fake, Asst. State's Atty., for the People.

MAGRUDER, J. (after stating the facts).

1. This indictment for burglary contains two counts. The first charges that plaintiff in error "forcibly," etc., "did break and enter into the certain building, to wit, hotel of Washington Porter and Nate R. Salisbury, partners then and there doing business as Porter & Salisbury," "with intent to steal," "contrary," etc. The second count was the same as the first, with the exception that the grand jury charged plaintiff in error with entering the certain building "without force, the doors and windows being open," etc., "with intent," etc.

The first point made by plaintiff in error is that the indictment alleged a burglary in the daytime, while the proof showed a burglary in the nighttime. This is not an accurate statement of the allegations in the indictment. Neither of the counts alleged that the burglary occurred in either the daytime or nighttime. Section 36 of the Criminal Code (Hurd's Rev. St. 1899, c. 38) provides as follows: "Whoever willfully and maliciously and forcibly breaks and enters, or willfully and maliciously, without force, (the doors or windows being open), enters into any dwelling house, * * * or other building, with intent to commit murder, robbery, rape, mayhem or other felony or larceny, shall be deemed guilty of burglary and be imprisoned in the penitentiary for a term not less than one year, nor more than twenty years: provided, however, that whoever willfully and maliciously and forcibly breaks and enters, or willfully and maliciously, without force (the doors or windows being open), enters into any dwelling house in the night time, with intent to commit, * * * shall, on conviction, be imprisoned in the penitentiary for a term of not less than five years, nor more than twenty years," etc. 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 1244, c. 38, par. 70. The counts of the indictment here are framed under the first part of section 36 for burglary generally, without specifying whether committed in the day or in the night. The proof showed that the offense was committed at night, and there was no variance.

In *Bromley v. People*, 150 Ill. 297, 37 N. E. 209, it was held that, under this section 36, and the statute there quoted, it was unnecessary to charge that the crime was committed either "in the nighttime" or "in the daytime," in order to constitute the charge of burglary under the existing law of this state. In *Bromley v. People*, supra, the indictment charged that the crime was committed in the nighttime, while the proof showed that it was committed in the daytime, and it was held that there was a fatal variance on that account between the proofs and the allegations. In that case a doubt was expressed as to whether, under an information which charged the commission of the crime of burglary, without stating whether the act was committed in the nighttime or in the daytime, a defendant could properly be convicted, under a statute such as ours, of a burglary committed in the nighttime. The expression of such a doubt, however, was unnecessary to the decision of that case, in view of the variance already referred to. In the subsequent case, however, of *Schwabacher v. People*, 165 Ill. 618, 46 N. E. 809, we said upon this subject (page 624, 165 Ill., and page 811, 46 N. E.): "It would therefore seem clear that under a count framed under the first part of the section for burglary generally, without specifying whether committed at day or night, as the last two counts in this indictment were framed, the accused might be found guilty, where the evidence was otherwise sufficient, even though it appeared the offense was committed in the nighttime. But in such a case the punishment would be from one to twenty years, at the discretion of the jury, and not from five to twenty years. * * * It would be burglary in either case, whether committed at night or in daytime, and it cannot be correctly said that, because the proof establishes the offense in its aggravated form, it does not establish it in its less aggravated form. Where sufficient is proved to establish the offense, it would be altogether illogical to say there was a failure of proof, or a variance between the allegations and proof, simply because more was proved than alleged." We are therefore of the opinion that under this indictment, which does not specify whether the burglary was committed at day or night, there is no fatal variance because the proof shows the crime to have been committed at night.

2. The indictment charges that plaintiff in error "did * * * enter into the certain building, to wit, hotel of Washington Porter and Nate R. Salisbury, partners then and there doing business as Porter & Salisbury." It is claimed that there was no proof that Washington Porter and Nate R. Salisbury were partners, and, therefore, that there was a fatal variance. One witness testified that he knew who the owners of the Hotel Majestic were, and that they were "Porter & Salisbury—Washington Porter and Nate Salis-

bury." This was substantially a statement that the hotel was owned by Washington Porter and Nate Salisbury, and that they constituted the firm of Porter & Salisbury. The evidence further shows that certain of the employees of the hotel were in the service of Porter & Salisbury in the management of the hotel. There was thus testimony tending to show that Porter & Salisbury were partners. That a partnership actually exists may be implied from circumstances, and positive proof of the fact is not indispensable. Whether certain persons are partners or not is purely a question of fact, to be determined from the evidence. *Kelleher v. Tisdale*, 23 Ill. 405; *Field v. Crawford*, 146 Ill. 136, 34 N. E. 481.

3. It is furthermore claimed that there was no proof of the allegation, contained in the indictment, that the hotel in question was a "building." We have no doubt that, within the meaning of the words, "other building," as used in the burglary statute, a hotel is a building. In *Orrell v. People*, 94 Ill. 456, 34 Am. Rep. 241, it was held that "a 'stable,' as that word is commonly used and understood, is the equivalent of 'building,' and is therefore fairly included, in the statute defining burglary, in that class of structures denominated 'other buildings.'" In *Gillock v. People*, 171 Ill. 307, 49 N. E. 712, it was held that a chickenhouse, or henhouse, was a building within the meaning of said statute. See, also, *Kincaid v. People*, 139 Ill. 213, 28 N. E. 1060, and *Schwabacher v. People*, supra. A building has been defined to be "a fabric or edifice constructed for use or convenience; as a house, a church, a shop. It must be permanent, and designed for the habitation of men or animals, or the shelter of property." 2 Am. & Eng. Ency. of Law (1st Ed.) p. 601. A hotel is certainly an edifice designed for the habitation of men.

4. It appears from the evidence that the plaintiff in error was searched, and that there were found upon his person keys belonging to two other hotels than the one where he was arrested. It is claimed that the trial court erred in not excluding the evidence in regard to these keys. In our opinion no error was committed in this regard. It has been held that burglars' tools found upon the person of the accused when arrested may be put in evidence upon his trial for burglary. *Williams v. People*, 196 Ill. 173, 63 N. E. 681. The evidence showed that one of the keys, found upon the person of the plaintiff in error, unlocked the door of room K64 in the hotel where he was found. None of the keys, which he had, were keys belonging to the Hotel Majestic, but, as he carried about his person a key which would open the door of one of the rooms in the hotel, the testimony in regard to his possession of the keys was competent, as showing what instrument he used to effect his entry into the room, and as tending to contradict the statement that he

was so intoxicated that he did not know how he came to be in the hotel, or where he was at the time he was arrested.

5. Various objections are made by the counsel of plaintiff in error to the mode of summoning the grand and petit juries. It is to be observed, in regard to these objections, as well as in regard to other objections to the indictment, that they can only be taken by a challenge of the array or by motion to quash the indictment. *Stone v. People*, 2 Scam. 326. In the case at bar, however, there was no challenge of the array, and no motion was made to quash the indictment upon any ground. It will be presumed, until the contrary appears, that persons summoned by the sheriff were duly qualified, and were selected from the body of the county. *Fletcher v. People*, 81 Ill. 116.

Plaintiff in error also complains of certain defects and irregularities in the making up of the record by the clerk of the criminal court of Cook county. There is much force in the criticism made upon the defective and irregular way in which the present record has been made up by the clerk. But no objections were made in relation to these defects in the court below. Plaintiff in error should have made his objections upon this ground at the time, and, if they were not sustained, should have taken exceptions, and preserved such exceptions by a bill of exceptions. As he did not do so, these irregularities will be regarded as having been waived. "A prisoner on trial under our laws has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error on account of such irregularities." *McKinney v. People*, 2 Gilm. 540, 43 Am. Dec. 65; *Wilhelm v. People*, 72 Ill. 468; *Hughes v. People*, 116 Ill. 330, 6 N. E. 55; *Kelly v. People*, 132 Ill. 363, 24 N. E. 56.

We will notice one of the objections referred to, which is here insisted upon, although no objection of any kind was made in relation to it in the court below. Plaintiff in error insists that no oath was administered to the foreman of the grand jury. The statute provides that, before the grand jury shall enter upon the discharge of their duties, an oath shall be administered to the foreman, and also an oath to the other grand jurors. 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 2396, c. 78, par. 17. But counsel for plaintiff in error refers to the case of *Lyman v. People*, 7 Ill. App. 345, where it was held to be essential, in order to sustain a conviction, that the record shows affirmatively that the grand jurors were sworn. In that case the record merely showed that the foreman of the grand jury was sworn, but did not show that the other grand jurors were sworn, and it was held that the fact that the foreman was sworn did not raise a presumption that the other grand jurors were sworn. In the case at bar, however, the record contains the following recital: "The panel of grand jurors being

now filled, the court having now here appointed Aaron B. Mead foreman of said grand jury, the grand jurors aforesaid were duly sworn and charged by the court, and thereupon retired to consider their presentments." Here is an express allegation that "the grand jurors aforesaid were duly sworn," and, as the foreman was one of the grand jurors, he must have been sworn if all of the grand jurors were sworn. We think the allegation of the indictment is broad enough to contain the statement that the oath required by the statute was administered to the foreman, and that the oath required by the statute to be administered to the other grand jurors was also administered to them.

6. It is furthermore charged that there was error committed by the court in the instructions given to the jury. By stipulation the court was authorized to instruct the jury orally, and did instruct them orally. We have held that, while the statute requires instructions to be given in writing, the requirement is one which may be waived by the parties, and that, where they have consented, they are bound by such consent and waiver. Where the record shows that the court instructed the jury orally by the express consent and agreement of the state's attorney and defendant and his counsel, made in open court at the trial, the defendant cannot complain of the fact that the instructions were oral, where the case is brought up for review by writ of error. *Bates v. Ball*, 72 Ill. 108; *Williams v. People*, 164 Ill. 481, 45 N. E. 987; *Cutter v. People*, 184 Ill. 395, 56 N. E. 412.

Plaintiff in error is in no position to question the correctness of the oral instructions given by the court, because he took no exception upon the trial below to the giving of the instructions. The bill of exceptions contains the instructions given by the court orally to the jury, but it does not show that plaintiff in error took any exception to the action of the court in this regard. Complaint is made that the court failed to instruct the jury upon certain points of law upon which they should have been instructed. If the court failed to instruct in any important particular, the defendant cannot complain of such failure for the first time on writ of error. He should have called the court's attention to such failure at the time. *Williams v. People*, supra. In *Village of Jefferson v. Chapman*, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136, we said (page 448, 127 Ill., and page 38, 20 N. E., 11 Am. St. Rep. 136): "It is also claimed that the first instruction given at the instance of appellee was erroneous. It appears, however, from the record, that no exception was taken at the trial to the giving of that or any other of the instructions submitted by appellee. Appellant is therefore precluded from now insisting upon this assignment of error." This rule is applicable in the case at bar, no exception to the instruc-

tions given by the court having been taken at the trial. But after a careful examination of what the court said orally to the jury in the way of instruction, as the instructions appear in the bill of exceptions, we are of the opinion that no error was committed. The plaintiff in error, when arrested, insisted that he was so intoxicated that he did not know where he was or what he was doing. The only testimony to the effect that he was intoxicated is the evidence of the witnesses for the prosecution, who testified that he made such a statement when he was arrested. No evidence whatever was introduced by plaintiff in error in his own defense. All the testimony presented to the court was so presented by the prosecution. Several witnesses testified that the plaintiff in error exhibited no indications of being intoxicated, and did not have the appearance of an intoxicated man. The main criticism made upon the instructions of the court is upon that feature of them which relates to this subject of intoxication. We have held that while drunkenness is no excuse for crime, either at common law or under the statute, yet, where it is necessary to prove a specific intent before a conviction can be had, it is competent to prove that the accused was at the time wholly incapable of forming such intent, whether from intoxication or otherwise. *Schwabacher v. People*, supra; *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97. We think that the oral instructions of the court sufficiently presented this idea to the minds of the jury.

7. The plaintiff in error made a motion for a new trial, and assigned various reasons in writing why a new trial should be granted. The motion for a new trial, and the reasons in support thereof, are set forth in the bill of exceptions; but the bill of exceptions nowhere states that plaintiff in error took exception to the action of the court in overruling the motion for new trial. Therefore such action of the court cannot be here assigned as error. It is true that in the recital by the clerk, upon the record, of the orders entered, it is stated that the motion for new trial was overruled, and that the defendant by his counsel excepted to the order of the court in so overruling the said motion. But this is not sufficient to authorize plaintiff in error to insist upon such action of the court as error in this proceeding upon writ of error. The exception of the plaintiff in error to the action of the court in overruling the motion for new trial could only become a part of the record by being incorporated in the bill of exceptions. The clerk's recitals in that respect are therefore extraofficial and of no legal effect. *Gould v. Howe*, 127 Ill. 251, 19 N. E. 714.

After a careful examination of the record, and of the numerous points made by counsel for plaintiff in error, we discover no ground upon which we would be justified in reversing the judgment of the trial court rendered

in this case. Accordingly, the judgment of the criminal court of Cook county is affirmed.

Judgment affirmed.

(206 Ill. 57)

DEEMER et al. v. KESSINGER et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

RULE IN SHELLEY'S CASE—INTENTION OF TESTATOR—EXTRINSIC EVIDENCE.

1. Where a will contained a codicil to the effect that testator desired to change a former provision bequeathing certain land to his son so that the latter should have the use, benefit, and control of the lands during his lifetime only, and at his death the lands should go to his lawful heirs, the son, under the rule in *Shelley's Case*, took a fee, although there were extrinsic facts indicative of testator's intention to give only an estate for life.

Appeal from Circuit Court, Pike County; A. Akers, Judge.

Action by Clair E. Deemer and others against Sarah J. Kessinger and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

This is a bill in chancery filed in the circuit court of Pike county by the appellants, the minor children of William L. Deemer, deceased, by their guardian, against their adult sister, Nina Long, for the partition of 120 acres of land located in said county, to which bill Sarah J. Kessinger and others claiming under her are made parties defendant, with the view of obtaining a holding to the effect that the title to said premises derived by her through mesne conveyances from said William L. Deemer is an estate for the life of William L. Deemer only, and not in fee, as is claimed by her. The premises formerly belonged to Jacob Deemer, the father of William L. Deemer and grandfather of the complainants, and whatever interest the complainants have in the premises, if any, was derived by them through the following provisions of the will and codicil of Jacob Deemer, deceased:

Will: "Second—I give and bequeath to my son, William L. Deemer, and to his lawful heirs, the following described lands: * * *

Codicil: "In regard to former will, in bequest to my son, William L. Deemer, I desire to change to read, to-wit: That he shall have use, benefit and control of [same lands described in foregoing provision of will] during his lifetime only, and that at his death said lands shall go to his lawful heirs."

A demurrer was sustained to the bill, and the same was dismissed.

Jefferson Orr, F. S. Dulaney, and William Mumford, for appellants. Williams & Grote, for appellees.

HAND, C. J. (after stating the facts). The sole question presented for the consideration of this court by this appeal is, did the devise to William L. Deemer in the will and codicil

of Jacob Deemer vest a life estate or a fee in William L. Deemer? We are of the opinion the rule in Shelley's Case applies to said devise, and that the fee vested in William L. Deemer, and passed by mesne conveyances to and vested in Sarah J. Kessinger, and that the complainants took no interest in said premises under the will and codicil of Jacob Deemer, deceased. That rule has been stated thus: "Whenever the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, either in fee or in tail, the word 'heirs' is one of limitation of the estate, and not of purchase, and the ancestor takes the fee." *Vangieson v. Henderson*, 150 Ill. 119, 36 N. E. 974. Manifestly, under the provision contained in the will, "to my son, William L. Deemer, and to his lawful heirs," William took a freehold estate, and the estate was limited immediately to his lawful heirs in fee, which fulfilled every requirement of the rule and vested the fee-simple title in William L. Deemer. By the terms of the codicil William L. Deemer is given the "use, benefit and control" of the premises "during his lifetime," the effect of which was to vest an estate of freehold in him, and at his death the fee is given to his lawful heirs. In legal effect, the devise to William L. Deemer contained in the codicil and that contained in the will are the same; that is to say, a freehold estate by each of said provisions is given to William L. Deemer, and an estate in fee is limited immediately to his lawful heirs, and the fee to the premises, under the codicil as well as under the will, vested in William L. Deemer. The devise of the "use, benefit and control" of the premises was a devise to William L. Deemer of the land, and vested in him a life estate, i. e., a freehold estate, therein. *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65. The words "nearest," "legal," "lawful," or similar expressions preceding the word "heirs," without other words of limitation, in a devise, do not convert the word "heirs" from a word of limitation to that of purchase. *Ryan v. Allen*, supra; *Vangieson v. Henderson*, supra; *Silva v. Hopkinson*, 158 Ill. 386, 41 N. E. 1013.

It is, however, urged by counsel for the appellants that this construction defeats the manifest intention of the testator, and vests the fee in William L. Deemer, when the testator intended he should take only a life estate. There is no latent ambiguity in the will or codicil, and the intention of the testator can alone be ascertained from the language used therein by him. In *Taubenhan v. Dunz*, 125 Ill. 524, 17 N. E. 456, on page 529, 125 Ill., page 456, 17 N. E., it was said: "The question of first importance in every case of construction of a will is, what was the intention of the testator? and, when that is ascertained, effect is to be given thereto. In the absence of latent ambiguity, the intention of the testator is to be gathered alone

from the will itself—from a full view and consideration of everything contained within the four corners of the instrument." And in *Fowler v. Black*, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670; on page 373, 136 Ill., page 596, 26 N. E., 11 L. R. A. 670: "Where there is no ambiguity in the terms used, or where the language of the instrument has a settled legal meaning, the instrument itself is the only criterion of the intention of the parties, and its construction is not open to oral evidence." And in *Engelthaler v. Engelthaler*, 196 Ill. 230, 63 N. E. 669, on page 233, 196 Ill., page 670, 63 N. E.: "The intention which is to be sought for in the construction of a will is not that which existed in the mind of the testator, but that which is expressed by the language of the will."

It has been repeatedly held by this court (*Baker v. Scott*, 62 Ill. 86, and subsequent cases) that the rule in Shelley's Case is in force in this state as a rule of property, and that, in determining whether it applies to a given case, its application does not turn upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs. *Vangieson v. Henderson*, supra. And in *Perrin v. Blake*, 4 Burr. 2579 (3 Greenleaf's *Cruise on Real Prop.* 313), as finally decided in the Exchequer Chamber, it was admitted that the rule in Shelley's Case often defeats the undoubted intention of the deviser, "for," it is said, "there never was an instance where an estate for life was expressly devised to the first taker that the deviser intended he should have any more. But if he afterwards gives an estate to the heirs of the tenant for life or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention and vests the remainder in the ancestor." *Vangieson v. Henderson*, supra; *Carpenter v. Van Olinder*, 127 Ill. 42, 19 N. E. 868, 2 L. R. A. 455, 11 Am. St. Rep. 92; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814; *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751. In *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325, on page 68, 156 Ill., page 327, 40 N. E., it was held: "Where a devise is made to a man and his heirs, neither the expressed intention that the devisee shall have an estate for his life and no longer; nor, secondly, that he shall have only an estate for life in the premises, and after his decease it shall go to the heirs of his body, and in default of such heirs vest in the person next in remainder, and that the devisee shall have no power to defeat the intention of the testator; nor, thirdly, that the devisee shall be a tenant for life and no longer, and that it shall not be in his power to sell, dispose of, or make away with any part of the premises—will change the word 'heirs' into a word of purchase."

Much stress is laid upon the fact that the bill avers that the scrivener who prepared the will, as well as the testator, were unfamiliar with the use and meaning of tech-

nical legal language, and that William L. Deemer had an illegitimate child which the testator sought to exclude from taking under the will by the use of the term "lawful heirs," and, further, that it appears from the codicil the testator executed the same with a view to cut down the devise to William L. Deemer from a fee to a life estate. As the language in the will has a settled legal meaning, we deem the extrinsic facts referred to of no importance; and as the testator, in framing the codicil, used language the legal effect of which was to vest in the son the fee, the intention thus expressed must control in giving a construction to the will, regardless of whatever unexpressed intention may have existed in the mind of the testator.

The decree of the circuit court will be affirmed. Decree affirmed.

(206 Ill. 74)

**RUDGEAR et al. v. UNITED STATES
LEATHER CO. et al.**

(Supreme Court of Illinois. Dec. 16, 1903.)

REFERENCE—REOPENING CAUSE AFTER DECREE—SECONDARY EVIDENCE.

1. Where, on a creditors' bill to recover money alleged to have been misappropriated by defendant from the assets of an insolvent corporation, it appeared that he had taken the money and the books of the corporation from Illinois to his home in California, and that notice to produce the books before a master had been given to him, which he disregarded, and he was present at the taking of the deposition of a witness in California with reference to his misappropriation, but made no effort to testify in his own behalf, and it did not appear that his evidence would change the result, it was not error for the master to refuse to open the cause after decree in order to permit defendant to testify.

2. Where original checks by which defendant was charged to have misappropriated the money of a corporation sought to be recovered in a suit by a receiver had been destroyed while in defendant's hands, and before such destruction he had disregarded an order to produce them, copies of the checks were properly admitted in evidence.

Appeal from Appellate Court, First District.

Action by the Chicago Title & Trust Company and another against Andrew Rudgear and others. From a judgment in favor of plaintiffs, affirmed by the Appellate Court (108 Ill. App. 227), defendants appeal. Affirmed.

W. A. Sheridan, for appellants. Ashcraft & Ashcraft (E. M. Ashcraft, of counsel), for appellees.

WILKIN, J. In July, 1898, the appellees, the United States Leather Company, a corporation, and Kullman, Salz & Co., also a corporation, each obtained a judgment against the Columbian Leather Company, a corporation of this state—the former for the sum of \$1,600.47, and the latter for \$117.88. Executions were issued upon each of said judgments, and returned "No property found."

On April 14, 1899, said first-named corporations filed their creditors' bill in the superior court of Cook county against the appellants, A. Rudgear, Eleanor Turnes, and Celeste K. Haskins and others.

The facts in the case are as follows:

In 1896 the Columbian Leather Company was organized as a corporation under the laws of this state, with a capital stock of \$25,000; and on May 23, 1898, William Kurzenknabe became the owner of all of the stock of said corporation, but on that date assigned the same to his two daughters, Eleanor Kurzenknabe (now Eleanor Turnes) and Celeste Kurzenknabe (now Celeste Haskins), two of the appellants herein. On the date of said assignment said William Kurzenknabe died, and immediately his two daughters entered into possession of all the property of said corporation; and an inventory was taken, showing assets of the firm amounting to \$17,574.40, and liabilities of \$9,057.43. Almost immediately after the death of the said William Kurzenknabe the creditors of said corporation began to insist upon the payment of their claims, and on May 25, 1898, a meeting of the said creditors was held, at which Eleanor Turnes and Celeste Haskins, the stockholders, and who had in the meantime been elected as officers of said corporation, were present. At that meeting it was agreed by all parties that the affairs of the corporation should be wound up, and a man by the name of De Boer, who had been a trusted employé of the corporation during its existence, was selected to assist in winding up its affairs, and to countersign all checks issued in the process of closing up its business. Shortly after this meeting of creditors, officers, and stockholders, the other appellant herein, A. Rudgear, an uncle of the said Celeste Haskins and Eleanor Turnes, arrived in Chicago from his home in California, and from the date of his arrival seems to have been the moving spirit in managing the affairs of the corporation and the control of his nieces. A dispute soon arose between him and the bookkeeper, De Boer, resulting in the latter's discharge. On June 14, 1898, the said Eleanor was married to one Turnes, and on the same date the check of the company for the sum of \$1,603.67 was drawn upon the First National Bank of Chicago by her, as Eleanor Turnes, and her sister, Celeste Haskins, payable to the said A. Rudgear, and by him indorsed, and the money paid by the said bank. Just who received the money on that check is one of the disputed facts in this suit. On the same date another check of the company was signed by both of said sisters, and drawn on the same bank, for the sum of \$4,635.09, payable to "currency," which was indorsed by the two sisters, and the money paid to Celeste Haskins. Both of these checks were paid out of funds belonging to said Columbian Leather Company, and on the next day the said A. Rudgear and Celeste Haskins departed for California, taking

with them in currency about \$6,000 of the money so drawn. Shortly after their departure the books and all of the papers of the corporation were shipped to California, and stored in the factory of the appellant Rudgear.

Immediately upon the filing of this bill the superior court, on May 17, 1899, appointed the Chicago Title & Trust Company as receiver of the corporation, the said Columbian Leather Company, and ordered that all of the assets of said corporation be turned over to it. To the bill the appellants filed their answer, and the cause was referred to the master to take the evidence, and report the same, together with his conclusions of law and fact. The hearing was set for December 12, 1899, and on November 27th a notice was mailed to the appellants A. Rudgear and Celeste Haskins, in California, notifying them to appear before the master on the date of taking said evidence, and produce all of the books and papers of said corporation. On the date of the hearing they failed to appear, and also failed to produce said books. The hearing was postponed until January 3, 1900, when the evidence was taken; said appellants Rudgear and Haskins not appearing, and without their having produced said books; they also having failed and neglected to turn over to the receiver the assets of the corporation in their hands. On February 17, 1900, a *dedimus* was issued to take their depositions. The taking of such depositions was postponed from day to day until November 21, 1900, when that of Celeste Haskins was taken; but between the issuing of said *dedimus* and the taking of her deposition the books and all the papers of said corporation stored in appellant Rudgear's warehouse, in California, were entirely destroyed by fire. On May 22, 1901, the master prepared his report, and sent a copy to appellants Rudgear and Haskins, in California; and on June 17, 1901, Rudgear filed his application, supported by affidavit, to have the cause reopened, in order that he might give his evidence concerning the money alleged to have been received by him, which application the master denied. Objections were filed to the master's report, and overruled by him, and the objections stood as exceptions before the court, which were also overruled by the chancellor, and a decree entered in accordance with the findings and report of the master. The decree found that the defendants, Rudgear, Turnes, and Haskins, took and appropriated to their own use assets of the Columbian Leather Company exceeding the value of \$1,600, and that they were indebted to said company therefor, with interest at the rate of 5 per cent. per annum from the 13th day of July, 1898, and ordered that they pay that amount to the Chicago Title & Trust Company, receiver for the corporation, for the benefit of the complainants, and that they pay the costs of the suit. From this decree the appellants prosecuted their writ

of error to the Appellate Court for the First District, and the branch of that court affirmed the decree of the superior court, from which judgment of affirmance this appeal is prosecuted.

On the merits of the case the decision below is manifestly right—in fact, more favorable to the appellants than they could reasonably ask. The evidence shows, beyond controversy, that Rudgear and Celeste Haskins took from the First National Bank of Chicago more than \$6,000 of the company's money, and carried it, in currency, to the state of California, and thereafter wholly failed to render any account therefor. The grounds upon which a reversal is here urged are technical, rather than substantial. In his affidavit in support of the petition to have the case reopened, Rudgear swears that the check for \$1,603.47 made to his order by the company was drawn by mistake, and that he indorsed it and returned it to the president of the company. He does not, however, pretend to explain what was done with the money. He also based that petition upon the alleged ground that he did not receive notice of the taking of the testimony before the master, and seems to think that, because the complainants did not seek to take his testimony at the time the deposition of Celeste Haskins was taken, at which he was present, he was excused from taking any steps to testify in his own behalf. He was a defendant to the action, and filed his answer to the bill, which charged him and his codefendants with fraudulently receiving moneys belonging to the corporation for the purpose of hindering and delaying its creditors. Certainly the law imposed upon him the duty of exercising some diligence in looking after his own defense to that charge. It further appears that notice had been sent him to produce the books and papers belonging to the corporation, service of which he had accepted before their destruction; but, so far as appears, he made no effort to produce them before the master, or excuse himself from so doing. We think the court was clearly justified, on his own showing, in refusing to reopen the case and permit him to make a defense which he had wholly neglected and failed to present prior to the report of the master finding him liable. We are also convinced that, if he had been permitted to testify to all the facts set up in his affidavit, they would by no means have been conclusive in his favor, being abundantly contradicted by the evidence in the case, and for that reason his motion to reopen the case was properly overruled. *Oliver v. Wilhite*, 201 Ill. 552, 66 N. E. 837.

It is next insisted that error was committed in receiving in evidence copies of the checks upon which the company's money was drawn out of the bank. It is not pretended that the copies introduced were not true copies of the originals, and the evidence shows that the originals were destroyed by fire

while in the custody and control of the defendants, and notice to produce them before their destruction had been ignored. Under these circumstances, the copies were the best remaining evidence of the execution and contents of the originals, and were clearly competent. The errors assigned by appellants are without merit.

Appellees have assigned cross-error on the refusal of the court below to hold the defendants liable upon unpaid stock. The evidence was insufficient to authorize such a decree.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(206 Ill. 278)

CHANNEL v. MERRIFIELD.

(Supreme Court of Illinois. Dec. 16, 1903.)

LANDLORD AND TENANT — LEASE — STIPULATIONS—CONSTRUCTION—SURRENDER — SUFFICIENCY OF EVIDENCE—AMENDMENTS—AUTHORITY OF COURT TO MAKE.

1. A lease of water power which provided that, if the lessor failed to furnish sufficient water, the lessee should have the right, on giving 30 days' notice in writing, to declare the "lease forfeited, terminated and at an end," and the lessor should then pay to the lessee, in lieu of damages, that portion of the rent paid in advance as should then be unearned, gave to the lessor 30 days after notice from the lessee within which to comply with the lease and furnish sufficient water power, and, on his failure to do so, the lessee would have a reasonable time thereafter within which to remove his effects from the premises.

2. Evidence that a lessee under a lease providing for its termination on 30 days' notice, on a certain contingency, gave such notice, and thereafter removed all his property from the premises, and delivered the key to the lessor, was sufficient to show a surrender of the lease.

3. The court, in an action brought by an administratrix, had the right to amend the record of the entry of judgment for defendant after the term had closed, and after the case was in the Appellate Court, by striking out the words "and that execution issue therefor," and inserting the words "to be paid in due course of administration," which amendment may be filed in the Appellate Court.

Appeal from Appellate Court, Second District.

Action by Josephine M. Channel, as administratrix of John W. Channel, deceased, against Louis W. Merrifield. Judgment for defendant affirmed by Appellate Court (106 Ill. App. 243) and defendant appeals. Reversed.

Butters & Carr, for appellant. Jarvis R. Burrows and Charles E. Woodward, for appellee.

RIOKS, J. This is an action of assumpsit brought by Josephine M. Channel, as administratrix of the estate of John W. Channel, deceased, in the circuit court of La Salle county, against Louis W. Merrifield. The declaration consists of counts for goods sold and delivered, etc., and a special count setting out in full a written lease between Louis W. Merrifield and John W. Channel, which, in part, is as follows: "This indenture, made

this 13th day of February, 1899, between L. W. Merrifield, party of the first part, and John W. Channel, party of the second part, witnesseth: That the party of the first part, in consideration of the covenants of the party of the second part, hereinafter set forth, do by these presents lease * * * and the party of the first part does also hereby, by these presents, lease to the party of the second part, water power equivalent to thirty-four horse power; also such further additional water power as may be sufficient to run and operate the machinery now on said property; but it is herein expressly provided that in case said party of the first part shall be unable to furnish such further additional water power, in excess of said thirty-four horse power, as may be sufficient to run and operate said machinery, then, in that case, said second party shall have the right and option, upon serving said first party with a thirty days' notice in writing, to declare this lease forfeited, terminated and at an end, and the party of the first part shall then, in such case, be obligated to pay to the party of the second part, in lieu of all damages by reason of such forfeiture, as aforesaid, such part or portion, if any, of the amount of said \$1,000 rent paid in advance as shall be unearned at the time of such forfeiture; * * * and the first party reserves the right to substitute any other kind of power in lieu of water power, if he sees fit, without additional cost to the party of the second part. To have and to hold the same to the party of the second part from the 13th day of February, 1899, to the 13th day of February, 1904. And the party of the second part, in consideration of the leasing the premises as above set forth," agrees to pay to the party of the first part the sum of \$1,800, payable \$1,000 in cash, being in full of the first three years of the lease, and the balance in 24 equal payments, etc. The plea of general issue, with notice of set-off, etc., was filed. The cause came to a hearing, and at the conclusion of the plaintiff's testimony the trial judge directed the jury to render a verdict in favor of the defendant. Judgment was rendered upon the verdict for costs. An appeal was prayed and allowed to the Appellate Court, and the judgment affirmed, and, upon a certificate of importance by that court, a writ of error is prosecuted from this court.

The legal question arises from the giving of the instruction by the court directing a verdict for the defendant. The record discloses that upon the trial of the cause it was proven the premises leased contained a tile and brick factory operated solely by water power, and that the same was useless without sufficient water power or some other power with which to run and operate the machinery, and that for a considerable length of time the water power had been wholly insufficient for the running of the machinery, and a 30-days notice was given by appellant, as provided for in the lease, which was, in

substance, that inasmuch as appellee failed, on his part, to furnish a sufficient quantity of water to operate the machinery, appellant had decided to forfeit the lease, and to declare the same terminated and at an end, and demanded, at the expiration of 30 days from the date, to cancel said lease, and demanded the damages provided for by the said lease. The notice was dated May 25, 1901. The evidence discloses there was no effort on the part of appellee to furnish the power necessary to run the machinery, and during the first part of July appellant began moving her property from the premises preparatory to abandoning them, and, as there was considerable tile and brick, it necessarily took some time to get them all removed, but she had her property all removed by July 30, 1901.

Appellee contends that appellant waived her rights under the notice by not abandoning the premises within 30 days; that the notice was a forfeiture, and she thereby waived her forfeiture; and he argues that the rule "that forfeiture clauses are not favored in either law or equity, and their effect will be limited by a strict construction," applies in this case. We are unable to perceive how this rule could apply here. The tenant gave notice to the lessor that inasmuch as the lessor was not furnishing the necessary power, as provided in the lease, she had decided, at the expiration of 30 days, to terminate the contract and declare the same forfeited, and demanded the damages provided for in the lease. Under our construction of the lease, the 30-days notice meant that, after the notice was given, appellee had 30 days within which to comply with the terms of the lease in furnishing sufficient power to run the machinery, and, if he neglected or refused to comply with the request, appellant would then have a reasonable time within which to remove her effects from the premises. The main purpose of this clause in the lease was to confine or limit the amount of damages appellant could recover in an action for the breach of covenant of the lease. The word "forfeiture," as used in the lease and notice, has no significance. The whole expression of which it is a part simply means to "terminate" or "end" the lease as provided, as it is not in the province of a tenant to compel a forfeiture by a landlord. Provisions for forfeitures of leases for breach of covenants or conditions are construed as voidable only at the option of the lessor. 18 Am. & Eng. Ency. of Law (2d Ed.) 380-382. All of the cases cited by appellee are where the tenant has done some act whereby the lessor decided to terminate the tenancy and declare a forfeiture, and the lessor afterwards did some act whereby he waived the forfeiture, and are, therefore, not in point.

It is also insisted there was no surrender of the lease. The evidence shows that appellant moved all her property from the premises and delivered the key to appellee, and

we think there is sufficient evidence tending to show a surrender.

It is also insisted by appellant that there was error in the trial court permitting appellee, on motion and notice to amend the record of the entry of judgment after the term had closed, and after the case was in the Appellate Court, by striking out the words "and that execution issue therefor," and inserting in lieu thereof "to be paid in due course of administration"; and, on suggestion of diminution of record, appellee was granted leave to file, and filed in the Appellate Court, an amended record showing the amendment. But we think there was no error in this, as "the statute of amendments and Jeofails authorizes the court, at a subsequent term, to rectify any defect or imperfection, in matter of form, contained in the record, pleadings, process, entries, returns, or other proceedings in the cause, in affirmation of the judgment, so that the judgment shall not be reversed or annulled." *Tosetti Brewing Co. v. Koehler*, 200 Ill. 369, 65 N. E. 636.

Other errors are argued, but, inasmuch as the cause will have to be reversed and remanded, we do not deem it necessary to pass upon them.

We are of the opinion that the evidence tended to prove the cause of action as set forth in the declaration, and that it was error for the court to direct a verdict for the defendant. The judgments of the circuit court of La Salle county and Appellate Court are reversed, and the cause is remanded to the circuit court of La Salle county for further proceedings. Reversed and remanded.

(206 Ill. 337)

CHRISTIE v. PEOPLE.

(Supreme Court of Illinois. Dec. 16, 1903.)

CRIMINAL LAW—BRIBERY AT ELECTIONS—INFAMOUS CRIME—DISFRANCHISEMENT—CONSTITUTIONAL LAW—INDICTMENT—CHARACTER EVIDENCE—TRIAL—INSTRUCTIONS.

1. Rev. St. 1845, c. 80, § 143, div. 11, provided for the punishment of any person convicted of bribery in elections by a fine not exceeding \$500 and disqualification for voting at any election for five years, and Const. 1848, art. 3, § 31, authorized the General Assembly to exclude from the privilege of electing or being elected any person convicted of bribery, perjury, or other infamous crime. *Held* that such sections being in force at the time of the adoption of Const. 1870, § 7, authorizing the General Assembly to pass laws excluding from the right of suffrage persons convicted of infamous crimes, the crime of bribery at elections was infamous within such section, and authorized the Legislature to pass Hurd's Rev. St. 1899, c. 46, § 83, punishing any person who should receive any money for the purpose of influencing his vote or that of any other person by disfranchisement.

2. An indictment for soliciting money from a candidate for a public office with intent to influence the votes of others, substantially in the language of Hurd's Rev. St. 1899, c. 46, § 83, creating such offense, was not objectionable for failure to allege that the person from whom the money was solicited was a legal candidate,

whose name was lawfully entitled to appear on the official ballot.

3. Where the court charged that defendant was entitled to the benefit of evidence of good character as tending to show that he would not be likely to commit the offense charged, it was not error to refuse to charge that if, on consideration of all the evidence, including that bearing on defendant's character, the jury entertained a reasonable doubt of his guilt, it was their duty to acquit.

4. Instructions that if the jury believed from the evidence, beyond a reasonable doubt, that defendant committed the crime charged in the indictment, they should find him guilty, were not objectionable for referring to the indictment instead of setting forth the hypothesis of the facts necessary to be proved to establish defendant's guilt.

5. Where defendant asked the court to give instructions referring the jury to the indictment, he could not object on appeal that the instructions of the court referred to the indictment for the facts necessary to be found in order to authorize a conviction, instead of reciting such facts.

Error to Williamson County Court; Rufus Neely, Judge.

Jim Christie was convicted of attempted bribery at elections, and he brings error. Affirmed.

Geo. W. Young and Burnett & Slater, for plaintiff in error. H. J. Hamlin, Atty. Gen., L. D. Hartwell, State's Atty., and Geo. B. Gillespie, Asst. Atty. Gen., for the People.

CARTWRIGHT, J. Plaintiff in error was indicted in the circuit court of Williamson county under section 83 of chapter 46, Rev. St., for soliciting, requesting, and demanding \$80 from one H. S. Harris, a candidate for sheriff of said county, to procure the votes of the legal voters of Eight-Mile Precinct for said candidate. That section provides that any person who shall solicit, request, demand, or receive, directly or indirectly, any money, intoxicating liquor, or other thing of value, or the promise thereof, either to influence his vote, or to be used, or under the pretense of being used, to procure the vote of any other person or persons, or to be used at any poll or other place, prior to or on the day of an election, for or against any candidate for office, shall be deemed guilty of the infamous crime of bribery in elections, and upon conviction thereof in any court of record shall be sentenced to disfranchisement by the judge of such court for a term of not less than five years nor more than fifteen years, and to imprisonment in the county jail not less than three months nor more than one year, and to pay the costs of prosecution. Hurd's Rev. St. 1899, p. 749. The indictment was certified to the county court for process and trial. The defendant moved the court to quash the indictment on the grounds that the section upon which it was founded was in violation of the Constitution, and that the indictment was insufficient for a failure to allege that Harris was a legal candidate, whose name was lawfully entitled to appear upon the official ballot. The motion was overruled, and the defendant pleaded not

guilty. Upon a trial the jury found him guilty, and he was sentenced to disfranchisement for a term of five years and to imprisonment in the county jail for three months.

It is contended that the statute under which the defendant was convicted is in conflict with section 1 of article 7 of the Constitution, which confers the right of the elective franchise upon resident citizens having the qualifications prescribed in that section. The argument in support of that proposition is that any person entitled to vote at an election in this state under the provisions of section 1 cannot be deprived of that right except upon conviction of an infamous crime, as provided by section 7 of the same article; that bribery in elections was not an infamous crime in the law at the time of the adoption of the Constitution; that in determining what crimes are infamous we must give the words the same meaning and effect that they had at the time they were written in the Constitution, and that by adopting that rule the crime of bribery in elections is not infamous, within the meaning of section 7. The Attorney General contends that the Legislature have power to take away the elective franchise as a punishment for crime in like manner as the citizen may be deprived of rights to life, liberty, and property secured to him by the Constitution. But, if we find that the crime of bribery in elections was deemed infamous when the Constitution was adopted, it will not be necessary to consider the other question.

Section 7, above referred to, is as follows: "The General Assembly shall pass laws excluding from the right of suffrage persons convicted of infamous crimes," and by the statute in question the crime of which defendant was convicted was declared to be infamous, and disfranchisement was imposed as a penalty. At common law certain crimes were of such character that infamy arose from their commission, and the criminal was deemed infamous. In this state the common law was superseded by a statute enumerating infamous crimes. The statute in force at the time of the adoption of the present Constitution, in 1870, was section 174, div. 15, c. 30, Rev. St. 1845, by which the Legislature designated certain crimes, and provided that each and every person who might thereafter be convicted of any such crime should be deemed infamous, and should forever thereafter be rendered incapable of holding any office of honor, trust, or profit, of voting at an election, of serving as a juror, and of giving testimony. This statute did not include the crime of bribery in general or bribery in elections. Said statute, however, did not embrace all the law relating to the subject of bribery or bribery in elections. Section 143, div. 11, of the same chapter of the Revised Statutes of 1845, provided for the punishment of any person convicted of bribery in elections by a fine not exceeding \$500, and disqualification for voting at any election

in the state for five years, and this statute remained in force when the present Constitution was adopted. The people had also given to the offense of bribery the character of infamy by a provision in the Constitution of 1848. Section 31 of article 3 of that instrument was as follows: "The General Assembly shall have full power to exclude from the privilege of electing, or being elected, any person convicted of bribery, perjury, or other infamous crime." In the present Constitution the form of the provision for excluding persons from the elective franchise was changed, and it assumed the form, in section 7, of a command to the Legislature to exclude from the right of suffrage all persons convicted of infamous crimes; but the crime of bribery did not cease to be regarded as infamous. On the contrary, it was provided by section 4 of article 4 of the Constitution as follows: "No person who has been, or hereafter shall be, convicted of bribery, perjury, or other infamous crime, * * * shall be eligible to the General Assembly, or to any office of profit or trust in this state." The offense of bribery in elections involves moral turpitude, and falls within the class of crimes deemed infamous, and in both the Constitution of 1848 and that of 1870 bribery was so classed by the people. In both instruments bribery of all kinds, which included bribery in elections, was classed with perjury, as rendering the offender infamous; one showing him to be insensible to the obligations of an oath, and the other proving him alike insensible to the obligations and duties of a citizen, and unfit to exercise the elective franchise. We do not see how it can be said that the framers of the Constitution or the people did not intend that bribery in elections should be included as an infamous crime within the meaning of section 7.

The other point in support of the motion to quash is that the indictment was defective in not alleging that Harris was a legal candidate, whose name was lawfully entitled to appear upon the official ballot. The indictment was substantially in the language of the statute creating the offense, setting it forth specifically in the statutory language, so as to fully inform the defendant of the nature of the charge. It alleged that Harris was then and there a candidate for sheriff of said county, and any candidate for office is a legal candidate, and entitled to have his name written on the ballot by those who are willing to vote for him. *Sanner v. Patton*, 155 Ill. 553, 40 N. E. 290. Harris had a right to be a candidate whether he was nominated by a political party or not, and it was no less a crime to request or demand money from him for procuring votes if he had not been so nominated. The allegations of the indictment were sufficient.

It is assigned for error that the court permitted the state's attorney, upon the examination of jurors, to read the statute, and, if they answered that they believed the statute

invalid, and were opposed to its provisions, they were challenged for cause, and excused by the court. None of these things appear in the record. Neither the examination of the jurors, nor any ruling of the court, nor exception thereto, is preserved for review. All that appears is a statement in the motion for a new trial, and it is not even supported by affidavit. That method of stating what occurred upon the trial is not sufficient. *Mayes v. People*, 108 Ill. 306, 46 Am. Rep. 698. Not conceding that a juror who did not believe in the validity of the law, and was conscientiously opposed to its enforcement, would be competent to sit in the case, the record does not raise the question.

It is next insisted that the court erred in modifying the fifth instruction asked by the defendant. The instruction was on the subject of the previous good character of the defendant, which there was evidence tending to prove. The part erased by the court is as follows: "And if, after a careful consideration of all the evidence in the case, including that bearing upon the defendant's good character as a man and citizen, the jury entertain any reasonable doubt of the defendant's guilt, then it is their duty to acquit the defendant, and return a verdict of not guilty." The instruction as given allowed to the defendant the benefit of the evidence respecting his previous good character, as tending to show that he would not be likely to commit the offense alleged against him. The modification was in conformity with the rule established by our decisions, by which it has always been held to be error to call the especial attention of the jury to particular evidence, or a particular kind of evidence, so as to give it especial weight. The jury were repeatedly informed by other instructions that, if they entertained any reasonable doubt of defendant's guilt, it was their duty to acquit him; and it is not error to eliminate from an instruction a reference to particular facts or particular evidence so as to give it especial prominence.

The third and fourth instructions given at the request of the people are objected to because they refer the jury to the indictment, and do not contain in themselves the hypothesis of facts necessary to be proved to establish the defendant's guilt. They told the jury, in substance, that if they believed, from the evidence, beyond a reasonable doubt, the defendant committed the crime as charged in the indictment, they should find him guilty. The indictment stated all the facts necessary to the conviction, and, if the jury believed that those facts had been proved by the evidence beyond a reasonable doubt, it was their duty to find the defendant guilty. Moreover, the defendant ought not to be heard to complain of that instruction, since he asked and the court gave an instruction referring the jury to the indictment, and telling them that the people were bound to prove every material allegation contained in the indictment

beyond a reasonable doubt. That instruction which defendant procured to be given to the jury not only referred them to the indictment, but also allowed them to determine what allegations contained therein were material.

It is also alleged that the court erred in refusing to give the eighth, ninth, and tenth instructions asked by the defendant. They were on the question of reasonable doubt, and were repetitions of instructions given. It was not error to refuse them.

The evidence was conflicting, the witness Harris testifying to facts establishing the defendant's guilt, while the defendant testified to the contrary. The evidence of another witness tended to corroborate Harris, and there was testimony of a number of witnesses as to the good character of the defendant as a law-abiding citizen. We cannot say that the verdict was against the weight of the evidence. The judgment is affirmed.

Judgment affirmed.

(206 Ill. 34)

GROVES & S. R. R. CO. v. HERMAN et al.
(Supreme Court of Illinois. Dec. 16, 1903.)

CONDEMNATION PROCEEDINGS—DAMAGES—AMOUNT—VIEW—PREJUDICIAL ERROR—VERDICT—IMPEACHMENT—QUOTIENT ESTIMATES.

1. In proceedings for the condemnation of land the jury may base their verdict on knowledge gained from inspection of the premises, as well as upon the testimony of witnesses whose statements were mere opinions and conclusions as to the extent of damages.

2. Where the amount allowed in condemnation proceedings for damage to lands not taken is within the range of the testimony, the award for such damage should not be disturbed for errors in instructions which could not have operated to petitioner's prejudice.

3. The fact that the jury in condemnation proceedings arrived at the damages, to be allowed each landowner, by a preliminary agreement that each juror should set down the amount that he believed should be awarded, and that the aggregate should be divided among the number of jurors, does not vitiate their verdict, in the absence of a binding agreement by them to accept the quotient as their verdict.

4. The affidavit of the right of way agent of a railroad that the jury adopted a quotient verdict by previous agreement, which did not disclose whether affiant spoke from knowledge or information, will be presumed to have been made on information alone, and to be therefore incompetent, as affiant could not lawfully have been in the jury room during the deliberation.

5. In condemnation proceedings the court properly refused to regard the verdict as arrived at by chance, where six of the eight jurors filed affidavits that they regarded merely the evidence and instructions, and that the verdict was not arrived at by chance, and five of them filed supplemental affidavits stating that, while a quotient estimate was made, it was not pursuant to an agreement to accept the same as their verdict, but merely as a comparative estimate of the views of the jurors.

Appeal from Jackson County Court; W. F. Ellis, Judge.

Petition by the Groves & Sand Ridge Railroad Company against John Herman and

others. From judgment on cross-petition for defendants, petitioner appeals. Affirmed.

W. W. Barr (J. M. Dickinson, of counsel), for appellant. Wm. A. Schwartz, R. E. Doty and Herbert & Levy, for appellees.

PER CURIAM. The appellant company filed in the county court of Jackson county its petition for the condemnation of the right of way for its railroad through certain lands belonging to the appellees. The appellee John Herman was the owner of 40 acres of land, out of which a strip along the east side, containing 3.57 acres, was asked to be condemned. The appellee Amil Sherman owned a farm of 100 acres, from which a strip of land containing 4.96 acres was asked to be taken. The other appellees, being the widow and heirs of Silas Crossin, deceased, were the owners of a farm of 120 acres of land, out of which about 9 acres were to be taken for the right of way of the railroad. These landowners filed cross-petitions, alleging they were entitled to an award for damages to the land not taken. The issues under the petition and cross-petition were submitted to the same jury. Many witnesses testified in behalf of the respective parties, and the jury visited and inspected the lands. The verdict of the jury was that compensation for land taken should be allowed as follows: Herman, \$201.57, Sherman, \$484.39, and widow and heirs of Crossin, \$856.25; and as damages to the land not taken, as follows: Herman, \$118.50, Sherman, \$694.38, and widow and heirs of Crossin, \$796.25. Judgment was entered upon the verdict, and the petitioner has brought the record of the proceedings into this court by appeal.

We have attentively examined the testimony of the various witnesses, and consulted the record in many instances. We think it clear many of the witnesses, in estimating the value of the strips of land to be taken, took into consideration, to some extent, the injury which would result to the remainder of the tract or to the farm by the severance of the strip, and in considering the damage to the remainder of the tract which was not taken would again consider the injury that would result from the severance of the strip to be taken. Cross-examination operated in some instances to remedy this error, but perhaps in others it did not. If the amounts allowed for land taken had been smaller, it would have more nearly coincided with our views of the right and justice of the matter. But many witnesses testified to their judgment of the value of the strips of land, and, while their estimates were widely variant, the amounts fixed by the jury are within the compass of the testimony. In addition, the jury visited and inspected the premises, and had the right to base their verdict on the knowledge gained by the personal inspection, as well as upon the testimony of the witnesses. The instructions on that branch of the case seem to be unobjectionable, and our

conclusion on the whole matter is that no substantial grounds can be pointed out on which to justify the declaration on our part that the verdict is palpably against the evidence.

The award for damages to lands not taken seems amply supported by the testimony produced from witnesses. The jury, having inspected the premises, had the right to base their verdict on the knowledge thus gained as well as upon the testimony of the witnesses, whose statements were but their opinions and conclusions as to the extent to which the lands not taken would be damaged. In *Sexton v. Union Stockyards Co.*, 200 Ill. 244, 65 N. E. 638, upon the authority of many cases there cited, in response to the insistence the award was inadequate, we said (page 251, 200 Ill., page 640, 65 N. E.): "The evidence consisted most largely of opinions of values entertained by the different witnesses. Their judgment varied widely, and their opinions were likewise variant. The amount allowed, though much less than the estimates of the witnesses produced in appellants' behalf, is larger than that of the witnesses produced by the appellee company. We cannot know the effect which was produced on the minds of the jurors by the actual inspection of the premises. The rule in such cases is not to disturb a verdict if it is within the range of the testimony, unless we can clearly see that injustice has been done and that passion or prejudice influenced the action of the jury." These remarks are applicable here, though the contention is the award is excessive. The record does not justify the condemnation of the verdict on the ground the jury were influenced by passion or prejudice in rendering it.

The instructions as to the element of damages to lands not taken are criticised, and in some respects they are not accurate. The inaccuracies are not, however, of a character that could have misled the jury, when it is kept in view the jury visited the premises, and acted, in part at least, from the information obtained by such personal inspection. Furthermore, as we have before observed, the amount allowed for damages to lands not taken is within the range of the testimony, and it is therefore clear that the award for such damages should not be disturbed for errors in instructions which could not have operated to the prejudice of the appellant.

It was urged as ground for new trial that the jury had arrived at the compensation and damages to be allowed to each landowner by a preliminary agreement that each juror should set down the amount he believed should be awarded, and that the aggregate should be divided by the number of jurors. The affidavit of the bailiff in charge of the jury during their deliberations was filed in support of this ground of the motion. But the affiant does not state that the jurors entered into any agreement binding them to join in accepting the quotient as their verdict. It is

not inconsistent with the statement of the affiant that the jurors adopted this process for the purpose of seeing how nearly the average of the views of all would suit the views of different jurors. A mere experiment of that kind does not condemn a verdict. *City of Pekin v. Winkel*, 77 Ill. 58.

The affidavit of the right of way agent of the appellant company was filed, which averred that a quotient verdict was adopted by previous agreement. This latter affidavit does not disclose whether the affiant speaks from personal knowledge or on information. He could not lawfully have been in the jury room during their deliberations, and it will be presumed he was not permitted to hear what occurred there. It must therefore be presumed this affidavit was based upon information merely, and for that reason it ought not to have been considered. *City of Pekin v. Winkel*, supra.

The jury, by agreement, consisted of but eight jurors. The affidavit of six of them was filed, and on a later day a supplemental affidavit of five of the six was filed. The affidavit of the six jurors does not specifically deny or affirm that during the course of their deliberations the aggregate of the different amounts the jurors believed ought to be allowed was ascertained and the same divided by eight, but contains the following statement: "That during the deliberations of the jury he, as said juror, was only and solely influenced by the evidence in the case and the instructions of the court in arriving at what he deemed was the just compensation for the land actually taken, and as to the damage to the adjacent land not taken, as to each and all of the said several tracts of land; that the amounts of the compensation for the land actually taken, and of the damage to the adjacent land not taken, as to each and all of the said several tracts of land, as returned by the jury to the court, and as shown by the report of the jury on file herein, was not arrived at by the jury by chance, accident, or by average, but was based by the jury on the evidence in the case, and was the deliberate judgment of the jury." In the supplemental affidavit the jurors stated "that, while the jury in this case did put down the several amounts that each and every juror was in favor of giving the owners of each and all the several tracts of land being condemned in this proceeding, as compensation for the land taken, and the amounts they were in favor of giving said owners as damage to their adjacent land not taken, and that they did add the several amounts as to each and every tract separately, and that they divided the result of said addition by eight, the number of jurors herein, but that said jury did not agree, at any time during their deliberations, nor at any time, that the said several quotients should be the amounts of the compensation for the land actually taken, and as damage to the adjacent land not taken, as to any or either of said several tracts of land.

And these affiants further say that, while said jury did resort to the process mentioned in the affidavit of A. W. Skinner as to adding the said several amounts that each juror was in favor of giving the landowners herein as compensation and damages, and dividing the result of said addition by eight, said jury did so as a mere experiment, and for the purpose only of ascertaining how nearly the result accomplished by said addition and division would suit the views of the different jurors; but that these affiants emphatically say that it was not agreed by the said jury that the several quotients reached by said addition and division, as to both compensation for the land taken and as to the damage to the land not taken, should be the verdict of the jury either as to compensation for land taken, or as to damage to adjacent land not taken, as to either or any of the several tracts of land herein. Affiants further say, as they have already stated in their affidavits, that the report that the jury made to the court herein was the result of their deliberate judgment, and was based on all the evidence in the case." It is quite clear the court correctly refused to regard the verdict as the result of an agreement to arrive at a conclusion by way of averages or by chance.

The judgment of the county court must be, and is, affirmed. Judgment affirmed.

(205 Ill. 528)

MCCHESNEY et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT—ORDINANCE—REPEAL IN PART—RE-ADJUSTMENT OF ASSESSMENT—CONFIRMATION.

1. Subsequent to an assessment under an ordinance requiring the cost of making the assessment to be paid by the assessment, the act of May 9, 1901 (Laws 1901, p. 117) took effect, which provided that the cost of making and collecting the assessment should be paid by the city from its general fund, and thereafter the assessment roll was recast by deducting the illegal item, the property owners were given a hearing, and the roll confirmed. *Held*, that the confirmation was valid, the ordinance not having become wholly void, and the court under the circumstances having had jurisdiction.

Appeal from Cook County Court; Frank Harry, Judge.

Proceedings for the confirmation of a special assessment for a local improvement by the city of Chicago. From a judgment of confirmation, A. B. McChesney and others appeal. Affirmed.

F. W. Becker, for appellants. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

CARTWRIGHT, J. This case was here on a former appeal, when it was decided that the judgment of confirmation of a special assessment, entered after the act took effect,

by which it was provided that the cost of making and collecting such assessment should be paid by the city out of its general funds, was erroneous in including such cost. *McChesney v. City of Chicago*, 201 Ill. 314, 66 N. E. 217. For that error the cause was remanded to the county court, and, being reinstated there, appellants filed additional objections, alleging that the ordinance for the improvement was void because it contained a provision that the whole cost of the improvement, including the cost of making and collecting the special assessment, should be paid by such assessment, and therefore the court had no jurisdiction to proceed further. Appellee moved the court to recast the assessment roll as to the property of appellants, by deducting therefrom the cost of making and collecting the assessment. The court granted the motion, recast the assessment roll accordingly, and thereupon overruled the objections. A jury being waived, the question of benefits was submitted to the court, and on a hearing the assessment as reduced was confirmed.

It is contended by appellants that the ordinance was void, for the reason that it, and the estimate on which it was based, included the item of cost; that the defect could only be cured, if at all, by a new estimate, a new ordinance, and a new proceeding; and that the court was without jurisdiction to enter the judgment of confirmation. If an ordinance for a special assessment is void, it is a nullity, and a court cannot acquire jurisdiction to confirm an assessment by virtue of it. An ordinance by which a city attempts to levy a special assessment not authorized by law is of that nature, as where it provides that the cost of paving approaches to a viaduct, or other space which it is the duty of a railroad company to pave, shall be paid by special assessment levied upon the property of individuals. *City of Chicago v. No-deck*, 202 Ill. 257, 67 N. E. 39; *American Hide & Leather Co. v. City of Chicago*, 203 Ill. 451, 67 N. E. 979. If an improvement cannot, in law, be paid for by special assessment, an ordinance providing that it shall be so paid for is void, because not within the power of the city. In this case, however, the ordinance, when passed, was fully authorized by law, and was legal and valid. The amendatory act in force May 9, 1901 (Laws 1901, p. 117) took effect after the proceedings for special assessment were instituted. It provided that the cost of making and collecting the assessment should be paid by the city out of its general fund, and in that respect superseded the provision of the ordinance. The ordinance became inoperative in a matter which lightened the burden, upon the property to be assessed, to the benefit of appellants, but the ordinance as a whole did not become void by reason of the subsequent act. The assessment could only be spread for the estimated cost of the work, not including the cost of making and collect-

ing the assessment. *Gage v. City of Chicago*, 195 Ill. 490, 63 N. E. 184.

Appellants rely upon the decision in *Thompson v. City of Chicago*, 197 Ill. 599, 64 N. E. 392, where it was urged by the city that we should remand the cause with directions to the county court to strike out the item of costs, following the course alleged to have been pursued in *Dobler v. Village of Warren*, 174 Ill. 92, 50 N. E. 1048. In the latter case the error of the court was in entering judgment upon the verdict, and it was within the power of the court to direct a proper judgment, which was done. In the former case the error was not in entering an improper judgment on a correct finding or verdict, but in overruling objections to an illegal item. It was held that where an assessment was spread for too large an amount there must be a new assessment roll, to be confirmed by the court. In such a case, upon reversal of the judgment, the parties are entitled to a new trial, and we have no authority to direct the court to strike out an item and enter a judgment. In this case the assessment roll was recast by deducting the illegal item, and, as so recast, appellants had a hearing, and the roll was confirmed. The court had jurisdiction, and there was no error in the proceedings. The judgment is affirmed.

Judgment affirmed.

(206 Ill. 387)

CINCINNATI, L. & C. RY. CO. v. PEOPLE
ex rel. HALSEY, County Treasurer.

(Supreme Court of Illinois. Dec. 16, 1903.)

TOWNS—TAXATION—LEVY—VALIDITY—BONDS.

1. Under Hurd's Rev. St. 1899, p. 1706, c. 139, art. 4, § 3, authorizing the electors at the annual town meeting to direct the raising of money by taxation for certain specified town purposes, a ratification by the electors at a town meeting of an attempted levy for proper purposes by the board of auditors amounted to a direction that the specified amount of money should be raised for the purposes specified, and was a sufficient compliance with the statute.

2. By Hurd's Rev. St. 1899, p. 1715, c. 139, art. 13, §§ 3, 7, town auditors are given power to audit all charges and demands against the town and certify the same to the town clerk. A record of a meeting of town auditors showed a motion that bonds for \$3,000 to pay the expense of building a bridge be issued for \$1,000 each, payable in one, two, and three years from the date of issue, and the town clerk certified to the county clerk the amount of \$1,000, plus a certain sum for town expenses, to be levied as a tax for town purposes. Thereafter the electors of the town at town meeting voted the levy of the amount certified by the town treasurer. Held that, in the absence of any showing that there were no outstanding bonds as to which the auditors might properly have allowed a claim against the town, the action of the town meeting could not be regarded as illegal on the ground that it was a direction to issue bonds which the town meeting had no authority to make.

3. Under a charter limiting a school district's power to incur indebtedness for building purposes to a certain sum, the limitation extended to the incurring of indebtedness only, and did

not prohibit the levying of a tax for building purposes after the district was already indebted to the limit.

Appeal from Kankakee County Court; A. F. Deselm, Judge.

Application by the people, on the relation of the county treasurer and ex officio collector of Kankakee county against the Cincinnati, Lafayette & Chicago Railway Company, for judgment against the property of respondent for delinquent taxes. From a judgment for relator, respondent appeals. Affirmed.

W. R. Hunter, for appellant. Bert L. Cooper, for appellee.

CARTWRIGHT, J. To the application of the county collector of Kankakee county to the county court for judgment against property of appellant for delinquent taxes, appellant filed objections, which were sustained except as to two items—the town tax of the town of Aroma, and the excess above the amount necessary to pay maturing bonds, and interest on outstanding bonds, of a tax levied by a school district in the city of Kankakee for building purposes. As to those items the objections were overruled and a judgment was entered, from which this appeal was prosecuted.

The board of town auditors of the town of Aroma met in March, 1902, for the purpose of auditing town accounts, and their record recites that, after having audited the same, and the tax levy being under consideration, it was estimated that they required the following amounts as a town tax, to be levied and collected for the following purposes: "For the salaries of town officers, \$200; for the care and support of the poor, \$100; for the miscellaneous expenses, \$100; for the payment of the Sugar Island bridge bonds, \$3,000." The record of the town meeting held April 1, 1902, contains the following: "The clerk also read the auditor's certificate of tax levy, asking for \$200 for salaries of town officers, \$100 for the care of town poor, \$100 for miscellaneous expenses, \$3,000 for payment of Sugar Island bridge bonds. Motion by S. W. Scott that the \$400 for town expenses be allowed. Motion carried. Motion by S. W. Scott that the bonds for \$3,000 to pay expense of building the bridge be issued for \$1,000 each, payable in one, two, and three years from date of issue." An amendment having been offered and lost, the original motion was voted on and carried. The town clerk certified to the county clerk the amount of \$1,400 to be levied as a tax for town purposes, as appearing "from the record of entries of moneys voted to be raised at the town meeting, and from the certificate of the board of town auditors of said town." The town tax objected to was levied in pursuance of that certificate.

There are separate objections to the \$400, made up of the first three items, and to the remaining \$1,000. The objections to the tax to the extent of \$400 are that the auditors had no power to make any certificate as to what

was required for town purposes, and that the electors at the town meeting did not direct the raising of the money by a tax, but merely ratified the attempted levy by the board of auditors, and therefore the levy was void.

Section 3, art. 4, c. 139, p. 1706, Hurd's Rev. St. 1899, authorizes the electors present at the annual town meeting to direct the raising of money by taxation for certain specified town purposes. The board of town auditors had no authority to levy any tax for such purposes, and the action of the board was a nullity. A tax must be levied by the authorities in whom the power to levy it is vested, and the power to raise money by taxation for the specified purposes is given by law to the electors assembled in the town meeting. A meeting must be properly convened, and the record must show, in some form, a substantial compliance with the law in levying the tax. It is not required, however, that any particular form of words shall be used in the record, and, if the substance of a vote of the electors at the town meeting directing the raising of money by taxation for lawful purposes appears, the fact that the board of auditors certified that the levy was required will not affect the validity of the tax. In this case the record shows that the \$400 in the three separate items recommended by the auditors to be raised by taxation was allowed, and there is no objection that the purposes mentioned are not legitimate and within the requirements of the law. Neither is there any objection that the electors at the town meeting could not vote money for said purposes. We think the record amounts to a direction that the \$400 should be raised by taxation for the specified purposes.

As to the remaining \$1,000, the objections are that the electors at the town meeting had no authority to direct the issuing of bonds of the town, and that they did not attempt to levy a tax to pay bonds, but the action, at most, was a direction to issue bonds for \$3,000, payable in one, two, and three years. It is true that the electors had no authority to direct the issuing of bonds, but it was within the authority of the board of town auditors to audit all charges and demands against their town and certify the same to the town clerk, to be certified by him to the county clerk. Hurd's Rev. St. 1899, p. 1715, c. 139, art. 13, §§ 3-7. The duty of passing upon claims against the town is imposed upon the board of auditors. Their certificate is the foundation of a levy of a tax to pay the same, and the electors at a town meeting cannot direct the levy of a tax for that purpose. *People v. Chicago & Alton Railroad Co.*, 193 Ill. 364, 61 N. E. 1063. The board of auditors certified the amount which they required for the payment of bridge bonds, and there is no evidence that there were no outstanding bonds described in the certificate which the auditors might properly allow as a claim against the town. The action of the town meeting related to the maturity of the bonds, and the

levy seems to have followed their direction, so that the bonds would be paid in one, two, and three years, instead of a single payment. The fact that the vote of the electors was followed, although they had no authority in the matter, was not prejudicial to appellant, but rather to its benefit, in reducing the amount of the taxes. It must be conceded that the action of the board of auditors and of the electors at the town meeting were both irregular, but there was nothing more than irregularities not affecting the substantial justice of the tax. As to each portion of the tax there was, in substance, a levy by lawful authority, although the authorities in each case attempted to levy a portion of the tax which they had no power to levy. The objections to the town tax were properly overruled.

It was stipulated on the hearing that the school district was operating under a special charter, by which its power to incur indebtedness for building purposes is limited to \$40,000; that the district had issued bonds to that amount, which were then outstanding and unpaid; and that the amount levied in 1902 against the property of appellant was more than enough to pay its proportion of the bonds then due, and interest on outstanding bonds, by the sum of \$119.82. The objection to that tax is that the school district, having reached its limit of indebtedness, could not levy any tax for building purposes, and could only raise money by taxation to pay its indebtedness. We do not think that the charter would bear that construction. The limit is to indebtedness, and not to taxation, nor to the power of the district to erect buildings. The district could levy taxes for building purposes within the limit prescribed by the law, and devote the surplus, above meeting its bonded obligations on account of building, to building purposes. There is no claim that the tax was in excess of the rate authorized by law to be raised for building purposes, nor that it was to pay indebtedness beyond the limit. The court was right in overruling objections to this tax. The judgment is affirmed.

Judgment affirmed.

(205 Ill. 538)

CINCINNATI, I. & W. RY. CO. v. PEOPLE
ex rel. MOFFETT, County Collector.

(Supreme Court of Illinois. Dec. 16, 1903.)

TAXATION—JUDGMENT—RECORD—LEVY OF
TAXES—HIGHWAY COMMISSIONERS—TOWN
BOARD—AUTHORITY—TOWN RECORDS—PRACTICE—REVIEW AND ERROR—APPEAL—QUESTIONS PRESENTABLE ON APPEAL—MOTION TO DISMISS APPEAL—EVIDENCE.

1. The record showed that appellant filed objections in writing to certain taxes; that there was no motion to strike the objections from the files, and no question was raised in any way as to appellant's right to object, but the cause was heard on the merits on such objections, and an appeal was allowed and duly perfected. There was no copy of the assessment list in the record showing to whom the property was assessed. *Held*, that the contention that the record did not show that appellant was interested in the property, so as to have a right to file objec-

tions, could not be raised by appellee for the first time on appeal.

2. Where no motion is made to dismiss an appeal, appellee joining in error, and both parties filing briefs, and the case is submitted for decision on the errors assigned, the question whether the appeal was regularly taken does not arise on such submission, and can only be presented by a motion to dismiss the appeal.

3. On appeal from a tax judgment, where the bill of exceptions contains no exception to the final judgment of the court, and no propositions of law are submitted, the Supreme Court cannot review the question whether the judgment is supported by the evidence, or whether proper rules of law were applied by the court.

4. On appeal from a tax judgment, the practice is the same as in other cases tried by the court, and a party may except to a decision in receiving improper or rejecting proper testimony, or to the final judgment on the law and evidence, and may assign for error in the Supreme Court any ruling or decision so excepted to.

5. Under Hurd's Rev. St. 1899, p. 1426, c. 120, § 191, providing that a tax judgment shall be considered as a several judgment for each kind of tax or special assessment included therein, where evidence respecting certain taxes was admitted without objection, there being neither objection of appellant nor ruling by the court in the course of the hearing, and no question of law respecting such taxes was submitted, the only complaint being that the final judgment on the law and evidence was wrong, there was no exception to the judgment, which should be affirmed as to such taxes.

6. Under Hurd's Rev. St. 1899, p. 1487, § 119, requiring the commissioners of highways to ascertain how much money must be raised for the several purposes therein specified, and authorizing them to levy a tax to raise the same, not exceeding 40 cents on the \$100 of the assessment, unless an additional amount, to be raised by a tax not exceeding 40 cents on each \$100 of valuation, is authorized by the legal voters at the town meeting, on notice as therein required, the town board cannot grant such additional levy without such authority from the legal voters.

7. Under Hurd's Rev. St. 1899, c. 139, art. 12, § 2, requiring the town clerk to record in the book of records of the town the minutes of every town meeting held therein, and every order or direction, and all by-laws, rules, and regulations made by any town meeting, the town record is the only competent evidence of the acts of the voters at such meeting, and parol evidence of a vote authorizing the levy of a greater tax than 40 cents on the \$100 is inadmissible in proceedings to enforce the payment of taxes.

Appeal from Macon County Court; O. W. Smith, Judge.

Application by the people, on the relation of the county collector of Macon county, for judgment for certain taxes against the property of the Cincinnati, Indianapolis & Western Railroad Company. Judgment for relator, and defendant appeals. Affirmed in part.

George W. Fisher, for appellant. W. E. Redmon, State's Atty., and E. S. McDonald, for appellee.

CARTWRIGHT, J. The county court of Macon county overruled objections to the application of the county collector of said county for judgment against appellant's property for certain taxes of Decatur and Long

Creek townships, in said county, and entered judgment and an order for the sale of said property to satisfy said taxes. The only answer of counsel for appellee to the argument in support of the errors assigned is that such errors cannot be reviewed for three reasons: First, because only parties interested in lands against which judgment is asked for delinquent taxes may file objections thereto, and no proof was made in this case that appellant was interested in the property on which the taxes had been levied; second, that the bill of exceptions does not show that appellant deposited with the county collector a sum of money equal to the judgment and costs before its appeal was allowed, and therefore the appeal was not properly taken; and, third, because the bill of exceptions does not show any exception taken by appellant to the judgment of the court.

The first of said propositions is raised for the first time in this court. The record shows that appellant filed objections in writing to the taxes; that there was no motion to strike the objections from the files, and no question was raised in any way as to the right of appellant to object, but the cause was heard on the merits on such objections, and an appeal from the judgment was allowed by the court, and was duly perfected. On the hearing it was agreed by the parties that a prima facie case was made for the collector, and there is no copy of the assessment or delinquent list in the record showing to whom the property was assessed. For aught that appears, the lands were taxed in the name of the appellant, and in that respect the case is different from that of *People ex rel. v. Quick*, 87 Ill. 435, where the record showed that they were not taxed to the party objecting. The question cannot be raised for the first time on appeal in this court.

As to the second proposition, the record shows that appellant deposited the sum of \$510.18 with the county collector, in compliance with the statute, for the purposes of the appeal. But, if that were not so, the objection comes too late. No motion was made to dismiss the appeal, but appellee joined in error, and briefs were filed by both parties, and the case was submitted for decision on the errors assigned. The question whether the appeal was regularly taken does not arise on such submission, and it could only be presented by a motion to dismiss the appeal. *Wabash Railroad Co. v. People*, 196 Ill. 606, 63 N. E. 1084.

The third proposition applies to some of the errors assigned, but not to all. The bill of exceptions contains no exception to the final judgment of the court, and there were no propositions of law submitted, so that we cannot review the question whether the judgment is supported by the evidence, or whether proper rules of law were applied by the court. The practice is the same as in other cases tried by the court, and a party may ex-

cept to a decision of the court in receiving improper or rejecting proper testimony, or may except to the final judgment of the court upon the law and evidence, and may assign for error in this court any ruling or decision so excepted to. *Bailey v. Smith*, 168 Ill. 84, 48 N. E. 75. While there is no exception to the final judgment, the bill of exceptions shows that the appellant excepted to the ruling of the court in admitting the testimony of witnesses as to what occurred at the annual town meeting in the township of Long Creek with respect to the road and bridge tax. The evidence was admitted over the objection of appellant, and the ruling of the court was excepted to, and was properly preserved for review. If the decision of the court in admitting such evidence was erroneous, it was material and prejudicial error as to the road and bridge tax.

The statute provides that the judgment in a case of this kind shall be considered as a several judgment for each kind of tax or special assessment included therein. *Hurd's Rev. St. 1899*, p. 1426, c. 120, § 191. As to the town tax of Decatur township, the town tax of Long Creek township, and the district road tax there is no error assigned or argued which we are authorized to consider on the record presented here. All the evidence offered by appellant respecting those taxes was admitted without objection, and there was neither objection of appellant nor ruling by the court in the course of the hearing. No proposition of law respecting those taxes was submitted, and the only complaint is that the final judgment of the court upon the law and the evidence was wrong. There was no exception to that judgment, and as to those taxes it must be affirmed.

The township of Long Creek is under the labor system, and the error assigned relating to the admission of testimony affects \$281.16 of the road and bridge tax of said township. The commissioners of highways met September 2, 1902, and the record of their meeting is as follows:

"Long Creek, Sept. 2, 1902, '78.

"The Com. met at the town hall on the above date and made their levy, being sixty cents on the one hundred dollars (\$100) of assessed value, which was granted by the town board.

R. F. McDonald,

"Wm. Sheets,

"C. C. Cochran,

"Commissioners of Highways.

"W. J. Hayes, Town Clerk."

That is the only record of any meeting for the levy of the road and bridge tax. The commissioners then made their certificate, which was presented to the board of supervisors at their meeting in September, 1902, as follows:

"Board of Comrs. of Highways,"

"Town of Long Creek, County of Macon, Ill.

"We do hereby certify that we require the sum of ——— dollars to be raised by a tax on the real, personal and railroad property in

the above town, for the making and repairing of bridges, the payment of damages by reason of opening, altering and laying out new roads and ditches, the purchase of the necessary material for building and draining roads and bridges, the pay of overseers of highways for the ensuing year, and for the payment of all outstanding orders drawn by the commissioners on their treasurer. Said amount being a levy of sixty cents on each one hundred dollars valuation according to the assessment of said town for the current year.

"Given under our hands this second day of September, 1902.

Wm. Sheets,

"C. C. Cochran,

"R. F. McDonald,

"Commissioners of Highways.

"Filed September 9, 1902.

"J. M. Dodd, County Clerk."

This certificate was made under the provisions of section 119 of the act in regard to roads and bridges in counties under township organization. *Hurd's Rev. St. 1899*, p. 1487. That statute requires the commissioners of highways to ascertain how much money must be raised for the several purposes in said section specified, and authorizes them to levy a tax to raise the same, not exceeding 40 cents on the \$100 of the assessment. That is the limit, unless the legal voters present at the town meeting shall, upon notice given as therein required, authorize an additional amount to be raised by a tax not exceeding 40 cents on each \$100 valuation. The statement in the record of the commissioners that the levy was granted by the town board had no effect for the reason that the town board had no authority to grant or authorize any levy. The record of the annual town meeting was in evidence, showing the proceedings at such meeting, and did not show any authority from the legal voters present at such meeting for any levy above the 40 cents fixed by the statute. The record did not show any notice that such a proposition would be voted on, as required by the statute. The court, against the objection of the appellant, allowed two witnesses to testify that there was a vote taken by the electors at the annual town meeting authorizing the levy of a greater tax than 40 cents on the \$100, and in this ruling the court erred. The statute requires the town clerk to record in the book of records of the town the minutes of the proceedings of every town meeting held therein, and every order or direction, and all by-laws, rules, and regulations made by any town meeting. *Hurd's Rev. St. 1899*, c. 139, art. 12, § 2. The town record was the only competent evidence of the acts of the voters at the town meeting, and what was done at such meeting could only be proved by such record. *Fagan v. Rosier*, 68 Ill. 84; *People ex rel. v. Madison County*, 125 Ill. 334, 17 N. E. 802; *Chaplin v. Commissioners of Highways*, 129 Ill. 651, 22 N. E. 484. The legitimate evidence

showed that the commissioners had no authority to levy a tax of more than 40 cents on \$100 valuation.

The judgment is affirmed as to the town tax of Decatur township, the town tax of Long Creek township, and the district road tax of said Long Creek township, and it is reversed as to the road and bridge tax of said Long Creek township, and the cause is remanded to the county court. The parties will pay their own costs in this court.

Affirmed in part, and remanded.

(206 Ill. 231)

MARChAL v. DAVIS et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

TRUST DEEDS—FORECLOSURE—SUIT BY EXECUTORS—APPEAL—RECORD.

1. Where, in a suit by executors to foreclose a trust deed executed to their testator, oral evidence showing that plaintiffs were executors of testator and that they were the owners of the trust deed was admitted without objection, and defendant filed a cross-bill making the executors defendants, defendant could not raise the objection that plaintiffs were not testator's executors.

2. Where, in a suit to foreclose a trust deed, the record showed that the trust deed and notes thereby secured were offered in evidence before the master and returned into court, and that the decree provided that they might be withdrawn by complainant, to be produced when requested, defendant, on appeal, could not complain that the trust deed and notes were not in the record.

Appeal from Appellate Court, First District.

Suit by Maria J. Davis and another, executors of John T. Davis, deceased, against Jane Marchal and others. From a decree for plaintiffs, affirmed by the Appellate Court (107 Ill. App. 629), defendant Jane Marchal appeals. Affirmed.

Gearon & Gearon, for appellant. F. L. Salisbury, for appellees.

WILKIN, J. This is an appeal from the Branch Appellate Court for the First District, affirming a decree of foreclosure of the circuit court of Cook county upon a trust deed executed on June 10, 1890, by one Lilly Wiltberger to one John T. Davis to secure the payment of \$12,000, due in five years after date, with interest at 6 per cent. per annum. At the maturity of this trust deed on June 10, 1895, by agreement of the parties the payment thereof was extended for a period of five years. In December, 1897, an agreement was entered into, in writing, between Lilly Wiltberger and the appellees herein, who were then the executors of the estate of the said John T. Davis, in which it was agreed that the appellees were to enter into the possession of the premises in question, rent the same, collect the rents, pay the insurance, taxes, and repairs, and apply any surplus upon the mortgage indebtedness. In pursuance of this agreement appellees entered into the possession of the premises and

continued therein until December, 1900, when Lilly Wiltberger conveyed all her right, title, and interest therein to the appellant, receiving therefor five acres of California land, valued at about \$1,000. At the maturity of the debt secured by said trust deed or mortgage, default was made in payment, a bill of foreclosure was filed, and a cross-bill was filed by appellant. The cause was referred to the master, and upon his recommendation a decree of foreclosure was rendered for the sum of \$14,877.91, together with \$446.31 solicitor's fees. From this decree an appeal was prayed to the Appellate Court, where the decree of the circuit court was affirmed, and the cause is now brought to this court by appeal.

Three reasons are assigned by appellant why this decree should be reversed: (1) Because the trial court twice allowed the item of \$300 for renting and managing said flat, first to the firm of Zanders & Co., and again to the so-called "janitor"; (2) for the reason that the appellees furnished no proof in the trial court that they were the executors of the estate of John T. Davis, deceased; (3) because the trust deed and the notes were never filed, either before the master or in the trial court, or in any way made a part of the record of the trial court.

As to the first assignment of error, the evidence shows that the property in controversy consisted of 12 flats and 3 storerooms in the city of Chicago. This property is what is known as "third-rate property." It was not in a first-class condition of repair, and did not contain such conveniences as would make it rent to good advantage. During the time appellees were in possession they obtained about \$85 a month rent. Many repairs were necessary, and they employed a real estate agent, who employed a janitor to assume charge of said premises and to aid in keeping the same rented and in repair. Considerable money was spent for these purposes, and complaint is made by appellant that the charges made for the repairs and for the service of the real estate agent and janitor are exorbitant. Appellant also claims that double charges were made for the management of said property by the real estate agent and by the janitor. From an examination of the evidence it will be found that appellees and their agents managed said property as well as could be expected, taking into consideration all of the facts and circumstances concerning the case. We do not think there is any error in the rulings of the chancellor or in his findings of fact.

As to the second error assigned, the appellant contends that proper proof was not offered before the master or upon the final hearing that the appellees had any right to sue as executors. An examination of the record will show that oral evidence was admitted showing that the appellees were the executors of the estate of John T. Davis, and that they were the owners of the trust deed

in question. Appellant also filed a cross-bill, in which she made said executors defendants. No objection was made to any of this testimony by the appellant. Had she desired to raise this question, objection should have been made to this testimony, so that other proof thereof could have been supplied, and by failing to do so she waived any rights which she might have had to here insist upon it.

As to the third error assigned, the appellant insists that the notes and trust deed were not offered in evidence before the master and were not filed in the trial court. An examination of the record, the evidence, and the decree will show that the trust deed and notes were offered in evidence before the master and returned into court, and the decree provides that these exhibits might be withdrawn by the complainant, to be produced at any time when requested. In taking this appeal it was the duty of appellant to make up the record, and, if she failed to include in said record all of the evidence offered in the case, she cannot be heard to complain of that omission here. We will assume that the documentary evidence offered sustains the decree of the trial court, and, if it does not, the only way appellant can take advantage of it is by including such evidence in the record, so we may inspect it and judge of its weight. If appellant had any cause for complaint on account of this omission, she could easily have obtained the production of the writings, and included them, or copies of them, in the record, and brought them to this court.

We are of the opinion there is no error in the decree of the circuit court and its affirmation by the Branch Appellate Court, and it will therefore be affirmed. Decree affirmed.

(205 Ill. 606)

BUTLER v. BROWN et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

HOMESTEAD—FORECLOSURE OF MORTGAGE—REDEMPTION BY EXECUTION PURCHASER—RIGHTS ACQUIRED—EQUITY—RELIEF—CONFORMITY TO PRAYER.

1. In the absence of proceedings under Hurd's Rev. St. 1899, p. 868, c. 52, §§ 10, 11, to set aside the homestead right, an execution sale of homestead property vests in the purchaser only the legal title to the excess of its value over \$1,000.

2. An execution purchaser of property subject to a mortgaged homestead right can redeem the property from a foreclosure sale only under Hurd's Rev. St. 1899, p. 1093, c. 77, § 18, providing that one interested in premises through defendant may redeem within 12 months from sale under judgment or decree, by paying to the purchaser, or master in chancery for him, the sum for which the premises were sold; such redemption merely annuls the sale as provided in said section, and gives the execution purchaser no right against the homesteader to contribution to the mortgage indebtedness, or to subrogation to the benefits of the foreclosure.

3. An execution purchaser of homestead property, a mortgage on which had been foreclosed, could not, on redemption from foreclosure, enforce his claim against the homestead by paying the homesteaders the value thereof, or having the same set off to them, under a bill against the homesteaders praying specifically for contribution, or, in default thereof, subrogation to the mortgagee's rights and for general relief, when he failed to accept the homesteaders' offer to release their claim on payment to them of the value of the homestead.

Appeal from Circuit Court, Fulton County; Jno. A. Gray, Judge.

Bill in equity by C. B. Butler against C. D. Brown and Orena Brown. From a decree dismissing the bill, complainant appeals. Modified and affirmed.

O. J. Boyer, for appellant. Chipperfield & Chipperfield, for appellees.

WILKIN, J. One of the appellees (C. D. Brown) was indebted to the appellant in the sum of \$665, and executed his note therefor. This note was not paid at maturity, and judgment was rendered thereon, and execution issued upon the judgment, which was levied upon the homestead of appellees. On February 23, 1901, the premises were sold by the sheriff of Fulton county for \$852.32, the amount of the judgment and costs, and a certificate of purchase was issued by him to appellant. On June 12, 1902, the equity of redemption having expired upon that sale, the appellant took a sheriff's deed to the premises. Prior to the rendition of that judgment, appellees had executed a mortgage upon said lands to one Jane Hand for the sum of \$1,000, releasing and waiving in said mortgage their right of homestead. That mortgage indebtedness was not paid at maturity, and a bill was filed to foreclose the same, a decree of sale rendered, and on August 19, 1901, the lands were sold to the said Jane Hand by the master in chancery for the sum of \$1,272.71, and his certificate of purchase issued to her. On August 14, 1902, 15 days prior to the expiration of the year in which appellees had the right to redeem from said mortgage sale, the appellant redeemed the premises by virtue of his sheriff's deed, and paid to the master in chancery the sum of \$1,347.38. At the May term, 1903, of the circuit court of Fulton county, he filed this bill for relief, setting up the above facts, and asking that the homestead rights of appellees be subjected to contribution to the mortgage indebtedness of said Jane Hand as redeemed by appellant from said mortgage sale, and that appellees be ordered to pay appellant the sum of \$1,272.71, with interest from August 4, 1902, and in default of such payment that appellant be subrogated to all the rights and benefits of said foreclosure, and that all claims of appellees in said homestead premises be declared void, and for general relief. Appellees filed their answer to said bill, in which they denied the right of the complainant to the relief prayed, but offered that if he would pay them the sum of \$1,000, the value of

¶ 1. See Homestead, vol. 25, Cent. Dig. § 384.

their homestead, they would execute to him a release of all their claim in and to the premises. This offer the complainant did not accept, but filed his replication, and the cause proceeded to a hearing before the chancellor, upon which the bill was dismissed. To reverse the decree of dismissal, this appeal is prosecuted.

It is conceded that the premises in controversy were the homestead of appellees, and were of the value of about \$2,500. At the time of the sale, on February 23, 1901, by the sheriff of Fulton county, under appellant's execution, there were no proceedings for assigning or setting off the right of homestead, as provided in sections 10 and 11 of chapter 52 of our statutes (Hurd's Rev. St. 1899, p. 868). By that sale the judgment became satisfied, and the only interest which appellant then had in the premises was the legal title to the excess over \$1,000. *Krupp v. Brand*, 200 Ill. 403, 65 N. E. 780.

Our statute provides (chapter 52, § 4) that the only way a homestead may be released or waived is by virtue of a writing signed and acknowledged by the householder and his wife, the same as a deed, and, if this writing be a mortgage, it shall only operate as to the specific release of homestead therein contained. The appellees, by their mortgage to Jane Hand, had made this release of homestead as provided in this section, and it was therefore included in the foreclosure sale of August 19, 1901. From that sale, however, the appellant could redeem only by virtue of section 18 of chapter 77 of our statutes, as one interested in the premises; the only effect of his redemption, as provided in that section, being to render null and void the sale and certificate of the master. No greater right is conferred by that section. If he had redeemed as a judgment creditor, as provided in sections 20, 21, 22, 23, and 24 of the same chapter, the right acquired would have related back to the judgment or decree from which the redemption was made, and would be paramount to any title acquired subsequent to the beginning of the lien of such judgment or decree, and would in this case have covered the homestead rights of appellees. *Smith v. Mace*, 137 Ill. 63, 26 N. E. 1092. If appellant had permitted his execution to remain as a lien upon the premises, and had not sold the same and acquired the title by sheriff's deed, he could have redeemed under these last-named sections, and would have been entitled to the relief herein sought; but by his sale and sheriff's deed he could, as already said, only redeem by virtue of section 18, which does not give him the rights prayed for in his bill.

Under the statute the appellees had one year from the date of sale under said mortgage during which they could have redeemed and saved their homestead rights. The appellant, by his redemption 15 days before the expiration of the year, deprived appellees of this right; and now to grant the relief as

prayed in appellant's bill would be to deprive appellees of their homestead without any default or laches upon their part, and to give appellant a greater title in said premises than he is entitled to under the statute.

The homestead of appellees has in no way been extinguished, and it now exists paramount to any claim appellant may have in the premises. He could only enforce a claim against the homestead premises by a bill, with proper averments, offering to pay defendants the value of their homestead, or asking the court to order the appointment of commissioners to set off the same to them. He contends that he is entitled to some such relief upon this bill under the general prayer for relief. Having failed to accept the offer of defendants to take \$1,000, and filed his general replication to the bill, the relief could only be in conformity with the averments of the bill supported by the proofs. A decree in chancery cannot grant relief, though warranted by the evidence, where there are no allegations in the bill to which the proofs can be applied. *Dorn v. Gender*, 171 Ill. 362, 49 N. E. 492. In that case we said (page 369, 171 Ill., page 494, 49 N. E.): "It is a fundamental rule of equity pleading that the allegations of the bill, the proof, and the decree must correspond, and that the decree cannot give relief that facts disclosed by the evidence would warrant where there are no averments in the bill to which the evidence can apply, and that, if the evidence disproves the case made by the bill, the complainant cannot be given a decree upon other grounds disclosed by the proofs, unless the court permits the complainant to amend his bill so as to present the case disclosed by the evidence." Citing a long line of authorities.

The allegations and prayer of this bill are very specific, and under the law the relief sought could not be granted. The ruling of the circuit court in dismissing the bill at complainant's cost was right, in the absence of any request by him for leave to amend his bill. We are, however, of the opinion that, in view of the equities of the case, the dismissal should be without prejudice, and the decree below will be so modified. The costs must be paid by appellant.

Decree modified and affirmed.

(206 Ill. 358)

PEOPLE ex rel. RICE v. BURKE.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—ORDINANCES—ENACTMENT—AMENDMENT—REPUBLICATION—LOCAL IMPROVEMENTS—SIDEWALKS.

1. Where an ordinance for the construction of a sidewalk provided that it should be constructed on a grade established by an ordinance then on file and of record in the office of the city clerk, and such ordinance was on file and in force during the time when an abutting property owner was entitled to build the sidewalk, it was immaterial that it was passed and approved on the same day that the sidewalk ordinance was passed, and had not been actually

recorded by the clerk at the time of the passage of the latter ordinance.

2. Where a city charter provided that the style of ordinances should be, "Be it ordained by the city council of the city of Carlinville," an ordinance containing an enacting clause, "Be it ordained by the city of Carlinville," was not void for want of a literal compliance with the charter.

3. An ordinance for the construction of sidewalks, requiring "property crossings for the use of property owners," was not void for failure to designate the location, number, or method of construction of such crossings.

4. Where a sidewalk ordinance provided for the construction of a sidewalk with paving brick, and the ordinance as published contained an error in the size of the brick, which was subsequently amended, and the amendatory ordinance was published more than 30 days before the construction of the sidewalk by the city, such amendment did not require a republication of the entire ordinance.

Appeal from Macoupin County Court; J. B. Vaughn, Judge.

Application by the people, on the relation of E. T. Rice, the county collector of Macoupin county, against Don A. Burke, for judgment for delinquent special taxes. From a judgment sustaining defendant's objections to the tax, the collector appeals. Reversed.

A. J. Duggan, for appellant. Rinaker & Rinaker, for appellee.

CARTWRIGHT, J. The county court of Macoupin county sustained objections to the application of the county collector of said county for judgment for delinquent special taxes levied by the city of Carlinville against lots and lands of appellee in said city for the construction of brick sidewalks along said property, and refused to enter such judgment. There were two separate sidewalks constructed under separate ordinances, one called the "Plum street sidewalk" and the other the "West Main street sidewalk." The ordinances were passed under the sidewalk act of 1875 (Laws 1875, p. 63), providing for construction by the owners of lots within 30 days, and that the city would pay to an owner constructing the same in front of his property one-third of the cost thereof. If constructed by the city, it was provided that two-thirds of the cost of constructing the same should be levied as a special tax upon the lots and parcels of land abutting thereon. It was admitted by the appellee that the sidewalks were constructed under the ordinances, and it was not denied that his property received the full benefit of the improvement. There was no pretense that he was misled in any way to his injury by anything that was done, or that the ordinances were not sufficiently specific, so that he could have constructed the sidewalks if he had been so disposed. The ordinances provided that, if he did so, the city would pay him one-third of the cost of construction.

Special taxes must be imposed by lawful authority, and in substantial conformity with

the power conferred; but a natural and reasonable construction is to be given to ordinances, and a substantial compliance with the law is all that is required. The objections in this case were without substantial merit. Each ordinance provided that the sidewalk should be built on a grade established for such street by an ordinance of the city. The ordinance for the sidewalk on Plum street provided that it should be constructed on a grade established by an ordinance then on file and of record in the office of the city clerk. One objection is that the ordinance establishing the grade and the sidewalk ordinance were passed and approved on the same day, and that the ordinance fixing the grade had not been actually recorded by the clerk when the sidewalk ordinance was passed. It is not disputed that the ordinance was on file in the office of the city clerk, and was in force, and furnished to appellee all the information necessary to enable him to construct the sidewalk on the grade fixed by the ordinance. The ordinance fixing the grade was in force during the time when he was entitled by law to build the sidewalk, and it was referred to in the sidewalk ordinance, and that was sufficient. *Parker v. Village of La Grange*, 171 Ill. 344, 49 N. E. 550.

The ordinance for the sidewalk on West Main street required it to be upon the grade established by an ordinance on file in the office of the city clerk. The ordinance so referred to was adopted and in force before the adoption of the sidewalk ordinance, and the objection to it is that it is void because the enacting clause was in this form: "Be it ordained by the city of Carlinville," while the charter provides that the style of ordinances shall be as follows: "Be it ordained by the city council of the city of Carlinville." In the case of *Law v. People*, 87 Ill. 385, where the enacting clause said "common council" instead of "city council," as required by the charter, it was decided that the ordinance was not void; and this is in accordance with the general rule that provisions as to the form of the enacting clause of ordinances are directory merely, and a failure to follow a prescribed form will not render the ordinance void. 21 Am. & Eng. Ency. of Law (2d Ed.) 975.

Each ordinance provided for the construction of the sidewalk with necessary crossings, which plainly referred to crossings over the sidewalk for the use of property owners. It was agreed on the trial that the term "property crossings" meant that part in the line of the sidewalk over which the owner would travel with a wagon or other vehicle in going from the street upon his property or leaving the same. Appellee objected that the location, number, or method of construction of such crossings was not fixed by the ordinances. It is manifest that it would be impossible, in an ordinance for a sidewalk, to provide the exact location or number of such crossings necessary or convenient for

¶ 2. See *Municipal Corporations*, vol. 35, Cent. Dig. § 224.

the property owner in going to and from the street. It would be unreasonable to require an ordinance to specify that such a crossing should be put at a given point, but the necessities of the situation would determine the location and number of such crossings. There was no objection and no evidence that crossings were not put in where necessary, or were constructed where unnecessary. It was agreed that the custom in the city of Carlville was to construct crossings by placing bricks edgewise instead of flat, as the rest of the walk was laid. If there were no other provision than the general description of the sidewalk, the ordinance would not be void as lacking in matter of description, but the agreement was sufficient to show the meaning of the ordinance as to the construction of the crossings.

The ordinance for the sidewalk on West Main street was passed October 2, 1899, and contained an apparent mistake in the size of the brick, which were required to be four inches by four inches by eight inches—not the form of paving brick. The ordinance was published, and was subsequently amended so as to make the description of the brick two inches by four inches by eight inches, and the amendatory ordinance was published more than 30 days before the construction of the sidewalk by the city. It is objected that the whole sidewalk ordinance, as amended, was not again published. Counsel do not point out any requirement that an ordinance so amended shall be again published, or cite any authority to that effect, and we know of none.

None of the objections were sufficient to defeat the collection of the tax, and the court erred in sustaining them.

The judgment is reversed, and the cause remanded. Reversed and remanded.

(206 Ill. 185)

FOOTE v. LAKE COUNTY.

(Supreme Court of Illinois. Dec. 16, 1903.)

COUNTY TREASURER—DUTIES—COMPENSATION —DUTIES AS SUPERVISOR OF ASSESSMENTS.

1. Act Feb. 25, 1898 (Hurd's Rev. St. 1899, p. 1444, c. 120, § 2), provides that in counties of less than 125,000 the county treasurer shall be ex officio supervisor of assessments; that he shall have an office furnished by the county board, which he shall keep open during specified hours; and that he may appoint deputies and clerks, whose compensation shall be fixed by the county board and paid by the county. *Held*, that the statute did not create a new office, so as to entitle the county treasurer to compensation for his duties performed under the statute; the term "ex officio" implying that the county treasurer shall be supervisor of assessments by virtue of his office as county treasurer, and as appurtenant thereto.

Appeal from Appellate Court, Second District.

Action by Anna F. Foote against Lake county. From a judgment of the Appellate

Court affirming a judgment in favor of defendant, plaintiff appeals. Affirmed.

R. W. Coon, for appellant. S. Delano Talcott, State's Atty. (Leslie P. Hanna, of counsel), for appellee.

CARTWRIGHT, J. On September 23, 1898, the county board of Lake county fixed the salary of the county treasurer of said county for the term beginning on the first Monday of December, 1898, at \$1,500 per year and necessary clerk hire. John M. Foote was elected to said office at the November election, 1898, and entered upon the duties thereof on the first Monday of December of said year. He continued to hold the office and perform its duties until his death, on April 27, 1901. During that time he filled the office and performed the duties of supervisor of assessments of said county in pursuance of the provisions of the act entitled "An act for the assessment of property and providing the means therefor, and to repeal a certain act therein named," in force July 1, 1898. Hurd's Rev. St. 1899, p. 1444, c. 120. After his death, appellant, Anna F. Foote, executrix of his will, presented to the county board a claim against the county for \$1,208.34 for his salary as supervisor of assessments during the time he filled that office. The county board allowed \$425 of the claim, and disallowed the balance. An appeal was taken to the circuit court, and, a jury having been waived, the case was tried by the court. Plaintiff introduced evidence that the services performed by John M. Foote as supervisor of assessments were reasonably worth from \$500 to \$600 per year. Defendant offered no evidence, and plaintiff then tendered to the court the following propositions, and asked the court to hold the same as the law:

"The court holds as a proposition of law that 'An act for the assessment of property and providing a means therefor, and to repeal a certain act therein named,' approved February 25, 1898, created and provided a new office designated as supervisor of assessments, with duties, obligations, and compensation as therein named, and the duties and obligations were not simply added duties to the office of county treasurer.

"The court holds, as a proposition of law, that the office of supervisor of assessments created by the act of 1898 is an office with a salary attached to it, payable out of the county treasury; and such salary, unless otherwise agreed upon, is a reasonable compensation for the duties and services required by the law creating the office."

The court refused both of the propositions, and plaintiff excepted. The claim was disallowed by the court, and judgment was entered against the plaintiff for costs. The plaintiff sued out a writ of error from the Appellate Court for the Second District, and, on a review of the judgment by that court, it

was affirmed, and a certificate of importance was granted, under which it was brought to this court by appeal.

The questions of law in the case arise from the refusal of the above propositions of law by the trial court, and the exception of the plaintiff thereto.

It is contended that the act of 1898 for the assessment of property creates a new office, designated as "supervisor of assessments," with duties, obligations, and compensation pertaining thereto as an independent office; that the duties are not simply added duties to the office of county treasurer; that the office is one with a salary, payable out of the county treasury; and that, if the salary is not agreed upon between the officer and the county board, he may recover what the services are reasonably worth. The county board had fixed the compensation of John M. Foote as county treasurer after the act of 1898 was in force, and before his election; and if that act does not create a new office, but merely annexes new duties to the existing office of county treasurer, there could be no recovery in the case. Section 10 of article 10 of the Constitution requires the county board, except as provided in a previous section relating to Cook county, to fix the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel, and other expenses, and provides that the compensation of no officer shall be increased or diminished during his term of office. Section 38 of chapter 34 of our statutes (Hurd's Rev. St. 1899, p. 494) provides that the time to fix the compensation of county officers whose compensation is to be fixed by the county board shall be at the meeting of such board next before the election of such officer whose compensation is to be fixed, or the next regular or special meeting to be held thereafter. In this case the compensation of the county treasurer was fixed, in accordance with the statute, at the meeting preceding the election, and it covered his entire compensation for duties performed by virtue of his office of county treasurer. Section 2 of the act of 1898 provides that in counties under township organization, of less than 125,000 inhabitants, the county treasurer shall be ex officio supervisor of assessments in his county; that he shall have a suitable office, to be provided and furnished by the county board, which he shall keep open during certain specified hours; and that he may, with the advice and consent of the county board, appoint necessary deputies and clerks, their compensation to be fixed by the county board and paid by the county. Hurd's Rev. St. 1899, p. 1444, c. 120, § 296. As supervisor of assessments, he is charged with certain duties by the act, and is required, before he enters upon the duties of his office, to give a bond, with sureties, and to take and subscribe an oath to discharge the duties of the office. Section 46 of the act contains the following: "The salary

of the county assessor, supervisor of assessments, and members of the board of assessors and board of review shall all be paid out of the county treasury on bills duly certified and approved by the county board." Hurd's Rev. St. 1899, p. 1455, c. 120, § 340.

We think it clear that the act of 1898 did not create a new office. The provision is that the county treasurer shall be ex officio supervisor of assessments in his county. The term "ex officio" implies that the county treasurer shall be supervisor of assessments from or by virtue of his office as county treasurer, and as appertaining to such office. His authority to act as supervisor of assessments, under the statute, is derived from his official character as county treasurer; and the duties of supervisor are annexed to his official position as a consequence thereof, without any other appointment or authority than that conferred by the office of county treasurer. By the revenue act of 1845 (Rev. St. 1845, p. 441, c. 89, § 27) it was provided that the sheriff of each county should be ex officio the collector of taxes; and it was decided in *Wood v. Cook*, 31 Ill. 271, that thereby it became one of the duties of the sheriff to collect the taxes; that the law simply imposed the duties of collector upon the sheriff, and the fact he was required to give an additional bond to secure the performance of the new duties did not change the character of the office. Section 144 of the act of 1872 for the assessment of property and the levy and collection of taxes provides that the treasurers of counties under township organization shall be ex officio county collectors of their respective counties; and in *Kilgore v. People*, 76 Ill. 548, it was decided that no new office was thereby created, but that new duties were imposed upon existing officers, who were required to give new bonds for the performance of additional duties. It was therefore held that an allowance of compensation to a county treasurer necessarily included the duties performed by him as collector. It is true that one person may, in the absence of any prohibition, hold two offices, and that the language of an act may show that such was the legislative intent. That was the case in *People v. Lippincott*, 67 Ill. 333, where the court passed upon the act of January 29, 1869 (Pub. Laws 1869, p. 49), requiring circuit judges to observe defects and omissions in the statute, and report the same, with their views as to amendments, and to prepare bills in conformity with such views. The duties imposed by that act were not judicial or pertaining to the office of circuit judge, and it was held that the designation of the circuit judges as commissioners for the revision of the laws was merely descriptive personee. They were not required to perform such duties ex officio, as pertaining to the office of circuit judge, while in this case the language indicates that the new duties merely resulted from holding the office of county treasurer. The assessment and collection of taxes both relate to the revenue, and are intimately connected with each

other. They are but different steps in the statutory scheme of taxation.

There being no new office, the compensation fixed by the county board included payment for all the duties prescribed for the county treasurer as supervisor of assessments under the act of 1898. Whatever salary or compensation John M. Foote was entitled to under the act of 1898, or any of its provisions, was included in the compensation so fixed as county treasurer. We conclude the court was right in refusing the propositions of law.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 53)

BECKER v. BECKER.

(Supreme Court of Illinois. Dec. 16, 1908.)

WILLS—CONSTRUCTION—FEE—LIMITATION.

1. Where a testator devised all his realty to his wife, and, with the exception of certain specific bequests, bequeathed to her all his personalty, declaring that she was to have full charge of the estate, without any restriction of any nature, a further provision that she was never to marry again, and that, if she did, his estate was to be divided equally between her and his brothers, did not reduce the fee theretofore given to a life estate.

Appeal from Circuit Court, Peoria County; T. N. Green, Judge.

Action by Edward Becker against Lizzie Becker. From a judgment for defendant, plaintiff appeals. Affirmed.

Ellwood & Meek (Nicholas Michaels, of counsel), for appellant. Arthur Keithley, for appellee.

BOGGS, J. A general demurrer presented to a bill in chancery filed by the appellant, praying for partition of certain real estate of which one William H. Becker died seised, was sustained, and a decree entered dismissing the bill at the cost of the complainant. Said William H. Becker departed this life April 1, 1901, leaving the following last will and testament:

"1 p. m., Peoria, Illinois, July 30, 1897.

"This is my last and only will that I have made up to this date. I wish to leave all of the building known as the Niagara building, all of the mortgages, notes and stocks, horses, carriage, buggy and cart, all of the furniture in our home, also all furniture, piano, lodgeroom furniture, two large pictures and grillwork in Elks' lodgerooms, on the seventh floor Niagara building, to my wife, Lizzie Becker.

"I wish to give to George Becker, my brother, of Terre Haute, Indiana, the sum of \$500; Edna Smith, of West Chazy, N. Y., \$500; Edward Becker, of Chicago, Ill., \$1,000; to Austin F. Johnson, of Peoria, Ill., \$50, and to Emile Becker, residence unknown, the sum of \$5.

"My wife, Lizzie, to have full charge of my estate after my death, without any restrictions of any nature. My wife, Lizzie,

never to marry again, and if she does, my estate to be divided equally between my brothers, George Becker and Edward Becker, and my wife, Lizzie Becker.

"Signed at 1:30 p. m. on this 30th day of July, 1897. W. H. Becker. [Seal.]"

There is no allegation in the bill that the widow has remarried.

The theory of the bill is that, under a proper construction of the will, the last clause thereof, placing a restriction on marriage by the widow, and providing for the devolution of the title to the property in the event of her remarriage, has the effect, in law, of limiting the estate taken by the widow under the will, that otherwise might have been a fee simple, to a life estate, except in the one-third interest with which the will provided she should be invested in case of her remarriage, and that appellant, as devisee under said final clause, is invested with a one-third interest, subject to the life estate of the widow. The chancellor did not err in refusing to accept this as the proper construction of the will. The first clause of the will, if standing alone, is clearly sufficient to invest Lizzie, the widow, with an absolute estate in fee simple in the real estate. It contains no technical words of inheritance, but, since the adoption of section 13 of our conveyance act, such words are not necessary to the creation of a fee. This clause is, however, to be construed with the final clause in the will, and the estate devised determined from the consideration of both clauses. *Saeger v. Bode*, 181 Ill. 514, 55 N. E. 129.

The growing tendency of courts has become a settled policy to adopt the construction of a will that will give an estate of inheritance to the first devisee unless other limiting or qualifying clauses in the will disclose clearly and unequivocally that it was the intention of the testator to limit or qualify the estate granted. When this will, in all its parts, is read, the intention of the testator is clearly disclosed. It was to give to his wife a fee-simple estate, subject to be defeated as to a two-thirds interest therein if she should remarry. The testator desired to vest in his wife an estate having all of the qualities of an absolute fee so long as she remained his widow, and in case of her remarriage he desired two-thirds of that estate to vest in his brothers, George and the appellant, Edward. No rule of law exists to prevent the accomplishment of such wishes of the testator. In *Underhill on Wills* (section 507), it is said: "No rule of law prevents the testator from giving her a fee simple in lieu of dower, which shall be defeasible and shall go to others on her remarriage. Thus, where the testator, in general terms, devises land in trust, to pay the income to the widow for an indefinite period, without words of perpetuity or inheritance [and a fortiori when it is to her and her heirs], with a proviso that, if she shall remarry, the land is to go to others, she takes

a fee conditional at common law, which will be defeated by her remarriage. If she conveys the fee, her grantee takes it also subject to being defeated by her remarriage; but, if she dies without having remarried, the fee descends to her heirs, and the devise over is defeated."

The estate taken by the appellee widow is a fee, because, in the absence of remarriage, it will endure forever in her and her heirs. The restriction against her remarriage qualifies her estate, and it is therefore a qualified or base fee. Until determined by her remarriage, she has the same rights and privileges over the estate as if it were a fee simple absolute, save that the determinable quality of the estate will follow any conveyance thereof by her. *Wiggins Ferry Co. v. Ohio & Mississippi Railway Co.*, 94 Ill. 83; *Lombard v. Witbeck*, 173 Ill. 396, 51 N. E. 61; *Chapman v. Cheney*, 191 Ill. 574, 61 N. E. 363; *Gannon v. Peterson*, 193 Ill. 372, 62 N. E. 210, 55 L. R. A. 701; 11 Am. & Eng. Ency. of Law (2d Ed.) 388, 369. It did not appear from the bill that the appellant had any present interest in the real estate. The contingency upon which he may succeed to an interest in the real estate has not happened, and may never happen.

The demurrer was properly sustained. The decree is affirmed. Decree affirmed.

(206 Ill. 362)

KNICKERBOCKER ICE CO. v. BENEDIX.

(Supreme Court of Illinois. Dec. 16, 1903.)

STREET RAILROADS—VEHICLE APPROACHING CAR—RIGHT OF WAY—ACTION FOR PERSONAL INJURIES—INTOXICATION OF DEFENDANT'S SERVANTS—MODIFICATION OF INSTRUCTION.

1. Where a street car going at a reasonable speed will reach a point where its line of travel is intersected by that of an approaching vehicle before the vehicle does, the street car has the right of way, which those in charge of the car have the right to assume the drivers of the vehicle will regard; and they are not negligent in failing to stop the car so as to avoid a collision.

2. In an action for personal injuries occasioned by collision between a street car and an ice wagon driven by intoxicated persons, the defendant ice company's requested instruction as to the effect of the intoxication of its servants was modified by the court adding that the jury had a right, in arriving at their verdict, to consider whatever the evidence might show as to intoxication. This modification was criticised as permitting the jury to consider the evidence of intoxication in estimating the amount of damages. *Held* that, as no punitive damages were sought, the objection was untenable.

Appeal from Appellate Court, First District.

Action by Emil Benedix against the Knickerbocker Ice Company. From a judgment of the Appellate Court, First District, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action on the case, brought by appellee in the superior court of Cook county to recover damages for a personal injury occasioned through the alleged negligence of

appellant. A trial before a jury resulted in a verdict for \$2,000 in favor of appellee. Judgment was entered on the verdict, and an appeal was taken to the Appellate Court for the First District, where the judgment of the superior court was affirmed, and the case is now before this court on appeal from the Appellate Court.

Appellee received the injuries complained of in this suit on May 30, 1900, in the city of Chicago, while engaged in the performance of his duties as a street car conductor for the Chicago Union Traction Company. The car was running west on North avenue, in that city, and when about 100 feet from Leavitt street, an intersecting street, the appellee rang a bell on the car as a signal to the motorman to stop at Leavitt street for the purpose of allowing passengers to get off the car. The car commenced to slacken speed. It had almost crossed the intersection of the streets, when an ice wagon belonging to the appellant, drawn by two horses, coming south on Leavitt street, ran into the car, and the pole of the wagon struck the plaintiff's leg with sufficient force to break it and seriously injure him. The car contained no aisle running lengthwise, and it was necessary for appellee, in performing his duties as conductor, to pass from one end of the car to the other along a foot-board running outside the car its entire length, and provided for that purpose. Appellee, immediately prior to the time of receiving the injury, was on the north foot-board of the car, with his face turned south, collecting fares. He testified that he heard the rumbling of a wagon, and, looking backward, saw the wagon, about 20 feet away, coming rapidly south on Leavitt street toward the car; that he tried to jump forward out of the way, but was struck just as he jumped. The evidence tends to show that the horses were being driven so fast that the driver was unable to stop them in time to avert the injury; that, just before reaching Leavitt street, the motorman sounded a gong on the car to give warning of the approaching car, and that the car was moving slowly when struck by the wagon pole. The wagon weighed 3,700 pounds, and the ice it contained weighed 2,200 pounds. Three employes of appellant, one of whom was driving the horses, were in the wagon at the time it collided with the car, and the evidence tends to show that these employes were intoxicated.

Wilfred H. Card and Quinn O'Brien, for appellant. Gemmill & Foell, for appellee.

SCOTT, J. (after stating the facts). Defendant below, at the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, moved the court to instruct the jury to return a verdict for the defendant. Both motions were overruled, and appellant presents to this court, as a matter of law, the question whether the evidence sustaining the

cause of the plaintiff below, with the reasonable inferences to be drawn therefrom, is sufficient to warrant a verdict for the plaintiff.

A considerable portion of appellant's brief and argument is devoted to establishing the fact that either appellee or the motorman could have seen the approaching wagon and stopped the car, and thereby avoided the accident. It may be conceded that this is true; but this fact does not in any way tend to show that appellant was not guilty of negligence, or that appellee was guilty of negligence. As the car approached the point where the line of travel it was following would intersect the line of travel the appellant's team was following it was traveling at a reasonable rate of speed, as shown by the evidence. Traveling at that rate of speed, it reached the intersection first. There was nothing to prevent appellant's driver seeing the car and perceiving that it would reach the point of intersection first. Under these circumstances it was the duty of the driver of the team, and not the duty of those in charge of the car, to stop; and the failure of the driver to stop his team under the circumstances is the negligence of appellant.

A large number of cases are cited in reference to the duty of those in charge of a street car to look ahead as they approach the street crossing, for the purpose of avoiding accidents to persons or vehicles using the crossing. These are all cases where the street car company has been made defendant, and have no application here. None of them go to the extent of holding that it is the duty of the conductor or motorman to stop a car for the purpose of permitting a vehicle traveling at right angles with the car to pass over the intersection first, when the car, by reason of its nearness to the point of intersection, has the right of way. The evidence tended to show that immediately preceding the collision the team of the appellant was traveling at a higher rate of speed than was the car. Those in charge of the car had the right, however, to assume that those in charge of the team would recognize the superior right of the car and stop the team before it ran into the car. The court properly refused the peremptory instruction to find for the defendant.

The only other error presented was the modification of appellant's ninth instruction. This instruction, as requested, read as follows: "The jury are instructed that the mere fact, if it is a fact, that the servants of the ice company were intoxicated, would not make the defendant liable, provided you believe from the evidence that at and just before the time of the accident said servants were using ordinary care in driving the team in question. And even though you should believe that said servants were intoxicated, you should find the defendant not guilty if you also believe from the evidence that the plaintiff himself failed to exercise reasonable care to prevent the accident, and that, if he

had exercised such care, the accident would not have occurred." The court modified it by adding thereto the following: "But in arriving at your verdict you have a right to consider whatever the evidence may show as to whether or not the servants of the defendant were intoxicated, together with all the other evidence in the case." The objection made to this modification is that it tells the jury that in arriving at their verdict they may consider the evidence of intoxication. This is said to be too broad; that the instruction at least should do no more than advise the jury that in determining defendant's liability they had a right to consider the evidence on that subject, the reasons assigned being that determining the amount of damages to be allowed was a part of the process of arriving at a verdict, and that the jury were therefore improperly told that they might consider the evidence of intoxication of appellant's driver in fixing the amount of damages. If this were a case in which punitive damages had been claimed, we can see that this instruction might have this effect; but a careful examination of the record shows that it was tried by both sides on the theory that the jury could award to the plaintiff only the actual damages sustained by him. So far as appears from the record, the question of punitive or vindictive damages was not suggested in the course of the trial. We do not think, under these circumstances, that the jury would understand from this instruction, as modified, that they were authorized to increase the amount of their verdict if they found from the evidence that appellant's driver was intoxicated. While the consideration of the evidence on the subject of intoxication might well, by the language of the instruction, have been limited to the deliberations of the jury in determining defendant's liability, we do not think the jury, under the circumstances of this case, could have given it any weight in fixing the amount of their verdict.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(205 Ill. 594)

PEOPLE ex rel. SMITH, Treasurer, v. CHICAGO & A. RY. CO.

(Supreme Court of Illinois. Dec. 16, 1903.)

TAXATION—BRIDGE TAXES—EXTRA ASSESSMENT—BOARD OF AUDITORS—CONSENT—STATUTORY REQUIREMENTS—COMPLIANCE.

1. The statute entitled "Roads" (section 1, as amended 1901 (4 Starr & C. Ann. St. 1902, p. 1130, c. 121, par. 6), provides that if, in the opinion of the highway commissioners, a greater levy than 60 cents on each \$100 of property is needed, they may certify the same to the board of town auditors and the assessor, and with the consent of a majority of them in writing, "definitely and specifically directing the particular purpose for which the same shall be applied," an additional levy at a certain rate may be made. Section 14 prior to the amendment authorized the commissioners, if in their opinion a greater levy was needed, "in view of

some contingency," to certify the same to the board, and authorized the additional levy if a majority of them should consent in writing. *Held*, that a certificate and consent referring to an additional levy, "in view of the contingency of floods, that building and repairing bridges," was insufficient to authorize the additional levy.

Appeal from McLean County Court; R. A. Russell, Judge.

Objections by the Chicago & Alton Railroad Company to the application by the people, on the relation of the treasurer of McLean county, for judgment against objector's property for road and bridge taxes. From a judgment sustaining the objection, the treasurer appeals. Affirmed.

Welty, Sterling & Whitmore, for appellant.
F. D. Tracy and A. E. DeMange, for appellee.

BOGGS, J. The appellee company filed objections to the application of the treasurer of McLean county for judgment against its property for all road and bridge taxes levied in the town of Lexington for the year 1902 above the levy of 60 cents on each \$100. The objections were sustained, and the treasurer has appealed.

The amount which may be levied for road and bridge purposes and for outstanding orders is restricted by the provisions of section 13 of the statute entitled "Roads," etc., to 60 cents on each \$100 of taxable property. Section 14 of the same chapter, as amended at the session of the General Assembly of 1901 (4 Starr & C. Ann. St. 1902, p. 1130, c. 121, par. 6), authorizes an additional levy of 40 cents on each \$100 to be made by the highway commissioners, and is as follows: "If, in the opinion of the commissioners, a greater levy is needed, they may certify the same to the board of town auditors and the assessor, a majority of whom shall be a quorum, and with the consent of a majority of this entire board given in writing, definitely and specifically directing the particular purpose or purposes to which the same shall be solely applied, an additional levy may be made of any sum not exceeding forty cents on the \$100 of taxable property of the town. If the commissioners shall use any part of the funds so authorized by said written consent for any other purpose than that therein specified without the further written consent of said board, they shall be deemed to have illegally appropriated the same, and shall be liable accordingly."

The making by a majority of the body composed of the board of auditors and the assessor of the written consent set forth in section 14 is jurisdictional, and a condition precedent to the right to levy the tax, and, in the absence of strict compliance with the requirements of the statute as to such consent, any special road tax levied will be void. *Chicago & Northwestern Railway Co. v. People*, 200 Ill. 141, 65 N. E. 705. The certificate of the highway commissioners and the consent of the board of town auditors and the assessor, relied upon as authority,

under said section 14, for the additional tax levy of 40 cents on each \$100 of the property of the appellee company and other taxpayers in said town of Lexington, in 1902, were as follows:

"State of Illinois, McLean Co., Town of Lexington, ss. Board of Com'rs of Highways. It is hereby certified to the board of town auditors and the assessor of the town of Lexington, that it is the opinion of the commissioners of highways of said town a greater levy than sixty cents on each \$100 is needed in said town in view of the contingency floods, that building and repairing bridges, not exceeding one hundred cents. Given under our hands this 30th day of August, A. D. 1902, William Edwards, D. D. Ralston, Howell Rowland, Commissioners of Highways."

"State of Illinois, McLean Co., Town of Lexington, ss. It having been certified to us, the board of town auditors and assessor of the town of Lexington, by the commissioners of highways of said town, that a greater levy than sixty cents on each \$100 is needed in said town in view of the contingency of floods, that building and repairing bridges, consent is hereby given for an additional levy on the property of said town for the purpose aforesaid, not exceeding one hundred cents. Given under our hands this 2d day of September, 1902. L. B. Strayer, M. F. Bray, J. P., Wm. N. McNaught, Board of Town Auditors. Joseph Enoch, Assessor."

The county judge correctly held the certificate of consent of the board of town auditors and the assessor did not definitely and specifically direct the particular purpose or purposes to which the levy should be applied, as required by said section 14, as amended in 1901. The certificate of consent recites that the additional levy is needed "in view of the contingency of floods, that building and repairing bridges." Section 14, as it existed prior to the amendment in 1901, authorized the commissioners of highways, if in their opinion a greater levy than 60 cents on the \$100 is needed "in view of some contingency," to certify the same to the board of town auditors and the assessor, and authorized the additional levy to be made if the board of town auditors and the assessor, or a majority of them, should "consent in writing." The amendatory act required, not that it shall appear to the commissioners of highways "that in view of some contingency" an additional levy was desired, as did the prior act, but that the levy should only be made for a "particular purpose or purposes," to be definitely and specifically set forth in the written consent of the board, composed of the town auditors and the assessor, or a majority of such board. In view of the statute as it existed prior to the amendatory act and the change effected by the amendment, the evil intended to be remedied by the latter enactment is unmistakably manifested. The legislative intent in adopting the amendatory act was to require the auditors and the as-

assessor to consider and determine that an additional levy was necessary in order to provide a special fund needed to be expended for the accomplishment of some particular, definite purpose or purposes, and to require that the auditors and the assessor should not only consent, in writing, to the levy of the additional tax, but should, in such written consent, definitely and specifically direct the particular purposes to which the fund produced by the additional levy should be "solely applied." The certificate of consent to the additional tax states that consent is given "in view of the contingency of floods, that building and repairing bridges." The phrase not only falls short of that definite and specific direction as to the purposes of the taxation required by the statute, but seems to be incomplete, and, if not meaningless, still uncertain instead of definite, and general instead of specific.

The judgment of the county court is affirmed. Judgment affirmed.

(206 Ill. 40)

CULVER v. H. R. ALLEN, SR., MEDICAL & SURGICAL ASS'N.

(Supreme Court of Illinois. Dec. 16, 1903.)
RECEIVERS—COMPENSATION—EVIDENCE—
APPEAL.

1. In the absence of legislation regulating the compensation of a receiver, the court appointing him has the right to determine his compensation.

2. The court, in fixing the amount of a receiver's compensation, may, in connection with the evidence on the subject, take into consideration its personal knowledge of the nature, character, and value of the services.

3. On appeal from an order fixing the compensation to be allowed a receiver, the appellate court will ordinarily defer to the judgment of the court appointing the receiver, and not disturb it unless manifestly wrong.

4. Where a receiver had charge for about 18 months of the business of a medical and surgical association, the business of which was the treatment of the crippled and deformed, and disbursed about \$26,000, and managed the business honestly and economically, an order allowing him 10 per cent. on the disbursements as compensation was not so manifestly wrong as to justify an appellate court in disturbing it.

Appeal from Appellate Court, First District.

Action by Frank H. Culver against the H. R. Allen, Sr., Medical & Surgical Association. From a judgment fixing plaintiff's compensation as receiver, he appeals. Affirmed.

Henry W. Leman, for appellant. Frank Lynch, for appellee.

HAND, C. J. This is an appeal from a judgment of the Appellate Court for the First District affirming a decree of the superior court of Cook county fixing the compensation of appellant as receiver in the case of Max Frost against the H. R. Allen, Sr., Medical & Surgical Association. The only evidence before the court at the time the compensation

was fixed was the reports of the receiver before that time filed and the petition asking the court to fix the receiver's compensation, which on the hearing seem to have been conceded to correctly state the facts therein set forth, from which it appeared that the appellant acted as such receiver for about 18 months; that he had devoted his entire time to the business of the association; that the business of the association was the treatment of the crippled and deformed; that he disbursed \$26,073.52; and that the business of the association was successfully, honestly, and economically managed by the appellant. He asked \$5,400 for commissions, and the court allowed him \$2,607.35, or 10 per cent. on the disbursements.

The rule of law governing this case is that, in the absence of legislation regulating the compensation of a receiver, the court in which a receiver is appointed has the right to determine the amount that shall be paid to him for his services; that the court, in fixing a receiver's compensation, may, in connection with the evidence before it, take into consideration its personal knowledge of the general nature and character and value of the services alleged to have been rendered; and that a court of review will ordinarily defer much to the judgment of the court that made the appointment, and will not disturb its action in fixing a receiver's compensation unless the decree is manifestly wrong. *Heffron v. Rice*, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271; *Olson v. State Bank*, 72 Minn. 320, 75 N. W. 378; 23 Am. & Eng. Ency. of Law (2d Ed.) p. 1103; 17 Ency. of Pl. & Pr. p. 843. We are unable to say, from the evidence found in the record, that the decree of the superior court fixing the receiver's compensation is manifestly contrary to the weight of the evidence. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(206 Ill. 190)

CORNING & CO. v. WOOLNER et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

STREETS—VACATION—ESTOPPEL—DEDICATION
—USE BY PUBLIC—EVIDENCE
—SUFFICIENCY.

1. Evidence considered, and *held* to support a finding that a certain street had been constantly used by the public as a public street from the time it was platted.

2. Where, after a street is laid out, and all the lots abutting thereon are conveyed by metes and bounds, the grantees, though they own all the lands abutting on both sides of such street, cannot, on failure of acceptance by the proper authorities or the public of the dedication of such street, lay claim to the fee thereof.

3. Where a street was by the original owner designated on the plat with reference to which subsequent lots and tracts have been sold, and private rights would be affected by its vacation or obstruction, there is an implied covenant that such street shall be forever open to the public, and free from any claim or interference by the original owner and author of the plat.

¶ 1. See *Receivers*, vol. 42, Cent. Dig. §§ 391, 394.

and those claiming under him, as between him or his privies in estate, and those buying lots on the faith of such plat, or with reference thereto.

4. A plat manifesting an intention of the author to dedicate to public use the designated streets thereon, whether a good statutory plat or not, is sufficient, as a common-law plat, to estop such original owner and author of the plat, and those claiming under him, from denying or rescinding such dedication, though it was not accepted by the public authorities.

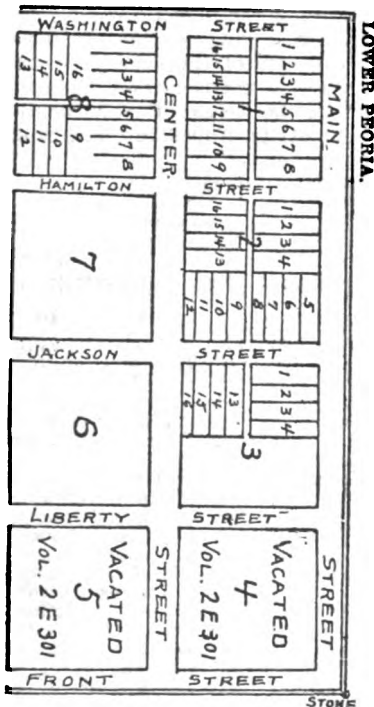
5. Where one who plats a tract of land, designating streets thereon, and thereby causes others to act on the presumption that the streets designated are to be used by the public, he and his privies in estate are estopped from afterwards denying that such streets are for the use of the public, and claiming the right to obstruct or vacate them to the injury of any persons who have been led to act on the faith of that position.

Appeal from Circuit Court, Peoria County; T. N. Green, Judge.

Bill by Adolph Woolner and another against Corning & Co. From a decree for plaintiffs, defendant appeals. Affirmed.

Stevens, Horton & Abbott and Winslow Evans, for appellant. Page, Wead & Ross, for appellees.

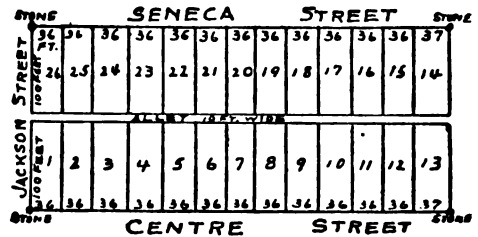
RICKS, J. This is an appeal from a decree of the circuit court of Peoria county enjoining and restraining the appellant, Corning & Co., from building upon or otherwise obstructing Liberty street, in Lower Peoria, which was laid out and platted by Aquilla Moffat in 1836. Said plat was duly recorded, and a substantial copy of which herewith follows:



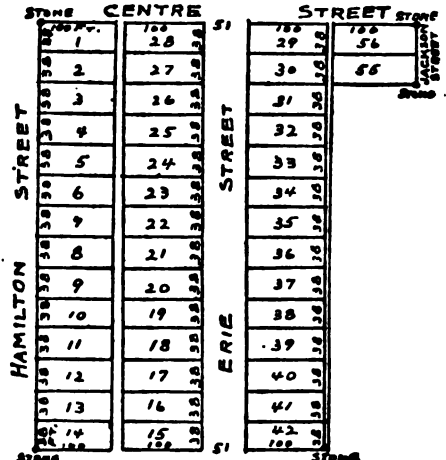
¶ 4. See Dedication, vol. 15, Cent. Dig. § 61.

In 1857 Moffat conveyed blocks 1, 2, 3, 6, 7, and 8 to William H. Haskell, describing the property conveyed by reference to the plat. In 1858 Haskell and wife conveyed part of the premises so conveyed to him to Edward J. Cowell. Cowell, shortly after acquiring title to such premises, subdivided and replatted the south half of block 3 and all of block 7, which plats are as follows:

PLAT OF SOUTH HALF OF BLOCK 3.

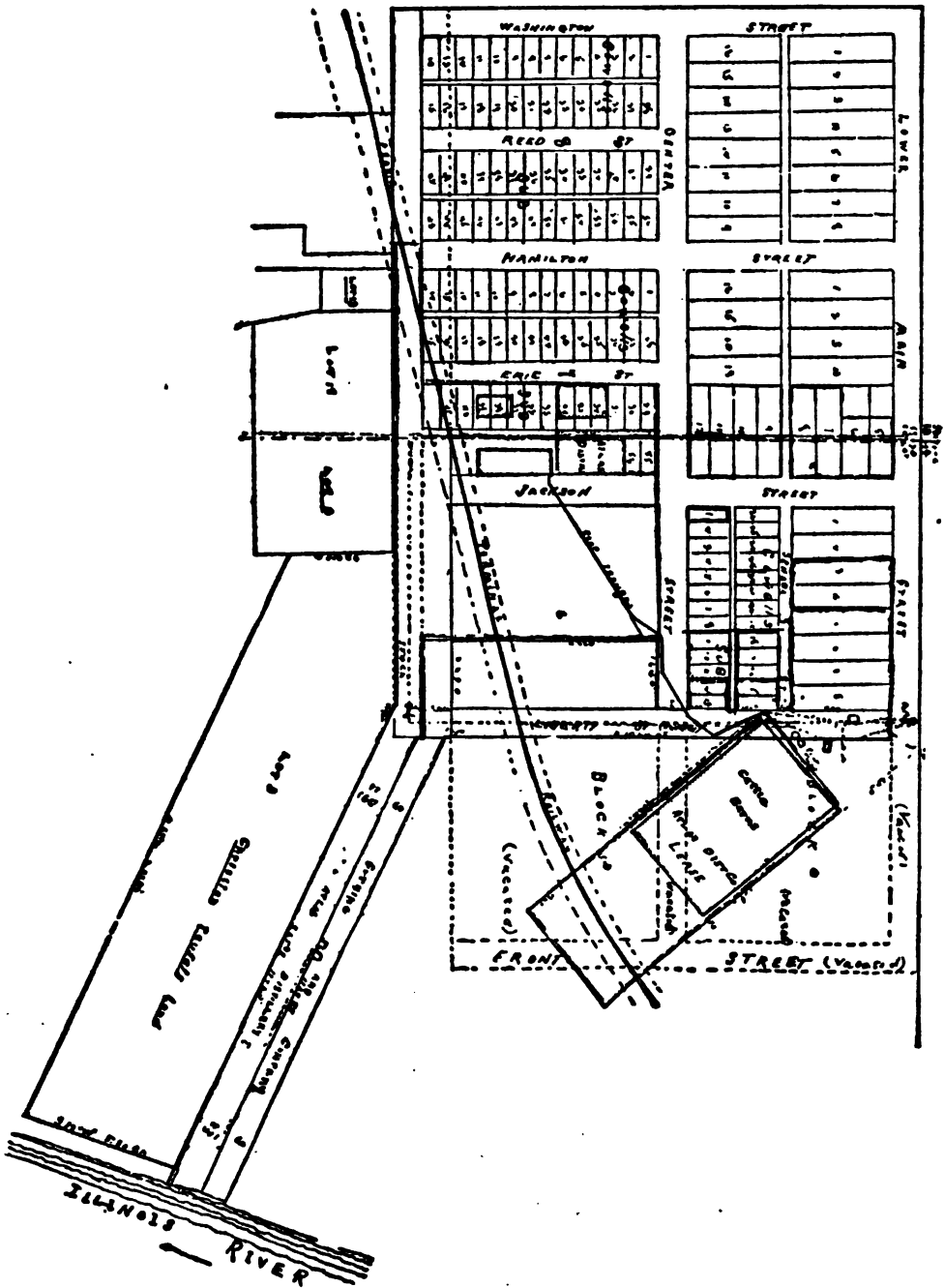


PLAT OF PART OF BLOCK 7.



Cowell, in making his plats, in no way changed or altered the streets indicated on the Moffat plat. He did, however, widen the alley in block 3, and designated it as Seneca street, and located an alley midway between that street and Center street. After such platting, Cowell proceeded to sell the lots, and in 1860, by two separate deeds, Cowell and wife conveyed to complainant Christian Tufel, by the name of Christian David, lots 11, 12, 16, and 17 in Cowell's subdivision of block 7. The grantee immediately entered into possession of said premises, built upon and improved the same, and they have ever since been occupied by him and his family as a homestead.

On December 9, 1875, Aquilla Moffat conveyed to said complainant Christian Tufel, by metes and bounds, a piece of ground containing about 12 acres, and directly south of the southeast portion of his plat of Lower Peoria, the location of which tract, with reference to the Moffat plat of Lower Peoria, is illustrated by the following map:



At the time of this purchase there was not, nor has there ever since been, any way of access to it, except along and over Liberty street. Complainant Tufel testified that, when he purchased this tract, Moffat told him that Liberty street extended to it, and that he relied upon such statements in making the purchase. After the purchase of this tract by said complainant, he inclosed it, and has ever since used it for farming and gardening purposes, and was accustomed to

reach said tract from his home, in block 7, by going along Hamilton street to Center street, thence along Center street to Liberty street, and along Liberty street to the land. April 26, 1883, Tufel purchased, from Sarah A. Reddingbow, who claimed title by mesne conveyances from Edward J. Cowell, lot 6 in Cowell's subdivision of the south half of block 3 in Lower Peoria. At various times from 1898 to March, 1901, the complainant Adolph Woolner purchased, from parties who

claimed title by mesne conveyances from Cowell, lots 4, 5, 23, 24, 25, and 26 in Cowell's subdivision of the south half of block 3 in Lower Peoria.

The allegation of complainants' bill that Liberty street was kept open and constantly used by the public from the time of its platting until the filing of said bill is supported by the testimony of numerous witnesses introduced by complainants. Appellant, however, contends that no part of Liberty street was ever opened and traveled as a public highway. On this point the chancellor found "that said Liberty street, from the time the same was platted as aforesaid, has been constantly used by the public as a public street," and we are inclined to think the proof supports such finding. There is evidence to the effect that as early as 1867 there was a row of maple trees of considerable size along the westerly boundary of blocks 4 and 5 in Lower Peoria (being the easterly line of Liberty street), its entire length, and coincident with such row of trees was a fence; that at the same time there extended a fence along the easterly boundary of blocks 3 and 6 (being the westerly boundary of Liberty street), except at street intersections, so that the street was fenced in its entire length. Complainant Tufel testified that he and his family, at certain seasons, had traveled said Liberty street almost every day from 1875 to the filing of the bill in this case. One Meldroth testified he had lived in the vicinity of Lower Peoria for 44 years, and is familiar with the streets and alleys as platted by Aquilla Moffat; that said Liberty street has been much used and traveled by wagons and other vehicles, and by foot passengers; that complainant Tufel used said street constantly in passing from his homestead to the tract of land owned by him south of said Liberty street; that there has been a great deal of hauling along said street, and that the closing or obstructing of said street will, because of the location of their said properties, rebound greatly to the injury of complainants. Quite a number of other witnesses testified equally as strong as the one just cited, in favor of complainants, and in support of the allegations of their bill; but we deem it unnecessary to dwell upon the testimony, as we have previously stated that it is of such character as to amply support the chancellor's decree.

In June, 1883, William R. Bush and Delos S. Brown, who claimed to have then become the owners, by mesne conveyances from Moffat, of all the lands on both sides of Liberty street, and abutting thereon, undertook to vacate Liberty street by executing a deed of vacation thereof; their position being that the dedication proffered by the plat of Aquilla Moffat had never been accepted by the proper public officials, or as a matter of fact, by the public, and, such being the case, that the lot owners having lots abutting thereon owned the fee of the street, burdened

only with the offer of dedication; that, they having acquired all the lots abutting on said street, the fee thereof was in them, burdened as aforesaid, but by such renunciation and deed of vacation such burden was removed. While, under the view we entertain, and as will be expressed herein, such contention is untenable in any event, yet we may add, in passing, that such contention as to the acquirement of the fee of the street by Bush and Brown is inaccurate, for the deeds of conveyance to Bush and Brown of a considerable part of the property abutting on Liberty street described such property by metes and bounds, and under such descriptions the area of the street was not included. So in no event are they in a position to lay claim to the fee of said street.

On July 7, 1900, Delos S. Brown and the legal representatives of Bush made a deed to appellant, Corning & Co., by metes and bounds, of certain property, which included Liberty street throughout its entire length, and all property owned by them contiguous to the west side of said street. Shortly before the filing of the bill in this case, said Corning & Co. began the erection of a large distillery upon that portion of the property conveyed to it which is situated in block 6; extending the building over and onto Liberty street, so that travel thereon would be obstructed. The location of this building was afterwards changed so that the obstruction caused by it was removed, but appellant still maintained and contended that it had the right to obstruct said street; and it caused a petition to be filed with the city council of the city of Peoria by the Peoria Terminal Railway Company for permission to lay side tracks in Liberty street, connecting with appellant's distillery buildings. The petition was granted, with the understanding that there should be left an open space of 32 feet for the use of the public on said street. After the beginning of this suit, appellant notified its grantors of Liberty street to appear and defend their title to the same. The said grantors and their representatives then presented a petition to the chancellor requesting that an order might be entered permitting them to appear and defend said suit, but said petition was denied.

Appellant's contentions are, first, that the plat of Aquilla Moffat, notwithstanding certain patent deficiencies therein, should be regarded as a good statutory plat; second, that the conveyances to Bush and Brown of the property abutting on Liberty street were made before any portion of the territory included in the Moffat plat had been included within the corporate limits of any city, village, or town, and before Liberty street had been opened or accepted by any public authorities, and that by reason thereof they took the title to said Liberty street by virtue of the conveyances to them of the adjoining property, burdened only with the offer of dedication; third, that, by reason of the deed of vacation of said Bush

and Brown, the offer to dedicate was withdrawn, and said parties thereafter held the fee to said street free from any claim of a public highway therein; fourth, that, in any event, Liberty street having remained unopened and unaccepted by any public authorities, the right to now open the same has been waived; fifth, that the evidence does not support, or the bill allege, a highway by prescription; and, sixth, that the chancellor erroneously denied the petition of the appellant's grantors to appear and defend appellant's title in this suit.

Under our view of the law applicable to this case, it is unnecessary for us to discuss the various contentions of appellant, or to determine whether the plat of Aquilla Moffat to Lower Peoria can be held to be a compliance with the statute. As we regard it, the vital point to be determined in this case, and those of similar import, is whether the alleged street which is sought to be vacated or obstructed was by the original owner designated upon the plat with reference to which subsequent lots and tracts have been sold. If so, where private rights may be affected, and as between the author of such plat, or his privies in estate, and those buying lots upon the faith of such plat, or with reference thereto, there is an implied covenant that such designated street or public way shall be forever open for such purposes, and free from any claim or interference by the original owner and author of the plat, and those claiming under him. Whether the plat of Aquilla Moffat, in this case, could be held to be a good statutory plat, or not, it was, at least, sufficient to constitute a common-law plat, and to manifest an intention of the author to dedicate to public use the designated streets thereon, which is sufficient to estop such original owner and author of the plat, and those claiming under him, from denying or rescinding such dedication, whether it was so accepted by the public authorities of the village or municipality or not. In *Marsh v. Village of Fairbury*, 183 Ill. 401, 45 N. E. 236, we said (page 407, 163 Ill., page 238, 45 N. E.): "But in connection with these public rights, those who purchased lots fronting on this park took with reference to the plat, and had an appurtenant right therein, which was their own property, as a right appurtenant, and that was to have the streets and block 10 remain open for public use. The vendor, or those privy to his title, would, by his acts in platting and selling lots by this plat, be estopped from inclosing block 10 as private grounds. Such being the case, the question as to whether or not the village authorities accepted the dedication of that block would not defeat the right of individual purchasers from asserting their rights to have the same open forever for the use of the public." In this case each of the appellees is the owner of one or more lots in Cowell's subdivision of the south half of block 3 in Lower Peoria, on the east and west of which subdivision extend Center and Seneca streets, and an alley

through the middle, all of which open into Liberty street. It seems but natural that the closing of Liberty street would work manifest inconvenience and injury to property so situated.

The several lots and tracts of land purchased by appellee Tuefel were purchased before the pretended vacation of said Liberty street, and, according to the undisputed testimony, the 12-acre tract was purchased under and on the faith of the express representation that Liberty street extended to it, and by means of it the purchaser gains access to his land. While the purchase of this tract, because of its location outside of the platted territory, might not vest in the purchaser any appurtenant right to have the integrity of the plat preserved, yet it is proper to take into consideration its location with reference to Tuefel's homestead site, which is within the platted district, and was purchased long anterior to the attempted vacation of Liberty street; and because of such relative locations it is apparent that the preservation of Liberty street, as designated on the plat of Aquilla Moffat, is of especial interest and value to Tuefel, and this interest arose before the execution of the deed of vacation referred to, as Tuefel was before that time the owner of both these tracts, and then, as now, by their management, they were intimately connected.

Thus it will be seen, both from the surrounding circumstances and the testimony of the witnesses, that the proposed closing up of Liberty street will work inconvenience and pecuniary loss to parties purchasing with reference to and on the faith of the plat of Aquilla Moffat, showing the existence of Liberty street. But even if no especial inconvenience or loss were shown, the complainants, who are shown to have purchased with reference to said plat, are entitled, under the law, to demand that, as between themselves and Aquilla Moffat, and those claiming under him, the representations made by said plat as to the public streets thereon, constituting, as they did, inducements to purchasers of property in the territory platted, shall not now, after such purchases have been made, be impugned or held for naught, but that the good faith and verity thereof shall be preserved. As said in *Clark v. McCormick*, 174 Ill. 164, 51 N. E. 215 (on page 174, 174 Ill., page 219, 51 N. E.): "The arrangement of streets and ways formed a part of the consideration of the purchase of each block, or part thereof, not only as between the original proprietor of the plat and those who purchase from him, but also as between all subsequent vendors and vendees. The original proprietor sold to his vendee the rights and privileges of the streets, and each subsequent vendor passed such rights to his vendee. The law implies mutual agreements between all such parties that the streets shall always remain open for use as platted. It was not, therefore, within the power of the petitioners, as owners of the blocks along the

west side of the street in question (being but a portion of the blocks in the subdivision), to withdraw the dedication of the streets, as against the private rights of any other owners of blocks or parts of blocks in the subdivision." Citing *Zearing v. Raber*, 74 Ill. 409; *Earl v. City of Chicago*, 136 Ill. 277, 28 N. E. 370; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269. And further, quoting from the same case, at page 173, 174 Ill., page 218, 51 N. E.: "And the right thus passing to the purchasers is not the mere right that such purchasers may use these streets, or other public places, according to their appropriate purposes, but a right vesting in the purchasers, that all persons whatever, as their occasion may require or invite, may so use them. In other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers that the streets and other public places indicated as such upon the plan shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use."

The insistence of appellant that by reason of the deed of vacation of its grantors, referred to in this case, complainants' bill is devoid of merit, is not tenable, where, as here, private rights have been acquired which would be sacrificed by such vacation. As said in *Clark v. McCormick*, supra, in speaking of the provision of the statute for the vacation of a statutory plat, "Such statute is framed with a view of protecting the rights of all interested;" and, as to the nature of the right to have the integrity of the plat preserved, acquired by those who purchase with reference to a particular plat, as set out in the previous quotation, it is held to be valuable and substantial. The principle here applied is only in conformity with all other transactions where one who takes a certain position, and causes others to act thereon, is estopped from afterwards denying or receding from such position, to the injury of those whom he has led to act upon the faith of his position.

As to appellant's sixth contention, viz., the denial of the petition of appellant's grantors to appear and defend in this suit, though more might be said, we regard it sufficient answer to say that this is the appeal of *Corning & Co.* Petitioners did not appeal, and the rejection of said petition was not a denial of any right belonging to *Corning & Co.*

The decree of the circuit court of Peoria county is sustained. Decree affirmed.

(206 Ill. 20)

STANLEY v. MARSHALL.

(Supreme Court of Illinois. Dec. 16, 1903.)
CONVEYANCE—REFORMATION—ESTOPPEL
—EVIDENCE—COSTS.

1. Evidence in a suit to reform a deed held to show that the tract of land in dispute was in-

tended by all parties to be included in the deed.

2. Under the rule that the facts constituting an estoppel in pais must be established by a preponderance of the evidence, evidence held insufficient to show that money refunded by a vendor of land was the price paid for the tract of land in dispute, so as to estop the purchaser from claiming it.

3. The error, if any, in a finding that a vendor paid back a sum on account of a shortage resulting from the omission of a tract from the description in a deed, and a decree that the sum be repaid to him, is not prejudicial to him, where he admits that the tract should be included.

4. In a suit to reform a deed, in which it is decreed, adversely to defendant's claim, that the deed be reformed, and also that complainant pay defendant a certain sum, there was no abuse of discretion in requiring two-thirds of the costs to be paid by defendant.

Appeal from Circuit Court, Henderson County; Geo. W. Thompson, Judge.

Bill by R. Newton Marshall against Wyatt Stanley and others to reform a deed. From a decree in favor of complainant, defendant Wyatt Stanley appeals. Affirmed.

This appeal is from a decree of the circuit court of Henderson county ordering appellant, Wyatt Stanley, and his wife, Helen T. Stanley, to convey to appellee, R. Newton Marshall, all that part of the northwest fractional quarter of section 5, in township 8 north, range 4 west, that lies directly south of the southeast quarter of section 32, in township 9 north, range 4 west, and all of the northeast fractional quarter of section 5, township 8 north, range 4 west, all in Henderson county, and, in case of failure of said Stanley and wife to so convey said premises within thirty days from said decree, that the master in chancery, for and on their behalf, convey said premises to appellee. The decree orders appellee to pay to appellant, within 10 days, the sum of \$77.93, and provides that appellee pay one-third of the costs of this proceeding, and appellant two-thirds thereof.

The original bill in this cause was filed on January 27, 1903, by appellee against Stanley and his wife, to reform a deed made by them to appellee for certain real estate, and to correct errors in the description of such real estate. The bill charged that appellant sold to appellee, and intended to convey to him, with other lands, all the northeast fractional quarter of section 5, and that part of the northwest fractional quarter of said section 5 which lies directly south of the southeast quarter of section 32, in town 9 north, range 4 west of the fourth principal meridian, in Henderson county, Ill.—said section 5 being in town 8, and in the same range and county as said section 32—but that the deed failed to convey these two tracts, and asked that it be reformed and corrected so as to convey them. The bill was afterwards amended, and J. Cecil Brook and John A. Brook were made parties defendant. Appellant answered the amended bill, denying the material allegations thereof so far as

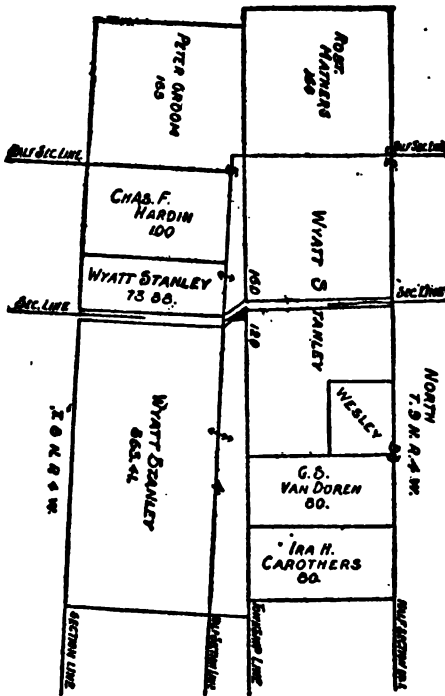
that part of the northeast fractional quarter of section 5 which lies east of the public highway, containing 1.037 acres, is concerned, and admitting that in other respects the deed should be reformed and corrected as prayed. That part of said northeast quarter which lies east of the public highway is improved by a dwelling house, and is the real estate in dispute in this suit. Appellant does not question the propriety of the decree so far as it directs a conveyance of real estate other than the part of said last-mentioned quarter section which lies east of the public highway. To the answer, appellee filed a general replication. Defendants John A. Brook and J. Cecil Brook also answered said amended bill, disclaiming any interest in the land in dispute, and averring that any interest they or either of them may have formerly had in said premises had been transferred and equitably assigned by them to appellee. The cause was on March 4, 1902, referred to the master in chancery, and, in accordance with the decree of reference, he took the evidence, and reported same to the court, without findings.

The record shows that prior to March 1, 1901, appellant was the owner of the following tracts of land in Henderson county, Ill.: The northwest quarter of the southwest quarter of section 33, the south half of the southwest quarter of said section 33, and the southeast quarter of section 32, all in township 9 north, range 4 west of the fourth principal meridian; also all of section 4; the east 60 acres of the southeast quarter of section 5, the northeast fractional quarter of section 5, and that part of the northwest fractional quarter of section 5 which lies directly south of the southeast quarter of said section 32, all in township 8 north, range 4 west, as shown by the plat hereinafter set out. The record further shows that appellant went to see J. Cecil Brook in regard to selling his farm or land, and told him that he wanted to sell out. He priced the land to him at \$75 per acre, but Brook, after looking the land over with appellee, told him he could not use all the land, and that the price was too high. After this a land agent from Kansas City, by the name of Waldo, with whom Stanley was dealing in Kansas real estate, carried on the negotiations for Stanley with J. Cecil Brook; the latter conducting the purchase of the land for himself, John A. Brook, and R. Newton Marshall. The evidence of the purchasers shows that Stanley stated to the three purchasers that he wanted to sell his land or his farm, and Stanley says the same thing, in substance, although he insists that he gave them the descriptions of the land he desired to sell, and did not include a description of the tract in dispute. An agreement was reached by Waldo with J. Cecil Brook, John A. Brook, and Marshall to purchase the land at \$70 per acre, and a division thereof was agreed on among the purchasers; Stanley, however, not being a par-

ty to the agreement of partition, nor consulted about the division, he having consented to deed it in any manner satisfactory to the purchasers. Separate deeds were executed and delivered on March 1, 1901, by Stanley to the purchasers; a banker named Kaiser, of Stronghurst, Ill., having prepared the deeds. The deed to Marshall described the land he was to have, under the division agreed upon among the purchasers, as follows: The southeast quarter of section 32, township 9 north, range 4 west; also the east 60 acres of the southeast quarter of section 5, and the south fractional part of the northeast quarter of section 5, containing 13 acres, more or less; all in township 8 north, range 4 west of the fourth principal meridian; containing 233 acres, more or less. A sectional map of Henderson county, containing township 8 north, range 4 west, and township 9 north, range 4 west, was shown to the purchasers by Stanley during the negotiations, and from this map they obtained the number of acres in the farm, and agreed upon the division of the land among themselves. This map was admitted in evidence, and shows the number of acres owned by Stanley to have been 717.29. One acre of this was school land, and was occupied by a schoolhouse. This acre was excluded, leaving 716.29 acres, according to the Henderson county map. Stanley was paid for 716 acres at \$70 per acre, and an agreement was entered into between him and J. Cecil Brook whereby each deposited \$250 with Mr. Moir at Oquawka, with the understanding that the land should be surveyed, and the number of acres ascertained from the survey. If the land contained more than 716 acres, the excess was to be paid for out of the deposit made by Brook, and, if it contained less than 716 acres, the shortage was to be refunded to Brook out of the deposit made by Stanley. In accordance with this agreement, a survey was made of the entire farm about eight months after the deeds were delivered, and it was therefrom ascertained that the farm contained 715.66 acres, including the school acre. While surveying, it was discovered that the part of the northwest quarter of section 5 lying immediately south of the southeast quarter of section 32 was not included in any of the deeds, but it was included by the surveyor in the 715.66 acres. A settlement was made between Stanley and J. Cecil Brook upon the basis of the number of acres shown upon the plat made by the surveyor; Marshall, however, not being present at this settlement. From the 715.66 acres there were deducted by Brook 2.037 acres. Stanley claims that this deduction was made on account of the school acre, and that part of the northeast quarter of section 5 that lies east of the road, which is the piece of land in dispute, and which Stanley claims he never sold, while Brook testified that the deduction was made on account of the school acre, and that part of the north-

west quarter of section 5 that lies directly south of the southeast quarter of section 32, which was not included in any of the deeds from Stanley, but which all parties agree should have been included in the deed to Marshall. This latter piece was not surveyed by itself, and it was not ascertained how many acres it contained. The piece in the northeast of section 5 was surveyed by itself, and it was then ascertained that it contained 1.037 acres. Brook also testified that at the time of making the settlement he judged that both pieces contained the same number of acres, and that he stated to Stanley that he was deducting 1.037 acres for the piece in the northwest of section 5.

The following diagram represents sections 4 and 5 in township 8 north, range 4 west, and the south half of sections 32 and 33 in township 9 north, range 4 west, upon which the farm of Wyatt Stanley was located. The black portion thereof shows the tract involved in this litigation. The acreage shown on this plat is taken from the sectional map of Henderson county, and not from the survey which was made after the sale of the land:



It will be observed that the north half of sections 4 and 5, measuring from north to south, is but a narrow strip, and each of these half sections contains but a few acres. The section line between sections 32 and 33 does not form a continuous straight line with that between sections 4 and 5, but is further west than the line between the two latter sections. A road corresponding with these section lines extends north and south through these sections, except that, coming south, in-

stead of turning on the township line between sections 5 and 33, and running east to the northeast corner of section 5, it runs diagonally from the southeast corner of section 32 to the southeast corner of the northeast quarter of section 5, and cuts off a corner of the northeast quarter of section 5 (the 1.037 acres in dispute), leaving that corner on the east side of the road, instead of on the west side. The township line and the quarter section line through sections 4 and 5 approach each other as they are extended west, and the space between them is greater through section 4 than through section 5. The sectional map of Henderson county, however, shows that the road corresponds with the section lines, and turns directly east on the township line at the southeast corner of section 32, and runs directly east to the northeast corner of section 5, and turns south at that point, which, if correct, would have placed all of the northeast quarter of section 5, including the 1.037 acres in dispute, on the west side of the road. That part of this tract which was east of the east line of the highway was fenced in with the northwest quarter of section 4. At the time of the sale there was no fence separating it from the northwest quarter of section 4, and east of it, on section 4, was a garden. It was purchased by Stanley as a part of a 90-acre tract constituting a farm. It appears from the testimony of the purchasers, of Stanley, and of Waldo, that nothing was at any time said either by Stanley or by Waldo about reserving any part of the land, or excepting this piece from the sale. Seventy dollars per acre was agreed upon as an average price per acre for the farm. This piece was never particularly mentioned during the negotiations, and was a part of the Stanley farm. It was not known by the purchasers, according to their testimony, that Stanley claimed to have retained the ownership of that piece until over eight months after the deeds had been delivered, and after possession of the farm (aside from the tract in dispute, about the possession of which there is a conflict in the evidence) had been surrendered to the purchasers.

Apollos W. O'Harra, for appellant.

SCOTT, J. (after stating the facts). It is earnestly insisted by appellant that the finding of the decree that the tract of land in dispute was intended by all parties to this transaction to be included in the deed is not supported by the evidence. It will be observed from the foregoing plat that the land in question is in the heart of the farm which was owned by the appellant. Negotiations for the sale of this land were opened between Stanley and J. Cecil Brook at the home of the latter's father, in Henderson county, near the Stanley farm. At that time, according to Brook, Stanley desired and offered to sell his "farm." Shortly after this, J. Cecil Brook and appellee went to look the farm over; and

both testify that at this time Stanley offered to sell the "farm," and made no suggestion about reserving any part thereof. During the negotiations Stanley was several times at the residence of the elder Brook, and there, on at least one occasion, he took the map of Henderson county, and pointed out thereon the land which he owned and desired to sell; it being the same land which the foregoing plat shows that he owned. Stanley himself says that when he first went to see John Brook, and talked with him with reference to the land, he (Stanley) showed him the different pieces on the Henderson county map; and, in this connection, it is important to observe that the disputed tract is not shown on that map as a separate tract, but is included with the remainder of the northeast quarter of section 5, as that map erroneously locates the highway by showing that, coming south to the township line, it jogs straight east to the northeast corner of section 5, and then runs south on the east line of section 5, which would throw this tract west of the highway; and this error makes it appear that this tract is in no way separated from the quarter section. All parties agree that nothing was ever said to either purchaser about reserving or excepting any of the land. Now, if Stanley pointed out the various pieces he was selling on that map and did not speak of excepting or reserving any portion thereof, he must have pointed out a tract which on that map included the small piece of land involved in this litigation. It is true that Marshall said during the negotiations that he was to have the land west of the road, only, but he also says he was to have all the land in section 5; and this inconsistency, we think, is explained by the fact that the Henderson county map was used, and that, treating the highway as being correctly located thereon, all the land in section 5 would be west thereof. Had the highway been where shown by that map, then there would have been no inconsistency in the two statements. But in any event, that inconsistency only went to the way in which the land was to be divided between Marshall and the other two purchasers. If Stanley sold the whole farm to the three, and Marshall was to have only that west of the road, that east of the road would be the property of the other purchasers; and as it now appears from the answer of the other purchasers that in the division among the purchasers, in accordance with which it was attempted to have the deeds made, this tract was to go to Marshall, that inconsistency becomes immaterial. Stanley himself testified that when the negotiations were opened the purchasers wanted to know how much he would take an acre for his land; that this tract now in dispute was a part of his land; that he quoted them a price per acre, and said nothing about any reservation; that afterward he directed Waldoek, the real estate agent, to sell them his farm or his land at \$70 per acre, but that he told Waldoek not

to sell the disputed tract, for the reason, as he says, that he might break up some time, and in that event he wanted this for a homestead. Waldoek reached a verbal agreement with the purchasers, but said nothing about reserving this tract, and nothing was ever said by either Stanley or his agent about reserving it, and each of the purchasers swears that all the offers made by both Stanley and Waldoek were to sell Stanley's "land" or "farm."

Appellant says he furnished the purchasers with the description of each piece of the land separately, and the evidence warrants the conclusion that J. Cecil Brook furnished to Kaiser, who wrote the deeds, the descriptions which were written therein. The description contained in the deed to Marshall, which it is sought to correct so that it will convey all the northeast quarter of section 5, reads as follows: "The south fractional part of the northeast quarter of section No. 5, containing 13 acres, more or less," all in township, etc. This language is regarded by counsel for appellant as being significant, and he inquires, why was the word "part" used if it was intended to convey the entire quarter? If the deed contained no description other than this one, it would be void for uncertainty in the description. It conveys absolutely nothing in the northeast quarter of section 5. There is no way of fixing the north line of the land which the grantor attempted to convey. The only conclusion which can certainly be drawn from the language used is that the parties sought to convey approximately 13 acres off the south side of the quarter, and, as the quarter section contained approximately $14\frac{1}{2}$ acres, the conclusion would be that the parties were attempting to convey practically all of the tract in dispute. We do not think that a consideration of this language aids the cause of appellant. To authorize the reformation of a deed between parties on account of a mistake, the mistake must be that of both parties, and must be proved by clear and satisfactory evidence. *Cleary v. Babcock*, 41 Ill. 271; *McDonald v. Starkey*, 42 Ill. 442; *Sutherland v. Sutherland*, 69 Ill. 481; *Rexroat v. Vaughn*, 181 Ill. 167, 54 N. E. 917.

Consideration of the evidence in this cause has led us to the opinion that the proof is of the character required to warrant the correction of the deed to Marshall as made by the court on the circuit. We are impelled to this determination of the matter largely by a consideration of the surrounding circumstances. This tract was practically in the center of this large farm, several miles from any town, where neither party would be apt to desire a sale of the farm without including this. Appellant seems to have been a keen business man, possessed of a large amount of property. He was moving to another state, and investing his means there. His statement that he desired to reserve this piece of ground for a homestead in case he

should meet with financial reverses seems to us in the highest degree improbable. He did not intend residing on this land succeeding the sale, and it would therefore be liable to the attacks of creditors should he become unable to pay his debts. Its location made it undesirable as a home for a man without other property or means, as it was not situated where its occupant could conveniently engage in any business other than farming the lands which appellant formerly owned, and which he conveyed in this transaction. Again, when the deeds were delivered, payment was made on the basis of the acreage as shown by the county map. From the acreage so shown, the school acre only was then deducted. If appellant was reserving the tract in question, as he now claims, and which he says he always regarded as containing one acre, we think it likely that he would at that time have had that deducted also.

Appellant also bases his defense to the bill upon an estoppel. The deed to Marshall, it is conceded by all parties, is erroneous, and should be reformed so that it will convey that portion of the northwest fractional quarter of section 5 which lies directly south of the southeast quarter of section 32, and the decree so reforms it by directing a conveyance of that land. This tract was wholly omitted from the deed, which does not contain any language by which any attempt was made to convey it. When the land was surveyed, J. Cecil Brook called Stanley's attention to the fact that this tract was omitted, and asked him to convey it to Marshall. Stanley says he replied that he would convey it if the deed did not cover it; and Brook says he first said he would convey it, and then refused. However this may be, it is certain that Stanley and J. Cecil Brook proceeded to settle the shortage in the acreage without this tract in the northwest of section 5 being conveyed.

When the survey was made, Stanley had that portion of the northeast quarter of section 5 which lies east of the highway surveyed separately, and it was found to contain 1.037 acres; and, in adjusting the acreage, this amount was added to the school acre, making 2.037 acres which was deducted from the total acreage. Appellant's position is that J. Cecil Brook, who was acting for the purchasers in making this settlement, acted on the theory that this part of the northeast quarter of section 5 was not included in the sale, and should not be included in the acreage, and that Stanley refunded to the purchasers for the same at the rate of \$70 per acre, and consequently Marshall is now estopped to say that this tract last mentioned should be included in the deed. An examination of the above plat will show that the half-section line running north through the middle of section 5 and through the middle of section 32 has in it the same jog to the west, at the township line, as had the sec-

tion line running north on the east side of sections 5 and 32, while the narrow strip of land which composed the north half of section 5 grew narrower as it was followed to the west, so that the portion of the northwest of section 5 which it is agreed was omitted from the deed by mistake was only slightly less in extent than the portion of the northeast quarter of section 5 which is in question would have been had the highway running south along the east side of section 32 continued straight south to the half-section line running east and west through section 5, as it appears to do from the evidence of some of the witnesses, although the plat in the record, by which we have been governed, shows the angle as does the plat above set forth. J. Cecil Brook swears that the 1.037 acres were deducted in figuring the shortage, because the part of the northwest quarter of section 5 above referred to, and which had been included in the survey, was not included in the deed; that, while he did not know its exact dimensions, he knew that the jog west in the north and south lines was the same in the middle of section 5 as at the east line thereof, and that the portion of the northwest of section 5 above described, which should have been included in the deed, was substantially the same in extent as the portion of the northeast of section 5 which lay east of the highway; and that the figures showing the amount of the latter were accordingly adopted. There is no testimony except that of these two men as to which tract they intended to figure out when they deducted the 1.037 acres. While it is true that support is lent to Stanley's testimony by the fact that these figures gave the exact contents of the tract he says was figured out, and were only approximately correct if it was the other tract which was deducted, still, if Stanley is right about the matter, then no deduction at all was made for the portion of the northwest of section 5 in question, but, on the contrary, Brook consented to pay for, and did pay for, that portion of the northwest of section 5, when there could be no pretense that the deed conveyed it, and when he (Brook) knew that the deed did not convey it—a theory which seems improbable, considering the fact that Stanley had at that time, notwithstanding Brook's request, failed to make any conveyance to correct the error in the deed occasioned by the omission of that part of the northwest quarter of section 5. In our judgment, the evidence does not preponderate in favor of the contention that the portion of the northeast quarter of section 5 which lies east of the public highway was deducted from the total acreage in figuring the shortage. Where an estoppel in pais is relied upon, the facts out of which it is claimed the estoppel arises must be established by a preponderance of the evidence, and (disregarding other objections to the successful interposition of this defense in this case), as there is

no such preponderance here, the doctrine of estoppel cannot be successfully invoked.

The decree finds that, when the survey was made, Stanley paid back \$72.59 on account of the shortage occasioned by omitting from the deed that portion of the northwest fractional quarter of section 5 which was included in the sale, and decrees that Marshall pay back that \$72.59, with interest, and that Stanley and wife, upon payment thereof, execute the deed directed to be made. It is objected that neither bill nor proof supports this finding. As appellant does not question the propriety of the action of the court in reforming the deed by including therein the part of the northwest of section 5 which was owned by Stanley, the error in this respect, if any exist, is a harmless one. It insures to the appellant the return of his money.

The action of the court below in apportioning the costs is assigned as error. Nothing is said in support of this assignment, except that appellant should not have been required to pay any part of the costs. It does not appear to us that the chancellor abused his discretion in making this apportionment.

The decree of the circuit court of Henderson county will be affirmed. Decree affirmed.

(206 Ill. 334)

PERRY v. PEOPLE ex rel. **HANBERG**,
County Treasurer.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ORDINANCES—SUFFICIENCY OF DESCRIPTION—ASSESSMENTS—CONFIRMATION—COLLATERAL ATTACK.

1. A judgment confirming an assessment based on an ordinance sufficiently describing the improvement to challenge the attention of the court to the determination of its sufficiency is not void, and cannot be collaterally attacked.

2. An ordinance for the improvement of a street, providing that, for a specified distance, the street should be graded within nine inches of the established grade, and that on the roadbed thus formed a layer of limestone of specified size should be laid, covered with specified screenings, and on these screenings a layer of limestone of specified size and depth, rolled with a roller of certain weight, and further providing for the manholes and catch-basins, although it omitted to designate the width of the street to be paved, sufficiently described the proposed improvement to invest the court, in proceedings for confirmation of an assessment based thereon, with jurisdiction to determine its legal sufficiency.

Appeal from Cook County Court; O. N. Carter, Judge.

Action by the people, on the relation of John T. Hanberg, county treasurer and ex officio collector, against Cornelia S. Perry. From a judgment for relator, defendant appeals. Affirmed.

Browning & Shepard, for appellant. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

¶ 1. See *Municipal Corporations*, vol. 34, Cent. Dig. § 1180.

BOGGS, J. To the application of the appellee collector filed in the county court of Cook county for a judgment against certain city lots belonging to the appellant, for a delinquent special assessment, the appellant presented the objection that the ordinance relied upon to authorize the assessment was void. The objection was overruled, and judgment awarded the collector as prayed in the application, and the appellant has perfected this appeal.

The ordinance provided for paying Forty-Fourth street, in the city of Chicago, from the west line of St. Lawrence avenue to the east line of Grand Boulevard, with macadam, and for curbing the same with limestone curbing; and the objection is that the ordinance is rendered void because the width of the street to be paved is not stated in the description given of the proposed improvement in the ordinance. Had this objection been preferred to the application for judgment confirming the assessment, it would have been sustained, for, while the ordinance seems in other respects to contain a full and complete description of the improvement, the width of the street to be macadamized is omitted from the description. But the appellant permitted a judgment to be entered confirming the assessment, and the question which now arises is whether she may in this collateral proceeding still avail herself of the right to urge the objection. If the ordinance, because of the failure in the description of the improvement to specify the width of the street to be paved, was a nullity, and the county court was for that reason lacking in jurisdiction to entertain the application of the city, and to enter judgment confirming the assessment, then the objection might be urged in the collateral proceeding for judgment against the property of the appellant for unpaid assessments of benefits under the judgment of confirmation.

An ordinance which does not attempt to comply with the requirement of the statute that it shall contain the description of the improvement is a nullity. If an ordinance on which an application for a judgment of confirmation is based contains sufficient allegations descriptive of the proposed improvement to challenge the attention of the court, jurisdiction attaches in the court to judicially determine as to the legal sufficiency of the description; and the decision and judgment of the court thereon, however erroneous, is not void, nor can it be attacked as for error in a collateral proceeding. *Figge v. Rowlen*, 185 Ill. 234, 59 N. E. 195; *Shepard v. People ex rel.*, 200 Ill. 508, 65 N. E. 1068; *Walker v. People ex rel.*, 202 Ill. 34, 66 N. E. 827. In the ordinance here under consideration, the requirement of the statute that a description of the improvement should be set forth was not ignored. It provided that the street, for a specified distance, should be graded to within nine inches of the established grade, and that on the roadbed thus formed should be spread a layer of broken limestone, crushed to a speci-

fied size, and upon the same should be laid a layer, of a specified depth, of limestone screenings, completely filling interstices, and the same should be flooded and rolled with a roller of a specified weight, and "upon this said first layer of broken limestone and screenings shall be spread a layer of the best quality of broken limestone, crushed to a size so as to pass through a two and a half inch ring, upon which shall be spread a layer of well screened and cleaned Joliet bank gravel, so as to fill all the interstices in the limestone, said layer of limestone and gravel to be of an average depth of three inches, after having been thoroughly flooded and rolled with a roller of not less than ten tons' weight. All manholes and catch-basins shall be made to conform to the established grade of said Forty-Fourth street between said points, said pavement to be laid to conform to the established grade of said Forty-Fourth street between said points. Said work to be done under the superintendence of the department of public works." The width of the street to be paved was omitted, but the proposed improvement was so far described as that the county court, in the proceeding for a judgment of confirmation, was called upon to consider and judicially determine as to the sufficiency of the description. Jurisdiction thereof attached in the county court to decide judicially whether or not judgment of confirmation should be entered, and its decision is not open to collateral attack. The defect in the description should have been availed of in the proceeding for a judgment confirming the assessment. Not having been there presented, the judgment rendered in that proceeding conclusively precludes an investigation in a collateral proceeding of the question whether the ordinance, in mere matter of detail in the description of the improvement, was in all respects good and sufficient.

The judgment of the county court is affirmed. Judgment affirmed.

(206 Ill. 374)

JONES v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATION—PUBLIC IMPROVEMENT—ASSESSMENT—OBJECTIONS—BENEFITS—HEARING—EVIDENCE.

1. Where a landowner, on the hearing of objections to an assessment on his property, claimed that a certain lot which was not assessed would be benefited by the improvement, and offered evidence to that effect, it was proper for the court to permit the attorney of the owner of the latter lot to appear and introduce evidence tending to show that it would not be benefited, no new issue being raised by the appearance of the attorney, and it being on the motion of the attorney for the city that the attorney for the other lot owner was allowed to appear.

2. Where a certain lot did not abut on a street for the paving of which assessments were made, but was separated from such street by railroad tracks, and was used as a freight teamyard, and the entrance to which was not from the street which had been improved, a

finding that it was not benefited by the paving of the street was proper.

3. Where, on the hearing of objections to an assessment for the paving of a street, it appeared that the street was a natural and convenient course of ingress and egress to and from the property, and there was conflicting testimony as to whether the lot would be benefited by the assessment, it could not be said, on appeal, that the finding of benefits was erroneous.

4. On a hearing of objections to an assessment for the paving of a street, testimony as to what benefits would be derived by a business conducted on certain assessed property was properly excluded.

5. On a hearing of objections to an assessment for the paving of a street, it was error to permit a witness who had not given any opinion on the subject of benefits to be asked on cross-examination whether he recalled any instances where property was worth more after the street was paved than before.

6. The error was not of such importance as to justify reversal of judgment confirming the assessment.

Appeal from Cook County Court; R. A. Russell, Judge.

Appeal by William A. Jones from a judgment confirming a special assessment to pay for certain improvements of Noble Street, in the city of Chicago. Affirmed.

Tyrrell & Fellingham, for appellant. Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for appellee.

CARTWRIGHT, J. This is an appeal from a judgment of the county court of Cook county confirming a special assessment to pay for plastering curb walls, curbing with sandstone curbs, grading, and paving with asphalt, Noble street, in the city of Chicago, from Milwaukee avenue to North avenue.

Lot A, the property of appellant, is situated at the north end of the proposed improvement, with an east frontage of 530 feet thereon, and a north frontage of 250 feet on North avenue. The lot was assessed \$3,198, to be paid in five equal installments of \$629.60. Appellant appeared and filed objections to the assessment on his property, among which was one that the assessment was levied upon part only of the property especially benefited. When this objection came on for hearing, the appellant claimed that lot B, owned by the Chicago & Northwestern Railway Company, which was not assessed, would be benefited by the improvement, and offered some testimony to that effect. The court then, against the objection of appellant, permitted the attorney of said company to appear and introduce evidence that lot B would not be benefited. The action of the court is assigned as error. The railway company did not file any pleading, and the court did not assume any jurisdiction over it. The issue between the city and appellant was whether lot B would be benefited by the improvement, and no new or different issue was raised by the appearance of the attorney for the railway company. Appellant cannot

complain that he was required to meet the proof offered on that issue, whether the examination of witnesses was by the attorney of the railway company or of the city. It was on the motion of the attorney for appellee that the attorney for the railway company was allowed to appear, in order that the court might have all the facts in determining the issue, and we see no error in what was done. The evidence showed quite clearly that lot B would not be benefited by the improvement. Lot A, the property of appellant, extends from North avenue to Blanche street, where the Chicago & Northwestern Railway, running in a northwesterly and southeasterly direction, intersects Noble street, giving the lot a triangular shape. The right of way is elevated, and the roadways of Noble and Blanche streets pass under the tracks. Lot B, owned by the railway company, does not abut on Noble street, but is on the other side of the railway, fronting on Holt street, and is used for a freight team-yard. The entrance to it is from Holt street, and it is practically shut off from the improvement. The court overruled the objection, and the evidence sustains the ruling.

The question of benefits was submitted to the court for trial, without the intervention of a jury, and the court found in favor of appellee, and confirmed the assessment. On that question appellant contends that the finding and judgment are against the weight of the evidence. Lot A is used for manufacturing purposes, and is occupied by the W. A. Jones Foundry & Machine Company. The evidence for the appellant was that it was worth about \$25,000, and the evidence for the appellee was that it was worth \$40,000. It had been the custom, in teaming to and from the property, to go out on North avenue to Elston avenue, and along that avenue to Milwaukee avenue, but Noble street, when paved, apparently would be a natural and convenient course to Milwaukee avenue, and one which would be valuable for use in connection with the property. There was testimony on the part of appellant that the lot would not be benefited to the amount of the assessment, or to any considerable amount, by the improvement. On the other hand, witnesses on behalf of appellee testified that the property would be enhanced in value by the improvement to the amount of the assessment. Aside from the facts stated, the question rested wholly in the opinions of different witnesses, and we think it will be seen that there is no controlling fact or circumstance from which we could say that the finding of the court was wrong and the property would not be benefited to the amount of the assessment. Considering the value of the property, its frontage of 530 feet on the street, and the probable usefulness of the street, when paved, in connection with the property, we are not able to say that the finding and judgment are wrong.

A witness for appellant testified on the 69 N.E.—5

question at issue that there would be very little benefit to the property, but the court refused to permit him to give his opinion as to what the benefit would be to the business of the manufacturing company occupying the lot. The basis for the assessment was the enhanced market value of the property, and the benefit to the occupant of the shop would not determine that question. It might be a proper subject of inquiry in testing the value of an opinion, but it was not error to exclude the evidence when offered as it was in this case.

A witness for the appellant, who had testified to the physical situation and uses of the property, but had not given any opinion on the subject of benefits, was asked, on cross-examination, whether he recalled any instance when property was worth more after a street was paved than before. The court overruled an objection of appellant to the question, and required the witness to answer. The question was of an impertinent nature, and was not cross-examination. The ruling was erroneous, but is not of such importance as would justify a reversal of the judgment.

The judgment is affirmed. Judgment affirmed.

(205 Ill. 568)

CITY OF CHICAGO v. BROWN et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ORDINANCES—VALIDITY—QUESTIONS FOR COURT—STREET PAVING.

1. An ordinance adopted by a city under a grant of power from the General Assembly to legislate generally on a given subject, if unreasonable, unjust, and oppressive, will be held invalid by the courts.

2. Whether such an ordinance is so unreasonable and unjust is a question for the decision of the court, in view of the existing circumstances and contemporaneous conditions.

3. Where a macadam pavement had been in place less than four years, was in good condition, and no reason for removing it appeared, a city ordinance requiring it to be torn up and replaced by an asphalt pavement was void, as unreasonable and oppressive.

Error to Cook County Court; O. N. Carter, Judge.

Petition by the city of Chicago for confirmation of a special assessment for street paving against Thomas R. Brown and others, objectors. Judgment for objectors, refusing to enter judgment of confirmation, and petitioner brings error. Affirmed.

Robert Redfield (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellant. Frank E. Hayner, for appellee Brown.

BOGGS, J. The county court of Cook county entered judgment refusing to confirm a special assessment levied to pay the cost of grading, paving with asphalt, and curbing Calumet avenue from the south line of Thirty-First street to the north line of Thirty-Third street, in the city of Chicago, and the city has appealed.

The proposed improvement covered but a distance of two blocks and one street intersection, viz., the intersection of Thirty-Second street and Calumet avenue. Thirty-Second street, including the intersection aforesaid, had within less than four years before been paved by the city with macadam, and the evidence, practically without contradiction, showed that the pavement at the street intersection was still in good condition. The view of the county court was that the requirement of the ordinance that the macadam pavement laid in the intersection of Thirty-Second street and Calumet avenue, which had been in place less than four years and was in good, serviceable condition, should, at the expense of the property owners, be torn up and replaced by a pavement of asphalt, was so unreasonable and oppressive as to justify the court to declare the ordinance to be void.

An ordinance adopted by a city under a grant of power from the General Assembly to legislate generally on a given subject, as was the ordinance here under consideration, if unreasonable, unjust, and oppressive, will be held invalid by the courts; and whether it is so unreasonable and unjust is a question for the decision of the court, in view of the existing circumstances and contemporaneous conditions. This rule has been frequently declared, and it is not questioned by counsel for the city. The power with which the court is vested to annul the action of the lawmaking body of a municipal corporation should, as is suggested by counsel for the city, be exercised only in clear and strong cases; but when such a case is presented it becomes the duty of the court to act, and protect the citizen against arbitrary and oppressive ordinances. We agree with the county court that the ordinance here under consideration should be regarded as inoperative. The macadam pavement of the intersection had been in place less than four years. It was in good condition, and no reason for removing it appeared. To impose upon the owners of the property in these two blocks affected by the ordinance the burden of defraying the expense of tearing up and removing the macadam and of repaving the intersection with asphalt cannot be defended against the insistence that it arbitrarily and unreasonably cast upon them unnecessary expense and operated unjustly upon them. The judgment is affirmed.

Judgment affirmed.

(206 Ill. 182)

CHICAGO & M. ELECTRIC R. CO. v. MAWMAN et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

EMINENT DOMAIN—RAILROADS—RIGHT OF WAY—DAMAGES—PERSONAL INJURIES—ERRONEOUS INSTRUCTIONS—CURING ERROR—WITNESSES—COMPETENCY—KNOWLEDGE.

1. In an action to condemn land for a railroad right of way, the measure of the land-

owner's damages is the fair cash market value of the land proposed to be actually taken, having proper regard to the location and advantages as to situation and the purposes for which it was designed and used, together with the amount, if any, which lands not taken would be depreciated in their fair cash market value by the construction and operation of the proposed road.

2. In a proceeding to condemn land for a railroad right of way, damages resulting from danger to the person of the owner of the land from the construction and operation of the road are too remote, uncertain, and speculative to be considered.

3. An erroneous instruction on the measure of damages, in a proceeding to condemn land for a railroad right of way, was not cured by the giving of another instruction stating the correct measure of damages.

4. Where, in a suit to condemn land for a railroad right of way, a witness had made no investigation and possessed no knowledge qualifying him to testify as to whether the sewer system of an incorporated town was low enough and large enough to accommodate the sewage from the subdivision through which the right of way was sought to be obtained, it was error to permit him to testify that the sewer system of the town was available therefor.

Appeal from Lake County Court; D. L. Jones, Judge.

Action by the Chicago & Milwaukee Electric Railroad Company against Margaret A. Mawman and others to condemn a right of way. From a judgment awarding defendants' damages, complainant appeals. Reversed.

Charles Whitney and William C. Upton, for appellant. J. K. Orvis, for appellees.

SCOTT, J. Rockland is a subdivision within the corporate limits of Lake Bluff, in Lake county. It consists, as platted, of eight blocks of ground with intervening streets, but the streets have never been opened or graded. This was a petition filed by appellant in the county court of that county to condemn a right of way across certain lots and parts of lots in this subdivision. The total area of such lots and parts of lots is $3\frac{1}{100}$ acres. The area of the right of way across those tracts is $1\frac{1}{100}$ acres. These tracts are the property of a number of persons who are related to each other, and who are referred to in the litigation as the "Mawman Family." On the trial the jury heard the evidence introduced in open court, and viewed the premises, and by their verdict found the land taken for the right of way to be of the value of \$4,894.01, and the damages to land not taken to be \$1,229.22. Judgment was entered on the verdict, and the railroad company appeals to this court, and complains of the admission of improper evidence, of the giving of one instruction requested by respondents, and that the verdict is contrary to the evidence. The basis of the complaint, so far as the verdict is concerned, is that the compensation allowed is excessive in amount.

¶ 2. See Eminent Domain, vol. 18, Cent. Dig. §§ 294, 295.

The instruction in question is as follows: "You are instructed that it is competent in this case to take into consideration the value of the land taken in the construction and use of the railroad, as well as damages on account of unfavorable division of the lands not taken by the construction and use of the railroad, thereby causing inconvenience and danger to the person and property of the defendant, if shown, in the use and occupancy of the balance of the land." Appellant's position is that the instruction should not have included danger to the persons of the respondents. The measure of respondents' compensation is the fair cash market value of the land proposed to be actually taken, having proper regard to the location and advantages as to situation and the purposes for which it was designed and used, and the amount, if any, which their lands not taken would be depreciated in their fair cash market value by the construction and operation of the proposed road. Chicago, Burlington & Northern Railroad Co. v. Bowman, 122 Ill. 595, 13 N. E. 814; Chicago, Milwaukee & St. Paul Railroad Co. v. Hall, 90 Ill. 42; Dupuis v. Chicago & North Wisconsin Railway Co., 115 Ill. 97, 8 N. E. 720; Wabash, St. Louis & Pacific Railway Co. v. McDougall, 126 Ill. 111, 18 N. E. 291, 1 L. R. A. 207, 9 Am. St. Rep. 539; Illinois Central Railroad Co. v. Turner, 194 Ill. 575, 62 N. E. 798. Damages resulting from danger to the person of the owner of the land from the construction and operation of the road are too remote, uncertain, and speculative to be considered by the jury in fixing the amount of the owner's compensation for lands taken and for the depreciation in the value of lands which will be damaged, but not actually taken, by the construction and operation of the proposed road. McReynolds v. Burlington & Ohio River Railway Co., 106 Ill. 152; Conness v. Indiana, Illinois & Iowa Railroad Co., 193 Ill. 464, 62 N. E. 221.

Another instruction was given which correctly stated the measure of compensation, and it is urged by counsel for appellees that the defect in the foregoing instruction, if any, is thereby cured. This is not an instance where an element omitted from one instruction is supplied by another, so that the two, taken together, state the law correctly. Here one instruction states the correct measure, and the other states an incorrect measure. The jury could not determine which they should apply.

Rockland subdivision is not touched by a sewer. There is a sewer system in the village of Lake Bluff. Edward Mawman, one of the respondents, was a witness, and, without showing that he had made any investigation or possessed any knowledge which would qualify him to speak on the subject, he was permitted, over the objection of appellant, to testify, in substance, that the sewer system of Lake Bluff was low enough and large enough so that sewage from Rockland sub-

division could be drained into it and carried away by it. This was error; whether of so grave a character as to require a reversal we do not determine, but point it out that it may be avoided on another trial of the cause.

As the case must be reversed, we do not deem it advisable to discuss the amount of the verdict, except to say that it leads us to conclude that the jury may have been misled by the erroneous instruction.

For the error in giving the instruction above set out, the judgment of the county court is reversed, and the cause remanded to that court for further proceedings not inconsistent with the views herein expressed. Reversed and remanded.

(206 Ill. 244)

PISA v. REZEK et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

APPEAL—DISMISSAL—MOTION TO SET ASIDE.

1. A motion to vacate an order dismissing an appeal on the ground that by a proper construction of the rules of practice movant was entitled to one day's notice of the motion to dismiss must be made during the term at which the appeal was dismissed, and cannot be allowed when made at the next term.

Appeal from Appellate Term, First District.

Claim by Matej Pisa against Anton Rezek, as administrator of the estate of Marie Rezek, deceased, and others. From an order of the probate court disallowing the claim, the claimant appealed to the circuit court, where the appeal was dismissed on motion, and from an order denying a motion to vacate the order dismissing the appeal claimant appealed to the Appellate Court. From a judgment of that court (108 Ill. App. 198) affirming the order, claimant appeals. Affirmed.

Jones & Lusk, for appellant. Kraus, Alschuler & Holden, for appellees.

BOGGS, J. From an order entered in the probate court of Cook county disallowing the claim of the appellant in the sum of \$1,700, filed against the administrator of the estate of Marie Rezek, the appellant perfected an appeal to the circuit court of Cook county by filing an appeal bond in the said probate court. The appeal bond and the transcript were filed in the circuit court on the 16th day of December, 1901. On the 3d day of April, 1902, certain of the heirs of the said deceased were permitted to become parties defendant, and they entered their appearance. On the 19th day of April, 1902, being the last day of the March term, 1902, of said court, an order was entered dismissing the appeal and adjudging that the costs should be paid by the appellant claimant. On the 7th day of June, 1902, being one of the days of the subsequent May term of the said court, the appellant entered a motion to set aside and vacate the order dismissing the appeal and adjudging that the appellant pay

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 3183.

the costs; but the court overruled the motion. The appellant perfected an appeal to the Appellate Court for the First District, and, the judgment being affirmed, has prosecuted this, his further appeal, to this court.

The circuit court correctly refused to grant the motion, entered at its May term, to vacate the order and judgment of dismissal which had been entered at its March term. That motion was not filed at the March term of the court at which the judgment of dismissal was entered, but at one of the days of the second subsequent term of the court. Defects or imperfections in matters of form in the record, pleadings, process, entries, returns, or other proceedings may be rectified, on motion, at a subsequent term. But an alleged error at law cannot be examined, revised, or corrected by the court on a mere motion entered after the close of the term at which the alleged erroneous action was taken and final judgment entered. *Tosetti Brewing Co. v. Koehler*, 200 Ill. 369, 65 N. E. 636. The motion substituted by the statute for the writ of error coram nobis may be invoked to enable the court to correct an error of fact that came within the scope of the writ as it existed at the common law, that the judgment was entered against a deceased person, an infant without a guardian, a feme covert, a person insane at time of trial, or a valid defense existing in fact, but which, without negligence of defendant, was not made, either through duress, fraud, or excusable mistake, without negligence on the part of the party who, by the motion, complained of the action of the court. 5 Ency. of Pl. & Pr. p. 27. The motion herein entered by the appellant did not seek to bring to the attention of the court any error of fact which was within the scope of a writ of error coram nobis at the common law. The motion disclosed no ground of complaint, but it appeared from affidavits filed in support thereof that the vacation of the order of dismissal was asked upon the ground that under the proper construction of the rules of practice in said circuit court the appellant was entitled to one day's notice in writing that the motion of the appellees that the appeal from the probate court be dismissed would be taken up and considered, and that such notice in writing had not been given. The court had jurisdiction of the parties and of the subject-matter, and proceeded to final judgment, and the judgment entered in the cause could not be opened and reviewed at a subsequent term to correct an alleged error in the construction or application of the rules adopted by the court to regulate the practice in the court. It is only the correction of matters of form, clerical errors, or matters quite of course that may be had on mere motion, after the close of the term. *Tosetti Brewing Co. v. Koehler*, supra, and cases there cited.

The judgment must be and is affirmed. Judgment affirmed.

(206 Ill. 208)

GRAND LODGE LOCOMOTIVE FIREMEN v. ORRELL.

(Supreme Court of Illinois. Dec. 16, 1903.)

FRATERNAL INSURANCE—TOTAL INCAPACITY—MEANING—PRESENTATION OF CLAIMS—SUFFICIENCY—INTEREST—WHEN ALLOWED—APPEAL—QUESTIONS FOR REVIEW—PREJUDICIAL ERROR.

1. Questions as to the admission of evidence, which were not presented to the Appellate Court, and which do not appear, from the abstract prepared for the Appellate Court, to have been excepted to on the trial, cannot be considered on appeal from the Appellate to the Supreme Court.

2. An instruction which, as given by the court, is not abstracted, cannot be considered on appeal to the Supreme from the Appellate Court.

3. Under a benefit certificate payable in case insured should become "totally incapacitated to perform manual labor," total incapacity means inability to perform sustained manual labor, so as to enable one to earn or assist in earning a livelihood.

4. In an action on a benefit certificate an instruction defining "permanent" incapacity as such as would "exist through all time" could not be complained of by insurer.

5. Where a beneficiary in a fraternal insurance society presented his claims in a satisfactory manner to the subordinate lodge, which forwarded them according to custom to the grand lodge, which received and acted upon the claims as having been properly presented, the society could not urge complaints as to the manner of presentation of the claims.

6. Where a benefit certificate was for a specified sum, payable to the beneficiary if totally disabled, interest on such sum was properly allowed from the date of refusal to pay the claim on its presentation according to the by-laws of the society.

Appeal from Appellate Court, Fourth District.

Action by Charles Orrell against the Grand Lodge of Locomotive Firemen. From a judgment of the Appellate Court, affirming a judgment for plaintiff (for opinion, see 97 Ill. App. 246), defendant appeals. Affirmed.

John H. Murphy and Jack, Irwin, Jack & Danforth, for appellant. R. J. McElvain and R. J. Stephens, for appellee.

BOGGS, J. The circuit court of Jackson county, on a trial before the court and a jury, awarded the appellee a judgment in the sum of \$2,152.50 against the appellant lodge on a beneficiary certificate, and on appeal to the Appellate Court for the Fourth District the judgment was affirmed. The case comes into this court on a further appeal of the appellant lodge.

The assignment as for error that the Appellate Court erred in not reversing the judgment of the circuit court because that court erroneously admitted testimony in behalf of the appellee cannot be considered, for the reason such complaints were not presented for decision to the Appellate Court. It appears from the opinion of the Appellate Court that the record, as abstracted, did not show that any objections were offered in the trial

¶ 4. See Insurance, vol. 28, Cent. Dig. § 1382.

court to the reception of this evidence, or that any ruling as to the admissibility of such evidence was asked of the trial judge or exception of any kind taken. The abstract, as prepared for the submission of the cause to this court, shows objections and exceptions to the introduction of the evidence; but counsel for the appellee, by leave of the court first had, filed a certified copy of the abstract on which the cause was submitted in the Appellate Court, and it fails to show that the appellant objected in the trial court to the evidence or that any exceptions were preserved. The transcript of the evidence found in the record is typewritten, and no objections or exceptions as to this evidence appear in typewriting. Objections and exceptions have been interlined with a lead pencil, but the abstract prepared for the submission of the case in the Appellate Court did not refer to any of the objections or exceptions now appearing in pencil writing. This appeal brings the action of the Appellate Court in review, and questions not presented to the Appellate Court are not before us for decision. *Indiana Millers' Mutual Fire Ins. Co. v. People*, 170 Ill. 474, 49 N. E. 364.

Many objections are urged against the instructions given to the jury. Those having reference to instruction No. 1, given at request of the appellee, in the greater degree arise from the effect of the word "not," which, as appears from the abstract, was used in a phrase of the instruction, "as is not here claimed." The instruction as abstracted appears in the record as originally certified, but counsel for the appellee procured an additional transcript to be filed in the Appellate Court, which additional transcript contains a corrected copy of the instruction, from which it appears the word actually used in the phrase of the instruction was "now," and that the word "not" did not appear in the instruction, leaving the phrase to read, "as is now here claimed." Instruction No. 1 as given by the court is not abstracted, and therefore is not before us for review.

The beneficiary certificate sued on provided for the payment to appellee of the sum of \$1,500 "in the event of his total disability." His suit was to recover for that cause. The right of the appellee to recover depended, in part, upon the meaning to be given the phrase, "totally and permanently incapacitated from performing manual labor," as employed in the following by-law of the appellant lodge:

"Sec. 60. A beneficiary member in good standing who shall be totally and permanently incapacitated from performing manual labor shall be entitled to the full amount of his beneficiary certificate, provided that all claims arising under the provisions of this section shall be referred to the grand lodge officers, who shall make a personal investigation thereof, employing such physicians as in their judgment may be necessary to determine the validity of the same, all expense

so incurred to be paid by the claimant unless assumed by the lodge of which he is a member."

Instruction No. 9, given at the request of the appellee, was as follows: "The term 'manual labor,' in its ordinary and usual meaning and acceptation, means labor performed by and with the hands or hand, and it implies the ability for such sustained exercise and use of the hands or hand at labor as will enable a person thereby to earn or assist in earning a livelihood. Being able to temporarily use the hands or hand at and in some kind of labor, but without the ability to sustain such ordinary exercise and use of the hands at some useful labor whereby money may be earned to substantially assist in earning a livelihood at some kind of manual labor, does not constitute the ability to perform manual labor as it must be understood was contemplated by the parties to the indemnity contract sued upon and relied on in this action."

The purpose of this instruction was to define the meaning of the words "manual labor," and to advise the jury as to the physical condition which would constitute total incapacity to perform manual labor. Counsel for appellant lodge insist that the phrase "total incapacity" means absolute and complete inability to perform any labor whatever with the hand or hands, and the criticism upon the instruction is that it erroneously advised the jury that the appellee may be regarded as totally incapacitated though he be not absolutely incapacitated to use his hand or hands in some manner of useful labor. The construction given by the instruction is proper. A condition of absolute and complete incapacity to do any manual labor ought not to be regarded as the true construction of the language of the by-law. Total inability to perform manual labor to an extent necessary to entitle him to receive earnings is what is meant. One who has power to use his hand or hands at labor for a brief effort only, and who is lacking in power to sustain the effort for a sufficient length of time to make the result thereof of any benefit to him in the way of assisting in his support, is for all practical purposes and in every actual sense totally incapacitated from performing manual labor.

The meaning to be given the word "permanently," used in the by-law in connection with the condition of incapacity, was given in a number of instructions, among them instructions Nos. 5, 13, and 15, which, in substance, charged the jury that the disability or incapacity, to be deemed permanent, must be shown to be such that "it will exist throughout all time." It must not be understood we approve of this construction of the word "permanent," but the appellant company cannot complain that it is unjust to it.

Counsel for the appellant lodge insist that compliance with the requirements of sections 60 and 62 of the by-laws, that all claims for

indemnity shall be referred to the grand lodge, is a condition precedent to the right of recovery of such indemnity. The case made by the appellee was that he became totally and permanently incapacitated to perform manual labor in consequence of personal injuries received in two railroad accidents. Three different claims for insurance for total disability were made by the appellee to the subordinate lodge, and were by the local order referred to the grand lodge, and were acted upon by that body. Counsel, however, urge that neither of such claims asked indemnity arising from personal injuries, and therefore insist that the claim on which the appellee recovered judgment had never been brought to the notice of the grand lodge or been acted upon by it. On this contention counsel base the remaining objections as to the ruling of the court in passing upon the instructions.

The appellee laid his respective claims before the subordinate lodge in some manner—whether verbally or by a written statement, or what cause was given for the disability, if any, by him in either of the claims, does not appear—and the subordinate lodge certified to the grand lodge that the appellee had applied for the indemnity. These certificates of the local lodge are in the record. Two of them make no reference to the cause of the alleged disability of the claimant, and the third contains a statement that the local lodge believes the claimant "is totally and permanently disabled from performing manual labor from the following cause: Tuberculosis, affecting principally the left lung; the disability is total and permanent." The evidence tended to show a locomotive engine on which the appellee was working as a fireman, in consequence of a washout of the track, was overturned, and he was caught between the cab and tank, and crushed and injured about the neck, breast, stomach, and other portions of the body; that he was pinned in the wreck, and immersed in the swiftly running water; and that as a consequence of the injuries and the exposure he became afflicted with chronic catarrh and with tuberculosis of the left lung. This affliction is given in the last certificate of the local lodge to the grand lodge as the ground of the claim. It does not appear from the record but that the appellee, in the presentation of his claims to the subordinate lodge, disclosed the same and all of the causes of disability that appeared in the evidence on the trial. The appellee presented his claims in a manner satisfactory to the subordinate lodge; that body certified them, in accordance with the custom and usage of the order, to the grand lodge; the superior organization received and acted upon the claims as having been properly presented; and it cannot now be allowed to urge complaints as to the manner of the presentation of the claims. The instructions were in harmony with the views we have expressed.

The verdict and judgment included interest on the amount specified in the beneficiary certificate at the rate of 5 per cent. from the date of the rejection by the grand lodge of the claim of appellee last referred to that body. The certificate is for a specified sum of money, which appellee should receive if entitled to indemnity for total disability. That sum became due when the contingency of its payment accrued and the requirements of the by-laws as to the presentation of the claim had been complied with and payment refused. Interest was properly allowed from the date of such refusal. *Massachusetts Mutual Life Ins. Co. v. Robinson*, 98 Ill. 324; *Supreme Lodge A. O. U. W. v. Zuhlke*, 129 Ill. 298, 21 N. E. 789; *Northwestern Traveling Men's Ass'n v. Schauss*, 148 Ill. 304, 35 N. E. 747; *Grand Lodge A. O. U. W. v. Bagley*, 164 Ill. 340, 45 N. E. 538. In *Railway Passenger, etc., Ass'n v. Loomis*, 142 Ill. 560, 32 N. E. 424, and *Same v. Tucker*, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286, the contract for indemnity was only partly in writing, and for that reason interest did not accrue under the statute.

The judgment is affirmed. The costs of the additional abstract furnished by the appellee will be taxed to the appellant lodge. Judgment affirmed.

(205 Ill. 575)

PEOPLE ex rel. SELBY, County Treasurer, v. DYER.

(Supreme Court of Illinois. Dec. 16, 1903.)

DRAINAGE DISTRICT—DEFECTIVE ORGANIZATION—INCLUSION OF LAND IN ADJOINING TOWNSHIP—COLLATERAL ATTACK—COLLECTION OF ASSESSMENT.

1. The act to provide for drainage for agricultural and sanitary purposes (section 76), as amended by Laws 1901, p. 157, provides for the formation of a township drainage district. The commissioners are required to examine the lands, and their proceedings are to be placed on the drainage records, and the district is to be named and numbered. Where the lands are in two or more townships, the petition must be filed in the office of each town clerk, who shall give notice to the commissioners of his township. These commissioners are required to hold a joint meeting, and from their number to select three, who shall be the corporate authorities of the district. *Held*, that though a district organized only by the authorities of one township, but including lands in an adjoining township, was defectively organized, yet it constituted a de facto corporation, whose existence could not be collaterally attacked by the owner of land outside the township when a drainage assessment was sought to be enforced against him.

2. As the illegality went to the organization of the district as a whole, the attack could not be justified as not made on the organization of the district, but only on the validity of the assessment on the lands outside the township.

Appeal from Moultrie County Court; E. D. Hutchinson, Judge.

Proceedings by the people for the collection of a drainage assessment against the land of Jasper Dyer, in which Dyer files objections. From a judgment sustaining the objections, the people appeal. Reversed.

W. K. Whitfield, State's Atty., and Marion Watson, for drainage district. Eden & Martin and A. W. Lux, for appellee.

CARTWRIGHT, J. A petition to the commissioners of highways of the township of Lowe, in Moultrie county, signed by owners of lands in said township upon which ditches had been constructed by the voluntary action of such owners, was filed with the town clerk of said township, asking for the formation of a drainage district to include all the lands to be benefited by maintaining such ditches, in pursuance of the provisions of section 76 of the act to provide for drainage for agricultural and sanitary purposes, as amended by an act in force July 1, 1901 (Laws 1901, p. 157). The petition included only lands situated in the township of Lowe, and the town clerk notified the commissioners of its receipt, and proceeded under the provisions of said section in relation to the formation of a drainage district of the township. Upon examining the lands to be benefited by reason of the proposed improvement of the ditches, the commissioners of highways concluded that the lands of the appellee in the adjoining township of Lovington would be benefited; and they proceeded to organize Drainage District No. 5 by user of the township of Lowe, including the lands of appellee, situated in the adjoining township. They classified the lands and assessed the same for benefits. The assessment against the lands of appellee was unpaid, and the county collector applied to the county court for judgment. The appellee appeared and filed his objections that the drainage district was organized, including lands in two townships, by the commissioners of highways of the township of Lowe without the co-operation of the commissioners of highways of the township of Lovington; that his lands were located in the township of Lovington; and that he never voluntarily connected his drainage with any ditch or ditches constructed by said drainage district. The court overruled a motion to strike the objections from the files, and, the parties having made an agreed statement of facts as above, the objections were sustained by the court, and judgment was refused.

Section 76, as amended in 1901, provides for the formation of a drainage district of a township by petition addressed to the commissioners of highways, where the owners of adjoining lands have by voluntary action constructed ditches which form a continuous line or lines and branches. The commissioners are required to examine the lands which will be benefited or damaged by reason of the improvement, and their proceedings are to be placed on the drainage records of the township, and the district is to be named and numbered. The section also provides for the formation of a district where the lands affected are in two or more townships, and in that case the petition must be filed in the office of the town clerk of each township,

who shall give notice to the commissioners of highways of his township, and cause notice to be given to the owners of land situated therein. For such a district the commissioners of highways of the several townships are required to hold a joint meeting, and from their number select three, who shall be the corporate authorities of the district, and designate the supervisor of one of the townships as treasurer of the district. In this case the district was organized without complying with the provisions of the law. It included lands in the townships of Lowe and Lovington, and was organized as a drainage district of the township of Lowe. But although the district was not legally organized, it was a de facto drainage district, and the legality of the action of the commissioners in organizing it could not be inquired into upon the application of the county collector for the purpose of collecting the assessment. There was a valid law in existence, under which such a drainage district might have been lawfully organized, and there was an attempted organization and user of the franchises pertaining to a drainage district. The acts of its officers did not constitute a mere usurpation of power without the authority of any law, but there was an attempt to organize a district which might, in law, have been organized, and an actual user of the corporate franchise. *American Loan & Trust Co. v. Minnesota & Northwestern Railroad Co.*, 157 Ill. 641, 42 N. E. 153; 8 Am. & Eng. Ency. of Law (2d Ed.) 748. In *Trumbo v. People*, 75 Ill. 561, it was found that a new school district was not legally formed because its boundary was nearer than one mile to a school house in another district, in direct violation of the law authorizing the formation of a new district, but it was held that the legality of the organization could not be inquired into in the collateral proceeding for the collection of a tax. The same rule was declared in *Osborn v. People*, 103 Ill. 224; *Blake v. People*, 109 Ill. 504; *Evans v. Lewis*, 121 Ill. 478, 13 N. E. 246; and other cases.

In a collateral proceeding for the purpose of collecting a tax or assessment, the court is without power to hear evidence for the purpose of determining whether a de facto corporation imposing the tax or levying the assessment was legally organized or not. Counsel for the appellee seem to concede that this is the rule, but they insist that they are not attacking the organization of the district or the right of the commissioners to levy an assessment within that part of the district in the township of Lowe, and they say they are only questioning the validity of an assessment on that portion of the lands in the drainage district which is not in the township of Lowe. They rely upon the decision in *Payson v. People*, 175 Ill. 267, 51 N. E. 588. In that case the district was established by the county court, which derived its jurisdiction from a statute requiring notice to the owners of lands, and the court was

without jurisdiction of one of the owners for want of such notice. There it was held that the action of the court was without jurisdiction and void, and therefore subject to collateral attack. That case we held not to be within the general rule. But there is no distinction between this case and any other attempt to question the organization of a corporation collaterally. The drainage district was organized as a whole, including lands in two townships, and the illegality affected the district as a whole. The ruling of the court in sustaining appellee's objections was in fact a holding that the district was not legally organized, and the objection that it was not so organized could not be made in this proceeding.

The judgment of the county court is reversed, and the cause remanded. Reversed and remanded.

(205 Ill. 625)

CHICAGO & A. RY. CO. v. PEOPLE ex rel. WOLFF, County Treasurer.

(Supreme Court of Illinois. Dec. 16, 1903.)

SCHOOL DISTRICTS—TAXES—CERTIFICATE TO COUNTY CLERK—SUFFICIENCY—BUILDING TAX—PAYMENT OF BONDS—PROPRIETY.

1. Under a statute requiring the directors of school districts to certify to the county clerk the amount of money to be raised for school purposes, leaving with the county clerk the clerical duty of ascertaining the rate at which the tax shall be extended, a certificate which states such rate, instead of the gross amount needed, though informal, will not invalidate the tax.

2. Const. art. 9, § 12, limits the amount of indebtedness which a school district may contract, and requires that it shall provide for the collection of a direct annual tax sufficient to pay interest on such debt as it falls due, and also to discharge the principal within 20 years. Hurds' Rev. St. 1901, c. 122, § 202, provides that, for supporting schools and repairing and improving schoolhouses, the directors shall be authorized to levy an annual tax, not to exceed a certain per cent., for educational, and a certain other per cent. for building, purposes. *Held*, that a school district could levy but two taxes—one for educational and one for building purposes—the proceeds of the latter being properly applicable to the payment of outstanding bonds issued to build a schoolhouse.

Appeal from St. Clair County Court; Jno. B. Hay, Judge.

Proceedings by the people, on the relation of Philipp Wolff, county treasurer, for the collection of a school district tax against the property of the Chicago & Alton Railway Company. From a judgment and order of sale entered against the railroad company's real estate, it appeals. Affirmed.

Chas. P. Wise, for appellant. James A. Farmer, State's Atty. (August Barthel, of counsel), for appellee.

SCOTT, J. On August 1, 1902, the directors of School District No. 4, township 2, range 10, St. Clair county, Ill., certified to the

county clerk of that county a tax levy of 2½ per cent. for school purposes, and 1¼ per cent. for building purposes, on the taxable property of the district, for the year 1902. Appellant is the owner of property in that school district. It paid all of its taxes except the tax levied for building purposes. The county collector applied at the June term, 1902, of the county court of that county, for judgment and order of sale against the lands of appellant, among others, for delinquent taxes. Appellant filed its written objections to the tax for building purposes above mentioned, and upon a hearing the objections were overruled, a judgment and order of sale entered against its real estate for this tax, and it appeals to this court.

It is objected that the certificate of the directors was not in proper form. The certificate recites that the directors require "the amount of two and one-half per cent." to be levied for school purposes, "and one and one-fourth per cent. for building purposes." The statute requires the directors to certify the amount of money that is to be raised for their purposes, and leaves with the county clerk the clerical duty of ascertaining the rate at which the tax shall be extended; and the position of appellant is that the certificate should state the amount of money required, instead of stating the rate at which the tax shall be extended. In *Chicago & Alton Railroad Co. v. People*, 155 Ill. 276, 40 N. E. 602, we held that a certificate in the same form as this one was not a strict compliance with the statute, but that the informality did not invalidate the tax. We are not inclined to depart from the rule there announced.

It appears from the testimony taken in the case that there are two schoolhouses in the district. One was built between October, 1888, and January 1, 1901. The other was built in the fall of 1901. In October, 1888, bonds to the amount of \$4,000 were issued in accordance with a vote of the people of the district, and the proceeds were used in erecting the first schoolhouse. Upon a like authorization, bonds to the amount of \$2,200 were issued in September, 1901, and the proceeds were used in building the second schoolhouse. The greater part of all this bonded indebtedness is still outstanding. At the time of the levy of the tax for building purposes, in 1902, no building had been done by the directors since the completion of the schoolhouse, in 1901; and, so far as appears, no indebtedness of the district contracted for building purposes was in existence, except the bonded indebtedness above mentioned. No building operations were in contemplation, but the building tax was levied with the purpose of applying it upon the bonded indebtedness. The question to be determined is, can a tax be legally levied for building purposes when the intention of the directors is not to pay directly for the construction of buildings, but is to apply the tax,

¶ 1. See *Schools and School Districts*, vol. 43, Cent. Dig. § 242.

when collected, to the payment of bonds of the district, the proceeds of which were used for building purposes?

Section 12, art. 9, of the Constitution of the state of Illinois, so far as applicable, is as follows: "No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. Any county, city, school district or other municipal corporation, incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." Section 202, c. 122, Hurd's Rev. St. 1901, so far as applicable, provides: "For the purpose of establishing and supporting free schools for not less than six nor more than nine months in each year, and defraying all the expenses of the same of every description, for the purpose of repairing and improving school houses, of procuring furniture, fuel, libraries and apparatus, and for all other necessary incidental expenses in each district, village or city, anything in any special charter to the contrary notwithstanding, the directors of such district and the authorities of such village or city shall be authorized to levy a tax annually upon all the taxable property of the district, village or city, not to exceed two and one-half per cent. for educational and two and one-half per cent. for building purposes (except to pay indebtedness contracted previous to the passage of this act), the valuation to be ascertained by the last assessment for state and county taxes."

The position of appellant is that there are three legal ways by which school boards may impose taxes—one under the constitutional provision for the purpose of paying interest and principal of bonded indebtedness, one for educational purposes under the statute, and one for building purposes under the statute—and that the tax here involved having been levied for building purposes, when it should have been levied to pay principal and interest of bonded indebtedness, cannot be sustained, even though that bonded indebtedness was incurred for building purposes. Language is found in the case of *Baltimore & Ohio Southwestern Railway Co. v. People*, 195 Ill. 423, 63 N. E. 262, which perhaps lends support to this view; but what was there said upon which appellant relies was unnecessary to the disposition of the question then before the court, and was, and should be treated as, mere obiter. There the school board levied one tax for school purposes, another tax for building purposes, and

still another for interest and sinking fund, which latter tax was to be applied upon the principal and interest of a bonded indebtedness incurred in obtaining money to be used for building purposes. The tax levy for building purposes in that case was held invalid, for reasons unnecessary to repeat here. The tax for interest and sinking fund was sustained. That tax had not been objected to in the court below, and in fact had been paid by the objector before the filing of the objections. The county court, however, deeming it illegal, held that it should not be paid. It was properly sustained by this court for the reason that it had been paid, and because no objections had been filed to it. While it is true that the section of the Constitution from which we have quoted is self-executing, it is equally apparent that the Legislature intended, by the language of section 202, supra, to limit the levy of taxes by school officers to the rates fixed by that section of the statute, and that enactment is not in conflict with the constitutional provision under consideration. If a bonded indebtedness has been incurred for educational purposes, the tax to meet it must be levied as an educational tax; and, if such indebtedness has been incurred for building purposes, the tax levied to meet it must be levied for building purposes, and the tax levied for either purpose, whether or not it includes any sum to be applied upon bonded indebtedness, cannot exceed the rate fixed by the statute for such purpose. We therefore hold that a school board can levy but two taxes—one for building purposes and one for educational purposes—and that bonded indebtedness must be paid out of the taxes so levied, and that the levy cannot exceed the rates provided by the statute. The term "educational," as used in section 202, supra, and the term "school," as used in the form for the certificate of the levy, which is found in the succeeding section of the statute, were intended by the Legislature to describe and refer to the same tax.

The judgment of the county court will be affirmed. Judgment affirmed.

(205 Ill. 601)

MARIE M. E. CHURCH v. TRINITY M. E. CHURCH.

(Supreme Court of Illinois. Dec. 16, 1903.)

STATUTE OF FRAUDS—ORAL TRUST—RESULTING TRUST—CHURCH MISSION—CAPACITY AS BENEFICIARY—FAILURE TO FURNISH MONEY.

1. Under the statute of frauds, requiring all declarations or creations of trusts to be evidenced by some writing, and declaring all other express trusts utterly void, an oral agreement by the trustee of a church, to whom a mission property had been conveyed, to convey it to another church, to be held until the mission is incorporated, and then to be conveyed to the mission, is ineffectual to create a trust in behalf of the mission when incorporated.

2. A mission started by a church, at which persons attend religious services, and children

attend Sunday school, but at which no society for the purpose of religious worship has been formed, the enterprise being supported by the church, does not constitute such an entity as is capable of becoming the beneficiary in a resulting trust.

3. Evidence held to show that a church mission, claiming, after its incorporation, certain property, as the beneficiary of a resulting trust, did not pay the purchase price thereof.

Appeal from Superior Court, Cook County; Jesse Holdom, Judge.

Bill by the Marie Methodist Episcopal Church against the Trinity Methodist Episcopal Church. Decree for defendant, and plaintiff appeals. Affirmed.

Holden & Buzzell (William H. Holden, of counsel), for appellant. Walker & Payne, for appellee.

CARTWRIGHT, J. The superior court of Cook county sustained the demurrer of appellee to the amended bill of appellant, which prayed the court to declare and enforce a trust in favor of appellant in real estate of which appellee held the legal title, and to order a conveyance of the same to appellant. The bill was dismissed for want of equity, and this appeal was prosecuted from the decree.

The material facts alleged in the amended bill, which by the demurrer were admitted, are as follows: The Trinity Methodist Episcopal Church of Chicago and the First Methodist Episcopal Church of said city are religious corporations, which have been and are interested in the enlargement of the work of the denomination, and have solicited funds from Methodists and the public generally for the foundation of missions, which are ultimately to form churches of the denomination. In 1883 Wentworth Avenue Mission, in Chicago, was organized with the aid of members of the Trinity Methodist Episcopal Church. Harlow N. Higinbotham, who was trustee of Trinity Church, assisted in starting the mission, and contributed means for the advancement of its interests. Trinity Church and other friends of the mission undertook to obtain aid to furnish a suitable place for public worship, and for the Sunday-school and mission work; and the real estate in question in this case was selected to be purchased for the mission by a committee of Trinity Church, of which committee Higinbotham was a member. The members of the mission and its friends in Trinity Church, and some who were not members of any church, donated money to be used in the purchase of the real estate. It was purchased and the legal title conveyed to Higinbotham by deed dated February 23, 1884, and it was paid for with the funds so contributed to the mission. In April, 1884, Higinbotham and sundry members of Trinity Church, and other promoters of the mission, laid before First Church the needs of the mission and Sunday school so established under the patronage of Trinity Church, and First Church

thereupon paid \$10,000 towards the contemplated building, and afterward contributed other moneys in aid of the mission. At the time of the gift by First Church, Higinbotham agreed that he would convey the real estate to said church within three years, free of incumbrance, and that First Church should hold it until there should be a legally incorporated Methodist church to take and hold it, when it should be conveyed by First Church to such new church, with the conditions usual in deeds of conveyance by First Church. A building was erected on the real estate, and there was expended in the purchase of the real estate and erection of the building over \$40,000, which was wholly provided by friends and members of Trinity Church and by First Church and other contributors to the mission. On March 10, 1885, Higinbotham conveyed the property to the trustees of Trinity Church. The building was erected in part for business purposes, with a reservation for the use of the mission and its Sunday school. The building was dedicated October 18, 1885, as a church, under the name of "Marie Methodist Episcopal Chapel," and on that day the mission entered into possession. It continued in occupation as a mission under the patronage of Trinity Church. Some of the workers in the mission were workers in the church, and Higinbotham continued to be a trustee of Trinity Church, which contributed to the current expenses of the mission. Portions of the property were rented by Trinity Church, and until 1901 the rent was devoted by that church to the current expenses of the mission. Up to that time Trinity Church contributed considerable sums of money in addition to the income from the rent of the property. In the year 1898 Trinity Church published a directory, in which it designated Marie Chapel as a Trinity M. E. mission, and mentioned Marie Chapel Sunday School among its societies and organizations. It also stated that Trinity M. E. Mission, a fine property on Wentworth avenue, erected at a cost of \$40,000, was dedicated in October, 1885. After 1900 Trinity Church ceased to apply the rents to the expenses of the mission, or to contribute to such expenses. On February 11, 1901, the unincorporated society became incorporated under the name and style of Marie Methodist Episcopal Church of Chicago, and soon after it demanded a conveyance of the legal title. Trinity Church replied, through Higinbotham, declining to make the conveyance, but offering to make a lease of the premises occupied by the mission for a nominal consideration. Since the incorporation of the mission as a church, it has had a regularly appointed pastor and membership, and has occupied the property, except the portion rented by Trinity Church to tenants.

The alleged verbal agreement of Higinbotham in 1885 that he would convey the real estate to the First Church within three years,

and that the First Church should hold it until there should be a legally organized Methodist church, and should then convey it to such church, is insufficient as a basis for declaring a trust, on account of the statute of frauds, by which all declarations or creations of trust must be manifested and proved by some writing. All other express trusts are declared to be utterly void and of no effect. The statute of frauds, however, has no application to trusts resulting by operation of law, and such trusts may be proved by parol. Such a trust results from the payment of the purchase money by one party, and the conveyance of the legal title to another; and it is contended that the trust alleged in this case resulted from the payment of the entire purchase money by the unincorporated society, which is now incorporated, and capable of taking and holding the legal title, which was taken by Higginbotham. It is essential, however, to the creation of such a trust, that there should have been a society formed for religious purposes, which paid from its funds the purchase price, or some definite part of it, and the trust can only arise from the original transaction. *Reed v. Reed*, 135 Ill. 482, 25 N. E. 1095; *Stephenson v. McClintock*, 141 Ill. 604, 31 N. E. 310; *Koster v. Miller*, 149 Ill. 195, 37 N. E. 46. If there was an organized religious society which furnished the purchase price of the real estate, the fact that the society had not become a corporation would make no difference, in equity, where the trust would be upheld and enforced. *Ferraria v. Vasconcellos*, 31 Ill. 25; *Hoeffer v. Cloghan*, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241; *Alden v. St. Peter's Parish*, 158 Ill. 631, 42 N. E. 892, 30 L. R. A. 232. By virtue of the statute, property held for the use of the members would, upon the incorporation of the society, rest in the corporation. *Dubs v. Egli*, 167 Ill. 514, 47 N. E. 766. The facts alleged in this case do not show that any society was formed or organized, but, rather, the contrary. In order to constitute a society, there must be a membership of persons associated together which collectively constitute the society, with such officers as are required, or at least a definite collective body acting as a society. The mission is alleged to have been a mission of Trinity Church, and the facts show that it was an establishment dependent on that church. A mission is ordinarily sustained by some church on the mission property, and is conducted by missionaries for religious instruction and worship for the benefit of those not having their own regular church privileges. The bill does not show that there was ever any society formed for the purpose of religious worship, but that the mission was sustained by Trinity Church and other well-disposed persons as a mission under the control and management of said church. The people who were aided by the mission and given religious instruction, and the children who came to the Sunday school, could not be regarded as a religious society. Trinity Church

could establish the mission, purchase the property, construct the buildings, and carry on the work of the mission, without becoming trustees of the people who were benefited by it. Neither are there any facts charged in the bill from which it can be said that the mission furnished the funds, or any part of them, for the purchase of the property or the erection of the building. The facts stated are that \$10,000 was provided by the First Church, and not more than \$15,000 by the members of Trinity Church, and that Higginbotham contributed. So far as appears, the money did not belong to the mission, but was contributed for the purpose of establishing the mission for Sunday school and other religious work under the direction, management, and control of Trinity Church. The property was erected, in a large part, for business purposes, reserving what was necessary for the Sunday school and work of the mission. Trinity Church rented the portions used for business purposes, and paid the expenses of the mission with the rent and other means. A resulting trust is not created by the facts alleged in the bill.

The court was right in sustaining the demurrer and dismissing the bill. The decree is affirmed. Decree affirmed.

(206 Ill. 64)

In re ASSESSMENT OF PROPERTY OF NORTHWESTERN UNIVERSITY.

(Supreme Court of Illinois. Dec. 16, 1903.)

TAXATION—PROPERTY EXEMPT FROM TAXATION—STATUTES—CONSTITUTIONALITY—RES JUDICATA—CONSTRUCTION.

1. The decision of the federal Supreme Court, which remains in full force and effect, upholding the constitutionality of Laws 1855, p. 483, providing that all property belonging to or owned by the Northwestern University shall be forever free from taxation, is res judicata between the same parties, not only as to the questions of fact and law decided in that suit, but also as to the grounds of recovery or defense which might have been, but were not, presented.

2. Laws 1855, p. 483, providing that "all property of whatever kind or description belonging to or owned" by the Northwestern University shall be free from taxation, exempts from taxation all the property of the corporation acquired prior to the passage of the act.

Proceedings for the assessment of certain real estate belonging to the Northwestern University. The board of review vacated the assessment, and the matter was certified by the auditor of public accounts. Affirmed.

The board of assessors of Cook county assessed for taxation for the year 1903 certain improved real estate located in the business center of the city of Chicago, owned by the Northwestern University, which is under lease to the Illinois Trust Safety Deposit Company, and in use by it for banking and safety deposit purposes. The university filed objections to the assessment with the board of review of said county, upon the ground

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1241.

that the property was exempt from taxation by virtue of section 4 of an act of the Legislature approved February 14, 1855, entitled "An act to amend an act entitled 'An act to incorporate the Northwestern University,' approved January 28, 1851," which section reads as follows: "That all property of whatever kind or description belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes." Laws 1855, p. 483. The board of review sustained the objections, and ordered that the assessment upon the fee be vacated and set aside, and assessed the leasehold interest to the trust company at the sum of \$50,000. The facts were certified by the board of review to the auditor of public accounts, and by the auditor to this court, in accordance with the provisions of section 85, p. 101, of the revenue act of 1898. It is claimed by the board of assessors the property is subject to assessment and taxation on the following grounds: First, the amendment of 1855 to the charter of the university is unconstitutional and void; and, second, the real estate in question having been acquired by the university prior to the passage of the amendment of 1855, it is not exempt from taxation.

H. J. Hamlin, Atty. Gen., for auditor public accounts. Frank L. Shepard, for board of review. John C. Richberg, for board of assessors. John P. Wilson and H. H. C. Miller, for Northwestern University.

HAND, C. J. (after stating the facts). In the case of *Northwestern University v. People*, 80 Ill. 333, 22 Am. Rep. 187, the question of the constitutionality of the amendment of 1855 to the charter of the university was presented to this court for consideration. That case was a suit between the same parties, and presenting the same issues involved here. This court then held the amendment was in conflict with the Constitution of 1848, in so far as it exempted property from taxation which was not itself used directly in aid of the purposes for which the corporation was created, but which was held for profit, merely, although the profits were to be devoted to the proper purposes of the corporation. The case went to the Supreme Court of the United States (*Northwestern University v. People*, 99 U. S. 309, 25 L. Ed. 387), where the judgment of this court was reversed; that court holding that the amendment of 1855 was a valid contract between the state and the university, the obligation of which could not be impaired by any subsequent legislation of the state imposing taxes upon the property of the corporation. That decision remains in full force and effect, and must be held to be decisive of the question now raised as to the validity of the amendment of 1855. By assigning new reasons for holding the act invalid, which existed at the time that decision was rendered, the parties cannot relitigate the question settled by that

litigation. In *Umlauf v. Umlauf*, 117 Ill. 580, 6 N. E. 455, 57 Am. Rep. 880, on page 594, 117 Ill., and page 456, 6 N. E., 57 Am. Rep. 880, the court said: "No principle is better settled than that where a question proper for judicial determination is directly put in issue and finally determined in a legal proceeding by a court having competent authority and jurisdiction to hear and determine the same, such decision and determination of the question will be deemed final and conclusive upon the parties and their privies. In all future litigation between them in which the same question arises, so long as the judgment remains unreversed or is not otherwise set aside." And in *Balley v. Balley*, 115 Ill. 551, 4 N. E. 394, at page 557, 115 Ill., and page 397, 4 N. E.: "As said in *Rogers v. Higgins*, 57 Ill. 244, the controversy cannot be reopened to hear additional reasons which before existed, and were within the knowledge of the party, in support of the same cause of action. The principle of *res judicata* embraces not only what actually was determined in the former case, but also extends to any other matter properly involved, and which might have been raised and determined in it." And in *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502, at page 133, 123 Ill., and page 164, 13 N. E., 5 Am. St. Rep. 502: "In *Beloit v. Morgan*, 7 Wall. 619 [19 L. Ed. 205], it is said: 'The principle of *res judicata* reaches further. It extends not only to the questions of fact and of law which were decided in the former suit, but also to the grounds of recovery or defense which might have been but were not presented.'"

It is contended the holding in *Northwestern University v. People*, supra, has been modified by the court rendering that opinion in the case of *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 23 Sup. Ct. 386, 47 L. Ed. 641. We do not so understand those cases. In the opinion filed in the Seminary Case the two cases are distinguished, and a different conclusion was reached in that case from the University Case, on the ground that the clauses found in the charters of the university and seminary exempting the property of said institutions from taxation were radically different, and not identical in meaning, as was contended in argument when the Seminary Case was being considered. In the Seminary Case, on page 675, 188 U. S., and page 388, 23 Sup. Ct., 47 L. Ed. 641, it was said: "The case of *University v. People*, 99 U. S. 309 [25 L. Ed. 387], is no authority for the contention contended for by the plaintiff in error. In that case the charter provided 'that all property, of whatever kind or description, belonging to or owned by said corporations, shall be forever free from taxation for any and all purposes.' The difference between the two provisions is intrinsic and material. What is lacking in the case at bar is present in the case cited, namely, a provision exempting all the property 'owned by

said corporation.' In the case before us it is the property 'belonging or appertaining to said seminary,' and the word 'belonging' is construed by the Supreme Court as not synonymous with 'owned by.' Nor is the word 'seminary' regarded in this connection as the equivalent of the word 'corporation.'

The only question remaining is, does the amendment of 1855 exempt from taxation the property of the corporation acquired prior to its passage? In *People v. Chicago Theological Seminary*, 174 Ill. 177, 51 N. E. 198, that question was incidentally involved, and it was held that all property belonging to the corporation was, in unmistakable terms, exempt from taxation. The language contained in the amendment is very comprehensive, it being, "all property, of whatever kind or description, belonging to or owned by said corporation," and is so plain as not to be open to construction, and clearly exempts all the property of the corporation from taxation, acquired prior to the passage of the amendment.

The decision of the board of review setting aside and vacating the assessment as to the fee was clearly right, and it will be approved. Decision approved.

(206 Ill. 332)

In re ARROWSMITH'S ESTATE.

(Supreme Court of Illinois. Dec. 16, 1903.)

WILL CONTEST—DEPOSITIONS—PRESENCE OF ATTORNEY—ADMISSIBILITY ON APPEAL—TESTAMENTARY CAPACITY—EXECUTION—EVIDENCE—SUFFICIENCY.

1. Hurd's Rev. St. 1890, p. 864, c. 51, provides for the taking of depositions of nonresident witnesses; and section 83 declares that a deposition taken on written interrogatories shall be rejected if the attorney of any party is present. Chapter 148, in regard to wills, provides that, if an attesting witness resides outside the state or county, it shall be lawful to issue a commission to take the testimony of such witness. *Held*, that chapter 51 does not apply to depositions of nonresident attesting witnesses taken under chapter 148 in proceedings to probate a will, and hence the presence of proponent's attorneys when such a deposition is taken is no ground for striking it from the files.

2. Hurd's Rev. St. 1890, p. 1746, c. 148, § 4, provides that, in probate proceedings, if any attesting witness resides beyond the limits of the state or county in which the will is produced for probate, a commission may issue to take his testimony, etc., while chapter 51 makes general provisions for taking depositions of nonresident witnesses. *Held* that, on trial de novo, on appeal to the circuit court from an order admitting a will to probate, a deposition taken under chapter 148 is admissible.

3. On appeal from an order admitting a will to probate, the parties are confined to the testimony of the subscribing witnesses.

4. On appeal from an order admitting a will to probate, evidence considered, and *held* sufficient to show that the will was duly executed.

5. On appeal from an order admitting a will to probate, evidence considered, and *held* sufficient to show that testator had testamentary capacity.

6. On a will contest, evidence that testator was "rational and under no restraint" was

equivalent to evidence that he was of "sound mind and memory," as required by statute.

Appeal from Circuit Court, McLean County; C. D. Myers, Judge.

Proceedings by James D. Arrowsmith to probate the will of Henry R. Arrowsmith, deceased, in which Elizabeth Bane and others appeared as contestants. From a decree admitting the will to probate, contestants appeal. Affirmed.

Ewing & Ewing (John F. Wight, of counsel), for appellants. Welty & Sterling, for appellee.

CARTWRIGHT, J. The county court of McLean county entered an order admitting to probate the last will and testament of Henry R. Arrowsmith, deceased, and an appeal was taken from the order to the circuit court. In the circuit court a motion was made by the contestants to strike from the files the deposition of William Botts, one of the witnesses attesting the will, which had been taken in Indiana by virtue of a commission issued by order of said county court. The grounds of the motion were that notice of the issuing of the commission was not given to the contestants or their attorneys, and that the attorney for the proponents of the will was present when the deposition was taken, and propounded oral interrogatories to the witness in regard to the matters inquired about by the written interrogatories. The court overruled the motion. A previous deposition of the witness had been taken, which was not deemed sufficient, on account of a defect in the commission; and the commission in question was issued by order of the county court, directing that it should issue, and that notice should be given to Ewing, Wight & Ewing, attorneys for the contestants. In support of the motion the affidavit of Mr. Wight, one of the firm of attorneys, was filed, stating that he was attending particularly to the case, that notice was not served on said firm or either of the contestants, and that he did not know that the commission was issued or the deposition taken until after the county court had admitted the will to probate. It was conceded that an attorney for the proponents was present when the deposition was taken. The witness Botts was produced at the trial by the contestants, and testified that when the deposition was taken he said, in answer to a question, that he did not believe the testator was in his right mind, and that the attorney said to him, "You don't want to keep Henry R. Arrowsmith's will from being probated?" The attorney for proponents so referred to filed his affidavit that he personally notified the firm of Ewing, Wight & Ewing, by giving notice to Spencer Ewing, one of the members of the firm, in accordance with the order of the court; and he denied that he asked the question attributed to him by Botts, or any other question, or had any conversation with

him when the deposition was taken. The commissioner who took the deposition, and the officer who served the subpoena on Botts, and was present when the deposition was taken, did not remember that the attorney said anything of the kind alleged. Chapter 51 of the Revised Statutes provides for the taking of depositions of nonresident witnesses in suits at law or in chancery, and section 33 of that chapter provides that a deposition taken upon written interrogatories shall be rejected if the attorney of any party is present. Hurd's Rev. St. 1899, p. 864. But the deposition in this case was taken in pursuance of the special provisions of chapter 148 of the Revised Statutes, in regard to wills, which contains no such provision. Section 4 of that chapter provides that, if any witness attesting a will shall reside without the limits of the state or county in which the will is produced for probate, it shall be lawful for the court, upon such notice to persons interested as the court may by special order direct, to issue a commission to take the testimony of the witness touching the execution of the will. Hurd's Rev. St. 1899, p. 1746. The special provisions of that section purport to cover the entire subject of taking depositions of witnesses to wills by commission from the county court. It makes no reference to the general statute, and in the case of *Matter of Noble*, 124 Ill. 266, 15 N. E. 850, the two statutes were regarded as independent of each other. In general, the law is that, in the absence of a statute or rule to that effect, the presence of one of the counsel at the taking of a deposition is no objection to it. 6 Ency. of Pl. & Pr. p. 531. The evidence before the court in this case justified the conclusion that the attorney had nothing to do with taking the deposition, and that it was in no manner influenced by him, and we think his mere presence in the room was not ground for striking it from the files, in the absence of any statutory prohibition.

It is further insisted that the deposition could not be read in evidence because taken under said section 4 of chapter 148, which, it is said, does not apply to the taking of depositions to be read in circuit courts, and the decision in *Matter of Noble*, supra, is cited as so holding. What was decided in that case was that on appeal the method prescribed by chapter 148 was not exclusive; that in the circuit court depositions of witnesses to a will may be taken under the general statute, although the circuit court would undoubtedly have power to order a commission with the will annexed thereto, under the provisions of chapter 148.

It is also urged that the deposition taken in the county court could not be read because the trial on the appeal was *de novo*. We do not so understand the rule. A deposition taken in a suit before the justice of the peace was held in *Jarrett v. Phillips*, 90 Ill. 237, competent to be read in the trial *de novo* in the circuit court on appeal. Depositions tak-

en and read in inferior courts are generally admitted on appeal where the case is tried *de novo*. 6 Ency. of Pl. & Pr. 576.

The circuit court, on a hearing, again admitted the will to probate; and it is argued that there was no sufficient proof of the execution of the will, or of the mental capacity of the testator to make a will. On the appeal from the order admitting the will to probate, the parties were confined to the testimony of the subscribing witnesses. *Andrews v. Black*, 43 Ill. 256. The rule in such cases is not the same as where probate is refused by the county court, in which case the proponent is entitled, on appeal, to introduce any evidence which would be competent to establish a will in chancery. The will was attested by W. A. Coss and William Botts, and the testimony of Coss at the hearing, with that of Botts as contained in the deposition, was sufficient to admit the will to probate. The attesting clause was in the usual form, reciting that the instrument was subscribed by Henry R. Arrowsmith in the presence of the witnesses, and acknowledged by him to each of them; that he at the same time published and declared the instrument so subscribed to be his last will and testament; and that the witnesses, in his presence, subscribed their names thereto. Coss testified that he was present when the testator signed the will, but did not see him sign it; that the witness signed the will at the request of the testator, and in the presence of William Botts and the testator; and that the testator saw him sign it. As to the condition of the testator's mind at the time he signed the instrument, he testified that, to the best of his opinion, the testator was rational, and that he was under no restraint. The witness Botts, in his deposition, testified that his signature attached to the will was genuine, that he saw the testator sign the instrument, that the testator asked him to sign it as a witness, and that Coss and the testator were present when he signed it. As to the condition of the testator's mind and memory, he testified that he did not believe that he was just right, but that he was capable of doing business. When produced as a witness at the trial by the contestants, Botts testified that he knew the testator, and one day met him, when he said he was going to make a will; that when he was at the testator's house afterward, hauling corn, the testator told him to "come in; we will fix that up now," and Coss also came in; that, when they were in the house, Ezekiel Arrowsmith got the will down, and laid it on the table; that the testator signed it, and Coss signed it, and, the witness not being able to write, Coss wrote his name, and the witness made his mark. As to the testator's mental condition, he contradicted his deposition, and testified that the testator was not in his right mind and capable of making a will. As to the deposition, he testified that he did not answer just in the way the depo-

sition read, but answered that he did not believe the testator was in his right mind. The attorney who was present when the deposition was taken testified that the answer given in the deposition was correct, as the witness gave it; that, when the witness said he did not think the testator's mind was just right, the commissioner said he thought he ought to state to what extent the testator's mind was not right, and the witness added that he thought he was capable of doing business. The commissioner testified that, when the witness was asked about the mental condition of the testator, he hesitated, and, when he made the statement that he was not just right, the commissioner asked him to make it more full and explicit, so that the court would understand what he meant, and he then said he was capable of doing business, and, in answer to a question, said he felt competent to do business with him. The testimony of Botts at the trial tended to impeach his deposition, but we cannot say that the court was wrong in concluding that the witness, at the time of the execution of the will, and when his deposition was taken, believed that the testator had testamentary capacity. The clear preponderance of the testimony was that the deposition was correctly taken, and the court was justified in regarding the deposition as representing the actual belief of the witness.

It is contended that the testimony of Coss as to the mental condition of the testator did not meet the requirement of the statute, because he said the testator was rational and under no restraint, instead of saying that he was of sound mind and memory. In *Yoe v. McCord*, 74 Ill. 33, and *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167, it was held that sound mind and memory is equivalent to sanity, and one who is rational and acting rationally is, in the common understanding, sane and sound of mind. We think the testimony of the witness was equivalent to the language of the statute.

The judgment is affirmed. Judgment affirmed.

(205 Ill. 643)

CITY OF MACON v. HOLCOMB.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—NEGLIGENCE—DEFECTIVE SIDEWALK—ACTION FOR INJURIES—INSTRUCTION—COMPARATIVE NEGLIGENCE.

1. In an action against a city for injuries from a defective sidewalk, an instruction that the city was bound to use all reasonable care and diligence was not prejudicially erroneous because of the use of the word "all," other instructions having properly defined the legal duty of the city.

2. In an action against a city for injuries from a defective sidewalk, an instruction imposing on the city the absolute duty of keeping sidewalks in repair was not prejudicially erroneous, where the law was correctly stated in many other instructions.

3. There is no prejudicial error in refusing requested instructions where the same principles

of law are stated in instructions given for the other party.

4. In an action against a city for injuries from a defective sidewalk, an instruction that defendant would be liable for its negligence, though plaintiff contributed to the injury, if by ordinary care plaintiff could not have avoided the consequence of defendant's negligence, was prejudicially erroneous, as qualifying the rule placing on plaintiff the burden of proving that he did not contribute to the injury, notwithstanding that the correct rule was laid down in other instructions.

5. The doctrine of comparative negligence does not exist in Illinois.

Appeal from Appellate Court, Third District.

Action by Benjamin F. Holcomb against the city of Macon. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Reversed.

Redman & Hogan, for appellant.

WILKIN, J. The appellee brought this action in the circuit court of Macon county against the appellant to recover for an injury to his ankle alleged to have been caused through the negligence of the defendant in failing to keep in repair a sidewalk on one of its streets. The plea was "Not guilty," and upon a trial by jury a verdict and judgment were rendered in favor of the plaintiff for \$1,200. The defendant appealed to the Appellate Court, where the judgment of the circuit court was affirmed, and to reverse the latter judgment this appeal is prosecuted.

All controverted facts, including the amount of damages, having been settled by the judgment of the Appellate Court, and no objection being here made as to the ruling of the trial court on the admission or exclusion of evidence, the only question for our consideration arises upon the giving and refusing of instructions.

It is insisted that error was committed in the giving of the second, third, fifth, and seventh instructions on behalf of the appellee, and the refusal to give the seventh asked by the appellant. The criticism made upon the second instruction given for plaintiff is that it uses the expression "all reasonable care and prudence," whereas it is said it should have read "reasonable care and prudence," omitting the word "all." The instruction would have been more accurate if it had omitted that word, but the jury could not have been misled by it, especially in view of the fact that other instructions given on behalf of both parties correctly defined the legal duty of the city in keeping its sidewalks in repair. It is said the third imposed upon the city the absolute duty of keeping its sidewalks in repair, whereas, the law simply required it to exercise diligence in that regard. Considering the instruction as a whole, it is not subject to the criticism made; but, if it were otherwise, the law is correctly stated in several other instructions given. The most

¶ 5. See *Negligence*, vol. 37, Cent. Dig. § 162.

that can be justly said as to either the second or third of plaintiff's instructions is that, standing alone, they might have been calculated to mislead the jury to the prejudice of defendant; but, in the light of others given, we are clearly of the opinion that such could not have been the case.

We see no substantial ground for the objection made to the seventh instruction given on behalf of appellee, which relates only to the measure of damages. It is in substantial conformity with the decision of this court in the case of *Chicago & Eastern Illinois Railroad Co. v. Kneirim*, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259.

The complaint made of the refusal of the seventh instruction asked by the city is without substantial merit. It laid down correct principles of law, but they were fully announced by those given on behalf of the city.

The objection to the fifth instruction given on behalf of the plaintiff remains to be considered. That instruction is as follows: "The court instructs the jury that the defendant corporation is bound, by law, to use reasonable care and caution to supervise and keep its streets and sidewalks in a reasonably safe condition for travel by night as well as by day, and, if it fails to do so, it is liable for any injuries sustained in consequence of such failure, provided the party injured is himself exercising due care and caution; and the fact that the plaintiff may in some way have contributed to the injury sustained by him will not prevent his recovery, if by ordinary care he could not have avoided the consequence to him of the defendant's negligence." It is, in our opinion, clearly erroneous, in that it excuses the plaintiff from exercising due care, and entitled him to recover even though he may by his own negligence have contributed to his injury. In other words, it is an attempt to qualify the rule which imposes upon the plaintiff in such cases the burden of proving by a preponderance of the evidence that he was at the time of the injury in the exercise of due care for his own safety; that is to say, he did not by his own negligence contribute to the injury of which he complains. He could not make out his case by proving a less degree of care than that which a reasonable person would have exercised under like circumstances. The doctrine of comparative negligence no longer exists in this state. In *West Chicago Street Railroad Co. v. Liderman*, 187 Ill. 463, 58 N. E. 367, 52 L. R. A. 655, 79 Am. St. Rep. 226, in speaking of the rule which obtains in some of the states, "that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence," we said: "Such has never been the law in this state. Here the rule is, where a party seeks to recover damages for a loss which has been caused by negligence or misconduct,

he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury; and the burden of proof is upon the plaintiff to show not only negligence on the part of the defendant, but also that he exercised proper care and circumspection, or, in other words, that he was not guilty of negligence." Although several of the instructions given laid down the correct rule in this regard, they cannot be said to correct the error in the fifth. It positively lays down a rule directly in conflict with the correct one, and, as we have frequently said in such case, it is impossible to say which instruction the jury followed.

For the error in giving the fifth instruction on behalf of the plaintiff, the judgments of the circuit and appellate courts must be reversed, and the cause will be remanded to the circuit court for another trial. Reversed and remanded.

(205 Ill. 547)

GAGE v. PEOPLE ex rel. **HANBERG**, County Treasurer (11 cases).

McCHESNEY v. SAME.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—ADVERTISEMENT—DATE OF DELINQUENCY—NAMES OF OWNERS—KNOWLEDGE OF COLLECTOR—EVIDENCE—COSTS ACCRUING AFTER ADVERTISEMENT—JUDGMENTS—FORM.

1. Where the advertisement of delinquent special assessments gave the number of each warrant, and the date when it was certified for collection, which was the date when the assessment was legally due, an objection that the advertisement did not state the years for which the several assessments were due was unsustainable.

2. Where the collector of special assessments had correctly given the name of the owner of the property sought to be charged in the delinquent list, such fact was sufficient evidence that he had knowledge of the owner's name, and was therefore bound to state the same in the advertisement as provided by the statute.

3. The collector of special assessments was not bound to search the records of other offices than his own to find the names of the owners of property subject to special assessments, and, in the absence of evidence that the return of the delinquent special assessment to the county collector contained the owner's name, or that such name was otherwise brought to his knowledge, he was not required to publish such name in the advertised notice of the assessment.

4. Where a special tax assessment collector omitted the name of the owner of property sought to be charged from the published notice of the assessment, such owner was entitled to introduce in evidence the delinquent list of the previous year on the same warrant for the collection of the same assessment, giving his name as the owner of the lots, to show that the collector had notice that he was the owner.

5. The fees and costs allowed by law subsequent to the date of the advertisement may be properly added to the total amount due on a special assessment, and included in the judgment against the property on the delinquent list.

6. Where the judgments entered for special assessments did not find anything to be due, and did not fix any amounts by reference to the delinquent list or otherwise, but purported

to be mere judgments of sale against the property for the amount of the special assessments, interest, penalties, and costs due thereon, such judgments were improper.

Appeal from Cook County Court; L. O. Ruth, Judge.

Consolidated actions by the people, on the relation of John J. Hanberg, county treasurer, against Henry H. Gage and another, for delinquent special assessments. From judgments in favor of plaintiff, defendants appeal. **Reversed.**

F. W. Becker, for appellants. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

CARTWRIGHT, J. Twelve appeals from judgments of the county court of Cook county were consolidated in this case on motion of the appellee, with the understanding that the records were identical, except as to the description of the property, and that the errors assigned and points raised were the same. The judgments were entered on the application of the county collector of Cook county against lots in the city of Chicago for delinquent special assessments. In each case a special appearance was entered by the owner, and the jurisdiction of the court was challenged for alleged defects in the published notice of the application by the collector. The objections being overruled, there was no further appearance, and the judgments were entered.

The first point made is that the advertisement did not state the years for which the several assessments were due, as required by the statute. A special assessment is due and payable when the warrant for its collection is issued, and it does not become legally due, so that it may be demanded and collected from the owner, until that time. By the law the clerk is to certify the assessment roll and judgment, and with it issue a warrant for the collection of the assessment, and the warrant is authority for such collection. The advertisement in this case gave the number of each warrant, and date when it was certified for collection, and therefore the date when the assessment was legally due was stated in the notice.

It is argued that the date of the certification and issue of the warrant does not give information as to the year for which the assessment is due, for the reason that the assessment may have been subsequently modified, or the judgment may have been appealed from, or the warrant, as originally certified, recalled by the court. The notice, on its face, was sufficient, in showing for what years the assessments were due, and it was not necessary to also show by the notice that an assessment had not been afterward modified or set aside, or the warrant recalled.

It was a ground of objection in each case that the name of the owner was omitted from the advertisement. The record shows that

the fact so alleged in the objections was not true as to any of the cases but three. In each of nine cases the name of the owner was given in the advertisement, and it was right to overrule the objection for want of any foundation in fact.

In case No. 3,288 (Henry H. Gage v. People), on warrant No. 25,532, the notice omitted the name of the owner, and the delinquent list contained it. The statute provides that the notice shall contain the names of the owners, if known, and the requirement is an important safeguard to the interests of persons against whose property judgment is to be asked. The object of notice is to apprise the owner of the intended application, and, where the name of the owner is known to the collector, the failure to give it in the advertised list will render the notice bad. *Cooley on Taxation*, 336. In the case of *McChesney v. People*, 178 Ill. 542, 53 N. E. 356, the fact that the collector had given the owner's name correctly in the delinquent list was considered sufficient evidence that he knew it. The court erred in overruling the objection in No. 3,288.

In No. 3,297 (Henry H. Gage v. People), on warrant No. 25,674, the name of the owner was omitted from the advertisement, but it did not appear in the delinquent list, and the only evidence tending to show that the county collector knew the name of the owner was the original assessment roll. There was no evidence that the return of the delinquent special assessment to the county collector contained the name of the owner, or that it was otherwise brought to his knowledge. We do not think the collector was bound to search the records of other offices to learn the name of the owner.

As to No. 3,301 (*A. B. McChesney v. People*), on warrant No. 24,238, the record shows that the name of the owner was omitted from the notice; and the objector offered in evidence the delinquent list of the previous year upon the same warrant for the collection of the same assessment, giving A. B. McChesney as the owner of the lots in question. The court sustained an objection to the offered evidence, and an exception was taken to the ruling. The collector had given the name of the owner correctly in the delinquent list of the previous year, which he could not have done if the name had been then unknown to him. Proof of that fact tended to show that the collector knew the name of the owner. It was competent to prove that he did know it, and it was error to reject the evidence tending to prove that fact.

The next point is that the total amount due is omitted from the advertisement, and this seems to apply to all the cases. There was a variance between the delinquent list and advertisement to the amount of 23 cents against each tract. The advertisement gave the total amount returned delinquent to the county collector, and showed the amount due for the special assessment, but the delinquent

list also contained the 23 cents for costs. The fees and costs allowed by law subsequent to the date of the advertisement are sufficient to cover this amount, and it is not improper, in rendering judgment, to add the subsequently accruing costs not earned at the time of the advertisement. The court was right in overruling that objection.

In each of the cases the form of the judgment is the same, and does not comply with the plain requirements of the statute. The court is required to examine the delinquent list, and to hear and decide upon written objections offered by any person interested in lands or lots to the entry of judgment against the same, and to pronounce judgment as the right of the case may be. The judgment must be in favor of the people of the state of Illinois against the tract or tracts or lots of land, or part thereof, for the sum annexed to each, or such part as the court finds to be due and payable; being the amount of taxes, special assessments, interest, penalties, and costs due severally thereon. These judgments find nothing to be due, and fix no amounts, by reference to the delinquent list or otherwise, but purport to be judgments "of sale" against the property for the amount of the special assessments, interest, penalties, and costs due thereon. A "judgment of sale" for whatever is due is not a judgment against the property for a definite or specific amount. The statute contemplates a judgment against the property, and an order for the sale of the same to satisfy the judgment, and the entry of a "judgment of sale" is rather an order for the enforcement of a judgment than a judgment itself. The practice in such cases was settled in *Gage v. People*, 163 Ill. 39, 44 N. E. 819, and *McChesney v. People*, 171 Ill. 267, 49 N. E. 491, where the judgments were reversed, with directions to the county court to enter proper judgments.

The judgments in cases No. 3,288 (*Henry H. Gage v. People*) and No. 3,301 (*A. B. McChesney v. People*) are reversed, and as to them the causes are remanded to the county court of Cook county for further proceedings in accordance with the views herein expressed. The remaining judgments are reversed, and the causes are remanded to said county court, with leave to the county collector to move for, and a direction to the county court to enter, a correct judgment in each case in accordance with the statute. Reversed and remanded.

(206 Ill. 611)

MCCHESNEY et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—PUBLIC HEARINGS—CHANGE OF MATERIAL—REMONSTRANCE—VACATION—ORDINANCE—DESCRIPTION OF IMPROVEMENT—SUFFICIENCY.

1. Local Improvement Act, § 8 (Hurd's Rev. St. 1901, p. 378), permitted the substitution of another ordinance for municipal improvement

without a further public hearing, where at the public hearing the proposed improvement was not abandoned, and by such section, as amended, the board of public improvements was allowed to adopt a new resolution changing the scheme proposed, without a second public hearing, when the change did not increase the cost more than 20 per cent. *Held*, that where, after a public hearing was had on a proposed improvement for grading, curbing, and paving a street with asphalt at an estimated cost of \$21,000, the board did not abandon the improvement, but substituted different material and a less expensive mode of making the improvement, a further public hearing was not required.

2. Local Improvement Act, § 8 (Hurd's Rev. St. 1901, p. 378), provides that when a remonstrance to a proposed improvement, signed by a majority of the frontage property owners, is filed with the board of public improvements, the board shall stay proceedings for one year from date, and that such remonstrance shall contain the signatures of the owners, or their legal representatives, of the property described therein; and section 9 declares that, with any ordinance for a public improvement presented by the board to the city council, shall be a recommendation of such improvement signed by at least a majority of the members of the board, and that such recommendation shall be prima facie evidence that all the preliminary requirements of the law have been complied with, and that any variance shall not be fatal, unless the court shall deem the same willful or substantial. *Held*, that where the board of public improvements stayed the proceedings on an improvement for a year on the filing of a remonstrance, and thereafter passed a resolution reciting that a number of the signatures on the petition were fraudulent, and thereupon set aside the suspension, and submitted an ordinance to the council, with a recommendation of its passage for such improvement, the record of such orders and resolutions, in the absence of proof that the remonstrance was properly signed and complied with the statute, was insufficient to rebut the prima facie case of regularity made by the recommendation of the board to the city council.

3. An ordinance providing for the curbing of a street, and declaring that an earth filling be placed back of the curbstones, even with the top of them, 4 feet wide at the top, with a slope down the outside of 1½ feet horizontal to 1 foot vertical, was not objectionable on the ground that it failed to state the depth of such filling, so that the quantity thereof could be determined.

4. An ordinance providing for the paving of a street, and requiring a layer of limestone screenings to be spread "so as to completely fill all the interstices in the layer of limestone," which was to be three inches thick, was not objectionable for failure to state the thickness of the layer of screenings.

Appeal from Cook County Court; O. N. Carter, Judge.

Application by the city of Chicago against Alfred B. McChesney and others to recover special assessments for paving. From a judgment of the county court overruling defendants' objections and confirming the assessment, defendants appeal. Affirmed.

F. W. Becker, for appellants. William M. Pindell (Charles M. Walker, Corp. Counsel and Edgar Bronson Tolman, of counsel), for appellee.

WILKIN, J. This is an appeal from a judgment of the county court of Cook county

overruling the objections of appellants and confirming a special assessment levied to pay for curbing, grading, and paving Seventy-Fourth street, in the city of Chicago.

On June 26, 1901, the board of local improvements passed a resolution originating the scheme for curbing the street with sandstone curbing, grading the street, and paving it with blast furnace slag, crushed limestone, and crushed granite. At the public hearing on July 18, 1901, the board passed a resolution abandoning the improvement mentioned in the former resolution, and directing the engineer to prepare an estimate of the cost of an improvement of the street with asphalt and a combined curb and gutter. Estimates having been presented by the engineer showing the cost would be \$21,000, the board on February 5, 1902, passed a resolution providing for the latter improvement, and fixed the time and place for the public hearing. On the day fixed, March 6, 1903, after proper notice, the public hearing was had, and, objections being presented, the board amended its resolution and substituted for the combined curb and gutter sandstone curbing, and for asphalt, slag and crushed limestone and granite, and directed the engineer to prepare an estimate of the cost of the improvement as amended, and that the improvement be proceeded with in accordance with the resolution of February 5, 1902, "as hereby amended and modified." The estimated cost of the improvement as last provided for was \$12,500. Thereafter, on April 7, 1902, on receiving what appeared to be a protest or remonstrance by a majority of the property holders, the board passed a resolution to the effect that the improvement be stayed one year. Afterward, on the 26th of June, 1902, the board passed a resolution reciting that it appearing to the board that a number of the signatures upon the petition and the affidavit are fraudulent (meaning the protest), the former order staying the proceedings was thereby rescinded, and the secretary was instructed to prepare the ordinance and submit it to the council, together with the recommendation of the board, for its passage. The ordinance was passed by the council, and the following November the petition for the assessment was filed with the county court.

The first objection urged by the appellants is that the board did not take the necessary preliminary steps; that is, that no public hearing was had as to the improvement provided for by the board at its meeting on March 6, 1902, and embraced in the ordinance submitted to and passed by the council. The contention is that the board abandoned not only the first proposed improvement, but also the second one—that is, the asphalt pavement and the combined curb and gutter—and that section 8 of the local improvement act (Hurd's Rev. St. 1901, p. 378) permitted the submission of an ordinance without a further public hearing only where, at the public hearing, "the said proposed improvement be not

abandoned." We do not understand that the grading, paving, and curbing the street was abandoned at the public hearing on March 6th, but only that different materials and a less expensive mode of making the improvement were substituted. Said section 8, as amended in 1901, authorizes the board, at a public hearing, to adopt a new resolution changing the scheme proposed, without another public hearing, when the change does not increase the cost more than 20 per cent. *Washburn v. City of Chicago*, 198 Ill. 506, 64 N. E. 1064. In the case at bar the cost was greatly decreased. We are of the opinion that no further hearing was necessary.

It is again insisted that the rescission by the board, at its meeting on June 26, 1902, of its former order staying the proceedings for one year, was without authority of law, and void. Section 8, as amended in 1901, provides that in cities of 100,000 inhabitants or more, "when a remonstrance petition is filed by the owners of a majority of the frontage on the line of the proposed improvement with the board of local improvements within thirty days after the public hearing thereon, said board shall thereupon stay all proceedings therein for one year from said date." The said section also provides that the remonstrance "shall contain the signatures of the owners or legal representatives, the description of the property owned or represented, the number of feet so owned or represented, and shall be verified by affidavit of one or more property owners fronting on the line of the proposed improvement, setting forth that the party making the affidavit is a property owner, fronting on the proposed improvement, and that the parties who signed the same are the owners or legal representatives of the property described therein." The contention is, first, that the board had exhausted its power when it acted on the remonstrance (whether such remonstrance was fraudulent or not) and stayed the proceedings for one year, and, secondly, that if it had power to set aside such stay order it could not do so without notice to the property owners; and authorities are cited which are thought to support this view. Undoubtedly, in all such statutory proceedings whereby the owner is deprived of his property without his consent, the statute must be strictly complied with, and we have often so held. But the whole statute, so far as applicable, must be considered. The proceedings before the board can have no force without the passage of the ordinance by the city council, and section 9 of the same statute provides as follows: "With any such ordinance, presented by such board to the city council or board of trustees, shall be presented also a recommendation of such improvement by the said board, signed by at least a majority of the members thereof. The recommendation by said board, shall be prima facie evidence that all the preliminary requirements of the law have been complied with, and if a variance be shown on the pro-

ceedings in the court, it shall not affect the validity of the proceedings, unless the court shall deem the same willful or substantial." It is not denied that the General Assembly had the power to make such recommendation accompanying the draft of the ordinance to the council prima facie evidence that the board had complied with all the preliminary requirements of the law. Even if variances in proceedings by the board are shown on the trial in court, they will not, as the statute expressly provides, affect its validity, unless they are deemed by the court to have been willful or substantial.

On the trial in the county court the appellants offered no evidence, except the record of the several orders and resolutions adopted by the board, already mentioned. We are of the opinion that such evidence was not sufficient to overcome the prima facie case made by the petitioner. It does not appear that the remonstrance was given in evidence, or any proof whatever made that it complied with the statute. It appeared that proper notice was given of the hearing, but whether notice was given of the proceedings to set aside the order staying the work for one year does not appear. Appellants might have shown, if it had been the fact, that a remonstrance within the provisions of the statute was filed with the board, and that the subsequent action by the board and city council within the year was unauthorized. Not having done so, the prima facie case made by the petition was not overcome. If no such remonstrance was filed, or if it was found to be fraudulent, as the board afterwards ascertained, it was not its duty to postpone the proceedings for a year. At all events, it was open to appellants in the county court to prove, if they could, that there was a substantial or willful departure by the board from the course of proceeding prescribed by the statute. To require the petitioner to prove, in the first instance, that the proceedings of the board were in exact compliance with the statute, before the assessment could be confirmed, would entirely abrogate said section 9. Departure from the statute, to affect the validity of the proceedings, must be substantial or willful.

The next alleged error insisted upon is that the ordinance, in requiring earth filling to be placed back of the curbstones and even with the top of them, 4 feet wide at the top, with a slope down the outside of $1\frac{1}{2}$ feet horizontal to 1 foot vertical, fails to state the depth of such filling so that its quantity could be determined, and *Willis v. City of Chicago*, 189 Ill. 103, 59 N. E. 543, is cited in support of the contention that the ordinance is insufficient in the respect mentioned. We do not understand that it was necessary to state in the ordinance the number of cubic yards of filling to be put in. If the filling was to be even with the top of the curb and four feet wide, with the slope as stated, it would be clear to every one that the amount of filling would depend

on the configuration of the ground after the grading was done and the curbstone put in, and that the depth of the filling would depend on the varying surface of the ground. We think all the necessary requirements were stated from which the contractor could determine the amount of work to be done, as well as any other person interested. The same objection might with as much, and even more, reason, have been made to the provision for grading the street. The ordinance does not state, nor was it necessary that it should state, how much dirt was to be removed, nor to what depth along the street, but only what the surface of the street, when graded, should be. The grading would include, in many cases, dirt to be removed from one place and deposited in another, and it would not be necessary to state in the ordinance anything more than the grade and the conformation, when completed, of the surface of the street. We see no reason why any stricter rule should be applied to the filling back of the curbing. In *Willis v. City of Chicago*, supra, the question was as to the depth to which the curbing should be placed. That question could not be determined from the ordinance. Its height was given, but, without anything from which its depth could be ascertained, its size and cost could not be determined so as to enable contractors to make an intelligent bid. As said in that case, "the top is the grade of the street, but the bottom may be one foot or two feet below the grade, for anything shown in the ordinance." That is a very different thing from "filling," which every one would know would have to begin at the bottom of the depression to be filled. Counsel also cites *City of Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926, but, like the *Willis* Case, it has no application. The ordinance there failed to state at what depth below the surface the sewer was to be placed, hence it was impossible to ascertain what excavation would be necessary.

The objection that the ordinance requires a layer of limestone screenings to be placed on the crushed limestone, and a layer of bank gravel to be placed on the crushed granite, without stating the thickness of these layers of screenings and bank gravel, is not sustained by the record. The abstract does not fairly state the provisions of the ordinance in that regard. The ordinance does provide that the layer of limestone screenings shall be spread "so as to completely fill all the interstices in the layer of limestone"—that is, in the three inches of crushed limestone provided for—and the same requirement was made as to the layer of granite screenings placed on the three inches of bank gravel.

Some other minor objections are made, which we have examined, but find without substantial merit, and they need not be further noticed.

No reversible error appearing, the judgment of the county court will be affirmed. Judgment affirmed.

(25 Ill. 310)

CARTER v. LOVE et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

VENDOR AND PURCHASER—OPTION—ACCEPTANCE—AGENCY—COMPENSATION—CONTRACTS—RESCISSION.

1. Where a contract for an option to purchase land also provided that, if the purchaser should be the cause of any person purchasing the property, he should be entitled to all obtained over a certain price per acre, and a provision for commission, which was contained in the blank form of contract used, was stricken out, the purchaser, if regarded as agent of the seller, was entitled, as compensation, to all he obtained over the agreed price per acre, and his duty to his principal did not require him to turn over to the latter the excess which he received for the land over the agreed price.

2. The fact that one party to a contract does not fully understand its legal effect does not justify a court in setting it aside.

3. A contract giving an option to purchase land, though unilateral and without consideration as to the vendee, becomes binding and capable of being specifically enforced upon its acceptance by the purchaser before being withdrawn.

4. Plaintiff gave defendant an option to buy certain real estate, agreeing to convey on payment of \$1,000 in cash; balance to be paid in one year. Later, and before the expiration of the option, defendant sold the land to another person, who deposited \$1,000 in a bank, which notified defendant of the deposit; and the latter informed plaintiff that he would take the land, and told him of the deposit, and some time later, after the execution by plaintiff of the deed, sent him a draft for the \$1,000. Held to constitute an acceptance of the option by defendant.

5. Where a contract giving an option to buy land allowed the purchaser until a certain date to perform his part of the contract, the vendor could not, after acceptance by the purchaser, and before the date set for performance, prevent him from making an effectual tender of performance by filing a bill to rescind the contract.

Appeal from Circuit Court, Whiteside County; Frank D. Ramely, Judge.

Action by George R. Carter against Martin G. Love and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Samuel J. Howe, for appellant. C. L. & C. E. Sheldon, for appellees.

CARTWRIGHT, J. About January 10, 1902, appellant, George R. Carter, a resident of Chicago, received a letter from appellee Martin G. Love asking whether his farm of 120 acres, near Tampico, in Whiteside county, was for sale. On January 14th Carter replied that the farm was not on the market, but if he could get \$77 per acre, net, he would sell, and did not want all cash. Love went from his home at Tampico to Chicago, and on January 20th met Carter. After some negotiations they agreed upon the terms of a contract, and Love asked Carter if he had any one he wanted to go to to have the contract drawn. Carter suggested that Love draw the contract, and he took a printed form, in which he made some changes; striking out a

provision for a commission of \$1 per acre to be allowed him for the sale of the farm, and making the contract correspond with the agreement of the parties. Carter read it over, and, being satisfied with it, signed it. It was as follows:

"This indenture, made and entered into this 20th day of January, A. D. 1902:

"Witnesseth, That I, G. R. Carter, of Chicago, county of Cook, State of Illinois, in consideration of one dollar to me in hand paid by M. G. Love, of Tampico, county of Whiteside and State of Illinois, do grant to him, M. G. Love, the sole option to purchase the following described piece, parcel or lots of land of which I am the owner thereof, namely, one hundred and twenty acres of land one mile southwest of Tampico, Ill., now occupied by John Nelson, \$1,000 to be paid March 15, 1902, \$8,240 to be paid March 15, 1903, if purchased by M. G. Love or sold by M. G. Love to another party. Now, if the said M. G. Love shall at any time before the expiration of this option so desire, I agree, in consideration of the sum of \$9,240, to convey to said M. G. Love, or as he shall direct, the above-described premises by clear warranty deed and good abstract of title. The above described property is not encumbered. For the faithful performance of the above agreement I bind myself in the penal sum of \$500, to be paid said M. G. Love if I fail to fulfill this agreement. I agree that if said M. G. Love be the cause of any person or persons purchasing the said above-described property, that he shall be and is entitled to a commission of all over \$77 per acre on farm. I also agree that if, before the expiration of this option, I fail to notify said M. G. Love to the contrary, this option shall be considered renewed on same terms per purchase for one year, hereby binding myself, my heirs, my administrators or assigns for the fulfillment of this agreement at any time during the period of fifty-three days after date first above written.

"I have hereunto set my hand. G. R. Carter. [Seal.]"

Carter told Love that after writing him he had received a letter from Mahlon Fell, at Tampico, asking if the farm was for sale, but had not answered the letter. He wrote to Fell, stating that the farm was not for sale. On his return to Tampico, Love entered into negotiations with Fell for the sale of the farm to him when he should obtain title from Carter, and entered into a contract to sell Fell the land at \$85.50 per acre, out of which he was to rebate \$400 for delay in delivering possession until the expiration of a lease of the farm to John Nelson. Fell deposited in the Tampico Bank \$1,000 to apply on the contract, and the bank addressed a letter to Love stating that the \$1,000 had been deposited. On January 30th Love went to Chicago, taking this letter with him, and told Carter that he would take the farm at Carter's terms, or that he had sold it, and would

¶ 2 See Contracts, vol. 11, Cent. Dig. §§ 418, 1153.

take it as agreed; and, in response to an inquiry from Carter, he said that Fell would eventually get the farm. Carter criticised the character of the letter from the Tampico Bank, stating that it should have been addressed to him instead of Love, but he made no objection to carrying out the trade; and, with his wife, he made and acknowledged a warranty deed of the farm to Love. He also gave Love the following writing:

"Chicago, Ill., Jan. 30, 1902. I hereby agree with Martin G. Love to leave \$6,000 of a loan secured by mortgage on the premises in Tampico township, Whiteside county, Illinois, conveyed by me to him, and that this sum of \$6,000 in loan so left will be accepted as a part of the purchase price to me to be paid by him. Interest at five per cent. per annum, dating from March 1, 1902. George R. Carter."

The deed and writing were, by agreement of Carter and Love, inclosed in an envelope, and mailed to the Bank of Tampico, to be held until the mortgage should be executed and the rest of the purchase money paid. On February 3d Carter wrote Love that he had sent to Morrison for the abstract, and, as soon as received, he would send it and the lease. On February 4th Carter received a letter from Love inclosing a draft for \$1,000 to apply on the purchase of the farm, and requesting Carter to mail the abstract and the lease assigned to him to the Tampico Bank, and then he would assign the lease to Fell. On February 6th Carter acknowledged the receipt of the draft, and said he would send the abstract as soon as it was returned from Morrison. On February 7th Love wrote to Carter, acknowledging the receipt of his letter on the 6th, and asking him to forward the abstract as soon as possible, saying it must reach him before March 1st, and stating that he had papers made from Fell and wife direct to Carter for \$6,000, due in five years, with interest at 5 per cent., and had written Fell \$700 insurance for five years, loss payable to Carter. Carter had not cashed the draft, and on February 13th he went to the Tampico Bank, and was shown the note and mortgage from Fell and wife to him. He said he was not satisfied with the form of the papers. He thought his deed should run direct to Fell, or else the mortgage should have been made by Love, as there was no deed from Love to Fell. By agreement the papers were then sent by the Tampico Bank to the First National Bank of Chicago for inspection. On February 17th, 13 days after receiving the draft from Love, Carter wrote the Tampico Bank that after examination of the papers he could not approve them, and he returned the draft. He also wrote Love, requesting him to come to Chicago. Love declined to do so, and on February 22d Carter telegraphed him to meet him at the Tampico Bank the following Tuesday. Carter went to Tampico and saw Love on February 25th, and then served no-

tice on the bank not to deliver the deed deposited for Love. On the next day, February 26th, Carter filed his bill in the circuit court of Whiteside county against Love, Fell, and the banker, Glassburn, asking for an injunction against placing anything on record to cloud his title, and praying that his contract of January 20th, and the memorandum relating to the \$6,000, should be canceled as having been procured by fraud; that Fell should be decreed to elect whether he would take the land from Carter at the price he was to pay Love; and that, if he elected not to do so, he should be barred from claiming any title to the lands. On the next day, February 27th, Love, with his wife, executed a note and mortgage for \$6,000, payable to Carter, in accordance with the memorandum, and deposited it in the Tampico Bank for Carter. On March 1st Love deposited the cash payment of \$3,240, and notified Carter that he had complied with the conditions of the contract. The defendants answered the bill, and Love and Fell filed cross-bills. Love's cross-bill set up the contract, and sought a specific performance of it; praying that the bank should be decreed to deliver the deed from Carter to him, and deliver the money and notes to Carter. Fell's cross-bill asked that his contract with Love should be carried out. Carter answered the cross-bills, and the issues were referred to the master in chancery, who took the evidence, and reported the same, with his conclusions, to the effect that Love was not the agent of Carter in the transaction, but that he had an option to purchase the lands at \$77 per acre; that there was no fraud or misrepresentation, and the transaction was fair; that Love was entitled to the deeds, and Carter to the notes and money in the bank; and that the optional contract was for a good and valuable consideration, and was not revoked by Carter. He recommended a decree in accordance with the prayer of Love's cross-bill, and also that Fell should pay the purchase price to Love, and Love should convey subject to the \$6,000 mortgage. The court overruled exceptions to the report, except so far as it related to a conveyance by Love to Fell, and entered a decree dismissing Carter's bill and Fell's cross-bill, and granting relief to Love on his cross-bill. The decree ordered the bank to deliver the deed of Carter to Love, and to deliver the money, note, and mortgage to Carter.

The first proposition stated for appellant is that Love was Carter's agent, and therefore, could not take advantage of his agency to make a profit for himself over and above his compensation. If it should be admitted that Love was Carter's agent, it must also be conceded that he did not make a profit for himself over the agreed compensation. It is true that one who acts as agent for another in the sale of land has no right to speculate upon the subject of the agency at the expense of his principal. He will not be allowed to put

himself in a position antagonistic to his principal, to whom he owes a duty; and, if he sells for a higher price than that limited by his principal, he is bound to account for the excess over and above his own charges and commissions. *Merryman v. David*, 31 Ill. 404; *Kerfoot v. Hyman*, 52 Ill. 512. But where there is no fraud the compensation may be agreed upon in any manner or to any amount by the parties. It is not uncommon to agree that an agent shall have as his compensation all that he can obtain over a certain fixed price, and in the absence of fraud such an agreement is conclusive upon the parties. In this case the proposition of Carter in his letter was that he should receive \$77, net, per acre, by which he would not be liable to any commissions; and, when the contract was entered into, the provision for a commission was stricken out of the blank form. The contract explicitly provided that, in case Love should be the cause of any person purchasing the property, he should be entitled to all obtained over \$77 per acre. Carter testified that Love told him he thought he was asking a pretty good price, and thought he ought to make it low enough so that he could make at least 50 cents an acre, and that this made him think that Love was going to act as his agent. If that is so, we do not see what effect it could have upon the agreement that Love should have all that he could realize above \$77 an acre. If he was acting as agent, he certainly owed nothing to Carter in regard to any enhanced price, but in negotiating a sale was working in his own interest, to get as much as he could as commission. There are other agreements, however, in the contract, having no relation to agency. The contract gave Love an option for 53 days to purchase the land at the stipulated price, and Carter agreed, in consideration of the purchase price, to convey to Love, or as Love might direct. It is clear that the contract represented the understanding of the parties.

Counsel for appellant says that Carter did not understand that he was dealing with Love as a principal. But that is merely saying that he did not fully understand the legal effect of his contract, which would not justify a court in setting it aside. His testimony, however, shows that he did understand the contract, and it corresponded substantially with his letter to Love that he would sell the farm for \$77, net. He was a business man, and read over the contract before he signed it, and it cannot be supposed that he did not know that Love had an option to buy the land himself. He testified that he knew Love was engaged in the insurance business and selling farms, but that fact is entirely consistent with the contract by which Love was allowed to sell the farm to some one else, or to buy it himself. If Love sold the land to Fell as an agent, he was entitled to all that he received above \$77 per acre; and, if he dealt with Carter as a purchaser, he was to have the land at that price. The evidence shows that he

availed himself of the option and became a purchaser.

The next proposition of counsel is that a contract, to be specifically enforced in equity, must be supported by a good and valuable consideration, and must be reasonably fair and just, and that the contract of Carter was unilateral and without consideration. If the contract was of that character, it would become mutual and capable of enforcement at the instance of either party, upon acceptance of its terms by Love within the time limited, and before the option was withdrawn. *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580. There was such an acceptance by Love at least on February 4th, when he wrote the letter to Carter, sending him the draft for \$1,000. He had previously, on January 30th, told Carter he would take the land on his terms; and Carter made the deed and memorandum, which were mailed to the Tampico Bank for the purpose of completing the sale. In the attempt to so complete it, a mortgage was made by Fell to Carter, which Carter would not accept; but his objections were to the party named as a receiver, and because there had been no conveyance from Love to Fell, and he feared trouble in foreclosing the mortgage. He then knew all about the sale to Fell, and made no objection whatever to complying with his contract. There was no fraud, deceit, or misrepresentation of any character in obtaining the contract; and Carter's conduct, up to the time he repudiated it, shows that he fully understood its terms.

It is also urged that Carter had a right to rescind the contract before acceptance, that the filing of the bill was a rescission, and that Love could not thereafter legally perform the contract on his part. As we have already said, there was an acceptance on the part of Love before the bill was filed; and, the contract having become legally binding upon the parties, Love had until the 1st day of March to tender performance. Appellant could not prevent such tender of performance by filing the bill and attempting to rescind the contract. The mortgage was made by Love and wife on February 27th, and the cash payment was made on March 1st. This was a full compliance with the contract, and he thereupon became entitled to the deed in the possession of the bank.

The decree is affirmed. Decree affirmed.

(206 Ill. 249)

MALICKI v. BULKLEY et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

INSOLVENT CORPORATION—CREDITOR—RIGHT TO PREFERENCE—DILIGENCE.

1. M., having obtained judgment against an insurance company, the company deposited with a trust company a fund to secure a fidelity company from loss as surety on its appeal bond in case M.'s judgment was affirmed. The judgment was, however, reversed, and on a retrial M. again obtained judgment. Meanwhile the insurance company had become insolvent. *Held*,

that M. was not entitled to a preference over other creditors of the insurance company in the fund deposited with the trust company, as the condition on which the deposit would have become available to the fidelity company had not occurred.

2. The fact that receivers of an insolvent corporation know of and report the existence of assets, from which report a creditor obtains his knowledge thereof, shows that the creditor is not entitled to a preference on the ground of diligence.

Appeal from Appellate Court, First District.

Suit by the insurance commissioner of the state of Illinois against the Chicago Guaranty Life Society and others, in which Almon W. Bulkley and others were appointed receivers, and in which Teofila Malicki sought to intervene as a preferred creditor. From a judgment of the Appellate Court (107 Ill. App. 595) affirming a judgment denying the intervenor's petition, she appeals. Affirmed.

John M. Duffy and Warwick A. Shaw, for appellant. Anson E. Meanor, for appellees.

BOGGS, J. The appellant instituted an action in the circuit court of Wayne county, in the state of Michigan, against the Chicago Guaranty Life Society, an Illinois corporation, to recover on a policy of insurance. Judgment was entered in appellant's favor, and the society appealed to the Supreme Court of the state of Michigan. In January, 1898, the Fidelity & Deposit Company of Maryland became surety on the appeal bond given by the society, and the society, to secure the Fidelity & Deposit Company as such surety, and also to secure it as surety on another undertaking which it had entered into, being a forthcoming bond in a garnishment proceeding pending in one of the courts in the state of Georgia against the society by one A. M. MacMurphy, deposited with the Royal Trust Company of Chicago the sum of \$2,800. The appeal was prosecuted with success, and the judgment was reversed, and the cause remanded. The case was redocketed, and on a subsequent hearing in the circuit court judgment was on the 15th day of January, 1901, awarded the appellant in the sum of \$3,600. In October, 1900, prior to the rendition of this judgment, a judgment creditor of the Chicago Guaranty Life Society procured a decree to be entered in the superior court of Cook county, Ill., ordering the society to be placed in the hands of the said Royal Trust Company, as receiver. On the 24th day of October, 1900, the insurance commissioner of the state of Illinois filed a bill in the superior court of Cook county to oust the Royal Trust Company as receiver and to secure the appointment of other receivers. On the 19th day of December, 1900, a decree was entered awarding the relief asked by the bill filed by the insurance commissioner, and the appellees were appointed receivers. The receivers, in a report to the court filed on May 11, 1901, advised the court that the Royal

Trust Company held the said sum of \$2,800, and stated fully the reason why said money had been so deposited, and that the proceeding instituted by MacMurphy in the court of Georgia was still pending, and for that reason the receivers were not entitled to the possession of the money. On the 1st day of June, 1901, the appellant filed an intervening petition in the proceeding, based on the bill filed by the insurance commissioner, which was pending in the said superior court of Cook county, praying that an equitable attachment or lien superior to that of other creditors of the society be adjudged in her favor against the money so remaining in the hands of the Royal Trust Company, and praying also that the Royal Trust Company be made defendant to said petition, and be brought into court and required to answer. On a hearing the prayer of the intervening petition was denied. The Appellate Court affirmed the action of the superior court, and the matter is here on a further appeal.

The money was deposited with the Royal Trust Company in part to secure the Fidelity & Deposit Company from loss on the appeal bond in the event the judgment which the appellant had obtained in the trial court in the state of Michigan should be affirmed by the Supreme Court of that state. But that judgment was reversed, and the cause was remanded. Without deciding whether the appellant could have obtained any right or interest in the fund by way of subrogation or other equitable doctrine had her judgment been affirmed by the Supreme Court of Michigan, it is clear that, as her judgment was reversed, no such right or interest accrued to her. The reversal entitled the Chicago Guaranty Life Society to have the fund returned whenever the other liability which the Fidelity & Deposit Company had assumed for the society should be adjusted. The appellant subsequently obtained a judgment against the society in the circuit court in Michigan, but not until after the society had been decreed by the superior court of Cook county, in this state, to be insolvent, and its property placed in the hands of receivers. The appellant had no preferential interest whatever in the fund or the disposition to be made of it. Nor was she entitled to the preference under some circumstances given a diligent creditor who has discovered assets, for the reason, if no other, that the receivers knew of the existence of the fund, and had reported all of the facts relative to the same to the court before the appellant filed her petition. It was from this report of the receiver the appellant became advised of the fact that the money was on deposit with the Royal Trust Company. No reason, legal or otherwise, appeared for giving the appellant any preference over other creditors of the society in the distribution of the fund in question.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(205 Ill. 582)

CLEVELAND, C., C. & ST. L. RY. CO. v.
PEOPLE ex rel. McCORD, County
Collector.

(Supreme Court of Illinois. Dec. 16, 1903.)

TAXATION—HIGHWAY TAXES—LEVY—CERTIFICATE—AMENDMENT—ADDITIONAL LEVY—AMOUNT—TOWN AUDITORS—POWERS.

1. Where the certificate of the levy of a town tax showed that the tax was levied "to defray the expenses of said town for the ensuing year," and in an action to collect the tax the record of the town meeting was introduced in evidence, which showed the specific purposes for which the tax was levied, it was proper for the court to permit the town clerk, in the presence of the court, to amend the certificate of levy, which was not sufficiently definite, so as to specify the purpose of the tax.

2. Where, in an action to collect a town tax levied under a certificate which did not sufficiently state the purpose of the tax, the record of the annual town meeting was not introduced in evidence, it was improper for the court to permit an amendment of the certificate.

3. Under Hurd's Rev. St. 1901, pp. 1777, 1780, c. 139, §§ 40, 60, providing for the levy of town taxes at a town meeting, a tax voted at a special election held in the town, at which polls were opened and ballots received in each of the four voting precincts in the town, as in general elections, was not voted at a town meeting, within the statute, and was therefore void.

4. Hurd's Rev. St. 1901, p. 1523, c. 121, § 14, provides that if, in the opinion of highway commissioners, a greater levy than 60 cents on each \$100 is needed, they shall certify the same to the board of town auditors and assessors, and, with the consent of a majority of the entire board, given in writing, definitely and specifically directing the particular purpose to which the same would be solely applied, an additional levy not exceeding 40 cents on the \$100 may be made. *Held*, that such section requires that both the certificate of the commissioners and the written consent of the auditors and assessors shall definitely and specifically direct the particular purpose or purposes to which the additional levy shall be applied.

5. Where a certificate of highway commissioners to the board of town auditors and assessors for an additional levy of highway taxes did not specifically state the purposes thereof, as required by Hurd's Rev. St. 1901, p. 1523, c. 121, § 14, but, in an action to collect the taxes levied, two of the commissioners testified that the items and amounts for which such levy was needed were set down by the clerk on a piece of paper which was offered in evidence, and that the commissioners knew of the requirement, and thought the certificate described the purpose with sufficient particularity, they were properly permitted to amend such certificate so as to show the purposes set forth in the list.

6. Where the consent of the board of town auditors and assessors to an additional levy for highway purposes did not specifically state the purposes of the levy, as required by Hurd's Rev. St. 1901, p. 1523, c. 121, § 14, and two of the members of the board testified that they intended to sign the consent in the exact form that it was in when they did sign it, and, though they intended to comply with the law, they did not understand that all the items for which the money was needed should be included in the written consent, and one of them testified that they did not intend to set forth the different specific items for which the money was to be used, and there was no evidence that such list of items was before the board, it was improper for the court to permit an amendment of such consent so as to show such items.

7. Under Hurd's Rev. St. 1901, p. 1523, c. 121, § 14, providing that a majority of the

board of town auditors shall consent to an additional levy of highway taxes, where a consent was insufficient for failure to recite the purposes of the additional levy, and only two of the members of the board testified that they intended to comply with the law, and believed that the consent given was sufficient, without any showing of the intention or belief of any of the other three members of the board, such evidence was insufficient to justify a trial amendment of the certificate.

8. Where a written consent of town auditors to an additional levy of \$8,000 highway taxes declared that \$3,000 should be used for a particular bridge, and \$1,000 for the building of roads and approaches to a dam, and the remainder of the levy applied to the following improvements (naming them), the consent was not invalid for failure to specify the amounts applicable to each of the improvements other than the two specified.

9. Hurd's Rev. St. 1901, p. 1523, c. 121, § 14, provides that if, in the opinion of highway commissioners, a greater levy is needed than the amount prescribed, they may certify the same to the board of town auditors, and, with the written consent of such auditors, an additional levy may be made. *Held* that, where highway commissioners certified that an additional levy of \$8,000 was necessary, the auditors had no power to authorize an additional levy which would produce a sum larger than that certified.

Appeal from Vermillion County Court; S. Murray Clark, Judge.

Action by the people on the relation of O. L. McCord, county collector, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, to recover delinquent taxes. From a judgment in favor of relator, defendant appeals. Reversed.

Rearick & Meeks, for appellant. Swallow & Swallow and John W. Keeslar, State's Atty., for appellee.

SCOTT, J. This is an appeal from a judgment of the county court of Vermillion county, rendered at the June term, 1903, against the real property of appellant, for certain taxes of the year 1902 which were delinquent. The judgment was entered after a hearing upon the written objections of the appellant, which covered the taxes hereinafter enumerated, and is for the town taxes of the towns of Georgetown, Danville, and Elwood, for a \$9,000 town tax levied in the town of Georgetown by virtue of a special election, for part of the road and bridge tax of the town of Georgetown, and for part of the road and bridge tax of the town of Danville.

Each of the certificates of the levy of the town tax, including the certificate of the levy of the \$9,000 tax for the town of Georgetown, recited that the tax was required "for town purposes." It is conceded that this statement of the purpose is too indefinite, and that where, as in each case here, a levy is made by a town meeting, it must appear from the certificate that it was made for some purpose for which the town meeting has authority to direct the raising of money by taxation.

On the trial in the county court the record of the annual town meeting of the town of Georgetown for 1902 was introduced in evi-

dence, and it appeared therefrom that the tax was levied "to defray the expenses of said town for the ensuing year." There was also introduced in evidence the record of a special election held in that town on May 27, 1902, from which it appeared that the voters at that election voted to raise by taxation the sum of \$9,000 for constructing two bridges, "one at the Jenkins ford over the Big Vermillion river, and one at the Big Rock ford over the Little Vermillion river." The record of the annual town meeting of the town of Danville for the year 1902 was also introduced in evidence, from which it appeared that the town tax was levied by that meeting "to defray expenses of the town for the ensuing year." As these records of the town meetings were respectively offered in evidence, the county court permitted the town clerks, in the presence of the court, to amend the certificates of levy so that each would correspond with the record of the town meeting in pursuance of which it was made, so far as specifying the purpose for which the tax was levied is concerned. We have frequently held such amendments proper. *Chicago & Northwestern Railway Co. v. People*, 183 Ill. 247, 55 N. E. 680; *Chicago & Alton Railroad Co. v. People*, 171 Ill. 544, 49 N. E. 489; *Indiana, Decatur & Western Railway Co. v. People*, 201 Ill. 351, 66 N. E. 293.

The certificate of the levy of the town tax for the town of Elwood was also amended, over the objection of appellant, so that it stated the purpose of the tax to be "to defray the running expenses of said town for the ensuing year." The record of the annual town meeting of this town was not introduced in evidence. This amendment was improperly allowed, as there was nothing before the court by which it could be made. The specification of the purpose for which these general town taxes were levied, namely, to defray the expenses of the town for the current or fiscal year, is not sufficiently definite and certain.

Appellee relies upon the case of *Wright v. People*, 87 Ill. 582. A reference to that case shows that the tax there levied was for "various named purposes, 'and such other expenses as the town may have to defray for the year 1873, as well as previous indebtedness.'" In the case before us no specific purposes of any kind are mentioned, and while it is impossible to specify each item of anticipated expenditure, either in the record of the town meeting or in the certificate of levy, still both the record and the certificate should specify the general purpose for which each portion of the tax is levied.

In reference to the \$9,000 voted at the special election in the town of Georgetown, appellant's position is that the levy of this tax could only be authorized at the annual town meeting, or at an adjourned meeting held in pursuance of an adjournment taken at the annual meeting. The town meeting, either general or special, contemplated by the statute,

is a meeting which may be attended by all the electors of the town, at which they may transact business pertaining to the affairs of the town, including the levy of taxes. *Hurd's Rev. St. 1901*, pp. 1777, 1780, c. 139, §§ 40, 60. A moderator presides over such a town meeting, acting as president or chairman, and the proceedings are conducted in the same manner as those of a parliamentary body. This tax was not voted at any such meeting, but, instead, the propriety of levying the tax was submitted at a special election held in the town of Georgetown; polls being open and ballots received in each of the four voting precincts in that town, as in any other election. No meeting at all was held which could have been attended by all the voters of that town. The statute does not provide for the levy of taxes in pursuance of a vote of the electors of the town taken at a special election. This tax could have been imposed by the electors either at a general or special town meeting, but its levy could not be authorized at a special election. The objection to the \$9,000 tax should therefore have been sustained.

The highway commissioners of the town of Georgetown levied 85 cents on each \$100 of the assessed valuation of the property in the town for road and bridge purposes. Section 14 of chapter 121, p. 1523, of *Hurd's Revised Statutes of 1901*, provides, that if, in the opinion of the commissioners, a greater levy than 60 cents on each \$100 is needed, "they may certify the same to the board of town auditors and the assessor, a majority of whom shall be a quorum, and with the consent of a majority of this entire board given in writing, definitely and specifically directing the particular purpose or purposes to which the same shall be solely applied, an additional levy may be made of any sum not exceeding forty cents on the one hundred dollars of taxable property of the town." For the purpose of obtaining such written consent, the commissioners of highways certified to the town auditors and the assessor that a greater levy than 60 cents on each \$100 was needed, which certificate concludes, "In view of the contingency that the sixty cents is not sufficient for the road and bridge fund, and we ask an additional levy" of 35 cents. No statement of the purpose for which the additional levy was desired was contained in the certificate. In response to this, a majority of the officers to whom the certificate was addressed signed a written document consenting that an additional levy, not exceeding 35 cents on the \$100, should be made. No attempt was made therein to direct the particular purpose or purposes to which such additional tax should be applied, but the document contained a statement that the consent was given "In view of the contingency that the sixty cents is not sufficient for the road and bridge fund." In our judgment, section 14, *supra*, requires that both the certificate of the commissioners and the

written consent of the auditors and assessors shall "dednitely and specifically" direct the particular purpose or purposes to which the additional levy shall be solely applied. This additional levy of 35 cents on the \$100 is the portion of the road and bridge tax to which appellants objects.

For the purpose of sustaining this additional levy, appellee offered the testimony of two of the commissioners of highways and of two members of the board of town auditors of that town. The highway commissioners testified that at a meeting on September 2, 1902, they discussed the purposes for which additional money was needed, and that the town clerk made up a list of the items and the amount needed for each; that the commissioners named the items and the amounts, and the town clerk wrote them down on a piece of paper, which paper was offered in evidence, and contained the following:

"Bridges located as follows:

Bridge at Zion Church, cost.....	\$125 00
Bridge at Elwood Church, cost.....	135 00
Bridge at Joe Massing's place, cost..	130 00
Bridge at Andy Devore's house, cost	122 00
Bridge at Abe Brown's place, cost...	108 00
Bridge at Lick Skillet or New Village, cost	200 00
Bridge near L. A. Clingan's house...	125 00
Bridge by Fred Sheet's place.....	140 00
Bridge south of Win Stephens' house	200 00
To take up outstanding orders.....	600 00
To finish grade at Jenkins' ford, cost	100 00
To finish grade at Big Rock bridge..	100 00
Bridge at Grape Creek.....	110 00"

—That the commissioners knew of the provisions of section 14, above cited, and were intending to comply with that law in making the certificate, and that they thought the certificate described with sufficient particularity the purpose for which the money was needed. The two members of the board of auditors testified that the written consent was given at a meeting held by the proper officers on September 2, 1902, and that they were familiar with the provisions of section 14, above cited, and that in receiving and acting upon the certificate of the commissioners of highways, and in giving their consent in writing, they were intending to comply with the provisions of that section; that the commissioners and the board of auditors and the assessor held their meeting at the same time and place. The two members of the board who testified stated further, in substance, that they heard the commissioners' discussion of the purposes for which the money was to be used, and that they intended the additional tax to be used for the purposes so discussed, and thought it was sufficient to specify in the written consent that it was "for the road and bridge fund." Both testified that they intended to sign the consent in the exact form that it was in when they did sign it, and that they did not understand that all the items for which the money was needed had to be included in the written consent, and one of them testified that they did not intend to set forth the different spe-

cific items for which the money was to be used. Thereupon, on motion of appellee, the commissioners were permitted to amend their certificate so that it showed that the additional levy was desired for the specific purposes designated in the list hereinabove set forth, and the board of town auditors and the assessor were permitted to amend their written consent by stating therein—particularly specifying each item—that the additional levy was for the purposes shown by such list, and the amendments so permitted were made by the proper officer in the presence of the court.

For the purpose of showing the propriety of permitting these amendments, appellee refers us to Chicago & Northwestern Railway Co. v. People, 184 Ill. 240, 58 N. E. 367, and Chicago & Northwestern Railway Co. v. People, 174 Ill. 80, 50 N. E. 1057. In these cases it is held that where the town clerk, in writing up the minutes of a town meeting, has omitted something which actually occurred, the court, in a proceeding of this kind, may permit him to make an amendment which will make the record correspond with the facts. It is possible that under this holding it was proper to permit the commissioners to amend their certificate, because the list written on the paper was made by them at the same time and might be construed to be a part of the certificate, if that certificate alone were sufficient to establish the legality of this tax. But it does not appear that the paper on which this list was written was presented to the auditors and the assessor, so that it cannot be held that a proper certificate ever was presented to the latter officers. If, in fact, they had actually received that paper, and had testified that they intended to make it a part of their written consent, we think the two cases last cited would be in point; but, in fact, they testified that they intended to make the written consent precisely as they did make it, and one of them testified affirmatively that they did not intend to include therein the list of items mentioned. To permit the amendment of that written consent as it was amended was to permit it to show that something had been done which in fact was not done, while in the two cases last referred to the amendment was permitted for the purpose of showing that something was done which in fact had been done. The correction of the record of the town meeting consisted in writing therein that which actually occurred, and which the persons composing the meeting intended should be written therein. Writing this list into the written consent under discussion was writing therein that which the persons who signed the consent did not intend to write therein at the time the consent was signed. True, they say they thought the paper they executed would authorize the expenditure of the money for the purposes indicated by that list; but this is a mistake in regard to the legal effect of the instrument, and not a mistake in reference to what it did contain, and

is a mistake which cannot be obviated by amendment in this proceeding. The testimony of these officers, to the effect that they knew the requirements of section 14, and intended to comply therewith, was evidently offered for the purpose of avoiding the decision of this court in *Chicago & Northwestern Railway Co. v. People*, 200 Ill. 141, 65 N. E. 705, where it was said, referring to the amendment made to section 14 in 1901, "In this case the fact that none of the officials knew of the existence of the law or its requirements is conclusive evidence that they were not following it or attempting to follow it." The evidence offered in the case at bar, however, does not go far enough. It fails to show any attempt to "definitely and specifically" direct the particular purposes to which the additional levy should be applied. Where it becomes necessary to show that the taxing officers knew the law, and intended a compliance therewith, it is not sufficient, when their municipalities are threatened with a loss of taxes on account of the officers' negligence, for them to testify that they knew the provisions of the statute, and intended to comply therewith. The testimony must show what they did or attempted to do, so that the court can see that they did intend to do those acts which the law requires. If the auditors and assessor intended to comply with the law, they intended to write the list of improvements in the consent which they gave. The evidence not only fails to show any such purpose, but, on the contrary, shows that they did not intend to definitely specify such improvements in the written instrument.

It was improper to permit the amendment of the written consent on the testimony of the two auditors for another reason. The officers to whom the certificate of the commissioners is addressed are five in number. The written permission must be signed by at least three of the five. Conceding appellee's position to be correct, still, to warrant the amendment it should have been shown that at least three of these officers were familiar with section 14, intended to comply therewith, and believed that the consent given authorized the levy of the additional tax for the specific purposes shown by the written list. Waiving the objections above suggested to the evidence, it at most showed this to have been the mental attitude of two of these officers, only, at the time the consent was given, and did not warrant the conclusion that any other one of these five officers had, at the time of the transaction, the same familiarity, intention, and belief. The levy of the additional 35 cents on the \$100 of road and bridge tax for the town of Georgetown was therefore illegal.

In the town of Danville the commissioners of highways levied for road and bridge purposes a tax of 90 cents on the \$100. The objection of appellant is to a portion of 30 cents thereof, that thirty cents being additional to the 60 cents which the commissioners

were authorized to levy by section 13 of chapter 121, p. 1523, of Hurd's Revised Statutes of 1901. The commissioners of highways of this town made a written certificate to the board of auditors and assessor for leave to make a levy in addition to the 60-cent rate, and in that certificate specified the purpose for which it was to be used, and estimated the amount needed in excess of the 60-cent rate at \$8,000. The written consent of the auditors and assessor specified the purposes for which the additional levy should be used (being, in substance, the same as stated in the commissioners' certificate) as follows:

"First. For the building of a wagon bridge across the North Fork of the Vermillion river at a point near Ellsworth Park dam, \$3,000.

"Second. For the building of roads and approaches to said dam, \$1,000.

"Third. The remainder of said levy, above the amount required for the purposes above stated, shall be applied to the following improvements, viz.: The building of a stone culvert on the Hungry Hollow Road, and two culverts on East Fairchild street, and the graveling of the Covington Road from the city limits to the state line, and for the repairing of the bridge over the Vermillion river on the road leading from Danville to Grape Creek."

This consent did not specify in dollars the amount of the additional levy, but provided that the commissioners might make an additional levy of 30 cents on the \$100, and this 30 cents on the \$100 would produce an additional tax of \$10,806.51.

Appellant contends, first, that the written consent is not sufficiently definite as to the purposes specified in the third paragraph thereof, above quoted, in that it does not designate the precise amount that was to be used for each purpose, and objects to all of the additional tax above the sum of \$4,000 which was required for the purposes pointed out in the first and second paragraphs of the written consent above set out. This is too strict a construction of the language of section 14. That section requires that the purpose or purposes to which the additional levy shall be solely applied shall be "definitely and specifically" directed by the written consent, but it does not require that the exact sum to be used for each purpose therein mentioned shall be specified. The third paragraph of the written instrument was in substantial compliance with this statute.

It is then objected that the additional levy, so far as it was in excess of \$8,000—the amount estimated by the commissioners as needful—is illegal. The language of section 14 is that "if in the opinion of the commissioners a greater levy is needed, they may certify the same to the board," etc.—that is, they may certify the greater levy—and, with the written consent of the officers to whom certified, "an additional levy" may be made, etc. Considering these two clauses of this section together, we think it apparent that

the Legislature did not intend to give to the auditors and the assessor power to authorize a greater additional levy than the commissioners had certified was necessary. It is upon the judgment of the latter officers, approved by the auditors and the assessor, that the additional levy is made, and those who are given authority to grant the written consent have no power to make such consent a basis for a legal tax in excess of the amount which, in the opinion of the commissioners, is needed.

Appellee seeks to justify the whole of this additional tax by the statement that the law requires that the portion thereof that is raised on property situated within the limits of any incorporated city or village has to be divided with the authorities of such city or village, and that, as this additional tax must be so divided if there be a city or village within Danville township, there is no basis by which this court can determine whether the highway commissioners will realize more than the \$8,000 from the additional levy. If this be a correct statement of the law as to this additional levy since the amendment made to section 14 in 1901—as to which we express no opinion—still it would be the business of the commissioners to take that fact into consideration, and make their certificate accordingly. We therefore conclude that \$2,806.51 of the additional levy of the road and bridge tax for the town of Danville was illegal.

The judgment of the county court of Vermillion county is therefore reversed, and the cause remanded, with directions to that court to enter a judgment against the property of objectors for that portion of \$8,000 of the additional road and bridge tax of the town of Danville which the property of objector bears, and sustaining the objections filed in that court by objector to the town tax of the town of Elwood; to the town tax of the town of Danville; to the town tax of the town of Georgetown, including the \$9,000 levied in pursuance of the result of the special election held in that town; to the additional road and bridge tax (being 35 cents on the \$100) of the town of Georgetown; and to so much of \$2,806.51 of the additional road and bridge tax of the town of Danville as the property of objector bears. Reversed and remanded, with directions.

(206 Ill. 296)

CHICAGO & E. I. R. CO. v. PEOPLE ex rel. McCORD, County Collector.

(Supreme Court of Illinois. Dec. 16, 1903.)

TAXATION—HIGHWAY TAXES—ADDITIONAL LEVY—TOWN AUDITORS—CONSENT—SPECIFICATION OF PURPOSE—AUTHORITY TO LEVY—SPECIAL ELECTIONS—TOWN MEETINGS.

1. Where the certificate of consent of the board of town auditors to an additional levy of highway taxes did not specifically and definitely state the particular purposes to which the fund raised by the additional levy should be applied, as required by 4 Starr & C. Ann.

St. 1902, p. 1130, c. 121, par. 6, § 14, such additional levy was invalid.

2. Under 3 Starr & C. Ann. St. 1896, p. 3931, c. 189, par. 60, providing that the electors at a special town meeting, when convened, shall have power to provide for raising money for the building and repair of bridges, the authorization of the levy of an additional tax for bridge purposes at a special election called for that purpose, and conducted by voting in the various precincts of the town, was void.

Appeal from Vermillion County Court; S. Murray Clark, Judge.

Action by the people, on relation of the county collector of Vermillion county, against the Chicago & Eastern Illinois Railroad Company. From a judgment in favor of relator, defendant appeals. Reversed.

H. M. Steely (W. H. Lyford and E. H. Seneff, of counsel), for appellant. Swallow & Swallow, for appellee and commissioners of highways of Georgetown township. John W. Keeslar, State's Atty.

PER CURIAM. The application of the appellee county collector and ex officio county treasurer for judgment against real estate in the county of Vermillion delinquent for taxes for the year 1902 asked for judgment in the sum of \$1,724.03 against the property of the appellant railroad company. The company filed objections to each of the items comprising said sum of \$1,724.03. Some of these objections were sustained, and others overruled. The appellant company conceded liability for all the items of tax to which the objections were overruled, and paid the same, except as to two items, viz., the sum of \$172.69 levied as an additional road and bridge tax in the town of Georgetown, in said county, and the sum of \$690.77 also levied in the town of Georgetown (as the application of the appellee collector recited) as town tax. On the hearing the objections as to these two items were overruled, and judgment was entered against the property of the appellant company accordingly. The company perfected this appeal, and deposited with the county collector, in cash, the amount of the two items of taxes.

The road and bridge tax was a levy of 35 cents on each \$100 of taxable property in addition to the levy of 60 cents on each \$100 of such taxable property authorized to be made by section 13 of the road and bridge act. The certificate of consent of the board of auditors and the assessor of the town of Georgetown to the imposition of the additional tax of 35 cents on each \$100 of the taxable property of the town did not definitely and specifically direct the particular purposes to which the fund raised by the additional levy should be applied. Such definite and specific directions were essential to the validity of the tax. 4 Starr & C. Ann. St. 1902, p. 1130, c. 121, par. 6, § 14; Chicago & Northwestern Railway Co. v. People, 200 Ill. 141, 63 N. E. 705.

The appellee collector entered his motion

for leave to amend the certificate, and in support of the motion, over the objections of the appellant company, the evidence of a number of witnesses was heard. This cause and that of *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. People ex rel.*, 69 N. E. 89, so far as this point is concerned, were heard and submitted upon the same testimony. We there held the evidence to be insufficient to authorize the amendment of the certificate. It is unnecessary to here repeat what was there said in support of the ruling. It was error to permit the certificate to be amended. As to these items the judgment must be reversed.

Legal authority for the imposition of the other item is also wanting. The application of the appellee collector indicates this item was levied to raise a fund for general town purposes. It is conceded that the validity thereof as a tax for town purposes cannot be maintained. The position of counsel for the collector, however, is that the tax was levied to raise a fund to be expended in the building and repairing of bridges. Paragraph 60 of the township organization act (3 Starr & C. Ann. St. 1896, p. 3931, c. 139) provides: "The electors at special town meetings when convened, shall have power: * * * Second, to provide for raising money for repairing highways, or building or repairing bridges, in cases of emergency and to direct the building and repairing thereof." Counsel for appellee insist that the levy was legally authorized by the action of the electors of the town of Georgetown at a special town meeting duly and lawfully called and held for that purpose. As in support of this insistence, the appellee collector introduced in evidence a petition addressed to Emerson Hill, the supervisor of the town of Georgetown, which bore the signatures of 2 of the highway commissioners of the town, 1 of the justices of the peace, the town clerk, and 64 other persons, in which it was represented "that the said commissioners desire to expend on the bridges, one at Jenkins' ford, on Big Vermillion river, and one at Big Rock ford, on Little Vermillion river, in said town, a greater sum of money than is available to them by other means, and that it will be necessary to raise by taxation to build the two bridges, wherefore the undersigned hereby petition you to call a special town election to vote on the proposition to raise by taxation \$9,000 to construct the bridges, and other work, as above set forth." Counsel in the same behalf produced in evidence an order, signed by the supervisor, directing that the town clerk should post up 10 notices that a special election would be held on May 27, 1902, "to vote on the proposition to raise money by taxation to build two bridges, one at Jenkins' ford across the Big Vermillion river, and one at Big Rock ford across the Little Vermillion river," and also a notice of such special election given by the town clerk, and a certificate of the publication of a like notice for a

special election in a weekly newspaper. There also appeared in evidence the certificate of the holding of the special election in the four different voting precincts in the town, and showing that in all the precincts a total of 203 votes were cast against the proposition to raise the sum of \$9,000 by taxation to construct the bridge at Jenkins' ford and the bridge at Big Rock ford, etc., and that 283 votes were cast in all of said precincts in favor of said proposition. A majority of the votes cast at all of the voting precincts in the town at this special election was in favor of the proposition to raise the said sum of \$9,000 to build said two bridges; and in virtue of that election the special levy under consideration was made, and extended against the taxable property of the town, including that of the appellant company.

The election was clearly not a town meeting. It was a special election at the four different voting precincts in the town, as other special elections. The annual town meeting is an assemblage of the electors of the town on the first Tuesday of April in each year at the place in the town appointed for the holding of the town meeting. A special town meeting is a like assemblage called together in special meeting in the manner provided by the statute at the same place appointed for the holding of the annual town meeting. All town meetings are presided over by a moderator, and each town, for all the purposes of town meetings, constitutes an election precinct. Township Organization Act, art. 6, par. 53, § 3. Elections of town officers, for changing the place of holding the town meetings, and for certain other purposes, may be held at the annual town meeting, the electors of the entire town voting at that meeting, and not at the different polling places established for the reception of ballots of voters at a general election. Under the provisions of section 10 of the township organization act (3 Starr & C. Ann. St. 1896, par. 60, c. 139, p. 3931), a special town meeting might have been called and lawfully convened in the town of Georgetown for the purpose of raising money for building bridges or repairing the same in case of emergency, and the action of the special town meeting, if called, conducted and convened in pursuance of the provisions of the statute, might have authorized the levy of taxes for such purposes. The statute authorizes this action to be taken by the electors when assembled as a town meeting, but we know of no statutory authority for authorizing the levy of such taxes by a vote taken at the different voting precincts of a town at a special election. The town meeting is designed to bring all of the electors of the town together in one assemblage, to discuss and consider any subject upon which the town may lawfully act. The powers of the electors, when assembled in the regular annual town meeting, are prescribed in section 3, par. 40, art. 4, of the township organization act, and, when convened at a special town meeting, are

prescribed by the provisions of section 10, par. 60, art. 6, of the same act. The power possessed by these meetings cannot be exercised by the electors by casting ballots at an election called and held in the different voting precincts in the town. The attempt to exercise the powers vested in the town meeting by a special election held in the different voting precincts of the town was illegal, and the tax levied by virtue of such election is void, and, in the eye of the law, void taxes are unjust and uncollectible. As to said item of \$690.77, designated as town taxes in the application of the appellee collector, the judgment will be reversed.

The judgment as to each item of taxes will be reversed, and the cause will be remanded, with directions to the trial court to sustain objections to these taxes. Reversed and remanded, with directions.

(205 Ill. 636)

PEOPLE ex rel. MUNSTERMAN, County Collector, v. McDOUGAL et al.

(Supreme Court of Illinois. Dec. 18, 1903.)

TAXATION — DRAINAGE COMMISSIONERS — VALIDITY OF LEVY — METHOD OF LEVY — EVIDENCE — BURDEN OF PROOF.

1. The farm drainage act (Hurd's Rev. St. 1901, p. 712), providing that the commissioners of a drainage district may levy a tax sufficient to "keep the work, or any part thereof, in repair," does not authorize them to levy a tax to clean out, deepen, and change the bottom of a drain.

2. Where drainage commissioners levied a tax of \$25,000, evidence in proceedings to collect it that \$24,200 of the levy was for a purpose not authorized by statute threw on the collector the burden of showing that the balance was authorized.

3. The determination of drainage commissioners that a tax is for repairs, within the farm drainage act (Hurd's Rev. St. 1901, p. 712), authorizing them to levy a tax for that purpose, is subject to review by the courts.

4. The record of drainage commissioners and the certificate of a tax levy by them under the farm drainage act (Hurd's Rev. St. 1901, p. 712), authorizing a levy for repairs for the ensuing year, were deficient where they did not state that the levy was for repairs for the ensuing year.

5. A tax levied under the farm drainage act (Hurd's Rev. St. 1901, p. 712), for repairing drains, should be extended on the tax books of the township collectors, and warrants for its collection issued to them, not to the county collectors.

Appeal from Iroquois County Court; Frank Harry, Judge.

Application by E. H. Munsterman, county collector of Iroquois county, for judgment against the lands of C. J. McDougal and others for the amount of a delinquent tax. From a judgment sustaining objections thereto, an appeal is taken. Affirmed.

J. W. Kern, State's Atty., Carey & Saum, and Morris & Hooper, for appellant. Ernest Severy and A. F. Goodyear, for appellees.

SCOTT, J. This was an application made by the county collector of Iroquois county to

the county court of that county at the June term, 1903, for judgment against the lands of appellees for the amount of a delinquent drainage tax levied on November 1, 1902, by the commissioners of special drainage district No. 1 of Onarga, Douglas, and Danforth townships, in Iroquois county. The tax levied upon the entire district was \$25,000. For the purpose of collecting this tax the county clerk spread it upon the land in the district in the manner hereinafter specified, the tax being extended on the records of the county collector, and a warrant for the collection thereof issued from the office of the clerk to the county collector, and the taxes involved in this suit were returned delinquent by the county collector. Objections were filed in the county court by appellees. Upon trial, judgment was entered by the county court sustaining the objections, and the cause comes to this court by appeal.

The district contains approximately 16,500 acres of land. In completing the work as originally planned, a little more than 21 miles of ditch was made and left open. This open ditch was from 5 to 14 feet in depth and from 6 to 12 feet wide at the bottom. This district is organized and exists under the farm drainage act (Hurd's Rev. St. 1901, p. 712), and the work of providing the drainage in accordance with the original plan was practically completed in the autumn of 1888, at a total expense, including the cost of tile purchased, of approximately \$95,000. Prior to June, 1888, for the purpose of determining what proportion of the expense of the drainage system the land of the various owners should bear, the land was classified in accordance with the statute. This classification was made on the basis of the benefits that would be derived by the land, both from the open ditch and from the tile that was to be put in. The open ditch is the main channel in the district. The drains carry the water from the lands of the various proprietors into the open ditch, and this open ditch carries the drainage out of the district. In 1892, \$1,098 was levied and raised for repairs in this district, and each year since a repair tax has been levied and collected, which has run in amount from \$493 to \$700 per annum. In the autumn of 1902 the main ditch throughout its entire extent, except the mile thereof next its outlet, had become filled up, so that the openings of the tile emptying into it had become covered with mud. For the purpose of cleaning out this deposit in the bottom of the ditch, and also for the purpose of deepening the open ditch throughout that portion of its length where this deposit existed, the commissioners levied a tax of \$25,000. The certificate of levy was made on November 10, 1902, and filed with the county clerk on the next day, and was as follows:

"We, the undersigned, commissioners of special drainage district No. 1 of Onarga, Douglas and Danforth townships, in the county aforesaid, do hereby certify that we re-

quire the sum of twenty-five thousand dollars (\$25,000) for the purpose of cleaning and repairing the ditches of said district; therefore, we do hereby levy said sum of twenty-five thousand dollars (\$25,000), and request the clerk of said Iroquois county to extend and charge the said amount of twenty-five thousand dollars (\$25,000) against the several pieces and parcels of lands and lots in said district, including sub-district No. 1 of Onarga township, according to the rate or ratio heretofore established and approved."

In making this levy the commissioners sought to proceed under section 70 of the farm drainage act (Hurd's Rev. St. 1901, p. 735), which provides that it shall be the duty of the commissioners, on or before the 1st day of December of each year, to file with the county clerk a statement of "the amount, if any, necessary to be levied to keep the work, or any part thereof, in repair for the year next ensuing," and the amount of any deficiency in the payment for repairs theretofore made, "and the clerk shall compute the pro rata share which each tract or parcel of land or property in said district, assessed for benefits, will have to pay to raise said respective amounts, which pro rata share shall be in the same proportion as the assessment for the construction of said work."

The tile which drain the lands of the objectors empty into the open ditch in the last mile of its course, so that their lands would, in fact, not be benefited by the proposed expenditure of the \$25,000. Moreover, in the classification of the lands upon which the proportion of the expense of the construction of the original work which each tract should bear was determined, and upon which this \$25,000 levy was distributed upon the lands of the district, the benefits taken into consideration were not alone those resulting from the open ditch, but likewise those resulting from the tile drainage. It will be perceived that not only was the \$25,000 to be expended in a manner that would be of no benefit to the property of the objectors, but they were required to contribute to it on the basis that the construction or improvement of the tile drainage was to be provided for in its expenditure. It will be observed that section 70 authorizes the levy of this tax only for the purpose of raising such an amount as may be "necessary to be levied to keep the work, or any part thereof, in repair for the year next ensuing," and for the payment of any deficiency there may be in the amount of money raised in other years to pay for repairs which were made in such years. No such deficiency is shown here, and the clause authorizing taxation to meet a deficit of that character will not be considered in this case.

The certificate recites that the levy is "for the purpose of cleaning and repairing the ditches of said district." In accordance with the statute, the statement should have been that it was for repairs. Where the work of repairing includes that of putting open ditches

in their original condition, it may perhaps be argued that repairing includes cleaning, and that the word "cleaning," in the certificate, was therefore superfluous. We are inclined to think, however, that it was not so understood by the commissioners in making the levy. On the 18th of November, 1902, seven days after the certificate of levy was filed, the commissioners entered into a contract for the work for which they proposed to pay with this levy. That contract provided for cleaning out the open ditch, except the lower mile thereof, and deepening it throughout the same portion of its length to a depth greater than that which it originally had. The amount that its depth was to be increased beyond the original depth is uncertain from the testimony. One of the commissioners estimated it at three or four inches. The bottom of the ditch was also to be changed in another respect. As originally made it ran on a level for several hundred feet, then dropped down slightly and continued on a level again, and then again dropped down, and so on throughout its entire length. Under the contract of November 18, 1902, the bottom of the open ditch was to be given a gradual slope from its head to the place where the work was to terminate, one mile above its outlet. This contract provided for the doing of all the work that was to be done, except the cleaning and deepening of the ditch where it runs through the city of Gilman. This part of the ditch was excepted from the contract for the reason that the work under the contract was to be done by steam dredges, and there were arches built over the ditch in the city of Gilman through which the dredges could not pass, making it necessary to do the work in that city by some other method. The contract price for the work that was to be done with the dredges was some amount slightly in excess of \$23,000, while the engineer estimated the total expense of the proposed work of cleaning and deepening, including the work to be done in the ditch through the city of Gilman, at \$24,200. At the time this case was heard in the court below the work of cleaning and deepening the ditch was progressing in the manner above described, and it appeared from the testimony of one of the commissioners that such work was the work they had in contemplation in the autumn of 1902, and for which they made the levy in question.

The levy of this tax was made at a meeting of the commissioners held November 1, 1902. The record of that meeting shows the tax to have been levied "for cleaning out and repairing the ditches." During the same month the commissioners made report of the financial condition of the district for the year ending October 31, 1902, in which is included the following statement: "At the regular meeting, November 1, 1902, the commissioners made a levy of \$25,000 for the purpose of deepening and cleaning out the ditches of this district." It is thus apparent that the commissioners, in making this levy, attached to the terms

"cleaning" and "repairing" a much wider significance than can be given the term "repair" under section 70, above cited, and it is also apparent that the commissioners were without authority to make this levy, under that section, for the purposes for which it was made, except such portion of the levy, if any, as was necessary "to keep the work, or any part thereof, in repair for the year next ensuing." It is certain from the record in this case that the \$24,200—the amount of the engineer's estimate—was not levied for any purpose within the meaning of section 70. We think the evidence offered by objectors was sufficient to cast upon the county collector the burden of showing that the remaining \$800 was authorized by that statute, and, as appellant failed to offer any evidence showing that any part of the tax was necessary for repairs for the ensuing year, the action of the court in sustaining the objection that the commissioners were without power to make the levy was proper.

Appellant cites the case of *Ottawa Glass Co. v. McCaleb*, 81 Ill. 566, in support of the proposition that "the commissioners, acting within the scope of their authority, are the judges as to whether or not the tax in question is a repair tax, and their judgment in the matter is not subject to review." If this statement of the law were correct, it would relieve the courts of the burden of determining whether the tax was a valid one. We find on examination, however, that the authority cited does not warrant the conclusion which counsel for appellant have drawn therefrom. In that case a bill had been filed to restrain the collection of taxes against the *Ottawa Glass Company*, for the reason, as charged, that the State Board of Equalization, which had assessed the capital stock and franchises of the company, had no constitutional warrant to make the assessment, and for the reason that the assessed value, as fixed, was excessive in amount and was so high as to be oppressive. In determining the matter the court said, in refusing to interfere on the ground that the assessment was too high (page 563): "Hence the legally constituted board of equalization have acted within the scope of their authority, and if they have reasoned incorrectly and erred in judgment we have no power to review and correct their action. They are empowered by law to fix the value of the property of corporations for taxation, and we can afford no relief, even if the rules that govern them are not such as commend themselves to our notions of the best means of ascertaining such value." It will be seen that the case referred to falls far short of sustaining the doctrine that the courts are bound by the statement of the commissioners made in their record and in the certificate of levy that the tax was for "cleaning and repairing." On the other hand, in the case of *O'Day v. People*, 171 Ill. 293, 49 N. E. 504, where school directors had levied a tax "for building purposes," this court found, on con-

69 N.E.—7

sideration of the evidence introduced in the court below, that the tax so levied was levied for purposes which were not building purposes, and reversed the judgment for such taxes without remanding the cause; and the same investigation was made and approved by this court in *Wabash Railroad Co. v. People*, 187 Ill. 289, 58 N. E. 254.

The statement of the drainage commissioners in their certificate that the tax levied is a tax for repairs is not conclusive, and where it is shown that it is not a tax for that purpose it cannot be sustained as a repair tax under said section 70.

The record of the commissioners and the certificate of levy are each deficient in failing to state, in substance, that the levy is made to keep the work, or some part thereof, in repair for the year next ensuing. Nor was the method pointed out by the statute for the collection of this tax followed. It should have been extended upon the tax books of the township collectors, and warrants for the collection thereof should have issued to the latter officers. We prefer, however, to place our holding on the ground that the commissioners were without power to levy this tax under section 70 of the farm drainage act.

The judgment of the county court will be affirmed.

Judgment affirmed.

(206 Ill. 159)

FORTHMAN v. DETERS.

(Supreme Court of Illinois. Dec. 16, 1903.)

VENDOR AND PURCHASER—MUTUALITY OF CONTRACT—CONSIDERATION—OFFER OF PERFORMANCE—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY—MORTGAGE ASSUMPTION—MERGER—ESTOPPEL—PERFORMANCE AGAINST PURCHASERS.

1. A contract for the sale of land reciting that the vendors "have sold" the premises to the vendee, and that the vendee "agrees to pay" the purchase money, is binding on both parties, when accepted by the vendee, and will be specifically enforced at his instance, though signed only by the vendors.

2. A contract for the sale of land, made under seal, imports a sufficient consideration.

3. In a suit for specific performance complainant must prove that he has been ready, willing, and eager to perform, and the burden is on him to show a full and complete performance, or offer to perform, on his part.

4. In a suit for the specific performance of a contract for the sale of land, evidence examined, and held to show complainant's willingness to perform and offer of performance.

5. A contract for the sale of land by the heirs at law of the former owner, by which the vendors agreed to give "a good deed free from all incumbrance, with abstract of title up to date," imposed on the vendors the obligation of exonerating the land from the payment of claims allowed against the estate of such former owner.

6. An allegation in a bill for specific performance of a contract for the sale of land, under which the vendee agreed to assume a mortgage thereon, that the vendee had paid the principal and interest due on the mortgage, estops the vendee from asserting a mortgage claim against the property.

7. A finding in a decree for the specific performance of a contract for the sale of land that the mortgage which the vendee had agreed to

pay was paid protects the vendors and their grantees from any liability thereon.

8. Where a vendee in a contract for the sale of land, by which he assumed the payment of a mortgage thereon, took to himself an assignment of the mortgage and unpaid notes, his estate as mortgagee would merge with that of the mortgagor on the conveyance of the mortgagor's interest to him, and thus protect the mortgagor or his vendees from liability on the mortgage.

9. Where a purchaser of property from a vendor in a contract for its sale had full knowledge of the rights of the vendee under the contract, he would be compelled to perform the vendor's contract, and convey to the vendee.

Appeal from Circuit Court, Jasper County; Wm. M. Farmer, Judge.

Bill by Joseph Deters against Theodore Forthman and others. From a decree for plaintiff, defendant Forthman appeals. Affirmed.

This is a bill filed on August 14, 1902, in the circuit court of Jasper county, by appellee, Deters, against Reka Huckstead, Ferdinand Huckstead, Anna Bartels, and appellant, Theodore Forthman, for the specific performance of a contract made by Reka and Ferdinand Huckstead with the appellee to convey to the latter 80 acres of land, to wit, the west half of the southeast quarter of section 8, township 7 north, range 8 east, in said county. The bill not only prayed for a conveyance of said lands from said Reka and Ferdinand Huckstead and Anna Bartels to appellee, but also that a deed subsequently made to appellant, Forthman, should be canceled. The bill was subsequently dismissed as to Anna Bartels. A joint and several answer was filed by Reka and Ferdinand Huckstead and the appellant, to which answer replication was filed. Testimony, oral and documentary, was introduced in open court before the chancellor, and the hearing resulted in a decree in favor of appellee, the complainant below. The present appeal is prosecuted from said decree.

The material facts are substantially as follows: One Christopher Huckstead died testate on November 28, 1901, leaving Reka Huckstead, his widow, and Ferdinand Huckstead, and Anna Bartels (formerly Anna Huckstead), his children and only heirs at law. At the time of his death he was the owner seised in fee of the 80 acres above described, and also of certain personal property, the value of which was afterwards appraised at the sum of \$446. His will was made on October 31, 1901, and by the terms thereof he bequeathed to Reka Huckstead, his wife, a life estate in the south half of said 80 acres, with remainder over at her death to his son, said Ferdinand Huckstead. The north 40 acres of the 80-acre tract he devised to his son, said Ferdinand Huckstead. By the terms of the will, as thus stated, the title to the whole 80 acres was in Reka Huckstead, the widow, and Ferdinand Huckstead, the son. No interest in the land was

devised to Anna Bartels. The will was probated in the county court of Jasper county at the February term, 1902, and one Charles Schmidt, the son of Reka Huckstead by a former husband, was appointed administrator with the will annexed, and qualified as such. In April, 1902, four small claims were allowed against the estate, amounting to \$172, and the appraisers fixed the widow's award at \$807, the reports of said appraisers being approved by the court March 3, 1902. Personal property was inventoried to the amount of \$446.

Prior, however, to the appointment of the administrator, and on January 20, 1902, a written agreement was made between Reka Huckstead, widow of Christ Huckstead, deceased, of the county of Jasper, Ill., party of the first part, and Ferdinand Huckstead, of Effingham county, Ill., of the second part, and Anna Bartels, formerly Anna Huckstead, of Day county, territory of Oklahoma, party of the second part, which written agreement witnessed "that for and in consideration of the stipulation hereinafter mentioned" the said parties of the first and second part "agree as follows: That we have sold to one Joseph Deters, of the county of Effingham, state of Illinois, the estate known as the Christ Huckstead estate, and described as follows:" [Describing the eighty acres as above]—"for the sum of \$2,100.00, and that the said Joseph Deters agrees to pay all of said purchase money on the delivery of a good title to the said described land, less \$800.00 and \$102.72, interest on mortgage and money; making a total deduction of \$902.72, and leaving a balance to be paid by said Joseph Deters of \$1,197.28; and that the heirs hereby further agree to give possession of the said described land to Joseph Deters on or before March 1, 1903. And we further agree to give purchaser a good deed, free from all encumbrance, with abstract of title up to date. All taxes to be paid by the said heirs for 1902." This written agreement was signed by Reka Huckstead and Ferdinand Huckstead under their respective seals, but was not signed by Anna Bartels, or by the appellee, Joseph Deters. It was acknowledged on January 20, 1902, before a notary public in Effingham county, by Reka Huckstead and Ferdinand Huckstead, and was acknowledged by Anna Bartels on January 24, 1902, before a justice of the peace in Day county, in the territory of Oklahoma, and was filed for record on May 10, 1902.

When Christ Huckstead died there was a mortgage upon the 80 acres in question, executed by the testator and his wife in the former's lifetime to H. P. Wyatt, dated January 28, 1898, to secure a note of the same date for \$800, payable five years from February 1, 1898, with interest at six per cent. per annum, payable semiannually, and evidenced by coupon notes, all the notes being payable to the order of said Wyatt. On January 22, 1902, two days after the making

¶ 8. See Mortgages, vol. 25, Cent. Dig. § 706.

of the contract, the appellee, Deters, took up and paid the mortgage notes, which were assigned and indorsed to him by Wyatt. Upon the hearing below the original mortgage and the principal note and coupons paid by Deters were introduced in evidence before the court. The amount paid by Deters for the notes and mortgage was \$902.72, being \$800 principal and \$102.72 interest.

The contract was made a part of the bill, and the bill averred the complainant's readiness to comply with the agreement; that complainant, Deters, so informed the defendants on May 10, 1902; that on August 12, 1902, complainant applied to Reka and Ferdinand Huckstead, and offered to pay them \$1,197.28 on delivery to him of a warranty deed for said land; that they refused to do so; that complainant Deters "on the 22d day of January, 1902, did pay to H. P. Wyatt \$972.72, principal and interest on mortgage secured by premises, which sum was a part of purchase price of said premises"; that Reka Huckstead, Ferdinand Huckstead, and Anna Bartels on June 2, 1902, conveyed by warranty deed said 80 acres to Theodore Forthman; that Forthman knew at the time of above contract. The bill prays, in addition to what is above stated, that \$1,197.28, the residue of purchase money, be placed to be used in payment of debts of the estate of Christ Huckstead, probated or to be probated, and for other relief.

The answer admits that Reka and Ferdinand Huckstead entered into a written agreement to sell the land, but denies that Anna Bartels joined in it, and denies that Deters was a party to it, or in any way connected therewith, and denies that he covenanted to pay \$2,100 or any sum for the land; denies that he was ready and willing to comply, and avers that he refused to become the purchaser of said real estate, and only showed a willingness to purchase the land after it had been sold to Forthman; denies that Deters paid Wyatt \$972.72, principal and interest of mortgage, as a part of the purchase price of said premises, but avers that he purchased said mortgage debt, and caused the same to be assigned to himself, and is now the owner thereof, unsatisfied and unpaid, and capable of being enforced against said real estate. The answer admits the conveyance of the land to Forthman, and avers that, Deters not being a party to the agreement, the same could not be enforced at law or in equity against him; that there was no mutuality or reciprocity of obligation created by said agreement between Deters and the defendants below:

On April 13, 1903, the court by its decree found that the land was devised as above stated to Reka and Ferdinand Huckstead; that the agreement of January 20, 1902, was entered into between said Reka and Ferdinand Huckstead and Anna Bartels with the appellee, Deters; that said agreement was filed for record May 10, 1902; that Deters

had tendered Reka and Ferdinand Huckstead \$1,197.28, after having paid the mortgage and interest mentioned in the contract amounting to \$902.72; that the defendants below refused to make deed to Deters; that on February 3, 1902, Charles Schmidt was appointed administrator with the will annexed of the estate of Christopher Huckstead, deceased; that the only real estate inventoried was the premises in controversy; that Deters had offered to deposit \$1,197.28, to pay off and release claims against estate, in the hands of any person defendants below would designate; that the defendants refused the offer; that June 2, 1902, Reka and Ferdinand Huckstead conveyed the premises to Theodore Forthman; that Forthman purchased the premises with knowledge of Deters' rights; and it was therein decreed that the agreement be specifically performed; that Reka and Ferdinand Huckstead execute to Deters warranty deed for the land, and deliver the same, with abstract of title, to the clerk of the court on or before August 1, 1903; that Theodore Forthman also convey the premises to Deters on or before August 1, 1903; that, if conveyances are made, Deters, within one day after August 1, 1903, pay the clerk \$1,197.28; that the clerk shall keep the money until premises are released from all claims allowed against said estate; that, if Deters is compelled to discharge said liens, then that the sum of money which he is compelled to pay for that purpose be deducted from the amount deposited with the clerk, and the balance, if any, be paid to Forthman; that if Reka or Ferdinand Huckstead or Theodore Forthman pay said claims, then the clerk shall pay to Forthman said sum of money so deposited with him; that, in the event of an appeal by the defendants or any of them, Deters need not pay said sum of \$1,197.28 to said clerk until the final determination of the case; that if defendants execute the deed as required, and deposit the same with the clerk, and pay off said claims, then the clerk shall deliver the same to Deters upon payment by him of said sum of \$1,197.28, and the clerk shall pay said \$1,197.28 to Forthman; that if the defendants comply with said decree, and Deters neglects to comply on his part, he shall, at the election of the defendants, be held to acquiesce in said Reka and Ferdinand Huckstead's failure to perform said contract, and shall not be entitled to a specific performance, or any damage for non-performance; that the defendants Reka and Ferdinand Huckstead pay complainant's costs. By the terms of the decree the court reserved for future consideration the matter of ascertaining whether Reka and Ferdinand Huckstead removed the liens of the claims allowed against the premises in controversy in the estate of the deceased, and how much, if anything, Deters may be compelled to pay to remove the same.

An appeal has been taken from the decree rendered by the circuit court by the present

appellant, Theodore Forthman, but no appeal has been taken by the defendants below Reka Huckstead and Ferdinand Huckstead.

James W. Gibson, for appellant. Davidson & Isley, for appellee.

MAGRUDER, J. (after stating the facts).

1. The first reason urged by the appellant for the reversal of the decree of the trial court is that the contract was not signed by appellee, Deters, and therefore is not such a contract as a court of equity will specifically enforce. It is true that the contract was signed only by Reka and Ferdinand Huckstead, the vendors, and was not signed by appellee, Deters, the vendee. But the evidence shows clearly that after the execution of the contract by Reka and Ferdinand Huckstead it was delivered by them to appellee, and appellee accepted the contract, and on May 10, 1902, recorded the same. The evidence is also clear that he paid a part of the \$2,100 named in the contract as the purchase money of the land, to wit, \$902.72, to pay off and take up the amount of principal and interest due upon the mortgage resting upon the land.

It is well settled by the decisions of this and other courts that where a party accepts and adopts a written contract, even though it is not signed by him, he shall be deemed to have assented to its terms and conditions and to be bound by them. *Memory v. Niepert*, 131 Ill. 623, 23 N. E. 431; *Ames v. Moir*, 130 N. Y. 582, 22 N. E. 535; *Lowber v. Connit*, 86 Wis. 176; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790. In *Memory v. Niepert*, supra, it was claimed that the contract there under consideration, because it was signed by one party only, lacked mutuality—that is, failed to show that it received the assent of the party not signing it—and therefore was no evidence of any contract whatever; but this view was held to be unsound. There, as here, the party signing the contract stated that he had “sold” to the party not signing the same the property therein described upon the terms therein set forth. The same is true of the contract in the case at bar, which contains the following words: “We have sold to one Joseph Deters” the 80 acres in question, describing the land. By these words Reka and Ferdinand Huckstead declared and acknowledged that they had sold the premises in question to Deters, and this declaration or acknowledgment was binding upon them. As we said in the *Memory Case*, supra: “The word ‘sold’ imports, not a mere proposition to sell, but a consummated contract of sale. * * * The writing in this case is the acknowledgment of a contract, in which there is complete mutuality—a buyer and a seller—a purchase and a sale. It is clear that the execution and delivery of such a writing by the seller to the buyer is not the submission of a mere proposition, but the execution of a contract capable of being

enforced, as such, against him.” The contract here also recites “that said Joseph Deters agrees to pay all of said purchase money on the delivery of a good title to said described land,” etc. By these words Reka and Ferdinand Huckstead further declared and acknowledged that Deters had agreed with them to pay the purchase money.

It is claimed, however, that the contract lacks mutuality, so as to render it enforceable as a written agreement, upon the alleged ground that it could not be enforced against Deters, the purchaser, if the breach had been on his part. In *Ames v. Moir*, supra, however, where a similar contract was signed by the purchaser, and suit was brought against him by the sellers for the purchase money, we said: “When the sellers accepted the paper as a contract, they became bound by its terms and conditions as completely as if they had in form signed the paper.” In *Lowber v. Connit*, supra, it was said by the Supreme Court of Wisconsin: “Where the contract has been accepted and adopted by the party not signing it, he does assent and agree to it on his part, and the law implies a promise to perform.” In the *Memory Case* we further said: “The delivery of a writing and its acceptance and adoption by the party to whom it is delivered are necessarily facts dehors the writing itself, and must therefore be proved by extrinsic evidence; and where mutuality is established by proof of the acceptance of the writing the contract is, notwithstanding such resort to parol evidence, a contract all of which is in writing. * * * But, where the writing on its face purports to be a consummated contract, the mere acceptance and adoption of the writing establishes mutuality, and makes the contract binding on both parties.” We see no reason, therefore, why, if there had been a breach of the contract by the appellee, it could not be enforced against him, even though it was not signed by him. The contract in the case at bar was made under seal, and hence must be regarded as having been made upon a sufficient consideration. *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555. The terms of the contract are criticised by counsel, but it gives the names of the contracting parties, a proper description of the premises sold, the time for the delivery of possession, the price and mode of payment, the character of the title to be conveyed, and the terms which go to make up a contract of sale.

2. In a proceeding for specific performance the complainant must prove that he has been ready, willing, and eager to perform, and the burden is upon him to show a full and complete performance, or offer to perform, on his part. *Morse v. Seibold*, 147 Ill. 318, 35 N. E. 369; *Tryce v. Dittus*, 199 Ill. 189, 65 N. E. 220. It is claimed by the appellant that the appellee in this case has not proved his willingness to perform the contract, or any offer

on his part to perform it. We do not think that this claim is sustained by the evidence. The appellee, Deters, not only paid the principal and interest due upon the mortgage upon the property within two days after the execution of the contract, but he tendered and offered to pay the balance of the purchase money, over and above the amount due on the mortgage, to wit, \$1,197.28, as soon as a deed showing good title should be given to him, as required by the contract. It will be observed that the contract for the sale of the 80 acres to Deters was made before any administration was taken out upon the estate of the deceased Christopher Huckstead. The real estate belonging to the deceased testator was liable to be sold by the administrator for the payment of the claims to be allowed against the estate, and the appellee insisted that whatever claims there might be against the estate should be paid off, in order to relieve the land from its liability for their discharge. We have held in a number of cases that the lands of a decedent are liable to be charged with the debts of the estate. *Noe v. Moutray*, 170 Ill. 169, 48 N. E. 709, and cases there cited. The proof shows that appellee was desirous of going abroad to Germany, and that he did leave for Germany on May 11, 1902, and did not return until August 6, 1902. Before his departure, and on February 3, 1902, Charles Schmidt was appointed administrator of the estate. On March 3, 1902, the report of the appraisers, fixing the widow's award at \$807, was approved by the court, and on April 11 and June 7, 1902, claims against the estate were allowed to the amount of \$172, making a total, including the widow's award, of \$979, which, after deducting \$446 of personal property, left \$533 as the amount of the claims due from the estate. The appellee proposed to pay the money, including the amount necessary to discharge these claims, and offered, as he was obliged to leave the country, to place the money in the hands of his own attorney, or in the hands of the attorneys of Reka and Ferdinand Huckstead, the vendors, in order that a portion of it might be applied to the payment of the claims allowed, and the balance be paid over to the vendors. As we understand the evidence, the money was left in the hands of appellee's attorney for such purpose, or left in such a way that the attorney had the power to pay the \$1,197.28 as soon as a deed conveying good title was delivered to him. Appellee left for Europe with the understanding that the claims, when allowed, would be paid off with a portion of this amount. As soon, however, as appellee had left the country, and on June 2, 1902, the vendors, Reka and Ferdinand Huckstead, in violation of the agreement, made a deed of the land to the appellant for a nominal consideration of \$2,350, which deed was never recorded. Upon the return of appellee on August 6, 1902, he ascertained that this deed had been made to

the appellant, and he tendered the money, and demanded a deed, which demand was refused. We discover nothing in the evidence to indicate that appellee did not do everything which he could do to show his willingness to perform the contract on his part, nor anything to show that he did not offer to perform it.

The decree of the court is criticised upon the alleged ground that creditors would have two years within which to file their claims, and that the vendors could not be compelled to wait two years for all the claims to be filed before receiving the purchase money for the land. The decree is not capable of the construction thus placed upon it, but provides that the clerk shall keep the money until the premises are released "from all liens of said claims allowed against said estate of Christopher Huckstead." The claims allowed, and which were to be paid out of the money by the terms of the decree, amounted to the sum already mentioned.

It is further said by the appellant that the mode provided by the decree for the extinguishment of the liability of the land to pay the claims allowed was not a specific enforcement of the contract as made, but was tantamount to the insertion therein and the enforcement of new terms, so as to create a new contract for the parties. The decree in all its material provisions is substantially the same as the decree approved by this court in *Hunt v. Smith*, 139 Ill. 296, 28 N. E. 809. By the terms of the contract the vendors agreed to give "a good deed free from all incumbrance, with abstract of title up to date." The obligation thus created by the contract involved the duty of removing the liability of the land for the payment of the claims allowed. In *Hunt v. Smith*, supra, where it appeared that at the time of the decree the lien of a mortgage held by an insurance company had not been removed, we held that the obligation on the part of the vendor to convey an unincumbered title necessarily involved the legal obligation or duty to remove the lien of the mortgage, and we there said: "This is in no sense a creation of a new contract for the parties, but only a mode, and we think an appropriate mode, of enforcing the legal obligations imposed by the contract which the parties have made for themselves."

3. It is further claimed on the part of the appellant that the appellee, Deters, did not pay off the mortgage upon the premises, but that he obtained an assignment to himself of the note and mortgage from the original mortgagee, Wyatt, and held it uncanceled against the land. In this connection it is also insisted that the note and mortgage were not surrendered. The appellee produced upon the trial the original mortgage, and the assignment thereof to himself, and the unpaid principal and coupon notes secured by the mortgage transferred to himself. Appellee alleges in his bill that he paid the principal and interest due on the mortgage to Wyatt,

and the decree rendered by the court finds that he paid the mortgage and interest. This allegation in the bill as to payment would estop appellee from asserting the mortgage claim against the property, and the finding of the decree that the mortgage was paid protects the vendors and their grantee, and they have no reason to complain.

Appellee being the holder of the mortgage when the original vendors in the contract or their grantee, the appellant, should execute to him a deed, there would unquestionably be a merger in appellee of the two estates—the legal estate of mortgagor and the equitable estate of mortgagee. It is well settled that at law when a greater or lesser or a legal and equitable estate coincide in the same person the lesser or the equitable estate is immediately merged and annihilated. 15 Am. & Eng. Ency. of Law (1st Ed.) p. 314. It is true that the question whether or not a merger takes place in equity depends upon the intention of the parties and a variety of other circumstances. *Id.* But “a merger will be prevented by equity only, however, for the purpose of promoting substantial justice; it will not prevent a merger where such prevention would result in carrying a fraud or other unconscientious wrong into effect.” 15 Am. & Eng. Ency. of Law (1st Ed.) p. 315. Pomeroy, in his work on Equity Jurisprudence (section 794), says: “Whatever may be the circumstances, or between whatever parties, equity will never allow a merger to be prevented, and a mortgage or other security to be kept alive, when this result would aid in carrying a fraud or other unconscientious wrong into effect under the color of legal forms. Equity only interposes to prevent a merger, in order thereby to work substantial justice.” In this case it would be an injustice to the original vendors in the contract, and to appellant, their grantee, to permit appellee to hold the mortgage as a subsisting incumbrance, and the note as a subsisting indebtedness, after a deed had been executed to the appellee by Reka and Ferdinand Huckstead and the appellant. Hence, upon the execution of the deed required by the contract to appellee, there would be a merger which would protect the interest of appellant and the vendors in the contract. Although a conveyance of the mortgagor’s estate to the mortgagee does not operate as a merger in equity unless it was intended to have that effect, yet when the holder of the notes secured by the mortgage accepts a conveyance from the mortgagor of the lands, and gives the notes up to the maker, or, as here, deposits them in court, and no reason exists for keeping the incumbrance alive, there will be a complete merger, and the mortgagee will acquire the entire title. *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642.

The contract is capable of the construction that the appellee, Deters, assumed the payment of the mortgage upon the property because the purchase price of the property is

stated in the contract to be \$2,100, and the \$2,100 included the principal and interest due upon the mortgage. The rule is that where the grantee of the mortgagor takes a conveyance of the land subject to the mortgage, and expressly assumes and promises to pay it as a part of the consideration, the assignment of the incumbrance to the owner of the property works a merger thereof, because such grantee is thereby made principal debtor, and the land is the primary fund for payment, so that, if he pays off the charge, it becomes extinguished. *Clark v. Glos*, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; 2 Pomeroy’s Eq. Jur. §§ 797, 793. Inasmuch, therefore, as an execution of a deed to appellee in accordance with the terms of the decree would create a merger, no injury could result to appellant if the terms of the decree should be carried out.

4. The evidence in the case shows clearly that before appellant accepted his deed from the heirs or devisees of Christopher Huckstead, deceased, he had notice, both actual and constructive, of the contract of sale made with appellee on January 20, 1902. That contract was on record as early as May 11, 1902, and appellant did not obtain his deed until June 2, 1902. In addition to this, the proof shows that appellant went to the recorder’s office, and saw the contract with appellee as there recorded. He therefore had full notice and knowledge of the rights of appellee under the contract before accepting his deed. Consequently, appellant, not being a bona fide purchaser without notice, will be compelled to perform the contract of his vendors Reka and Ferdinand Huckstead. He stands upon the same equity as they did. Although he is not personally liable, yet he is properly decreed to convey the land in the same manner as his vendors. In other words, he is treated as a trustee of appellee, the first vendee. “The general principle upon which this doctrine proceeds is that from the time of the contract for the sale of the land the vendor as to the land becomes a trustee for the vendee, and the vendee as to the purchase money a trustee for the vendor, who has a lien upon the land therefor. And every subsequent purchaser from either, with notice, becomes subject to the same equities as the party would be from whom he purchased.” 1 Story’s Eq. Jur. (12th Ed.) § 789. In Pomeroy on Specific Performance (section 465) it was said: “When the vendor, after entering into a contract of sale, conveys the land to a third person, who has knowledge or notice of the prior agreement, * * * such grantee * * * can be compelled, at the suit of the vendee, to specifically perform the agreement by conveying the land, in the same manner and to the same extent as the vendor would have been liable to do had he not transferred the legal title.” See, also, *Bryant v. Booze*, 55 Ga. 438; *Hunt v. Smith*, supra; *Chicago & Eastern Illinois Railroad Co. v. Hay*, 119 Ill. 507, 10 N. E. 34; *Wollen-*

sak v. Briggs, 119 Ill. 453, 10 N. E. 23; Bishop v. Newton, 20 Ill. 175.

For the reasons above stated, we are inclined to think that the decree of the circuit court is correct, and accordingly it is affirmed. Decree affirmed.

(206 Ill. 322)

LANDIS et al. v. WOLF.

(Supreme Court of Illinois. Dec. 16, 1903.)

INJUNCTION—INTERFERENCE WITH BUSINESS—DAMAGES—DISSOLUTION OF INJUNCTION—COUNSEL FEES—COSTS.

1. Where the wrongful issuance of an injunction causes injury by suspending a business, damages may be allowed.

2. In an action for damages owing to the suspension of a business by the wrongful issuance of an injunction, profits for a reasonable period next preceding the time when the injury was inflicted, may be taken as a basis for an estimate of such damages.

3. One who had contracted to deed land in consideration of a conveyance of a stock of goods tendered a deed and claimed a right to possession of the goods. The other party claimed that the contract was not consummated, and that the deed did not properly describe the property, but the grantor drove him from the store, and took possession, whereupon the other party sued for specific performance and for an injunction restraining the grantor from interfering with the goods. *Held*, that the dismissal of the bill and dissolution of the injunction were conclusive that the injunction was wrongfully sued out.

4. Where propositions of law submitted by a party are held to be the law in the case, he cannot complain on appeal of the holdings on such questions.

5. Where counsel fees are necessarily incurred in procuring the dissolution of an injunction, they may be allowed as damages, but where the injunction is ancillary to the principal relief sought, and its dissolution only incidental to the defense, counsel fees incurred in defending the suit cannot be assessed as damages.

6. One who had contracted to deed land in consideration of a conveyance of a stock of goods tendered a deed and claimed a right to possession of the goods. The other party claimed the contract not consummated, and that the deed did not properly describe the property, but the grantor drove him from the store, and took possession, whereupon the other party sued for specific performance and for an injunction restraining the grantor from selling the goods. The grantor employed attorneys to procure a dissolution of injunction for a certain sum. A motion for dissolution on the face of the bill was denied. Testimony was then taken, and on final hearing the question was considered whether complainant was entitled to specific performance. The bill was dismissed on such question, and incidentally the injunction dissolved. *Held*, in an action for damages for wrongful issuance of the injunction, that the agreed compensation of the attorneys could not be allowed as damages on the theory that the services were in securing "the dissolution of an injunction."

7. The fact that defendant in the injunction pending the same had sued out a writ of attachment against the complainant, and caused the same to be levied on the goods, was no bar to a recovery of damages for the wrongful issuance of the injunction, the suing out of the attachment not having been in violation of the injunction.

Appeal from Appellate Court, Third District.

Action by John M. Wolf against William Landis and another. From a judgment of the Appellate Court (106 Ill. App. 533) affirming a judgment in favor of plaintiff, defendants appeal. Reversed.

This is an action of debt, brought by appellee against appellants upon an injunction bond, executed by appellants, as obligors, to appellee, as obligee; the appellant George F. Richter being surety upon the bond. Pleas were filed by the defendants, and the cause was tried by the court without a jury. The court found the issues for appellee, plaintiff below, and assessed the damages at \$1,000, and thereupon rendered judgment in favor of appellee against the appellants, defendants below, for \$1,000 debt and damages \$1,000, together with all costs and charges; judgment to be satisfied upon payment of the damages. Upon appeal to the Appellate Court the judgment was affirmed. The present appeal is prosecuted from such judgment of affirmance.

The bond sued upon was dated the 25th day of March, 1901, and recited that appellant Landis filed his bill in the circuit court of Moultrie county against appellee, praying, among other things, for an injunction restraining appellee from interfering with the dry goods store of Landis, or from selling any of the goods therefrom, or from coming into said store, until the further order of the court; and that the master in chancery of the court in vacation allowed the injunction according to the prayer of the bill upon Landis giving bond and security as provided by law, and as required by the order of the master. The condition of the bond is that Landis, his executors or administrators, or any of them, shall pay or cause to be paid to Wolf, his executors, administrators, or assigns, "all damages which may be caused to him if said injunction be wrongfully sued, and also all such costs and damages as shall be awarded against the said complainant, William Landis, in case the said injunction shall be dissolved." The declaration in the case, after setting up the terms of the bond, and that the writ of injunction was issued and served, alleges that at the September term of the court in 1901 it was decreed that the injunction should be dissolved; and the declaration thereupon further alleges that by reason of the unlawful issuing of the injunction appellee, Wolf, was, during all the time the injunction remained in force, prevented from merchandising and making profit of the said stock of dry goods and from carrying on his business as a merchant, and that thereby he, the said Wolf, sustained injury to his business, amounting to the sum of \$1,000; and also was compelled to and did become legally bound to pay out divers sums of money, amounting to the sum of \$1,000, for the fees and charges of solicitors and counsel, and for other charges and expenses in and about securing the dissolution of the injunction.

The first plea filed by the defendants is the

plea of non est factum. The second plea, to which the plaintiff filed a similliter, avers that plaintiff, during the time mentioned, was not prevented by reason of the injunction from carrying on the business of a merchant, nor was he thereby deprived of any gains or profits he might otherwise have made. The third amended plea filed by the defendants, to which the plaintiff below filed a similliter, alleges that the bill so filed was a bill for the specific performance of a contract between Landis and Wolf, and the injunction issued was an interlocutory injunction, granted in vacation, whereby Landis sought to compel Wolf to convey to him certain real estate, and give him certain notes and a chattel mortgage in payment for said stock of merchandise, except boots and shoes, and to restrain him from disposing of or interfering with said stock of goods during the pendency of said suit; and that all the fees and charges paid or incurred by the plaintiff, Wolf, for fees and charges of solicitors and counsel in his defense in that behalf, were paid or incurred in the defense of said suit for specific performance; and upon final hearing of said cause for specific performance the court dismissed the bill and supplemental bill of said defendant for want of equity, and ordered the injunction to be dissolved, and said alleged fees and charges for services of attorneys were not paid or incurred in and about procuring the dissolution of the injunction. The fifth plea, to which the similliter was filed, denies that plaintiff was compelled to pay out or did pay out by reason of the injunction any sums of money for fees and charges of solicitors and counsel in and about the defense of said suit. The fourth plea, and the sixth amended plea, and the additional seventh plea filed by defendants below were demurred to by the plaintiff, and by agreement the two latter pleas were to be considered as an amendment to the fourth plea. The demurrer to the amended sixth plea and the additional seventh plea was sustained, and the defendants below excepted to the ruling of the court sustaining the demurrer, and abided by their said pleas. The amended sixth plea sets up substantially that plaintiff is only entitled to one cent damages, and alleges that on April 5, 1901, the plaintiff, Wolf, commenced suit by attachment in the circuit court of Clay county against Landis, therein making his own affidavit for attachment, and claiming that Landis was indebted to him \$8,000, and was about to fraudulently dispose of his property and hinder and delay his creditors; that Wolf executed an attachment bond in the sum of \$18,000; that a writ of attachment was issued, commanding the sheriff of Moultrie county to attach the property of Landis; that the attachment writ, by order of Wolf, was given to said sheriff, and plaintiff ordered the sheriff to, and the sheriff did, on April 6, 1901, under said writ, take possession of all the said stock of dry goods and other property involved in the said suit in the declaration upon which said injunction was in

operation; that said levy was made under the direction of Wolf upon said property as the property of the defendant Landis; that the sheriff retained the possession of all said property under said levy until after the termination of the said suit in chancery; that upon a final hearing of said suit in chancery the injunction was dissolved, but the dissolution was not obtained upon motion; and that all the expenses and solicitors' fees in the declaration mentioned were incurred after the injunction became inoperative, and all of the damage to plaintiff's business as a merchant, if any was suffered by him, was suffered after the injunction became inoperative as aforesaid. By the additional seventh plea defendants say *actio non* as to all damages except one cent, because they say that on April 5, 1901, plaintiff, Wolf, sued out of the Clay county circuit court a writ of attachment in his favor against William Landis, and on April 6, 1901, in violation of the injunction mentioned in the declaration, caused the sheriff of Moultrie county to levy said attachment on said stock of merchandise described in plaintiff's declaration as the property of Landis, and by virtue thereof the sheriff held the merchandise in custody from said date till the termination of the chancery suit and the dissolution of the injunction upon a final hearing, whereby plaintiff caused the property to be held as the property of the defendant Landis, and not to be subject to the use of the plaintiff in his said business as a merchant, as alleged.

The bill in chancery filed by Landis against Wolf on March 25, 1901, was a bill for the specific performance of a contract entered into on March 9, 1901, between Landis and Wolf, by which Landis agreed to sell his stock of merchandise, including all store fixtures, except boots and shoes, at net invoice price, to be invoiced between March 9th and March 23d, and all goods sold after March 9th to be charged to Wolf at cost price, and he to receive the proceeds after the date when the sale was fully consummated. And Wolf bargained for the stock of goods, except boots and shoes, owned by Landis, and agreed to pay for them his equity in a farm of 164.14 acres in Clay county, Ill., amounting to \$5,400, and \$700 personal property, more or less, consisting of horses, cattle, hogs, farm implements, hay, corn, etc., and \$800, due in 12 months, secured by a bankable note, the balance to be secured by a note signed by Wolf and his wife and a mortgage on the store fixtures, Wolf agreeing to pay \$46 interest on the mortgage on the farm for the year ending March, 1902, and to pay the interest from that time until the mortgage fully matured.

The bill for specific performance sets up the contract, and alleges that the fixtures had not yet been invoiced, but when invoiced would amount to about \$200; that they proceeded to invoice the stock of goods, and had done the greater part of it prior to Friday evening, March 22d, when it became neces-

sary for Landis, the complainant, to go to Cerro Gordo; that he left the stock of goods in care of his clerk, with directions to deliver to Wolf, the defendant, one of the three keys to the store when he should bring to the clerk a deed to the land; that Landis went away, and returned Monday, March 25th, when he learned that Wolf had left with the clerk a quitclaim deed purporting to be to 166.14 acres of land in Clay county, but that the deed did not properly describe the land; that Landis examined the deed, and informed Wolf that he would not accept it. The bill also alleges Wolf did not furnish Landis an abstract of title, so that the latter did not know whether Wolf owned the land or not; that Landis informed Wolf he could not have the goods until he complied with his agreement and paid therefor. The bill charges that Wolf was fraudulently seeking to get possession of said goods without paying for them, and that he was an intruder and trespasser upon Landis' rights. The bill prayed that Wolf be compelled to account for the goods sold, and that he specifically perform the terms of his contract. The bill was answered by Wolf, admitting that Landis resided at Sullivan, and owned a retail stock of merchandise, but denied that he was the owner thereof when he brought the suit. The answer admits that the boots and shoes were the property of Landis, and also admits the execution of the contract on March 9th. The answer alleges that Landis took possession of Wolf's farm, and leased the same, and took possession of the personal property on the farm, and sold and disposed of a part of the same. The answer charges that the defendant Wolf had complied with the terms of the contract; admits that Wolf was to pay Landis \$800 in addition to the personal property, consisting of the farm, stock, etc., and to pay for the fixtures at the invoice price, by giving the note of himself and wife and chattel mortgage on the fixtures, as soon as the amount could be ascertained; that Landis accepted U. S. Wolf for the \$800, and caused U. S. Wolf to enter into a written agreement to pay the \$800, and thereby released defendant from the payment thereof. The answer admits that Wolf was to give Landis a mortgage on the fixtures for the invoice price thereof, and states that the invoice had not been completed when the suit was brought, and that he requested Landis to complete the same before bringing the suit; alleges that when Landis left for Cerro Gordo he gave his keys to his clerk, Foster, and told him that when Wolf brought the deed to him Foster should deliver to Wolf the stock of goods, the keys, and all the money received since March 9th. The answer states that Wolf delivered the deed to Foster, and Foster delivered to Wolf the keys and possession of the stock of goods; that he was in continuous possession of the same when the suit was brought; that he (Wolf) was at that time the owner of the stock; that the deed

left with Foster was a quitclaim deed, and properly described the land; that he (Wolf) was ready to pay the balance of the purchase price, if any remained unpaid, as soon as the amount was ascertained. Upon the trial of the present suit upon the injunction bond the bill in the chancery suit and the answer thereto were introduced in evidence.

John R. Eden, J. K. Martin, and E. J. Miller, for appellants. W. K. Whitfield and Mills Bros., for appellee.

MAGRUDER, J. (after stating the facts). The damages claimed by appellee in his declaration are, first, those alleged to have accrued to appellee during the time the injunction remained in force—that is to say, about eight months—upon the alleged ground that appellee was prevented from merchandizing and making profit on the stock of dry goods in question, and from carrying on his business as a merchant; and, second, fees of his solicitors and counsel in and about the dissolution of the injunction, alleged by appellee to have been incurred and paid by him.

1. It is claimed by appellants that the court below erred in allowing appellee any damages for injury to his business and loss of profits therein while the injunction was in force. It is well settled that in such cases damages which are remote, speculative, and incapable of ascertainment cannot be allowed, but where, by the issuance of an injunction, a business is unavoidably suspended, and thereby injured, damages may be allowed. It may not be possible to show by demonstration the precise extent of such damages, but profits for a reasonable period next preceding the time when the injury was inflicted, may be taken as the measure of such damages, and as the basis of an estimate thereof, leaving the other party to show that by depression in trade or other causes they would have been less. *Chapman v. Kirby*, 49 Ill. 211; *Greene v. Williams*, 45 Ill. 206; *Gerard v. Gateau*, 15 Ill. App. 520. In the case at bar there was evidence tending to show that the business of appellee was injured by reason of the issuance of the injunction. The final decree of the court in the chancery proceeding for the specific performance of the contract dismissed the bill and dissolved the injunction. The dismissal of the bill and the dissolution of the injunction were conclusive that the injunction was wrongfully sued out. *Cummings v. Mugge*, 94 Ill. 186. The only question, then, in the present case, is as to the extent to which the appellee was injured by reason of the issuance of the injunction. Upon this branch of the case no error of law was committed by the trial court of which the appellants can complain, because the propositions of law upon this subject submitted by the appellants to the court were held to be the law in the case. The trial court held "that under the breach alleged in the declaration char-

ging that plaintiff incurred damages to his business as a merchant, he is not entitled to recover anything for anticipated profits in carrying on his business." The court also held for the appellants another proposition of law to the following effect, to wit: "That plaintiff cannot recover in this case for prospective gains and profits that might result from his business as a merchant, or other damage than that arising solely from the issue and service of the injunction writ, and its effect upon his business as a merchant."

2. The evidence shows that when the injunction in the chancery case was served upon the defendant therein, the present appellee, Wolf, he employed two attorneys to procure for him a dissolution of the injunction, and agreed to pay them \$500—\$250 apiece. A motion was made to dissolve the injunction for want of equity appearing upon the face of the bill, but this motion was overruled by the court. The attorneys employed then proceeded to take testimony before the master, and a final hearing of the cause was had. The injunction was not dissolved until such final hearing, which resulted in the dismissal of the bill. This court has held in many cases that, where counsel fees are necessarily incurred in procuring the dissolution of an injunction, they may be allowed as damages, but that where the injunction is merely ancillary to the principal relief sought by the bill, and its dissolution is only incidental to the defense made, and the counsel fees are incurred in defending the suit generally, they cannot be assessed as damages. *Walker v. Pritchard*, 135 Ill. 103, 25 N. E. 573, 11 L. R. A. 577; *Jevne & Almini v. Osgood*, 57 Ill. 340; *Elder v. Sabin*, 66 Ill. 126; *Alexander v. Colcord*, 85 Ill. 323; *Blair v. Reading*, 99 Ill. 600; *Milligan v. Nelson*, 188 Ill. 139, 58 N. E. 938. In the latter case of *Milligan v. Nelson*, supra, we said: "It is well settled in this state that on suggestions damages will not be allowed for services rendered in the general defense of the suit, but only such as have been incurred for the purpose of getting rid of an injunction on a motion to dissolve, and not upon final hearing." In *Jevne v. Osgood*, supra, it was said: "It [the statute] was only intended to reimburse the defendant for moneys which he has paid, or for which he has become liable, on the motion to dissolve." In *Elder v. Sabin*, supra, it was said: "The statute only allows the assessment of damages sustained by reason of improperly suing out the injunction, and the damages must be confined alone to that ground. The charge for lawyer's fees could only extend to the motion to dissolve the injunction." In *Blair v. Reading*, supra, we said: "The propriety of suing out the injunction was never called up or considered by the court until the case was finally considered on its merits. Hence the extra expense of a separate hearing of a motion to dissolve was not incurred." In the case at bar the cause came on for a

final hearing after testimony was taken and the report thereon had been made by the master to the court. Upon such final hearing, the court heard evidence, and considered the question whether the complainant in the bill was entitled to a specific performance of the contract or not. The main question involved in the case was whether the defendant in the chancery suit had performed the contract for the purchase of the stock of goods, so as to be entitled to their possession. The court held that the complainant was not entitled to the relief prayed for, and, in view of the issues made by the bill and answer, must have held that the defendant had specifically performed the contract. Incidentally to the determination of the main question—whether or not there had been a specific performance of the contract—the court upon the final hearing dissolved the injunction. The services of counsel were performed, not merely for the purpose of securing a dissolution of the injunction, but in defense of the suit upon the charges set up in the bill. Damages cannot be assessed for services of counsel in thus making a general defense of the suit. As was said in *Jevne v. Osgood*, supra, "To give the statute such an unreasonable construction would render it an instrument of great oppression." In its rulings upon the evidence and upon the propositions of law submitted to it the trial court ignored the rule thus announced. It allowed as damages \$500 as counsel fees, which were earned, not merely in procuring a dissolution of the injunction, but also in making a general defense of the suit. It is true that the testimony introduced on behalf of appellee tended to show that his contract with his lawyers was a contract to procure a dissolution of the injunction. But the mere fact that it was called a contract to procure a dissolution of the injunction would not have the effect of limiting the services of the attorneys to securing that object, if, in fact, as the testimony shows, such services were directed to a general defense of the suit, as well as to a dissolution of the injunction. The court refused to permit evidence to be introduced for the purpose of showing how much of the services rendered were necessary to procure a dissolution of the injunction and how much of such services were rendered in the general defense of the suit. The court also refused to hold, as the law in the decision of the case, propositions submitted to the court by the appellants below to the effect that appellee was not entitled to recover for fees paid or contracted to be paid to his counsel in the chancery cause brought for a specific performance and injunction, if the services of said counsel were directed to a defense upon the merits of the bill, although including and involving a dissolution of the injunction. The court also refused to hold as law a proposition submitted by the appellants to the following effect: "The court holds the law to be that, when a claim for attorneys'

fees is made, and the evidence does not disclose how much fees are incurred or paid on a motion to dissolve the injunction, but does disclose that \$500 was paid upon a motion to dissolve and upon a final hearing together, then the plaintiff cannot recover for attorneys' fees." We are of the opinion that the court erred in this regard. Where the evidence makes no discrimination between services rendered in the case generally and services which were strictly necessary to procure a dissolution of the injunction, there is no evidence upon which the assessment of damages can be based, and therefore the allowance of damages in such case cannot be sustained. *Lambert v. Alcorn*, 144 Ill. 813, 33 N. E. 53, 21 L. R. A. 611.

We concur in what is said by the Appellate Court in its opinion deciding this case as to the sustaining by the trial court of a demurrer to the amended sixth and seventh pleas. In such opinion it is said: "By these pleas it was sought to relieve appellants from all liability under the injunction bond, except nominal damages, because appellee began suit in attachment against Landis, and had the attachment writ levied upon the goods after the service of the injunction writ. * * * The scope of the injunction writ was to restrain appellee from selling the goods under an asserted right by purchase. It had no reference to an enforcement of any right which he might have had against Landis as a creditor. He was by the injunction left free to exercise by attachment, as creditor, any right which any other creditor might exercise. The suing out of the attachment writ therefore was not in violation of the injunction. * * * The pleas present no bar to the recovery of damages."

For the error committed by the trial court in allowing counsel fees as part of the damages the judgments of the appellate and county courts are reversed, and the cause is remanded to the county court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(206 Ill. 214)

LANDT et al. v. McCULLOUGH.

(Supreme Court of Illinois. Dec. 16, 1903.)

LANDLORD AND TENANT—ACTION ON LEASE—LEASE IN EVIDENCE—ALTERATIONS—MATERIALITY—EXPLANATION—VARIANCE—NEW TRIAL—MOTION.

1. In an action for rent, the lease introduced in evidence by plaintiff originally provided that the lessor should have the right to purchase improvements at the termination of the lease, and it was provided that the valuation of the improvements should be determined by each party choosing a real estate dealer to fix it, but there had been interlined between the word "estate" and the word "dealer" the words "owner or." It originally provided that it should be sufficient service of demand, for the purpose of terminating the lease, to leave a copy with the lessee, but a clause had been inserted authorizing notice by publication. A typewritten page had been inserted, different in appearance from the rest of the instrument, having

reference to the right of the lessor to purchase the improvements, providing for an extension of the lease, and providing that it should not be assigned during the first 25 years without the consent of the lessor. The lease also originally provided that at the expiration of its term, or at its termination by forfeiture or otherwise, the lessee "will yield up said demised premises in good condition together with all the buildings and improvements thereon." But the words "together with all the buildings and improvements thereon" were erased. *Held*, that the alterations, etc., were material, and it was error to admit the lease in evidence without requiring the lessor to explain them.

2. In an action on a lease the declaration alleged, in *hac verba*, an unsigned and unacknowledged lease, but the lease introduced in evidence purported to have been executed by the parties. Plaintiff was given leave to amend the declaration so as to prevent a variance, but he failed to do so, and the variance was assigned as an error on a motion for a new trial and on appeal. *Held*, that the objection on the ground of variance was good on appeal.

3. Practice Act, § 25 (Starr & C. Ann. St. 1896, c. 110, par. 26), gives the defendant the right, where plaintiff is allowed the privilege of amending his declaration, to make an affidavit that in consequence thereof he is unprepared to proceed with the trial. *Held*, that defendant must state in his affidavit what particular fact or facts he expects to prove.

4. A continuance is to be refused only where the court is satisfied that a continuance is not necessary after examining the affidavit, and it was error to refuse leave to present the affidavit, without reference to whether it showed cause for continuance.

5. In an action for rent, counsel for plaintiff stated that he had served notice on defendants to produce at the trial an assignment of the lease to defendants, and the consent of plaintiff to such assignment; but defendants stated that they did not have the instruments, and no showing was made that defendants had ever had possession of them. *Held*, that it was error to admit secondary evidence; possession by defendant not having been shown, and no proof made of service of notice.

6. Where, in an action for rent, the declaration alleged a written assignment of the lease to defendants, and plaintiff, in order to show the assignment, introduced a bond signed by defendants, which, referring to the lease, described it as "assigned by" S. to defendants, the recital was insufficient to sustain the declaration.

7. Where, in an action on a lease, the declaration alleged a written assignment to defendants and a written consent of plaintiff, drafts of a proposed assignment of the lease and of a proposed consent did not establish the allegation.

8. Where the written reasons on which a motion for a new trial are based embrace objections to the admission of evidence, such objections are subject to review on appeal.

9. Practice Act, § 56 (3 Starr & C. Ann. St. 1896, c. 110, par. 57), provides that a party moving for a new trial shall, before judgment entered, or during the term that it is entered, file the points in writing specifying the grounds, and that judgment shall be stayed until the motion can be heard. As soon as the court instructed the jury to return a verdict for plaintiff, defendant moved for a new trial, and the court refused to allow the motion "to take its usual course," but said he would dispose of it right away. Defendant suggested as a reason for his motion that the evidence did not entitle plaintiff to recover. The court said he would hear the reasons, and defendant's counsel replied that he would not urge them, "for fear you will grant it." After the denial of the motion, and at the same term, defendant filed his written reasons. *Held*, that there was no waiver by defendant of his right to insist on the

motion for a new trial, and on the reasons therefor.

10. Where the bill of exceptions on appeal shows that a motion for a new trial was made and overruled, and an exception taken, and the written reasons are properly filed and noticed in the bill of exceptions, they are reviewable on appeal.

Appeal from Appellate Court, First District.

Action by James O. McCullough against Charles C. Landt and another. From a judgment of the Appellate Court (103 Ill. App. 668) affirming a judgment in favor of plaintiff, defendants appeal. Reversed.

This is an action in assumpsit, commenced on January 18, 1901, in the superior court of Cook county by the appellee against the appellants, Charles C. Landt and Will H. Moore, upon a lease dated March 20, 1889, alleged to have been made by the appellee to one James M. Stebbins, leasing certain premises therein described for a term of 50 years from the 1st day of May, 1889, and ending the 30th day of April, 1939, at an annual rental of \$1,050, payable in equal quarterly installments, of \$262.50 each, on the 1st days of August, November, February, and May in each year for the first 16 years. The lease describes the premises therein leased as being in the town of Lake, in Cook county, and contains, among other covenants, a covenant for the erection of buildings on the premises by the lessee. The declaration charges that "on the 20th day of March, A. D. 1889, the plaintiff and one James M. Stebbins entered into a certain instrument in writing, commonly called a 'lease,' and bearing date of that day, a copy of which is in words and figures as follows, to wit." The declaration then sets forth in *hæc verba* the copy of an unexecuted lease; that is to say, a copy, which does not appear to be signed by either of the parties named in the body of the lease. The declaration further avers that afterwards, on October 12, 1892, Stebbins assigned, transferred, conveyed, and set over to the defendants below (the appellants here), Landt and Moore, all his title, interest, claim, and demand in, under, and to said instrument, in writing, and that the plaintiff below (appellee here), McCullough, consented to said assignment in accordance with the terms of said instrument in writing. The declaration further sets forth that the defendants entered into possession of the premises described in said instrument in writing, and undertook and promised to pay the plaintiff, his heirs or legal representatives, the yearly rent at the times aforesaid, and that during the first 16 years of the term thereby granted, to wit, on January 17, 1900, \$5,000 of the rent, accrued from the 1st day of November, 1896, was in arrears and unpaid, "contrary to the tenor and effect of the said instrument in writing." The defendants below filed a plea of the general issue, and an affidavit of merits as to the whole of appellee's demand.

The case was tried on the short-cause calendar, and at the conclusion of the evidence the jury, by direction of the court, found a verdict for the appellee, McCullough, and assessed his damages at \$3,750.50. The appellants, Landt and Moore, made a motion for a new trial, which was overruled. Judgment was entered upon the verdict, and an appeal was prayed and allowed to the Appellate Court. The Appellate Court affirmed the judgment of the superior court of Cook county, and the present appeal is prosecuted from such judgment of affirmance.

The judgment in this case, as to the material parts thereof, is as follows: "Whereupon come the jurors, * * * who, * * * after hearing all the evidence adduced, say: 'We, the jury, find the issues for the plaintiff, and assess the plaintiff's damages at the sum of \$3,750.50.' Whereupon the defendants submit herein their motion for a new trial in said cause. After arguments of counsel, and due deliberation by the court, said motion is overruled, and a new trial denied. Therefore it is considered by the court that the plaintiff do have and recover of and from the defendants his said damages of \$3,750.50, in form as aforesaid by the jury assessed, together with his costs and charges in this behalf expended, and have execution therefor. Whereupon the defendants, having entered their exceptions herein, pray an appeal," etc.

The bill of exceptions shows the following: "Plaintiff's Attorney: * * * The plaintiff rests. Defendants' Attorney: We will rest, too. * * * Plaintiff's Attorney: Now, if the court please, I ask the court to give the jury this instruction. * * * I will waive my opening. Defendants' Attorney: Will you waive your speech entirely? Plaintiff's Attorney: I will reply, if there is anything necessary, but I do not understand there is anything to be said to the court or the jury. Whereupon the court instructed the jury to render a verdict in favor of the plaintiff for the sum of \$3,937.50. Defendants' Attorney: If your honor please, I enter a motion for a new trial, and I suppose it will take its regular course. The Court: I will dispose of it right now. (To the jury) You gentlemen may go until to-morrow morning at ten o'clock. I will dispose of the motion for a new trial now. Defendants' Attorney: I do not think I care to urge the reasons that I have, on the court, further than to say that the evidence does not entitle them to recover any verdict from the state of facts. The Court: I will hear your reasons now. Defendants' Attorney: I think I will not urge my reasons for a new trial upon the court, for fear you will grant it. Plaintiff's Attorney: Then we move for judgment, of course, upon the verdict. The Court: If that is all to be said on the motion for new trial, the motion will be overruled. [Then follow a copy of the lease introduced in evidence, together with a statement of the *crasura*,

interlineations, and insertions in the same, and also a copy of an unsigned assent to the transfer of the lease by Stebbins to Landt and Moore, and the unsigned copy of a transfer of the same, and also a copy of a bond for \$5,000 executed by Landt and Moore to the appellee.] Which was all the evidence introduced upon the trial of the above-entitled cause. And thereupon the court gave to the jury on behalf of the plaintiff the following instruction, to wit: "The jury are instructed that, under the law and the evidence in this case, the plaintiff is entitled to recover, and you will find the issues for the plaintiff, and assess his damages at the sum of \$3,937.50;" to the giving of which instruction the defendants, by their counsel, then and there excepted. And the defendants, by their counsel, then and there asked the court to give the following instruction, to wit. [Then follows an instruction asked by the defendants below.] But the court refused to give this instruction to the jury, to which decision of the court in refusing to give the same to the jury the defendants, by their counsel, then and there excepted. And thereupon the jury rendered a verdict against the defendants for the sum of \$3,937.50. Whereupon the defendants, by their counsel, then and there moved the court to set aside the verdict so rendered and grant a new trial of the cause, and filed the following reasons in writing for their motion, to wit. * * * And for grounds of their motion the defendants show to the court the following, to wit: (1) That the said plaintiff has not made out any case entitling him to recover in said cause, by the evidence submitted by him to the jury therein; (2) that the verdict of the jury is not based upon any evidence whatever which entitles the said plaintiff to recover; (3) that the court erred in instructing the jury to find for the plaintiff in said cause; (4) that the court admitted on the trial improper evidence on the part of the plaintiff; (5) that the court erred in refusing to give to the jury the instruction asked by the defendants; (6) that the court erred in admitting in evidence the lease on which the said plaintiff relied for his recovery, inasmuch as there was a variance between it and the lease declared upon in the declaration, to which the attention of the court was specifically called at the time the objection was made; (7) that the court erred in admitting in evidence the alleged assignment of said lease, both because the plaintiff did not show himself competent to testify in reference thereto, and because it appeared therefrom that said assignment was never executed by the said James M. Stebbins; (8) that the court erred in admitting in evidence the alleged consent to such assignment on the part of the said plaintiff, inasmuch as it appeared therefrom that the same had never been executed by him; (9) that the verdict of the jury is contrary to the law and the evidence in the case. * * * But the court

denied the motion, and gave judgment on the verdict against the defendants, to which decision by the court in denying such motion the defendants, by their counsel, then and there excepted."

The amount of the verdict and judgment, as stated in the record made up by the clerk, is \$3,750.50, while the amount of the verdict mentioned in the bill of exceptions, which the jury were instructed by the court to render, is \$3,937.50; and the bill of exceptions states that the court gave judgment on the verdict for the latter amount.

Follansbee & Follansbee, for appellants.
E. W. Adkinson, for appellee.

MAGRUDER, J. (after stating the facts). Upon the trial below, appellee introduced only one witness (the appellee), besides the documentary evidence herein referred to, and the appellants introduced no evidence whatever.

1. Appellee introduced in evidence the lease set out in the declaration. To its introduction the appellants objected upon the ground that there were material erasures, interlineations, changes, and alterations apparent upon the face of the lease, and that it was the duty of the appellee to explain these. The objection was overruled by the trial court, and the lease was admitted in evidence as it was, without such explanation. The objection was well taken, and should have been sustained. These alterations and interlineations and erasures in the lease were pointed out by counsel for the appellants as appearing upon the face of the lease itself, and, although some of them may have been immaterial, many of them were material alterations, interlineations, and erasures. It would extend this opinion to too great a length to point out all of these alterations, erasures, and interlineations, but a few of them which were material may be noticed. By the terms of the lease the lessee therein named, Stebbins, agreed, as security for the rents and covenants therein contained, to erect and complete upon the premises on or before the 1st day of May, A. D. 1893, a block of good and substantial three-story (at least) first-class brick or stone buildings, not less than five in number. It was also agreed that at the termination of the leasehold the lessor should have a right to purchase the buildings and improvements then upon said ground of the lessee, and, in case the lessor and lessee could not agree as to purchase and sale, then said ground was to be revalued in a certain manner therein provided. The lease, as originally drawn, provided as follows: "The manner of revaluation shall be as follows: The lessor and lessee shall each choose a competent real estate dealer in the city of Chicago to revalue said ground," etc. Between the words, "estate" and "dealer," there were interlined the words "owner or," so that after this interlineation the lease read as follows: "The lessor and lessee shall

each choose a competent real estate owner or dealer in the city of Chicago to revalue said ground." The alteration here made was a material one, because the lessor and lessee were not confined, in their choice of persons to make the valuation to real estate dealers, but could name, if they chose, in lieu thereof, an owner of real estate. Again, provision was made in the lease for serving notice or demand upon the lessee for the purpose of forfeiting or terminating the lease in case of default in its provisions. The lease, as originally drawn, provided that "it shall be a sufficient service of such demand, notice, or declaration to leave a copy thereof with the lessee, with the assignee of said lessee, or any of their legal representatives." This was a requirement of personal notice of the forfeiture, and of the other matters referred to, by leaving a copy with the lessee, etc. But the lease, upon its face, showed that the following clause was inserted therein, to wit: "Or in case such copy cannot be so served [that is, leaving it with said lessee, etc.] to give notice by publication once each day for ten days in a prominent daily paper in the city of Chicago." This was a material alteration, because it gave the lessor the privilege of giving to the lessee or the assignee of the lessee notice by publication, instead of personal notice. It also appears that a typewritten page had been inserted in the lease, different in appearance from the rest of the writing used in said instrument. The additional page so inserted had reference to the right of the lessor to purchase the buildings at the termination of the lease, and to the method of revaluing the same in case of a disagreement upon that subject. It also provided for an extension of the lease for 10 years longer at 5 per cent. upon the revaluation, and gave an additional time of 6 months at the expiration of the 10 years to the lessee, in which he was to sell or remove the buildings and improvements, etc. The additional page also provided that the lease was not to be assigned during the first 25 years without the consent of the lessor, etc. The lease also provided that at the expiration of its term, or at its termination by forfeiture or otherwise, the lessee "will yield up said demised premises in good condition together with all the buildings and improvements thereon." But the words "together with all the buildings and improvements thereon" were erased. That these alterations, interlineations, and erasures were material is evident from the fact that many of them changed the legal effect of the instrument (*Kelly v. Trumble*, 74 Ill. 428), and its operation, and the liability of the parties thereto. It was therefore the duty of appellee, claiming the benefit of the lease in which they appeared, to explain the same. They were of such a character as, in connection with the other matters hereinafter referred to, amounted to "suspicious circumstances," as those words are used in the decisions and text-

books, and therefore the court should have refused to admit the instrument without explanation. *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; *Merritt v. Boyden & Son*, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246. In *Pyle v. Oustatt*, 92 Ill. 209, where a deed was introduced showing interlineations and erasures upon its face, this court said (page 213): "The instrument when offered in evidence being in this condition, it clearly devolved upon appellants to satisfactorily account for the interlineations and erasures before the jury would be warranted in regarding it as a valid deed."

2. The appellants upon the trial below also objected to the introduction of the lease upon the ground of a variance between the allegation in reference thereto contained in the declaration and the proof offered in support of the allegation. The declaration set forth in *hæc verba* an unsigned and unacknowledged lease, while the lease introduced in evidence appeared to be executed by the parties thereto. The court at once sustained this objection, and gave leave to the appellee to amend by making the allegation in the declaration correspond to the proof introduced; but, although leave was given to amend, no amendment was made to obviate the variance. *City of Chicago v. Moore*, 139 Ill. 201, 28 N. E. 1071. As is said by the Appellate Court in their opinion, "this also was error, the variance being a material one." In *Wisconsin Central Railroad Co. v. Wleczorek*, 151 Ill. 579, 38 N. E. 678, we said (page 583, 151 Ill., page 679, 38 N. E.): "If a party for any reason disregards the leave given by the trial court to amend his pleading so as to make it correspond with the proofs, and omits, without justifiable cause, the due incorporation into the record of the amendment pursuant to the leave, this court, sua sponte, has no authority to carry out the leave, make his amendment for him, interpolate it into the record, and thereby save him harmless of error assigned. After obtaining such leave, the plaintiff was in no wise obliged to exercise the privilege given and make the amendment; and, until the amendment was in fact made, the declaration in all respects remained the same as though no leave to amend it had been given." Again, in *Sinsheimer v. Skinner Mfg. Co.*, 165 Ill. 116, 46 N. E. 262, it was held that a mere permission by the court to amend does not of itself amount to an amendment. The objection in regard to this variance is not made for the first time in this court, but was made in the court below, and was assigned as one of the reasons for granting a new trial, and is assigned as one of the errors in this record. In this connection it is to be observed that, when the trial court gave leave to the appellee to amend its declaration, the counsel for appellants asked for time to file an affidavit for a continuance. This application was overruled at once. Section 25 of the practice act (*Starr & C. Ann.*

cc. 1893, c. 110, par. 26) gives the defendant in such case, where the plaintiff is allowed the privilege of amending, the right to make an affidavit that in consequence thereof the defendant is unprepared to proceed with the trial of the cause. It is true that the defendant must state in his affidavit what particular fact or facts he expects to prove, and the court, if satisfied that the evidence expected to be procured at the next term would not be material, may refuse a continuance of the cause. But as we understand the statute, the court only refuses such continuance after being satisfied from an examination of the affidavit presented that such continuance cannot be properly granted. Here, however, leave to present the affidavit, without reference to the question whether it showed good cause for continuance, or not, on account of the amendment, was refused.

3. The appellee upon the trial below proposed to introduce in evidence certain documents showing an assignment of the lease and of the leasehold term by the lessee, Stebbins, to the present appellants, and also showing the written consent of the appellee, as lessor, to such assignment by Stebbins to appellants; but the appellee did not have in his possession the original instruments, and proposed to offer secondary proof thereof. Upon this subject we concur in what is said in relation thereto by the Appellate Court in their opinion, as follows: "In the further progress of the trial, appellee's counsel stated to the court that he had served notice upon appellants' counsel to produce at the trial two certain instruments, or he would offer secondary evidence of the same. Appellee's counsel then asked appellants' counsel if he had said instruments, to which appellants' counsel and also appellants themselves stated that they did not have the instruments called for. Whereupon, against the objection of appellants' counsel, the court permitted oral evidence tending to establish an assignment in writing of the lease offered in evidence, and a written consent by the lessor to such assignment. The court also, against objection of appellants' counsel, permitted in evidence purported copies of the same. To all these rulings of the court, exceptions were duly preserved. The rulings were, in our opinion, erroneous, in that there was no showing, beyond the mere statement of counsel, that any notice had ever been served upon appellants or their counsel to produce the original documents, purported copies of which were admitted in evidence; nor was there any showing that appellants, or either of them, ever had in their possession or control the alleged assignment of the lease, or the alleged written consent thereto. *Matteson v. Noyes*, 25 Ill. 591; *Bishop v. American Preservers' Co.*, 157 Ill. 284 [41 N. E. 765, 48 Am. St. Rep. 317]; 1 *Greenleaf on Evidence*, § 560; 1 *Jones on Evidence*, § 218. For appellee it is claimed that a certain bond offered in evidence, signed by appellants, inde-

pendent of the evidence above objected to, shows that the lease sued on was assigned by the lessee, Stebbins, to appellants, but we think the contention is untenable. The recital in the bond referred to states that the lease (describing it), was 'assigned by said Stebbins to said Landt and Moore,' but it fails to show whether the assignment was in writing. The allegation of the declaration is that the assignment was in writing, and consequently this proof would be insufficient to sustain the declaration." In this connection it is to be observed that the allegations of the declaration and the proof offered on the part of appellee are to the effect that the latter claimed rent for the premises by virtue of a written assignment, and also by virtue of a written consent to that assignment. But the record shows that what appellee termed a written assignment of the lease, and a written consent to the assignment of the lease by the lessor, were neither signed nor acknowledged by the lessee, Stebbins, nor by the lessor, McCullough. Drafts of a proposed assignment of a lease by the lessee, and of a proposed consent to such assignment by the lessor, did not establish the allegation of the declaration as to a written assignment and a written consent. As we understand the record, it was not established by the evidence that there was a parol assignment of the lease in question by Stebbins to the appellants, followed by their possession, nor that the appellants entered into possession in pursuance of the unsigned draft of the assignment.

4. But it is said that all the errors committed by the trial court were waived by the appellants, and this alleged waiver is based upon the alleged failure of counsel for appellants to press upon the attention of the court his reasons for a new trial. The bill of exceptions, as quoted in the statement preceding this opinion, shows that counsel for appellants made a motion for a new trial, and that he filed in writing the reasons upon which he based his motion for a new trial. The bill of exceptions shows that the court overruled the motion for a new trial, and that appellants excepted to the decision of the court in overruling the motion. The written reasons upon which the motion for a new trial was based, as set forth in the statement preceding this opinion, are sufficient to embrace the objections by the appellants to the admission of evidence, as hereinbefore indicated. Under these circumstances this court has a right to consider whether or not the objections so made were valid. *Chicago, Paducah & Memphis Railroad Co. v. Goff*, 158 Ill. 453, 41 N. E. 1112; *Ottawa, Oswego & Fox River Valley Railroad Co. v. McMath*, 91 Ill. 104; *Firemen's Ins. Co. v. Peck*, 126 Ill. 493, 18 N. E. 752; *Illinois Central Railroad Co. v. O'Keefe*, 154 Ill. 508, 39 N. E. 606. We have held that where a plaintiff in error or appellant has filed certain points in writing, particularly specify-

ing the grounds of his motion for a new trial, he will be confined in the Appellate Court to the reasons specified in the court below, and will be held to have waived all causes for a new trial not set forth in his written grounds. *Ottawa, Oswego & Fox River Valley Railroad Co. v. McMath*, 91 Ill. 104; *Consolidated Coal Co. v. Schaefer*, 135 Ill. 210, 25 N. E. 788; *Hintz v. Graupner*, 188 Ill. 158, 27 N. E. 935; *Brewer Brewing Co. v. Boddie*, 162 Ill. 346, 44 N. E. 819; *West Chicago Street Railroad Co. v. Krueger*, 168 Ill. 586, 48 N. E. 442; *Bromley v. People*, 150 Ill. 297, 37 N. E. 209. In view of what has been said, it cannot be claimed that the appellants here waived the causes for a new trial embraced in the objections above mentioned upon any such ground as that such causes were not set forth in their written reasons for a new trial. They were so set forth therein. The rule that a party will be considered to have waived all points not contained in his written motion implies the converse of the rule, namely, that he has not waived any points which are contained therein. The statute provides that "if either party may wish to except to the verdict, or, for other causes, to move for a new trial, or in arrest of judgment, he shall, before final judgment be entered, or during the term it is entered, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion, and final judgment shall thereupon be stayed until such motion can be heard by the court." Practice Act, § 56 (3 Starr & C. Ann. St. 1898 (2d Ed.) p. 3054, c. 110, par. 57. In the case at bar the points in writing were certainly filed during the term, whether they were filed on April 22, 1901, or on April 24, 1901, because the April term of the superior court extended through the whole of the month of April. We are inclined to think that the points in writing were filed on April 24, 1901, because the file mark indicated that such was the date of the filing, and because, when counsel for appellants, on April 22, 1901, entered his motion for a new trial, he said, "I suppose it will take its regular course." Its regular course would be the filing of his points in writing at any time during the term when the judgment was entered. As the cause was tried on the short-cause calendar, the trial lasted but a short time, and probably not longer than an hour. It is impossible to suppose that the nine written reasons in support of the motion for a new trial were prepared and submitted to the court on April 22, 1901, when the motion was summarily disposed of by the court.

It is said that counsel for appellants waived his right to insist upon his motion for new trial, or upon the written reasons filed in support of the motion, because, when the court said, "I will hear your reasons now," counsel for appellants replied, "I think I will not urge my reasons for a new trial on the court, for fear you will grant it." This language,

counsel states, was used by him in a sarcastic or humorous way, by reason of the fact that the court had already, within the hour during which the trial lasted, overruled peremptorily every objection which he made to the evidence introduced by the appellee. The language was not respectful to the court, but, taking all the statements in the bill of exceptions together, we do not think that counsel for appellants can be charged with the intention of waiving his right to insist upon his reasons for a new trial. As soon as the court instructed the jury to return their verdict in favor of the plaintiff, counsel for appellants entered his motion for a new trial. The court refused to allow the motion to take the usual course, and expressed an intention to dispose of it right away. Counsel had no time to prepare the written reasons in support of his motion for a new trial at that time, but did suggest to the court one of those reasons, namely, "that the evidence does not entitle them to recover any verdict, from the statement of facts." If what occurred in court, as between the court and counsel for appellants, on April 22, 1901, is to be considered as literally correct, then it would appear that the motion for a new trial was made and overruled by the court before the jury returned their verdict into court. The statement is, "whereupon the court instructed the jury to render a verdict in favor of the plaintiff for the sum of \$3,937.50." But there is no statement that the jury did return their verdict into court there and then, on April 22, 1901. The statement that the jury rendered their verdict against the defendants is made in that part of the bill of exceptions which relates to what occurred subsequently, on April 24, 1901. It also appears that appellants asked an instruction to the jury, which was refused by the court. The asking for this instruction, and its refusal by the court, are matters which are set forth in that part of the bill of exceptions relating to what occurred on April 24, 1901, and not in that part which relates to the occurrences of April 22, 1901. It surely cannot be true that the court overruled the motion for a new trial before the jury returned their verdict, and before the instructions asked for were disposed of. It seems to be clear that the part of the bill of exceptions which refers to the transactions taking place on April 22, 1901, must be read in connection with the part of the bill of exceptions which relates to the filing of the written reasons in support of the motion for new trial, as appears in that part of the bill of exceptions relating to transactions occurring on April 24, 1901. In other words, the two parts of the bill of exceptions supplement each other, and must be read together. When so read, we are unable to see that there was any waiver by appellants of their reasons for a new trial.

The facts of the case at bar seem to be somewhat similar to the facts in the case of

Chicago, Paducah & Memphis Railroad Co. v. Goff, supra. In the latter case it appeared that the written motion and points of appellants for a new trial were filed after the hearing thereof, and after the motion for a new trial was made and passed on by the court, but at the same term. So, here, as soon as both parties rested, and the court had instructed the jury to find for the plaintiff, counsel for appellants made a motion for a new trial; and after the hearing of that motion, and after it was passed on by the court, counsel for appellants filed his written reasons in support of his motion for new trial, but he filed them at the same term at which the action of the court passing upon the motion for new trial was taken. In the Goff Case the motion for a new trial, as made and overruled, was only a verbal one, and such is the fact here, so far as what occurred on April 22, 1901, is concerned. In the Goff Case it was held that the court below committed no error in refusing to strike the written reasons for a new trial from the files, because such reasons were filed after the court had passed upon the motion for new trial. If it would have been error to strike the written reasons in support of the motion for a new trial in this case from the files, then no error can be predicated upon the fact that here they appear in the files, and as a part of the bill of exceptions. Being properly filed, and properly noticed in the bill of exceptions, they can be considered by this court. We are therefore of the opinion that there was no waiver by appellants of their right to insist upon their motion for a new trial, and upon the written reasons therefor. Inasmuch as the bill of exceptions shows that a motion for a new trial was made and overruled, and an exception was taken, the court of review, to which the record is taken on appeal, may consider the propriety of refusing the motion for a new trial. *Bromley v. People*, supra. We think that the court erred in refusing to grant a new trial.

Accordingly the judgments of the Appellate Court and of the superior court of Cook county are reversed, and the cause is remanded to the superior court of Cook county for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(206 Ill. 234)

CHICAGO, P. & ST. L. RY. CO. et al. v.
VAUGHN et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

PARTITION—DECREE—POSSESSION BY THIRD PERSON—JUDGMENT FOR SURRENDER—LIFE ESTATE—CONVEYANCE BY LIFE TENANT—TITLE OF PURCHASER—LIMITATIONS AGAINST REMAINDERMEN.

1. Where a deed by the owner of land reserved to himself the sole control, use, and occupation of the premises, and all the rents and profits thereof, during his natural life, he retained a life estate, with remainder in the grantees.

2. Where a life tenant in land gave a railroad a quitclaim deed to a portion thereof, the rail-

road took no greater interest than that of its grantor.

3. The possession of one claiming land under a tenant for life cannot be adverse to the remainderman during the existence of the life estate.

4. A deed creating a life estate in the grantor, with remainder in fee to the grantees, properly recorded, was constructive notice to a subsequent grantee of the life tenant.

5. Where the stipulation of facts on which a case was tried stated that a certain person executed to his wife a quitclaim deed in consideration of natural love and affection and \$1, without any statement that the consideration was not sufficient, or made from any improper motive, a subsequent contention that the deed was made merely for the purpose of giving a court of chancery jurisdiction in partition proceedings was unavailable.

6. Where a railroad company, claiming under a deed from a life tenant of land, went into possession of the same, it could not, in a suit for partition by the remaindermen after the death of the life tenant, be regarded as a trespasser, in the absence of anything to show that its occupation of the land had worked any injury to the remainder.

7. A railroad company constructed its tracks over a portion of a piece of land, claiming under a deed from the life tenant, and after his death the two remaindermen sued for partition. *Held*, that a decree in partition directing that the railroad company be ousted, and that it surrender possession to the remaindermen, and appointing commissioners to make partition, etc., was erroneous, since the court should have waited until the commissioners had made their report, or have provided in advance that possession should be surrendered to the party to whom that portion of the tract occupied by the railroad should be set apart.

8. The railroad company should be granted a reasonable time within which to condemn the property.

9. In case of condemnation by the railroad, it should not be required to pay the owners of the land for the improvements that it had placed thereon; it not having entered on the land as a trespasser.

Appeal from Circuit Court, Jersey County; O. P. Thompson, Judge.

Suit by Edward J. Vaughn and others against the Chicago, Peoria & St. Louis Railway Company and others. From a decree in favor of complainants, defendants appeal. Reversed.

This is a bill in chancery, filed on September 11, 1902, in the circuit court of Jersey county by the appellee Edward J. Vaughn for the partition of 160 acres of land, to wit, the southwest quarter of section 10, township 8 north, range 10 west of the third principal meridian, in said county. The defendants to the bill were Sarah J. Vaughn, wife of the complainant, Edward J. Vaughn; George D. Locke, holding a mortgage upon the premises executed to him by Edward J. Vaughn and his wife; and the appellant the Chicago, Peoria & St. Louis Railway Company of Illinois. The bill alleged that the complainant Edward J. Vaughn and one of the defendants below, Sarah J. Vaughn, were the owners in fee, as tenants in common, of the 160 acres, and that each owned an undivided half thereof, the share of each being

¶ 2. See Life Estates, vol. 33, Cent. Dig. § 24.

subject to an inchoate right of dower of the other; that said railway company was in possession of a part of the premises, using and occupying the same as a railroad right of way, and claimed some interest in the strip of land occupied by it, but had no interest in or title to the same, or right to the possession thereof; that complainant is desirous of a partition between himself and Sarah J. Vaughn according to their respective interests, or, in case the premises could not be divided, then the same should be sold, and the proceeds divided. The bill prays that the railway company be declared to have no interest in the premises, or any part thereof, and no right to the possession and use of the same, and that it be required to surrender up and deliver to the complainant and said Sarah the possession of the strip or portion of the premises used and occupied by it; that partition be made, and, in case it cannot be made, that the premises be sold, and the proceeds divided.

The railway company above named filed a demurrer to the bill, which was overruled. The railway company then filed a separate answer, denying the ownership by Edward J. Vaughn and his wife, as alleged in the bill; admitting its possession of the portion of the premises used by it as a right of way, 50 feet wide on each side of the center line of its railroad; and averring that it was the sole and lawful owner of the said strip of ground occupied by it as a right of way. The answer avers that Sarah J. Vaughn had no interest in the premises, except an inchoate right of dower, and that the deed of conveyance to her by her husband was made for the purpose of giving a court of chancery jurisdiction; that the railway company was a corporation organized under the laws of Illinois for the purpose of carrying on the business of a public common carrier, and was then engaged in such business; that on January 11, 1881, one Josiah Vaughn, the father of Edward J. Vaughn, executed a contract with the St. Louis, Jerseyville & Springfield Railroad Company, by which he agreed to give said last-named company a good deed, free from all incumbrances, for a strip of land 50 feet wide on each side of the center line of the railroad, as the same might be located and constructed over the north half of said southwest quarter; that Josiah Vaughn put the St. Louis, Jerseyville & Springfield Railroad Company in possession of said strip, and said company located and constructed its line of railroad over said premises in the year 1881; that the appellant and its legal predecessors expended large sums of money in the construction and operation of said line of railroad over said premises; that said strip was part of a main line running from Springfield to a point near Grafton, or Jersey Landing, in Jersey county; that in 1881 Edward J. Vaughn had knowledge of the construction of the railroad across said tract, and did not protest against such use

until September 13, 1900, when he demanded possession of the same, and on the next day commenced an action of forcible detainer against the railway company, in which action judgment was rendered in the circuit court in favor of Vaughn and against the railroad company, but upon appeal to the Appellate Court the judgment of the circuit court was reversed, etc.; that appellant, the Chicago, Peoria & St. Louis Railway Company of Illinois, is the sole and real owner of said strip of land conveyed by Josiah Vaughn to its legal predecessor, the St. Louis, Jerseyville & Springfield Railroad Company, and by mesne conveyances to appellant; that, under said contract of 1881, Josiah Vaughn executed to the St. Louis, Jerseyville & Springfield Railroad Company a quitclaim deed conveying said strip of land, and that the legal predecessors of appellant entered into possession of the strip thereunder, and they and appellant have held the sole and exclusive possession thereof in good faith from that time until this suit in partition was begun; and that appellant and its legal predecessors during all the time of their possession of the said strip have paid all the taxes assessed thereon.

All the defendants below, except the appellant company, were defaulted, and the cause was referred to a master in chancery to take proofs; but a stipulation was made between the parties before the master by which all the material facts were agreed to.

The court rendered a decree upon the bill, answer of the railway company, replication thereto, and report of the master, which was approved, and therein found that Edward J. and Sarah J. Vaughn were each entitled to one-half of the 160 acres, as tenants in common in fee simple, and ordered that partition be made. The decree also found that the fee-simple title to that part of the premises occupied by the appellant as a railway company, being 100 feet wide, was vested in Edward J. and Sarah J. Vaughn, and the railway company was thereby adjudged to be ousted of the possession of said strip of ground, and directed to surrender possession thereof to Edward J. Vaughn and his wife within a period of 60 days from the date of the decree, and, in default, that a writ of possession be issued against the company. The decree then proceeds to appoint commissioners to make partition.

Thos. F. Ferns and Wilson & Warren, for appellants. H. W. Pogue, for appellee Edward J. Vaughn. Brown, Wheeler, Brown & Hay, for appellee Sarah J. Vaughn.

MAGRUDER, J. (after stating the facts). On November 11, 1879, Josiah Vaughn, being then the owner in fee simple and in the exclusive possession of the quarter section of land here sought to be partitioned, conveyed the same to his two sons, Edward J. Vaughn and Charles A. Vaughn, together with other

lands, containing in all 342 acres, and the said deed contained the following reservation: "Reserves to the said Josiah Vaughn the sole control, use and occupation of the above-described premises, and all the rents and profits thereof, during the term of his natural life." This deed was recorded in the recorder's office of Jersey county on the day of its date, to wit, November 11, 1879. Unquestionably, after the execution and delivery of this deed Josiah Vaughn had only a life estate in the property thereby conveyed; and his two sons, Charles A. Vaughn, and the appellant, Edward J. Vaughn, owned the remainder subject to the life estate. Subsequently, on February 19, 1885, Josiah Vaughn executed and delivered to the St. Louis, Jerseyville & Springfield Railroad Company, the original predecessor of the appellant railway company, a quitclaim deed to the strip of land 50 feet wide on each side of the center line of the said railroad, as the same was located and built across the 160 acres here sought to be partitioned. The deed recited that it "is executed, acknowledged and delivered by the grantor, and accepted by the grantee therein, as a full performance of the covenants and agreements of the grantor," contained in the bond or contract for a deed previously executed.

By the quitclaim deed executed to it on February 19, 1885, the St. Louis, Jerseyville & Springfield Railroad Company took no other or greater interest in the strip of land conveyed to it than an interest for the life of Josiah Vaughn; and the appellant company, as the successor of the St. Louis, Jerseyville & Springfield Railroad Company, took the same interest held by its predecessor. The defense made by the appellant in this partition proceeding is that under the deed of February 19, 1885, as claim and color of title made in good faith, it went into possession of the strip of land, and has been in possession thereof for more than seven years, and during that time has paid all the taxes legally assessed against the strip or right of way. There is no dispute as to the facts of its possession and payment of taxes during seven years under the quitclaim deed, as color of title. But under the circumstances already stated, the appellant cannot make a successful defense on the ground of possession and payment of taxes under section 6 of the limitation law (Hurd's Rev. St. 1901, c. 83).

The possession of land by a tenant for life cannot be adverse to the remainderman or reversioner; and, if he conveys to a third person by words purporting to pass the absolute property, the possession of the purchaser is not, during the continuance of the life estate, adverse to the remainderman or reversioner. The statute of limitations does not run against the remainderman or reversioner until after the life estate falls in, and it is only after the latter event occurs that the possession will be adverse to the re-

mainderman or reversioner. The possession of the tenant for life, or his vendee, during the continuance of the life tenancy, is, in contemplation of law, the possession of the remainderman or reversioner. The latter cannot, during the life of the person for whose life the life estate is, bring an action against the person in possession under such life tenancy to recover possession of the premises. "No laches can be imputed to one who has no remedy or right of action, and to hold the bar of the statute could run against the title of a person so circumstanced would be subversive of justice, and would be to deprive such person of his estate without his day in court." *Turner v. Hause*, 199 Ill. 464, 65 N. E. 445; *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529; *Rohn v. Harris*, 130 Ill. 525, 22 N. E. 587; *Higgins v. Crosby*, 40 Ill. 260. In other words, the statute of limitations, upon which the appellant railroad company here relies, could not run against appellee Edward J. Vaughn, as remainderman or reversioner, until the life estate of his father, Josiah Vaughn, fell in. Josiah Vaughn died July 18, 1900. Prior to that date Charles A. Vaughn and his wife conveyed by warranty deed their undivided interest in the lands to the appellee Edward J. Vaughn, the deed providing that it was "subject, however, to the rights and interests (if any) during the lifetime of Josiah Vaughn, Sr., of the Chicago, Peoria and St. Louis Railway Company in and to the right of way, now used and occupied by said railway company, over and across" the north half of the 160 acres sought to be partitioned. The possession of the appellant company could not and did not become adverse to the appellee Edward J. Vaughn until the end of the life estate, and hence has only been adverse since July 18, 1900. In September, 1900, the appellee Edward J. Vaughn asserted his claim to the appellant railway company of title in fee to the property occupied as a right of way, and at the same time the appellant company asserted its claim of title to the said strip as a right of way.

It is claimed on the part of the appellant company, that it had no notice when Josiah Vaughn executed the contract in 1881 to convey the strip of land to appellant's predecessor, or when subsequently Josiah Vaughn executed a deed to the railroad company on February 19, 1885, that Josiah Vaughn was not the owner in fee of the property; in other words, that appellant's predecessor had no notice that the interest of Josiah Vaughn in the land was merely a life interest. Whether the question of notice is material or not, it is not necessary here to decide. But if it is material, the deed executed by Josiah Vaughn to his two sons on November 11, 1879, was recorded on that day, and was upon the records when the railroad company took its contract and its deed from Josiah Vaughn. Therefore appellant's predecessor had constructive notice by the record of the

nature of Josiah Vaughn's interest in the property.

It appears from the evidence that on August 8, 1902, the appellee Edward J. Vaughn executed and delivered to the appellee Sarah J. Vaughn, his wife, a quitclaim deed conveying to her an undivided half of the quarter section of land over which the right of way runs. It is charged by the appellant that this deed was a fraud, and was made merely for the purpose of giving a court of chancery jurisdiction in this proceeding. But there is no proof to sustain the charge thus made. On the contrary, the stipulation as to the facts upon which the cause was tried shows that the appellant company abandoned its contention upon this subject. In the sixteenth paragraph of the stipulation it is agreed that on August 8, 1902, Edward J. Vaughn executed to his wife this quitclaim deed for and in consideration of natural love and affection and \$1, without any statement that the consideration in the deed was not sufficient, and without any statement that the deed was made for any improper purpose or from any improper motive. Therefore the deed cannot be regarded as otherwise than valid. *Danville Seminary v. Mott*, 136 Ill. 289, 28 N. E. 54.

It is clear, therefore, from what has been said, that the decree of the court below was correct in holding that appellee Edward J. Vaughn and his wife were the owners in fee of the property sought to be partitioned, including the strip of ground claimed by appellant. When Josiah Vaughn, the life tenant, under whom the appellant company held, died, all the title of the appellant company ended, and the fee-simple title was vested in the remainderman.

But a more serious question is presented in regard to that portion of the decree which requires the appellant company to surrender the possession of the property to the appellees Edward J. Vaughn and his wife. A decree may be made in a partition proceeding, requiring a surrender of the possession to be made by a third party, claiming an interest in the premises, to the parties found to be the owners thereof as tenants in common. *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927; *Iberg v. Webb*, 96 Ill. 415; *Henrichsen v. Hodgen*, 67 Ill. 179; *Gage v. Lightburn*, 93 Ill. 248; *Gage v. Bissell*, 119 Ill. 298, 10 N. E. 238. In *Iberg v. Webb*, supra (by mistake referred to in *Mott v. Danville Seminary*, supra, as *Gage v. Lightburn*), "the decree of the circuit court required the defendants, who held under the tax deed, which was claimed to be a cloud upon the title, to surrender possession to the complainants, and allowed the defendants nothing for the improvements they had made upon the premises. The decree was held not to be erroneous in these particulars, because the defendants had asked no affirmative relief in respect of the matters so complained of." *Mott v. Danville Seminary*, supra. In the

case at bar the appellant company has claimed to be the absolute owner in fee of the strip of ground in question, and has asked no affirmative relief in regard to its improvements placed upon said strip of ground. In *Smith v. Chicago, Alton & St. Louis Railroad Co.*, 67 Ill. 191, it was held that ejectment will lie against a railway corporation by the owner for land taken and used by it for the purposes of its road, where the land has not been condemned under proceedings instituted for that purpose in the mode prescribed by the Constitution, and laws enacted in conformity therewith. See, also, *Chicago & Alton Railroad Co. v. Smith*, 78 Ill. 96; *Edwardsville Railroad Co. v. Sawyer*, 92 Ill. 377; *Chicago, St. Louis & Western Railroad Co. v. Gates*, 120 Ill. 86, 11 N. E. 527; *Postal Telegraph Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722, 62 Am. St. Rep. 390.

In the case at bar the appellant company commenced no proceeding after the termination of the life estate for the condemnation of the title owned by the remaindermen or reversioners. But the railroad company cannot be regarded as a trespasser. It went into possession of the strip of land occupied by it under a deed from the life tenant, and had a right, during the life of the life tenant, to construct its railroad bed and lay its tracks upon this strip, and operate its road thereon. There is nothing to show that such use and occupation by it of the strip in question worked any injury to the interests of the remaindermen or reversioners. It was intimated in *Smith v. Chicago, Alton & St. Louis Railroad Co.*, supra, that, where the entry of the railroad company was legal as to the life estate, and no objection was made to its occupation by the reversioners, the railroad company would be entitled to a notice to quit before action brought. There is no question, under the evidence in this case, that such notice was given, and efforts were made to induce the appellant company to commence condemnation proceedings. The owner of the land is not bound to take the initiative, so far as condemnation proceedings are concerned, because by the statute the corporation in such cases must be the actor. "The owner having no duty to perform, he is passive." *Smith v. Chicago, Alton & St. Louis Railroad Co.*, supra.

Although a court of chancery in a partition suit may make an order, requiring a surrender of the possession, and may issue a writ of possession to put such order in force, yet we think that the portion of the decree requiring the appellant company to give up the possession was prematurely entered. The decree directs as follows: "And the said defendant railway company is hereby adjudged to be ousted of the possession of the aforesaid strip of ground, and is hereby ordered and directed to surrender possession thereof to the complainant and defendant herein within a period of sixty days of this date, and that,

in default or refusal to so surrender possession thereof, a writ of possession issue by and under the authority of this court, directing the said defendant railway company to surrender possession thereof in accordance with the terms of said writ." The decree then goes on to appoint commissioners, and directs the commissioners to make partition of the property, and provides that if the property cannot be divided without manifest prejudice, etc., they shall appraise the value, and make a report to the court, and that they shall go upon the premises, and allot the several shares to the respective parties entitled thereto, designating such shares by metes and bounds, and that they may employ a surveyor, etc. The partition proceeding is not ended by the decree entered herein, from which the present appeal is prosecuted. The decree was final in so far as it determined the titles or interests of the parties in the property, but it was not final in the execution of all the steps required by the statute for the partition and division of the property. It directs that possession be given to the complainant, Edward J. Vaughn, and his wife, Sarah J. Vaughn; but the commissioners appointed to partition the property may divide the 160 acres in such a way as to set apart that portion of the tract where the railroad right of way is located to one or the other of these parties alone. If the portion of the 160 acres over which the right of way passes, is set apart to Edward J. Vaughn, then he is the party in whose favor the writ of possession should be issued. It certainly would not be proper to issue a writ of possession to put Sarah J. Vaughn in possession of the strip of ground in question, if in the partition there was set apart to her a portion of the tract upon which the railroad right of way was not located.

In *Kern v. Zink*, 55 Ill. 449, which was a bill in chancery for partition, brought by a part of several heirs against their coheirs, to which a party in possession, claiming as lessee of a portion of the premises, was also made a defendant, it was held to be proper, upon the lease being decreed to be void, and the portion of the premises so claimed under the lease being assigned to some of the heirs who were defendants in the bill, to award to the latter writs of possession against their co-defendant, claiming under the void lease; and in that case it was said: "The land was then partitioned, and two of the parties to whom the land held by Allison was allotted took out writs of possession. There was no error in this. The validity of the lease was brought before the court by the bill in behalf of all the heirs, and, when the court decided it to be void, it was proper to carry that decree into full effect by giving the possession to whichever of the heirs the land might be assigned." In the case at bar there was no prayer in the bill that the deed made by Josiah Vaughn to appellant's predecessor

should be removed as a cloud upon the title, as being a deed which by its terms conveyed the whole title, when, as a matter of fact, the grantor in it owned only a life estate. There is therefore no provision in the decree here setting aside any instrument as a cloud upon the title, as the lease held to be void was set aside in *Kern v. Zink*, supra. But it is very clearly intimated, if not held, in the latter case, that the writ of possession, when issued, should be issued in favor of the co-tenant to whom a particular part of the property has been set off or apated, in order to put him in possession of his portion of the land.

For these reasons, we are of the opinion that the provision of the decree in regard to the surrender of the possession was made too soon, and that the court should either have waited until the commissioners had made their report, before it ordered a surrender of possession, or should have provided in advance that the possession should be surrendered to the party, to whom that portion of the tract should be set apart on which the right of way of the railroad company was located. It might be that the commissioners would report that the property could not be divided, and that the same should be sold, and then the question would arise whether the purchaser at the sale would be entitled to be put in possession of the property.

In addition to what has been said, counsel for the appellee Edward J. Vaughn makes the following statement in his brief: "Appellee Edward J. Vaughn did not in his bill in the circuit court, nor in the argument in said court, nor does he now, claim the improvements erected by appellant on the strip in controversy. The circuit court held by its decree that the appellant was ousted of possession in sixty days after the rendition of the decree, which was regarded as a reasonable time to the railway company to remove its improvements or file its petition to condemn. * * * Appellee Edward J. Vaughn now stands ready to adjust the reasonable damages for the strip in controversy by a condemnation suit." It is thus admitted that there is no desire to take from the railroad company the improvements which it has placed upon the property, and which by the terms of the stipulation between the parties are valued at \$5,400. It is also admitted that a condemnation proceeding to determine the amount of damages to be paid will not be objected to. If a condemnation proceeding is instituted for the purpose of taking the ground embraced in the right of way and making compensation therefor to the owners, the appellant company will not be required to pay the owners of the land for the improvements so placed upon it at its own expense. This is so, for the reason that the railroad company did not enter upon the land as a trespasser. In *Chicago & Alton Railroad Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622

which was a condemnation proceeding, and where a railroad company had entered upon land and constructed a railroad over it, without injury to the inheritance, under a license from the tenant for life, it was held that there was no trespass on the part of the railroad company, and that the law would not require the company, in seeking a condemnation of the land so entered upon for a right of way, to pay the owner for structures placed upon it at its own expense with a view of subsequently acquiring the right of way; and it was also held in that case that such entry, being originally lawful, would not subject the railroad company so entering to either an action of trespass or ejectment on the part of the remaindermen. Certainly the railroad company ought not to be required to take up its track located across this quarter section, and remove all its improvements entirely therefrom, if such a result can be in any way avoided, so as to protect the interests of appellees, because such action would necessarily stop the operation of the railroad, and cut its right of way in two. When the commissioners appointed to make partition submit their report, the court below should then enter a decree or an order requiring the railroad company to surrender the strip of ground of which it is in possession within a reasonable time, to be fixed by the court, unless within that time it either removes its improvements, or makes compensation to the appellees for their property, either by agreeing with them upon the price to be paid for it, or by instituting a condemnation proceeding for the purpose of determining the price so to be paid. In other words, the railroad company should have a reasonable time within which to condemn the property before it is summarily ejected from the possession thereof. We do not hold that in this partition proceeding the court of chancery should summon a jury to determine the amount of compensation to be paid to the owners, or to adopt a proceeding for the condemnation of the property as a part of this proceeding. But the court can easily so frame its order in regard to the possession as to give the railroad company a reasonable time for making compensation to the owners, either by negotiation, or by a separate proceeding for condemnation, outside of and independent of the present partition proceeding.

Our best judgment is, and we so order, that that portion of the decree of the court below which decides the ownership of the property here in controversy to be in the appellees Edward J. Vaughn and his wife should be, and is hereby, affirmed, but that the portion of the decree relating to the surrender of possession be reversed; and the court below is hereby ordered to make such order or decree upon that subject, after the coming in of the report of the commissioners, as is consistent with the views herein expressed. Partly affirmed, and partly reversed and remanded.

(177 N. Y. 39)

HAMLIN v. STEVENS et al.

(Court of Appeals of New York. Dec. 18, 1903.)

WILLS—DESCRIPTION OF LEGATEES—CONTRACT TO MAKE—EVIDENCE.

1. Where a will describes a legatee as testator's nephew, and refers to his own children as his "oldest daughter" and his "second daughter," and directs that after the death of his wife the estate should be equally divided between "our children or their heirs," such nephew is not entitled to share in the residuary estate, though from the time he was 11 years old he had been treated as an adopted child, though never formally adopted.

2. Contracts alleged to have been entered into with persons, to be enforced after the death, unless established clearly by satisfactory proofs, and unless they are equitable, will not be specifically enforced.

3. In an action to construe a will, evidence held insufficient to establish a contract by which testator agreed to give to an alleged adopted child a share of his estate.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Charles A. Hamlin, administrator of Lyman Stevens, against Julia E. Stevens and others. From a judgment of the Appellate Division affirming a judgment of the Special Term (79 N. Y. Supp. 1133) construing the will of Lyman Stevens, Lyman A. Stevens appeals. Affirmed.

Theodore E. Hancock and Thomas K. Smith, for appellant. Homer Weston and Waldo Weston, for respondent.

VANN, J. This action was brought for the construction of the will of Lyman Stevens, deceased, with reference to certain questions not material on this appeal. The appellant was not made a party in the first instance, but he was permitted to come in as a defendant, and to raise two issues: (1) That according to the terms of the will, when considered in the light of surrounding circumstances, he was one of the residuary legatees; (2) that he was entitled to one-third of the residuary estate by virtue of a contract alleged to have been made in his interest between his father and the testator when he was an infant. The Special Term found against him upon both issues, and the judgment entered accordingly was affirmed by the Appellate Division, one of the justices dissenting. From the judgment of affirmance Lyman A. Stevens appealed to this court.

The will was drawn by the testator himself but two days before his death. He first bequeathed to Lyman A. Stevens, whom he described as his "nephew," the sum of \$6,000, and by the next clause he devised to his "oldest daughter Mary L. Hamlin" a house and lot in confirmation of a former informal gift, and gave her a legacy of \$2,000. He then devised to his "second daughter Grace S. Loomis," also in confirmation of a former informal gift, a house and lot, and bequeathed her \$2,000 in money. His fourth gift, of \$1,000, for the benefit of a religious organization,

was followed by the residuary clause, whereby he instructed his executors "to administer, execute and keep employed all that remains of my estate for the use, benefit and comfort of my beloved wife Julia E. Stevens during her natural life, * * * and at the decease of my wife the residue remaining of my estate shall be divided equally between our children or their heirs."

The first claim of the appellant is founded upon the words "our children," as used in the residuary clause. The only natural children of the testator were the two daughters named in the will, but the appellant contends that it was the intention of his uncle, in using the words "our children," to include him as one of his residuary legatees, because from the time he was 11 years old he was treated as an adopted child, although never formally adopted. The trial court found that the testator clearly distinguished in his will "Lyman A. Stevens as a nephew, and his daughters as his children, and the words 'our children,' as used in the residuary clause in the will, were not intended to and do not include the defendant Lyman A. Stevens, and he is not entitled to share in the residuary estate of the decedent as a child under said terms." We think this conclusion was right, for the testator described the appellant as his nephew, not as his son. He referred to his own children as his "oldest daughter" and his "second daughter," and finally in the same sentence in which he made provision for his wife he directed that upon her decease the remainder of the estate should be divided equally between their children. Although there was evidence tending to show that the testator treated the appellant as his son, and often spoke of him as his son, still his description of him as his nephew shows that he did not intend to include him by the use of the word "our" as one of his children. That word referred to himself and wife, and it was natural to use it in referring to their children, especially as it occurs right after the thoughtful provision made for his wife and in connection with his tender allusion to her. As this point was not pressed upon the argument, it needs no further discussion.

The main reliance of the appellant is upon the alleged contract. The trial judge found that the testator "never made a contract with the defendant Lyman A. Stevens, or with his parents, whereby and wherein he agreed to give to the said Lyman A. Stevens any share of his property at his decease, and that there is no clear and convincing evidence establishing such a contract." As this finding was based on conflicting evidence, we are not asked to review it, but we are asked to set it aside and grant a new trial, because incompetent evidence was received by the trial court, although duly objected to by the appellant. In order to decide the points raised, it becomes necessary to state the leading facts. The testator died on the 16th of October, 1891, leaving a widow, said two daughters, and an estate valued at \$65,000. The

appellant is the son of Leonard Stevens, a brother of the testator, and his wife, Sarah, who lived in Huron county, Ohio. He resided with his parents until April, 1869, when, at the age of 11 years, he came to Syracuse, and lived with his uncle, the testator. "From that time onward," as the trial justice said in his opinion, "he formed a part of the family of Lyman Stevens, and seems to have been treated with all the regard and affection of a son. He was reared, educated, and clothed by his uncle, and on his part seems to have repaid the latter for his care by affection and gratitude and by services similar to those which a child would have rendered to a father. He helped his uncle about his farms and about his business, and the uncle often referred to him as his righthand man and as his son. On several occasions he stated that he knew no difference between Lyman and his other children, and that he should make no difference between him and them when he came to divide his estate." When he was 19 or 20 years old, the testator paid him wages at the rate of \$10 a month, and after he became of age \$15 a month, and charged him with all sums paid to him or for his benefit. His board was without charge. Leonard Stevens, his father, died a good many years ago, but his mother, who was 77 years old when her deposition was taken before the trial, testified that in the fall of 1868 the testator, while on a visit to his brother in Ohio, "asked if we were willing that Lyman, his namesake, should come to live with him as his own son. He said that, if we would allow him to come and live with him until he was twenty-one, he would educate him, and he should share in whatever earthly wealth he had at his death. The subject was then dropped. In January, next year (1869), brother Lyman came to visit us again. * * * My husband suggested that in such a matter we should have some legal papers. My brother-in-law stated that he could not see the necessity of any such a thing; that he considered his word just as binding as any papers that could be drawn up. He said: 'You need have no misgivings. I shall always regard him as my own son, and always treat him as such.' He said that whatever worldly wealth that he should have to dispose of at the time of his death they should share and share alike, his two daughters and Lyman." She further testified that between January and April, 1869, two letters came from the testator, which, after due search, could not be found. When asked if she could give the contents of those letters she answered, "Not exactly." When asked if she could give the substance of the letters, she answered, "No." The examination then continued: "Q. You may give the substance, if you can, of those letters. A. They told how pleased his wife and family were that Lyman was coming. Q. Did he state anything as to how he would dispose of his goods? A. He should have any-

thing that money would buy, his education, etc. I do not think he said anything in those letters as to how he should dispose of his earthly goods. Q. What were you going to say? A. He repeated in those letters that he should be treated as his own son, and whatever he had should be equally divided between him and his two daughters. His words were that they should share and share alike." The appellant testified that when he was 20 or 21 years of age his father showed these letters to him, and he remembered that each contained the statement "that, if I was allowed to come and live with my uncle until I was twenty-one years old, I should share equally with Mary and Grace in whatever property he had to dispose of at the time of his death." He could not state anything else that the letters contained, except that they were signed by his uncle, and addressed to his father, and possibly to his mother. Three letters from the testator to Mr. and Mrs. Leonard Stevens were read in evidence, one without date and the others dated respectively April 8 and 27, 1869. The one without date was apparently written at about the same time as the others. They all referred to the appellant, spoke of him with affection, and in one of them the testator wrote: "If he [meaning the appellant] could stay with us, nothing would be spared on the part of any of us to do the very best we could for him. We have furnished a room in the best manner for him, where he sleeps alone, and it breaks our hearts to think he will not stay. * * * I am 'Son less,' and we want my little namesake, and if you have not repented letting him come and are of the same mind still, you must write in a very decided manner that he must stay and then I can manage it. If you do regret sending him I will yield up all my wishes and plans and send him home. But I think it would be decidedly bad for him. * * * If you say stay, he will feel desperately for a time, but will soon be over it, and I am persuaded he will grow up a blessing to, and pride of us all, for we should never distinguish between him and my own children." In another he said: "I am afraid I shall be too indulgent; I now regard him as my boy and I can't see but all love him just as well as we do Grace, for Julia loves him just as well as I do and is afraid the relation will have to be sundered. * * * No doubt he has his homesick spells as any good boy must in having all his life associations broken up. But this will wear away and, my word for it, he will be greatly benefited for it in the end, for he shall have all that love, money and care can do for him." In the third he wrote: "It would be strange, indeed, if he could give up the idea of going home without a struggle in his mind. He is a good and beautiful boy and has got into my heart so I cannot give him up." These letters were written after the boy had become homesick, for the purpose of persuading his father to be firm with

him, and to tell him he must remain with his uncle. Although they set forth the advantages that Lyman would have if he remained—such as a good home, education, loving care and the like—no allusion was made to any contract of the testator to give him a part of his estate. This was a singular omission if such a contract had in fact been made, for the prospect of a large inheritance would naturally have had great persuasive force with a farmer of somewhat limited means and a number of children. A letter from Leonard Stevens, the father of the appellant, to the testator, dated February 21, 1869, was read in evidence by the plaintiff. It was written in answer to a letter dated the 16th of February, but not produced, and the material part is as follows: "You said in your letter that you and Julia had considered the matter over, and that you would like to have Lyman come and live with you and grow up side by side with your Grace; Sarah and myself have considered the matter over and have come to the conclusion to let him go and live with you. Dear brother, you know it is a struggle for a parent to give up their loved ones when so young. But I have all confidence in you and Julia that you will look to his interest and welfare. I shall expect you to be parent and guardian. Lyman is young and it is a great responsibility to take one so young and rear to manhood. But he is a fine boy and by good training I think he will be an honor to his parents in their declining years." Evidence was also given tending to show that the testator repeatedly said he knew no difference between the appellant and his other children and that on several occasions he declared he should make no difference between him and them when he came to divide his estate. No further evidence was given tending to establish the alleged contract.

After probate of the will the amount due the appellant for unpaid wages according to the books of the testator was paid him, and he gave a receipt "in full for all demands of every kind and nature against the estate of Lyman Stevens, deceased, except the legacy as stated in the will." He accepted the bequest of \$6,000 without objection, and without notice of any claim by virtue of the contract. About nine years after the probate of the will this action was commenced to obtain a construction thereof with reference to subjects not now material. In the meantime the executors had advertised for claims, but none was presented by the appellant, who does not appear to have given any notice of the existence of a contract until after this action was commenced.

Contracts of the character in question have become so frequent in recent years as to cause alarm, and the courts have grown conservative as to the nature of the evidence required to establish them, and in enforcing them, when established, by specific performance. Such contracts are easily fabricated

and hard to disprove, because the sole contracting party on one side is always dead when the question arises. They are the natural resort of unscrupulous persons who wish to despoil the estates of decedents. In *Shakespeare v. Markham*, 72 N. Y. 400, 403, this court declared that "contracts claimed to have been entered into with aged or infirm persons, to be enforced after death to the detriment and the disinheriting of lawful heirs, who otherwise would be entitled to their estates, are properly regarded with grave suspicion by courts of justice, and should be closely scrutinized, and only allowed to stand when established by the strongest evidence." While such contracts are sometimes enforced by the courts, it is only when they have been established by evidence so strong and clear as to leave no doubt, and when the result of enforcing them would not be inequitable or unjust. Thus, in a recent case the agreement was in writing, there were no children to be disinherited, and no will to show the understanding of the decedent. *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647. In deciding that case we said: "In cases of this character, where it appears for any reason that the enforcement of an agreement would be unfair, inequitable, or unjust, the remedy should be denied. Each case must be governed by its own facts and circumstances, and, unless the proof discloses a situation where good conscience and natural justice require the enforcement of the agreement, this relief should not be awarded. * * * While we are of the opinion that specific performance of this contract was properly awarded, this decision is based solely upon the findings of the trial court and the particular facts and circumstances of this case. Yet it must not be regarded as an authority for maintaining such an action under different circumstances or upon other proof, as the granting or denial of such relief always rests in the sound discretion of the court, and should be denied unless the agreement is fair and just and its enforcement equitable." In a later case we were fettered by the iron rule of unanimous affirmance which prevented us from looking into the evidence, and, following the *Winne* Case, we affirmed the judgment. *Healy v. Healy*, 166 N. Y. 624, 60 N. E. 1112. In *Brantingham v. Huff*, 174 N. Y. 53, 66 N. E. 620, the parol contract was rejected, because at the time or after it was made a written indenture of adoption had been entered into. In *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903, we refused to enforce by specific performance a parol contract between the grandfather and the father of an infant, whereby the latter surrendered his rights to the child, and the former adopted her as his daughter, and agreed that upon his death she should have one-fourth interest in all the property he should thereafter acquire. Before his death the grandfather had given a part or the whole of his property to his wife. Commenting up-

on the nature of the contract in that case, Judge O'Brien said: "It certainly is not a testamentary disposition, since they must be in writing, executed with all the statutory formalities. It is not a conveyance or transfer in present of any property whatever. If it had the effect attributed to it by the judgment, it is more potential and effective than any testamentary disposition could be, since such dispositions are always ambulatory, and subject to revocation. It is not an executory contract for the future conveyance or transfer of any specific property. It could not take effect until the death of the grandfather, and during his life he was not in default with respect to it; and yet this anomalous arrangement was, according to the judgment in this case, effective enough for the latter to nullify the gifts and conveyances made by the grandfather in his lifetime to his wife and the provisions of his will that took effect upon his death. The deceased left three children of his own that certainly had as strong a natural claim upon his bounty as the plaintiff, his grandchild; but no one, I think, would claim that, had the deceased made the same promise to them that it is found he made to the plaintiff, it would constitute a basis for an action of specific performance against the widow. An adopted grandchild must therefore have acquired in some way a greater right in the grandfather's estate than his own children, since in a verbal interview between her father and grandfather when she was five years old she acquired one-fourth of all his property. * * * If this was a contract, it certainly was not a mutual one binding the child or her father as well as the grandfather. The father and the child could at any time repudiate it, and the grandfather had no remedy. * * * Whatever the transaction in the finding in this case may be called, or however conclusive, it would seem to be clear that it does not possess all or any part of the qualities required in order to sustain the judgment."

We are of the opinion that no view of the evidence in the case before us would warrant the conclusion that the alleged contract was made. Assuming that the trial judge believed that the appellant and his mother intended to tell the truth, still, owing to their deep interest, it would be unsafe to base a finding on their testimony when it may be followed by such grave consequences. Such contracts are dangerous. They threaten the security of estates, and throw doubt upon the power of a man to do what he wills with his own. The savings of a lifetime may be taken away from his heirs by the testimony of witnesses who speak under the strongest bias and the greatest temptation, with all the dangers which, as experience shows, surround such evidence. The truth may be in them, but it is against sound policy to accept their statements as true under the circumstances and with the results pointed out.

Such contracts should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses. Unless they are established clearly by satisfactory proofs, and are equitable, specific performance should not be decreed. We wish to be emphatic upon the subject, for we are impressed with the danger, and aim to protect the community from the spoliation of dead men's estates by proof of such contracts through parol evidence given by interested witnesses.

During the trial of this action certain evidence was received under the objection and exception of the appellant, which we regard as incompetent; but, in view of what has been said, it is obvious that it could not have affected the result. No competent evidence was excluded, and, if all the testimony in favor of the respondents were rejected, still the evidence in favor of the appellant would not have justified the trial court in finding that the alleged contract was made. The error therefore was harmless, and the judgment should be affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

(177 N. Y. 33)

BOPP v. NEW YORK ELECTRIC VEHICLE TRANSP. CO. et al.

(Court of Appeals of New York. Dec. 15, 1903.)

NONSUIT—REFUSAL—WAIVER OF OBJECTIONS.

1. Where, on trial of an action for negligence against two defendants, one of them moves for a nonsuit, and, on denial of the motion, excepts thereto, but puts in its evidence, and again makes the motion, and again excepts on its denial, and cross-examines the witnesses of its codefendant to show that it was free from all responsibility, the refusal to grant the nonsuit is waived if at the close of the whole case the evidence presents a question for a jury.

Parker, C. J., and Gray and O'Brien, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Ida E. Bopp, by John H. Bopp, guardian ad litem, against the New York Electric Vehicle Transportation Company and another. From a judgment of the Appellate Division (79 N. Y. Supp. 1035) affirming a judgment for plaintiff, and denying a new trial, defendants appeal. Affirmed.

Eugene Lamb Richards, Jr., for appellant New York Electric Vehicle Transp. Co. Carl Schurz Petrasch and Alvin C. Cass, for appellant J. F. Otto Meyer. T. F. Hamilton and Frank H. Smiley, for respondent.

VANN, J. At the close of the plaintiff's evidence in chief, each defendant made a sep-

arate motion for a nonsuit, and each excepted to the action of the court in denying the motion. Each defendant had the right to then withdraw from the case and rest upon its exception. Neither did so. The vehicle company picked up the burden first, put in its evidence, and again moved for a nonsuit. Assuming that an exception was taken to the denial of its motion, for the second time it was in a situation to rely on its exception and refuse to take any further part in the trial. It did not do so. On the contrary, it continued to take an active and aggressive part in the trial, by cross-examining the witnesses of its codefendant thoroughly and at length. It aided in developing the facts, and attempted to defend itself against the allegations of the plaintiff, and the effort of the other defendant to fasten the responsibility upon it alone. It did not succeed, and it now claims that all its action, after its motions to nonsuit were denied, should go for naught and be ignored upon the ground that the question is the same as if it had withdrawn from the case at that time. We do not think so. It did not remain in the case for amusement, but for self-defense, and it could not make further efforts to defend itself without running the usual risks. The plaintiff had the right to rely upon any evidence in her favor, whether it was put in by herself or by either defendant; and the vehicle company, by failing to withdraw when it had the right to, and continuing to take part in the trial, ran the risk that evidence tending to make it liable would be received. The situation does not differ in principle from the ordinary case where a sole defendant, instead of withdrawing when he fails to secure a nonsuit, continues to take part in the investigation to the end. In so doing, even if his motion should have been granted when made, the exception is undermined and becomes of no avail, provided at the close of the whole case the evidence presents a question for the jury. Thus, in *Jones v. Union Railway Company*, 18 App. Div. 267, 268, 46 N. Y. Supp. 821, 322, Judge Cullen said: "When the defendant enters into its proof, the question never is whether the plaintiff's evidence is sufficient to justify the submission of the case to the jury, but whether, on the whole case, there is a question of fact as to the defendant's liability. If, at the close of a plaintiff's case, the defendant is confident that no cause of action has been made out, the only method of securing a review of an erroneous ruling on the point is to let the case stand without further evidence. If the defendant enters upon its evidence, it takes the chances of supplying the deficiencies of the plaintiff's case." So, in *Hopkins v. Clark*, 158 N. Y. 299, 304, 53 N. E. 27, 28, we said through Judge Bartlett: "The rule laid down by the Supreme Court of the United States seems the proper one, to the effect that when a defendant, after the close of the plaintiff's evidence, moves to dismiss, and, the motion being denied, excepts thereto, and then proceeds with

his case, and puts in evidence on his part, he thereby waives the exception, and the overruling of the motion to dismiss cannot be assigned as error." Judge Martin relied upon the case last cited, when, speaking for us all, he said: "Where, after a motion to dismiss at the close of the plaintiff's evidence, a defendant proceeds with his case and puts in evidence on his part, he thereby waives the exception to the refusal to nonsuit when the plaintiff rested." *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 506, 64 N. E. 194, 200. The rule of the federal courts was expressed by Chief Justice Waite as follows: "It is undoubtedly true that a case may be presented in which the refusal to direct a verdict for the defendant at the close of the plaintiff's testimony will be good ground for the reversal of a judgment on a verdict in favor of the plaintiff, if the defendant rests his case on such testimony and introduces none in his own behalf; but if he goes on with his defense, and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, in the absence of the defendant's testimony, on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked." *Grand Trunk Railway Co. v. Cummings*, 106 U. S. 700, 701, 1 Sup. Ct. 498, 27 L. Ed. 268. See, also, *Littlejohn v. Shaw*, 159 N. Y. 188, 191, 53 N. E. 810; *Wangner v. Grimm*, 169 N. Y. 421, 427, 62 N. E. 569; *Accident Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; *Northern Pacific R. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. 279, 32 L. Ed. 686; *Columbia R. Co. v. Hawthorne*, 144 U. S. 202, 206, 12 Sup. Ct. 591, 36 L. Ed. 405; *Union Pacific R. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597.

In the cases cited the defendant ran the risk that his own evidence might supply any defect in the plaintiff's evidence. So in this case the vehicle company, by continuing to try its case—for that is what it did—ran the risk that the evidence of its codefendant would supply the defects in the plaintiff's case against itself. It could not keep on trying its case without abiding by the condition of the evidence when all the testimony was in. At that time there was a question for the jury as to its liability, and hence its previous exceptions, taken when the evidence did not present that question, became of no avail. It did not let go of the case when it could have done so in safety, but hung on until there was evidence enough to warrant a verdict against it.

Courts sit to do justice according to the rules of law after giving all parties an opportunity to be heard. The vehicle company had its day in court, and was fully heard. No legal evidence was excluded, and no incompetent evidence was received to its injury. It took no exception to the charge of the court. Under these circumstances, pub-

lic business and private rights should not be delayed by granting a new trial on account of an error which was waived by the subsequent course of the party now complaining.

The vehicle company was not compelled to remain in the case in order to get an exception when its second motion was not granted, because an effort to except, made at the proper time and in the proper form, is an exception, whether allowed by the court or not.

After considering all the exceptions taken by both defendants, we find none upon which a new trial should be granted in behalf of either. The judgment should be affirmed, with costs.

GRAY, J. (dissenting). The plaintiff was injured in a collision between the electric vehicle in which she was being conveyed and a trolley street car. She brought this action for damages against the company which owned the vehicle, and the owner of a beer truck, upon the theory, as, in substance, alleged by her in the complaint, that the misconduct or negligence of the men in charge of the two vehicles combined to bring about the accident. Upon the trial the case made by her proofs showed that only the driver of the beer truck was at fault, for having so driven his truck as to strike the rear wheel of the electric vehicle; thereby causing the latter to swerve to one side and to collide with the street car. No evidence proving or tending to prove concurrent misconduct or negligence was given by her. Thereupon the electric vehicle company moved for a dismissal of the complaint as to itself, and, the motion being denied, duly excepted. It then proceeded to put in its proofs, which showed that its servant was in no wise at fault, and again requested a dismissal of the complaint; but the trial judge refused to decide then, and reserved his decision. The other defendant then gave evidence tending to prove, as was to be expected, that his servant was blameless, and that the man in charge of the electric vehicle was responsible for what occurred. At the close of the whole case the vehicle company's motion for a dismissal of the complaint was renewed, and again denied. The jury returned a verdict against both defendants, and the judgment upon the verdict was affirmed.

I think, when the plaintiff failed, upon her proofs, to inculcate the defendant the electric vehicle transportation company as a joint tortfeasor, the latter was entitled to a dismissal of the complaint as to itself. The failure to prove some concurrent act of negligence on its part entitled it to demand that of the court, and it could not lose the benefit of its exception to a refusal to dismiss the complaint by remaining in the case. There was no waiver of the exception, for the motion was renewed at the close of its proofs and at the close of all the evidence. It was entitled to a nonsuit, as a matter of right, and as though the case were one of a suit

brought against it alone. *McMartin v. Taylor*, 2 Barb. 356; *Dominick v. Eacker*, 3 Barb. 17. This decision will establish a rule whose operation must be that none of several defendants jointly sued in tort can ever obtain a dismissal of the complaint as against him, however insufficient the plaintiff's proofs to inculcate him. The complainant, therefore, in such a case, so far from incurring any risk, will probably always be benefited, by joining all parties concerned, whether capable of proving liability as to some, or not, for he may well indulge in the hope that, through some of the evidence adduced upon the trial by some one or more of the defendants, a case may be made out against all—a result obviously tending to make the payment of any recovery more secure.

HAIGHT, MARTIN, and WERNER, JJ., concur with VANN, J. PARKER, C. J., and O'BRIEN, J., concur with GRAY, J.

Judgment affirmed.

(177 N. Y. 51)

PEOPLE ex rel. MUTUAL TRUST CO. OF WESTCHESTER COUNTY v. MILLER, Comptroller.

(Court of Appeals of New York. Dec. 18, 1903.)

TAXATION—TRUST COMPANIES—CORPORATE FRANCHISE.

1. Laws 1901, p. 316, c. 132, § 187a, as amended by chapter 535, p. 1320, provides for the taxation of every trust company organized in the state, and that it shall "pay to the state annually for the privilege of exercising its corporate franchise or carrying on business in such corporation or organized capacity an annual tax" of a certain amount. *Held* a tax on the privilege of exercising the corporate franchise, and measured by the value of the investment made in carrying on the corporate business.

2. The "annual" tax imposed "annually," as provided by Laws 1901, p. 316, c. 132, § 187a, as amended by chapter 535, p. 1320, means a tax imposed once a year, and computed by the year; and, where a trust company does not commence business until six days before the expiration of the tax year, it should be taxed according to the period during which the company exercised its corporate franchise.

Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Certiorari by the people, on the relation of the Mutual Trust Company of Westchester County, to Nathan L. Miller, comptroller of the state of New York. From an order of the Appellate Division (83 N. Y. Supp. 185) affirming the determination of the defendant to refuse to revise a tax against the relator for the year ending June 30, 1901, relator appeals. Reversed.

Herbert Parsons, for appellant. John Cunnene, Atty. Gen. (William H. Wood, of counsel), for respondent.

VANN, J. The relator, a trust company with the powers which its name implies, was

organized on the 6th of June, 1901, and began to do business on the 24th of that month. Its capital was \$300,000; its surplus, paid in with the capital, was \$60,000; and it had no undivided profits when the question presented by this appeal arose. On the 30th of August, 1901, the Comptroller imposed a tax of \$3,600 upon its capital and surplus, amounting to \$360,000, which he declared was "for tax on franchise or business based on capital stock, surplus and undivided profits, per chapter 132, p. 316, Laws 1901, as amended by chapter 535, p. 1319, Laws 1901, for year ending June 30, 1901." The relator, after paying the tax under protest, applied to the Comptroller for a revision and readjustment, but the application was denied. A writ of certiorari, issued for a review of such determination, resulted in an order of the Appellate Division confirming it in all respects. From that order the relator appealed to this court.

The statute under which the Comptroller proceeded provides that "every trust company incorporated, organized or formed under, by or pursuant to a law of this state, * * * shall pay to the state annually for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity, an annual tax which shall be equal to one per centum on the amount of its capital stock, surplus, and undivided profits. * * * Tax Law, § 187a (Laws 1901, pp. 316, 1320, cc. 132, 535).

Every company liable to pay a tax under this section is required to make a written report to the Comptroller, on or before August 1st in each year, "of its condition at the close of business on June thirtieth preceding, separately stating the amount of its capital stock, the amount of its surplus, and the amount of its undivided profits, and containing such other data, information or matter as the Comptroller may require." Upon the basis of this report, or if no report is made, or the one made is unsatisfactory, upon the facts discovered by the Comptroller through an examination which the statute authorizes, it is his duty to "order and state an account for the tax due the state," and to notify the corporation interested, which is required to pay the tax thus fixed on or before the 1st of September in each year, with a penalty of 5 per cent. for nonpayment within 30 days after it becomes due, and 1 per cent. for each month thereafter. At any time within one year after notice of the imposition of the tax, the Comptroller may revise his action, correct any error, and, if the tax has been paid, make the proper adjustment. The action of the Comptroller may be reviewed by certiorari, provided the amount of the tax is first deposited with the Treasurer of the state. *Id.* §§ 195-197 (Laws 1896, pp. 864, 865, c. 908).

The relator claims, among other things, that, as it had carried on business but six days before the fiscal year expired, the tax

should be apportioned according to the period during which it exercised its corporate franchise. The Comptroller claims that a fraction of the year cannot be considered in imposing the tax, and that the exercise by the relator of its corporate franchise for any part of the year subjects it to a tax the same in amount as if it had been engaged in business during the entire year.

The tax under consideration is not imposed upon property, but upon a privilege. It is not imposed upon the privilege of becoming a corporation, for that would be an organization tax, payable but once for the entire period of corporate existence. It is imposed "for the privilege of exercising" the corporate franchise, and is measured by the value of the investment made and used in carrying on the corporate business. It is an "annual" tax, imposed "annually," as the statute expressly provides, for the privilege of exercising, not of possessing, a corporate franchise. This privilege was used by the relator for only 6 days during the fiscal year in question. It could not exercise its franchise for the entire year, because the state did not bring it into existence until the year had nearly expired. The consideration for the tax is the privilege of carrying on business, yet the relator, according to the requirement of the Comptroller, was compelled to pay for a privilege that it did not have and could not exercise during the greater part of the period for which the tax was laid. It used the privilege for only 6 days, but it is taxed for using it 365 days, during 359 of which it did no business and enjoyed no privilege. An annual tax is a tax reckoned by the year, the same as annual rent or annual interest. An "annual" tax imposed "annually" means a tax that is imposed once a year, computed by the year. If a trust company does not commence business until 6 days before the fiscal year ends, or if it ceases to do business 6 days after the year begins, the tax for doing business by the year requires apportionment. While the Legislature did not so provide in express terms, it is a fair and reasonable implication from the words used that such was its intention. When, by section 182 of the tax law, it imposed an annual tax, payable annually, upon every corporation of a certain class, to be computed upon the basis of the amount of its capital stock "employed within the state" during the year, it did not say expressly that the assessment should be determined by the average amount of capital so employed, but we held that this was what was necessarily meant. *People ex rel. Brooklyn Rapid Transit Co. v. Morgan*, 57 App. Div. 835, 68 N. Y. Supp. 21, 163 N. Y. 672, 61 N. E. 1132. Adopting the opinion below, we said: "This is not a tax upon property, but a tax upon the business done. It is an annual tax to be measured by an annual business done, or, in other words, by the appraised value of capital employed during an entire year. The capital must

have been employed, or else there is no tax. It must have been employed within the state. All the data going to fix the amount of the tax must be past transactions. Time of employment and amount employed are essential data to fix the amount of an annual tax upon a business with any degree of fairness.

* * *

Section 187a does not fix the date when the capital stock, surplus, and undivided profits shall be taken, although they are variable quantities, of which an average can be made for the year, the same as an average of the capital stock employed by the year was used in the *Case of the Brooklyn Rapid Transit Company*, and with as much reason. In pronouncing judgment in that case, we relied in part upon *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 166, 38 N. E. 990, and *People ex rel. New England Loan & Trust Co. v. Roberts*, 25 App. Div. 16, 49 N. Y. Supp. 10; *Id.*, 156 N. Y. 688, 50 N. E. 1120; and we distinguished *People v. Spring Valley Hydraulic Gold Co.*, 92 N. Y. 383, the main reliance of the learned Attorney General in the case in hand. In the latter case, as an examination of the record shows, the question of apportionment was raised neither by the pleadings nor at the trial, but was suggested for the first time in this court, which did not consider it, and could not consider it, because it was raised by no exception. That appeal was heard upon the judgment roll only, none of the evidence having been returned. The only exceptions were to the conclusions of law as found by the trial judge, and they did not suggest the question. Moreover, the statute in that case differed in many important particulars from the one now before us, although the words "annual" and "annually" appeared therein. The question there was not as to the amount of the tax, but as to the constitutionality of the act, and whether the company was liable for any tax whatever. Here the question of apportionment was distinctly raised in the petition for the writ, as well as, but less distinctly, before the Comptroller. It is the only debatable question in the case, and the only one considered by the Appellate Division. The meaning of a statute imposing a new kind of tax is seldom settled by one adjudication, but there is a gradual growth as new questions occur to counsel in its progress through the courts, and authorities under one statute frequently fall in analogy to cases under another statute relating to a similar subject, but differing in many essential respects. We do not consider the decision in the case relied upon by the respondent as controlling in this.

Statutes should receive a reasonable construction unless the language used prevents it. Here we have an act which does not expressly provide for the case before us. It imposes annually an annual tax for doing business, but does not say whether, if business is done for only part of a year, the tax

shall be fixed in accordance with the time business is done, or for the entire year, including that part when not only no business was done, but there was no right to do any. It would be unreasonable to hold that a tax on doing business covers the whole year, when business was done for only six days. A tax is presumed to be laid by the state in return for some proportionate value received by the taxpayer, and the Legislature, in imposing an annual tax for the privilege of doing business, intended, as we think, that it should be based upon the period that the privilege was extended and enjoyed.

We may assume that the question is not free from doubt, for we cannot unite in judgment upon it, but serious doubt in a case of taxation should be resolved in favor of the taxpayer. *Matter of Harbeck*, 161 N. Y. 211, 217, 55 N. E. 850; *Matter of Fayerweather*, 143 N. Y. 114, 119, 38 N. E. 278; *Powell v. Tuttle*, 3 N. Y. 396, 401. A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax. *Sutherland on Statutory Construction*, 458; *Black's Interpretation of Laws*, 326; *Cooley on Taxation*, 200.

We think the construction adopted is fair to the government and just to the citizen, for it gives the former full payment for the time the franchise was exercised, and takes from the latter nothing but what it impliedly agreed to pay when it accepted the franchise. We therefore reverse the order of the Appellate Division and the determination of the Comptroller, with costs, and remit the matter to the Comptroller for adjustment in accordance with the rule laid down.

BARTLETT, J. (dissenting). The relator trust company received from the Superintendent of Banks a certificate of authorization to do business on the 6th day of June, 1901, and did actually commence the transaction of business on the 24th day of June, 1901. It had, therefore, been in business six days when a report was due to the Comptroller as to its condition, etc. No such report was made, and on the 30th day of August, 1901, the Comptroller imposed the assessment and tax now under review.

The counsel for the relator insisted at our bar and in the courts below that the company was not liable to any tax for the year 1901, and that its first report to the Comptroller was not due until June 30, 1902. It was also argued that, if the company was assessable at all, it was only on its capital stock and surplus, spread over 12 months; that is on $\frac{1}{12}$ of \$360,000, and the tax would be $\frac{1}{12}$ of \$3,600, or \$59.18.

It is conceded that the Legislature did not provide in express terms for the apportionment that is now to be allowed by the deci-

sion of this court, but that it may be reasonably implied when seeking for its intention. When taxes are imposed upon corporations, to be computed upon the basis of the capital employed by them within the state, and the amount of that capital varies from time to time during the fiscal year, apportionment is, of course, necessary. In the imposition of a franchise tax no such situation is presented. Section 187a, under which this tax is assessed, expressly states that it is for the privilege of exercising a corporate franchise, or carrying on the business of the corporation. This tax is imposed upon the amount of the capital stock without regard to its actual value. It may be quoted at two or three times its par value, and yet the tax is assessed only upon the amount of the capital stock. Tax Law, § 187a. In considering this new form of taxation affecting trust companies, we are to keep in mind that it is accompanied by several valuable concessions to them. Section 202 of the tax law, as amended by chapter 132, p. 316, Laws 1901, and chapter 172, p. 461, Laws 1902, provides that a trust company is not only released from taxation on its personal property for state purposes, but is exempt from assessment and taxation for all purposes. In addition to this is the provision that the holder of stock of a trust company is not liable to be taxed thereon. In view of the nature of the tax and these valuable concessions, I am of opinion that the section under construction should be enforced as it stands, and that there is no occasion to read into it the supposed intention of the Legislature.

I vote for affirmance.

PARKER, C. J., and O'BRIEN, HAIGHT, CULLEN, and WERNER, JJ., concur with **VANN, J. BARTLETT, J.,** dissents.

Order reversed, etc.

(69 Ohio St. 215)

LINDSEY v. STATE

(Supreme Court of Ohio. Nov. 17, 1903.)

CRIMINAL LAW—PLEA IN ABATEMENT—SUFFICIENCY—JUROR—COMPETENCY—CHALLENGE—MURDER—INDICTMENT.

1. A plea in abatement to an indictment, while not required to be worded with the strictest technical and verbal accuracy, yet the matter pleaded therein must be clearly and distinctly stated, and must embrace facts as distinguished from conclusions. Hence a plea which states that the defendant was required, against his will, to take an oath and give testimony before the grand jury concerning a case then being investigated against the defendant and his codefendants, but which does not state how he was thus compelled to take an oath, nor that he refused to take it, nor that he claimed his privilege of refusing to testify, and which fails to show what he testified to, or that his testimony was material concerning any fact necessary to be proven by the state to justify the finding of an indictment, or that there was not testimony other than that of defendant before the jury sufficient to justify such indictment, is bad on general demurrer.

2. A juror being examined on his voir dire, stated that from what he had talked and read about trials of codefendants he had formed an opinion against the defendant which it would require testimony to remove, although he had nothing personally against him, and that the fact that the defendant had been indicted would have weight with him unless defendant proved himself not guilty, and as the case stands would require the defendant to prove his innocence; but it did not appear that he had talked with or read the testimony of any witness, or had talked with any one claiming to have knowledge of the facts, and it was shown on further examination that his opinion rested principally on the suspicion that the defendant was one of the gang that committed the crime, but that he did not assume to know that to be a fact; and that if the court should instruct that he need not consider the fact that the defendant had been indicted he could lay aside that fact, and not consider it in evidence against him; and, finally, that, notwithstanding any previous bias, opinion, or prejudice, he could render a fair and impartial verdict according to the law and the evidence, and the court, so believing, overruled the defendant's challenge for cause—*held*, that the facts do not show an abuse of discretion in so overruling the challenge. *McHugh v. The State*, 42 Ohio St. 154, and *Golins v. The State*, 21 N. E. 476, 48 Ohio St. 457, approved and followed.

3. An indictment, which charges in proper form an attempt to commit a robbery, and then avers that the defendant, with others, in such attempt did unlawfully and purposely, by means of a revolver loaded with gunpowder and a leaden bullet, shoot the deceased, with intent to unlawfully and purposely kill and murder him, and did, by means of the shooting, strike, penetrate, and wound him, with intent unlawfully and purposely to kill and murder him, thereby giving him a mortal wound from which he instantly died, and that by these means they did unlawfully, purposely, and in an attempt to perpetrate a robbery, kill and murder the deceased, sufficiently charges murder in the second degree, although the word "malice" is not employed in the indictment in describing the act.

4. It is not error in such case for the court, in connection with proper instructions with respect to the several degrees of murder and as to assault and battery, to charge, if the facts proven warrant it, as follows: "Has the state established by clear, convincing, and satisfactory evidence beyond a reasonable doubt, that the defendant is guilty as charged in the indictment, or of some other degree of murder or manslaughter, or it may be assault and battery, or assault merely? Otherwise your verdict should be 'Not guilty.'"

Burket, C. J., and Crew, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Wyandot County.

Marsh Lindsey was convicted of murder, and brings error. Affirmed.

At the January term, 1901, of the common pleas of Wyandot, the plaintiff in error, Marsh Lindsey, with four others, was indicted for murder in attempting to perpetrate a robbery. The grand jury was a special one. It investigated but one case and found only one indictment. In substance the indictment charged that the defendants, in and upon one William C. Johnson then and there being, unlawfully and forcibly did make an assault, with intent then and there forcibly and by violence and by putting him in fear to take from the person and against the will of him, the said William C. Johnson, the money and personal

property of great value of him, the said William C. Johnson, and then and there the said William C. Johnson to rob, and the money and personal property aforesaid to steal, take, and carry away; and that the said defendants (naming them) then and there did attempt unlawfully, forcibly, and by violence, and by putting him in the fear, to take from the person and against the will of said William C. Johnson the money and personal property of great value of him, the said William C. Johnson, with the intent thereby then and there the said William C. Johnson to rob, and the moneys and personal property aforesaid, to take, steal and carry away; and that the said defendants (naming them) a certain revolver then and there loaded and charged with gunpowder and one leaden bullet, which said revolver they the defendants (naming them) in their right hands then and there had and held, then and there unlawfully and purposely, and whilst engaged in said attempt to perpetrate a robbery in and upon the said William C. Johnson as aforesaid, did discharge and shoot off against and upon the said William C. Johnson, with the intent the said William C. Johnson unlawfully and purposely to kill and murder; and that the said defendants (naming them), with the leaden bullet aforesaid, so as aforesaid by them, the said defendants (naming them), by force of the gunpowder aforesaid then and there discharged and shot out of the revolver aforesaid, then and there unlawfully, purposely, and whilst engaged in said attempt to perpetrate a robbery in and upon the said William C. Johnson, as aforesaid, did him, the said William C. Johnson, strike, penetrate, and wound, with intent him the said William C. Johnson unlawfully and purposely to kill and murder, thereby then and there giving to him, the said William C. Johnson, in and upon the abdomen and into the body of him, the said William C. Johnson, one mortal wound, from which the said William C. Johnson then and there instantly died. And so the jury aforesaid, upon their oaths and affirmations aforesaid, do say that the said defendants (naming them) him, the said William C. Johnson, in the manner and by the means aforesaid, unlawfully, purposely, and in the attempt to perpetrate a robbery, did kill and murder, contrary to the statute, etc.

To this indictment there was filed a motion to quash, which was overruled. Then followed a plea in abatement, the material parts of which repeat substantially one ground stated in the motion to quash, and are as follows: "The new grand jury investigated the case against this defendant and his codefendants and none other, and all being the same transaction, and that while said grand jury were investigating said case and during the time of the trial of this case was in progress before the grand jury which returned the indictment herein, and while said grand jury was investigating the charge against him, the charge with which he is now

charged in the indictment herein filed, he was required by the state of Ohio, and by writ of subpoena duly issued by the clerk of this court, upon a præcipe for that purpose filed by the prosecuting attorney of said county, to appear before said grand jury, and was, against his will, required to and did take an oath as a witness, and was, against his will, required to and did appear before said grand jury, and before them he was required, against his will, to give testimony in this case concerning the charge against him. Defendant says he did not, neither was he permitted to, have counsel to advise him concerning his rights herein; that he was by the prosecuting attorney and sheriff of said county required to dress himself, against his will, as the person or persons who committed the crime for which he stands charged were dressed or appeared to be dressed by those who saw them at the time said crime was committed; and while so dressed this defendant was, against his will, required to walk, talk, and exhibit himself in the presence of the prosecuting witness and other witnesses for the state to enable them to testify before the grand jury as to whether or not this defendant was the person who committed the crime with which he now stands charged; and certain witnesses, after having so seen this defendant so disguised as aforesaid, appeared before said grand jury, and gave testimony against him as to his identity in this case—all of which is, as he believes, in violation of the rights of this defendant, who is a citizen of the United States and of the state of Ohio." A demurrer to this plea in abatement was sustained. A plea of not guilty was then entered, and trial had. Divers exceptions were taken during the impanelling of the jury, which are considered in the opinion. The jury returned a verdict of guilty of murder in the second degree and not guilty of murder in the first degree. Motion for new trial being overruled, sentence followed. On error to the circuit court the judgment and sentence of the common pleas was affirmed, and the prisoner brings error here.

E. T. Dunn, W. H. Hare, and John W. Winn, for plaintiff in error. Benjamin Meck, pros. atty., for the State.

SPEAR, J. (after stating the facts). 1. First in natural order come the questions arising on the motion to quash and the plea in abatement. These may be treated together. A motion to quash may be made when there is a defect apparent upon the face of the record, and a plea in abatement may be made when there is a defect in the record which is shown by facts extraneous thereto. It is not, however, now seriously urged that the indictment is defective in form, and it is practically conceded that the motion to quash was properly overruled. It was the judgment of the courts below that the plea in

abatement was insufficient on two grounds: One, that it was bad for indefiniteness, in that it alleges conclusions rather than facts; and another that it fails to show that the defendant was in any wise prejudiced by the facts alleged.

We are of opinion that the courts were right on both grounds. It is not necessary to hold that facts relied upon in a plea in abatement should be worded with the strictest technical and verbal accuracy, as is held in many cases; yet it is the rule that the facts must be pleaded, as held in *Wagner v. The State*, 42 Ohio St. 537, with exactness, and the plea is to be strictly construed. The reason is apparent. It is a dilatory plea. The rule is given in *Bishop's Criminal Procedure*, § 327, thus: "In these—such as pleas in abatement and the like—it is necessary to employ extreme certainty. An excellent work on pleading (Gould's Pl. p. 84) states that this superlative certainty 'requires the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, leaving, on the one hand, nothing to be supplied by intendment or construction; and on the other no supposable special answer unobviated.' It is a rule, not of construction only, but also of addition; that is, it requires the pleader not only to answer fully what is necessary to be answered, but also to anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat his plea." The plea in this case avers that the defendant was required to and did take an oath as a witness, and was required to and did appear before the grand jury, and was required against his will to give testimony in this case concerning the charge against him. But the plea does not state that he refused to take an oath, nor in what manner nor by what means he was required against his will to take an oath; nor does it allege that the defendant, when before the grand jury, claimed his privilege, or refused to answer any question, or in any manner objected to appearing as a witness and to testifying. There is no law that could compel the witness to testify to matters which would incriminate himself, or to punish him for refusing. If he did not object, how could there be compulsion? For all of any statement of fact which appears, he took the oath voluntarily and testified voluntarily. Where a privilege to refuse exists, and the witness testifies without objection, the natural inference is that he testifies voluntarily. Indeed, the only feature which, according to the facts stated, is shown to have been involuntary, was the appearance in obedience to the subpoena. That would, in and of itself, be regarded as compulsory process.

The same may be said with regard to the complaint that he was required to dress, walk, and talk, and exhibit himself so dressed before persons who afterward testified before the grand jury. Facts are not stated which

show that this was compulsory. The averment, also, that he was not permitted to have counsel to advise him concerning his rights is equally a conclusion. It does not appear that he desired to have counsel, or was in need of counsel, nor that he was at the time upon trial for any crime or offense.

But, aside from the foregoing, how stands the case? The proposition of the plaintiff in error is that the indictment should have been held bad because a constitutional right of the defendant had been violated; that is, the grand jury and the prosecuting officer should be rebuked for improper practice, without regard to whether the defendant had been thereby prejudiced or not. We are not commending the practice of subpoenaing persons suspected of crime as witnesses before a grand jury which has been summoned to inquire respecting that crime; indeed, we do not hesitate to characterize it as improper practice. But the question is what effect that mere fact ought to have in a test of an indictment otherwise regular and valid. It is of importance to note that this plea does not show that the defendant testified against himself, or that he testified to any fact material to the inquiry, or that the testimony he gave was of consequence in the deliberations of the jury, or that there was not other testimony before the jury upon which the indictment might have been properly found. On the contrary, for all that appears in this plea, there was abundant competent evidence, by competent witnesses before the jury, and the jury in fact found the indictment wholly upon such other competent testimony. Speaking more specifically, the plea does not show that some one material fact, and what material fact, was testified to by the defendant without which an indictment could not have been found, which fact was not testified to or established by other witnesses. The statement simply is that he was required "to give testimony in this case concerning the charge against him." A like test shows the insufficiency of the plea that he was required against his will to dress and exhibit himself before persons who afterwards testified before the grand jury against him as to his identity in this case. Suppose this to be just as stated. For all that appears, witnesses other than the ones referred to gave testimony to the grand jury as to identity abundantly supporting the charge. It results that, so far as this inquiry is concerned, the case stands just as it would had Lindsey not testified before the grand jury. Why, then, should the indictment be held bad, and the proceedings in the courts below go for naught? Our statute (section 7252, Bates' Ann. St.) provides that upon an adjudication in favor of the accused on a plea in abatement he may be committed or held to bail for appearance at the next term. It would follow, simply, that another grand jury would be summoned, impaneled, and the testimony other than that given by Lindsey be pre-

sented in all respects like the one on which the trial was had. So that again the court would be precisely where it was when the trial was entered upon. How could such circumlocution aid the cause of justice? How would the people gain, or the citizen be more secure in his rights, by all this needless delay and expense? We think it quite unnecessary to consider further the much discussed question of the constitutional right and privilege of the citizen arising under section 10 of our Bill of Rights. No case is made on the facts calling for such discussion. Other allegations appear in the plea, but they are irrelevant, because contradicting the record, and need not be further noticed.

2. Exceptions were taken to the overruling of challenges made to several of the petit jurors on the ground of previous opinion and prejudice. The instance of Louis Cross is a sample. He was questioned by counsel for defendant, and answered: "Q. From all you have talked and read about these other trials, state whether you have at any time formed any opinion in your mind as regards the guilt or innocence of the defendant. A. I think I did have an opinion. Q. Is that opinion with you still? A. Yes, sir. Q. I want to inquire if it would require any testimony to remove the opinion you have now formed? A. Well, yes; I think it would. Q. And the opinion that you now have is against the defendant, is it not? A. I have nothing that would decide against that I know of. I have nothing against him at all. Q. The question now is whether the opinion you think you have is against the defendant? A. Yes, it would be against him. Q. It would take sworn testimony to remove that opinion, would it not? A. It would take some testimony, yes. Q. So when you start into the investigation of this case you would not begin exactly fair and even between the state and defendant, would you? A. Well, I think I could start about even with this man in this case. Q. Tell us how you could start in even with an opinion against the defendant in the jury box? A. Well, my opinion is if he was in the gang that murdered Mr. Johnson, I would have some opinion of him. Q. Yes, so would everybody. A. That is all I would have against him; that is all I could say against this man now, because I don't know. I don't know what he may do or prove. Q. But I understand you to say it would take testimony to remove the opinion you now have? A. Well, of course, it would. Q. Your opinion is against the defendant; that he was possibly one of the gang? A. Yes, sir. Q. That is what you think about it? A. Yes, sir. Q. And it would take sworn testimony to remove that conclusion of yours? A. Yes, sir. Q. Then when you start into this jury with the notion that this defendant is one of the gang, to that extent you would be prejudiced against him? A. That far I would. Q. You are aware that the grand jury has returned an indictment against this

defendant for murder in the first degree? A. Yes, sir. Q. I want to inquire of you if the fact that they have returned such indictment into this court, and indorsed as a true bill, if that fact, in your mind, would bear any weight against the defendant? A. It would, unless he proved himself not guilty. Q. Yes, you would require of him to prove he was not guilty? A. Yes, sir. Q. As you now stand, with your present notion about the case, you would require the defendant to prove his innocence, would you? A. Yes, sir. Q. Now, to that extent, you are prejudiced against him, are you not? A. Of course, I will be prejudiced against him until he proves himself clear. By Dunn: We tender challenge for cause." When questioned by the prosecuting attorney the juror answered: "Q. If the court should tell you that the fact that he is indicted for murder is no evidence that he is guilty of murder, would you lay aside any prejudice you might have by reason of the indictment? A. Yes, sir. Q. Have you any opinion now whether the defendant Marsh Lindsey is guilty of this offense? A. Yes, sir— Q. Well, if you have any explanation, you may offer it. A. My opinion is he was guilty if he was in the gang with these other fellows. If he don't prove himself— Q. But you don't know now whether he was in the gang or not? A. No, sir. Q. Then, if you don't know he was in the gang, how can you have an opinion as to whether he is guilty or not? A. I don't know whether he is guilty or not, I can't tell anything about that. Q. What do you mean by saying to the lawyer that you had an opinion as to his guilt or innocence? A. Did I say he was guilty? Q. No, but he finally got you to say you had an opinion as to his guilt or innocence. If there is any mistake about that, correct it. A. I have no opinion that he is guilty. Q. You have not? A. No, sir. Q. Have you an opinion now that he was in the gang? A. Not any more than as they have indicted him. Q. But if the judge here on the bench should tell you that you need not consider that fact against the defendant, could you lay aside the fact that he was indicted, and not consider that as evidence against him? A. I think I could. Q. Let me ask you, could you, notwithstanding any bias, opinion, or prejudice that you may have, render a fair and impartial verdict according to the law and the evidence? A. Yes, sir."

The sum and substance of this is that the juror, from what he had heard and read respecting the trials of codefendants, had formed what he called an "opinion" against the defendant, which it would require some testimony to remove, but which was in no way against this person unless he was one of the gang which committed the crime, and which was based in part upon the fact that he had been indicted with the others. It does not appear that he had talked with any witness, or with any one claiming to be acquainted with the facts, or had read what purported

to be the testimony of any witness. It does appear, on the other hand, by his statements, that the opinion was that the defendant is guilty if he was in the gang with the other fellows, and that he has no opinion that he is guilty independent of that, and the further fact that he had been jointly indicted with them. As to this he also stated that if the court should instruct that he need not consider the fact that defendant was indicted he could lay aside that fact, and not consider that as evidence against him. And, finally, being asked, he stated that, notwithstanding any bias, opinion, or prejudice, he could render a fair and impartial verdict according to the law and evidence. The court, having the juror before him, was of opinion that he would render an impartial verdict, and overruled the challenge. The juror was then challenged peremptorily by defendant.

We are not prepared to say that this ruling was an abuse of discretion on the part of the court. Our statute (section 7278) provides: " * * * if a juror has formed * * * an opinion, * * * the court shall thereupon proceed to examine such juror as to the grounds of such opinion; and if such juror shall say that he believes he can render an impartial verdict notwithstanding such opinion, and if the court is satisfied that such juror will render an impartial verdict on the evidence, it may admit him as competent to serve in such case as a juror." The facts present a case much less extreme than was present in *Goins v. State*, 46 Ohio St. 457, 21 N. E. 476, where it is held that: "A juror who states on his examination that he has formed an opinion on a matter affecting the guilt of the defendant, from having heard the circumstances of the crime related by one who claimed to know them, may nevertheless be competent to sit as a juror, if he says on oath that he believes he can render an impartial verdict in the case, and the court is satisfied he can do so. The fact that the court admitted him to sit as a juror is a sufficient finding that it was satisfied he could render an impartial verdict." The case at bar is essentially different in its facts from *Palmer v. The State*, 42 Ohio St. 596, cited and relied upon by counsel for plaintiff in error, and is not controlled by it. It is, however, on all fours as to the essential facts with *McHugh v. The State*, 42 Ohio St. 154, where the overruling of the challenge was sustained. A case presenting good grounds for challenge, and in striking contrast to the case last cited, and to the case at bar, is that of *Frazier v. The State*, 23 Ohio St. 551, where the refusal to sustain the challenge is held to be error.

In passing, it may be remarked that jurors are usually not mental philosophers, nor are they experts as to the law of criminal evidence. The shrewd lawyer, in examining them upon their voir dire, invariably puts the question as to the forming of an opinion, and the juror, having perhaps in reality but

a casual impression respecting the case, is quite certain to dignify his state of mind by the adoption of the term used by the lawyer, and call it an "opinion." While alike in kind, there is an essential difference between the two in degree. An "opinion," such as is contemplated by our statute, is well defined as being "a conclusion or judgment held with confidence, but falling short of positive knowledge." An "impression," as applied to this subject-matter, is correctly defined as "a notion, remembrance, or belief, especially one that is somewhat indistinct or vague." It is quite apparent, from all that this juror stated, that his state of mind respecting Lindsey's connection with the crime of which he stood charged was of the latter class. We, all of us, in our everyday life, receive impressions respecting a thousand subjects and events which do not reach the dignity of opinions, and which change or fade away entirely upon being subjected to the effect of counter information or further light. If such impressions should be held to conclusively disqualify a juror, the obstacles to securing jurors would, in this age of newspapers, be well nigh insuperable. And that a juror should not, until advised, comprehend the office and legal effect of an indictment, or the rule of law respecting the presumption of innocence, is not a matter of wonder, and does not afford ground for challenge.

3. It is also insisted that the verdict of murder in the second degree cannot be sustained under this indictment, our statute (section 6810) providing that, "Whoever purposely and maliciously * * * kills another is guilty of murder in the second degree." The specific claim is that the word "malice," in defining the act of killing, is not found in the indictment. This statement is true. It is true, also, that section 7217, Rev. St. (Bates' Rev. St.), provides that in an indictment for murder in the second degree it shall be sufficient to charge that the defendant did purposely and maliciously kill the deceased. This section does not, however, provide that the words stated are indispensable, and are the only words that may be sufficient in an indictment in defining that crime. The section makes it unnecessary "to set forth the manner in which, or the means by which, the death was caused," but an inference does not follow that the indictment may not set forth the manner or the means by which the death was caused, nor that, if such manner and means, as set forth, necessarily import malice, and that the killing was therefore maliciously done, that is not the equivalent of a direct charge that the defendant did maliciously kill. It is said in *Robbins v. The State*, 8 Ohio St. 131, that "intentional killing by means of administering poison includes, and per se imports, malice." If the inference follows in a killing by administering poison, why not in a killing while committing, or attempting to commit, a robbery, as both offenses are covered by the same section of the statute

(section 6808, Bates' Ann. St.), which reads: "Whoever purposely and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree and shall be punished by death, unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life." Evidently the legislative purpose in enacting this section, where the murder is charged as murder in an attempt to rob, was to cause an averment of that fact to become a substitute for the averment of deliberation and premeditation required to be charged in terms in the usual indictment for murder in the first degree. The indictment does charge in apt words the attempt to rob, and then that the defendant, with others, did unlawfully and purposely discharge their revolver, loaded with gunpowder and a leaden bullet, and by that means did shoot Johnson with the intent to unlawfully and purposely kill and murder him; and did, by means of the shooting, strike, penetrate, and wound him with the intent to unlawfully and purposely kill and murder him, thereby giving to him a mortal wound, from which he instantly died; and that by these means they did unlawfully and purposely kill and murder him. Now, when it is remembered that the rule in Ohio is, and from the earliest time, as shown by the holdings in *The State v. Turner*, Wright, 20, and *The State v. Town*, Id. 75, down to *Davis v. The State*, 25 Ohio St. 369, has been that, "where the fact of killing is proven, notice is to be presumed," and *Weaver v. State*, 24 Ohio St. 584, that, "the shooting with intent to kill being established, the law implies malice, and the malice thus implied can only be rebutted by showing circumstances of justification or excuse," it would seem that the absence of the word "malice" from the indictment ought not to render it insufficient as to a charge of murder in the second degree. What necessity, we ask, can there be of incorporating a specific word in an indictment when the full meaning and purpose of such word is conclusively to be inferred from the words which are therein used?

4. The claim is further made that the verdict cannot be sustained because it should have been either for murder in the first degree or an acquittal, and that the trial court erred in its charge to the jury. This in face of the fact that, at the request of defendant's counsel, the court charged the jury that: "The law and the evidence should be their (the jury's) only guide in determining the guilt or innocence of the defendant. Has the state established by clear, convincing, and satisfactory evidence, beyond a reasonable doubt, that the defendant is guilty as charged in the indictment, or of some other degree of murder, or of manslaughter, or, it may be, assault and battery, or assault merely? Otherwise your verdict should be

not guilty." Forms of verdicts were given the jury covering each class of offenses referred to, and, consistent with the instructions, the jury found murder in the second degree. We see no error in this action of the court prejudicial to the defendant. The language of the instruction is not entirely happy, but the principle covered is not incorrect as applied to the case. It is in accord with the holdings of this court in *Robbins v. The State*, supra, *Beaudien v. The State*, 8 Ohio St. 634, and *Adams v. The State*, 29 Ohio St. 412, which latter was a robbery case. Our statute (section 7316) provides: "Upon any indictment the jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit the same, if such attempt is an offense; when the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any inferior degree; and if the offense charged is murder, and the accused be convicted by confession in open court, the court shall examine the witnesses, and determine the degree of the crime, and pronounce sentence accordingly." But the case of *Dresback v. The State*, 38 Ohio St. 365, is cited and relied upon as sustaining the claim of plaintiff in error on this point. That was a poisoning case. The syllabus is: "On the trial of an indictment for murder in the first degree, charging the accused with purposely killing another by administering poison, the evidence tending to show no other grade of offense, it is error to charge the jury to the effect that if they find the accused guilty their duty will be fulfilled by convicting of murder in the first or second degree, or manslaughter. And where the verdict is returned for a lower grade of homicide than murder in the first degree, a new trial should be granted where it appears from the evidence that a verdict of acquittal might have been rendered had the jury been properly instructed." Owing to the meagerness of the statement we are unable to ascertain exactly what the facts in this case were, and are not disposed to comment at length upon the decision, more than to say that the report has puzzled many legal minds. But, from what appears, it does not seem to have application to the facts of the case at bar. The one before us is a case involving a charge of crime committed by violence, the murder being perpetrated by means of a revolver, a deadly weapon, fired at the victim for the purpose and with the intent of killing him, and that purpose instantly accomplished. We are clearly of opinion that, whatever may have been the proper rule of law applicable to the *Dresback Case*, in this case it was not error for the court, in connection with a full and correct charge defining murder in its several degrees, and assault and battery, to instruct the jury to ascertain and return the degree of the crime, in case they found the defendant guilty as charged. The current of

decision in this state justifies the conclusion that an indictment good as to murder in the first degree embraces necessarily the lower grades of homicide, and that, when this is the case presented, the jury may, if the facts proven warrant it, acquit of the graver offense and convict of the lower. *Stewart v. The State*, 5 Ohio, 241; *White v. The State*, 13 Ohio St. 569; *Heller v. The State*, 23 Ohio St. 582; *Howard v. The State*, 25 Ohio St. 399; *Marts v. The State*, 26 Ohio St. 162.

Other grounds of error are alleged, but we do not regard them as being of sufficient gravity to warrant space in dealing with them. Other reasons and grounds are also urged by the state requiring an affirmance of the judgment, but we do not find it necessary to discuss them.

Finding no prejudicial error in the record, the judgment will be affirmed.

DAVIS, SHAUCK, and PRICE, JJ., concur. BURKET, C. J., and CREW, J., dissent.

(69 Ohio St. 202)

STATE ex rel. GUILBERT, State Auditor, v. LEWIS, Hamilton County Auditor.

(Supreme Court of Ohio. Nov. 17, 1903.)

STATE DECISIS—CONSTITUTIONAL QUESTIONS—PROPERTY RIGHTS.

1. The doctrine state decisis will not be allowed to interfere with the overruling of a former decision upon a constitutional question, when such former decision is clearly erroneous, and it does not appear that such decision has been acted upon as a rule of property, or that rights have vested under it, so that more injury would follow if it were overruled than if it were allowed to stand.

2. State ex rel. Guilbert v. Yates, 64 N. E. 570, 66 Ohio St. 546, is approved and followed, and State ex rel. Attorney General v. The Judges et al., 21 Ohio St. 1, is overruled.

(Syllabus by the Court.)

Application by the state, on the relation of Guilbert, Auditor of State, for writ of mandamus against Lewis, county auditor of Hamilton county. From an order denying the writ, relator brings error. Reversed.

The relator filed his petition in the circuit court of Hamilton county, praying for a writ of mandamus to issue against the defendant, as auditor of Hamilton county, commanding him to proceed forthwith, according to law, to make the reports required under the said statute, and to collect for his fee, perquisites, and compensation, and his said salary, as is provided for under sections 1070-1078, 1334-1336, 1365, 1345, 2620, 2774, 2775, 2785, 2908, 4064, 4903, 6909, 7382, 7387, Rev. St. 1880, and that he be ordered to cease to draw from the treasury of the said county any salary, fees, or compensation or perquisites provided for in said alleged statutes, governing and controlling said Hamilton county

¶ 1. See Courts, vol. 13, Cent. Dig. § 320.

only, and to treat such acts as nullities, and to observe the forms prescribed by the relator, and to observe the aforesaid instructions and constructions of the general statutes so designated, and to report to the relator by a certified statement of the amount of moneys and fees received or due the county treasurer, recorder, sheriff, prosecuting attorney, probate judge, commissioners, clerk of the court of common pleas, and also a like statement verified by defendant's affidavit, and to comply with said general statutes as aforesaid. The defendant, for answer, says that, as county auditor of Hamilton county, in the matter of the administration of such office, and the employment of all deputies, bookkeepers, clerks, and other assistants in the office of said county auditor, he has been and is governed and controlled by the provisions of the act of April 6, 1870, as found in 67 Ohio Laws, p. 36, and as supplemented and amended by the act of April 12, 1871, found in 68 Ohio Laws, p. 58, and the act of April 17, 1872, found in 69 Ohio Laws, p. 75, and the act of February 14, 1873, found in 70 Ohio Laws, p. 28, and the act of April 16, 1874, found in 71 Ohio Laws, p. 81, and the act of May 14, 1878, found in 75 Ohio Laws, p. 556, and the act of June 3, 1879, found in 75 Ohio Laws, pp. 117-180, and the act of April 8, 1880, found in 77 Ohio Laws, pp. 137-139, which acts were revised and codified in the Revised Statutes of 1880 as sections 1341 to 1365, inclusive. And he says that in a case brought by the state of Ohio, on the relation of the Attorney General, against the judges of the court of common pleas of the First Judicial District of Ohio, the question of the validity and effect of said statutes, and especially the act of April 6, 1870, and the act of April 12, 1871, supplemental thereto, were brought in issue before the Supreme Court of the state of Ohio, and said acts were held by said court to be constitutional, valid, and binding laws, which decision of the Supreme Court is reported in *State v. Judges*, 21 Ohio St. 1, and has not been reversed or set aside, and is still in full force and effect. Defendant further says that such changes as have been made in said original acts in 67 Ohio Laws, p. 36, and 68 Ohio Laws, p. 58, and as have been made in the acts above cited, from time to time, by the Revised Statutes of Ohio, have not affected their validity or changed their effect, and that by reason of said judgment the relator is now concluded and estopped from relitigating the question decided by the Supreme Court in said case, or from obtaining the relief sought in his petition herein. The relator demurred to the answer upon the ground that said answer does not state a defense to the relator's petition. The demurrer was overruled, and, the relator not desiring to plead further, judgment was rendered for the defendant, and to reverse this judgment of the circuit court he files his petition in error in this court.

J. P. Bradbury and F. S. Monnett, for plaintiff in error. Gideon O. Wilson, Co. Sol., and Otway J. Cosgrave and Oliver B. Jones, Asst. Co. Sols., for defendant in error.

DAVIS, J. (after stating the facts). It seems to be conceded that the ruling in *State ex rel. v. Yates*, 66 Ohio St. 546, 64 N. E. 570, is broad enough in its terms to include Hamilton county and to dispose of the issues in this case; but the circuit court regarded *State ex rel. v. Yates* as not controlling the judgment of this court in *State ex rel. v. The Judges*, 21 Ohio St. 1, which the circuit court seemed to think is made venerable and unimpeachable by the frosts of 30 winters. The doctrine of stare decisis is interposed formally, and with some heat, to sustain the legislation which is now attacked as being in conflict with the Constitution, as interpreted in *State ex rel. v. Yates*. Counsel for the defendant in error advance a step further, and claim that *Cincinnati v. Taft*, 63 Ohio St. 141, 58 N. E. 63, is conclusive in favor of the judgment rendered by the circuit court in the case at bar. The last-mentioned case may be put aside at once, because it is not based on the precedent of a former decision as to the constitutionality of the statute there drawn in question, but upon an overwhelming principle of public policy. "The bonds having been thereafter sold and the improvement made," property had been acquired and immensely valuable rights had vested upon the faith of the former decision, and therefore vastly more harm would ensue from the court reversing itself than to allow its judgment in that case to stand. *Cincinnati v. Taft* is in line with numerous decisions by this court. *Arrowsmith v. Harmoning*, 42 Ohio St. 254, 261.

In the present controversy we are concerned not so much with the propriety of the rule of stare decisis as with the limitations upon the rule, for, as was said by Bartley, C. J., in *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334, "mere precedent alone is not sufficient to settle and establish forever a legal principle. Infallibility is to be conceded to no human tribunal. A legal principle, to be well settled, must be founded on sound reason and tend to the purposes of justice. * * * Precedents are to be regarded as the great storehouse of experience, not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation, which, although at times they may be liable to conduct us to the paths of error, yet may be important aids in lighting our footsteps in the road to truth." The court in that case refused to be governed by a rule which had been recognized and acquiesced in for nearly 200 years. In *Mead et al. v. McGraw*, 19 Ohio St. 55, 62, the principle of stare decisis was reviewed; and it was held that, where a rule of property is not involved, if the former decision is er-

aneous, and affects only the practical administration of justice, it ought to be corrected at the earliest opportunity. If this is a sound principle in the general administration of justice, it must be especially so in the administration of the fundamental law of the Constitution, for the integrity of the Constitution is of supreme importance in every free government, and every departure therefrom should be closely scrutinized and rigidly restrained. It cannot be tolerated that those whose duty it is to support the Constitution may subvert it by a construction, inadvertent or deliberately formed, which shall be forever after binding upon their successors and the people.

In a comparatively recent case, in which this subject seems to have been fully considered, the Supreme Court of Utah, in the opinion by Bartch, C. J., said: "When a point has once been decided by an appellate court, the decision forms a precedent which should not ordinarily be departed from, and never on any slight grounds; but courts occasionally find it necessary to overrule decisions which have been made contrary to principle and the law of the land as established by statute, judicial decision, and the Constitution. * * * Where, however, there has been but a single decision, which is clearly erroneous, and important private or public rights are concerned, or where the questionable matter was not necessarily involved in the case or cases, or where the points involved were decided contrary to the well-established legal principles which ought to have governed, and injustice or hardship would result, or where it appears that the facts which impelled the former decisions and the conditions under which they were made were materially different from those in the case under consideration, or where it is manifest that the law has been erroneously decided, and no material property rights or business rules have been established thereunder, the doctrine of stare decisis ought not to be applied, so as to prevent a reconsideration of the former action of the court." *Kimball v. Grantsville City*, 19 Utah, 368, 394, 395, 57 Pac. 1, 8, 45 L. R. A. 628. See, also, *Ellison v. Georgia Railroad Co.*, 87 Ga. 691, 695, 696, 13 S. E. 809; 1 Kent's Com. 476, 477; 23 Am. & Eng. Ency. Law (1st Ed.) 86-47, cited in argument; *Paul et al. v. Davis*, 100 Ind. 422, 426-428; *Board of Commissioners v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58. Two other cases deserve particular attention, because they deal with the precise issue which is raised in the case at bar, viz., whether a former decision upon a constitutional question may be reviewed and overruled. In *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, Chief Justice Fuller, delivering the opinion of the court, pages 574-576, 157 U. S., page 687, 15 Sup. Ct., 39 L. Ed. 759, says, "Doubtless the doctrine of stare decisis is a salutary one, and to be adhered to on all

proper occasions, but it only arises in respect of decisions directly upon the points in issue;" and he cites the case of *The Genesee Chief v. Fitzhugh*, 12 How. 455, 13 L. Ed. 1058, in which the case of *The Thomas Jefferson*, 10 Wheat. 428, 6 L. Ed. 358, was overruled, and he quotes Chief Justice Taney in the case of *The Genesee Chief* as follows: "It is the decision in the case of *The Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not, therefore, receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the West and on the Lakes was in its infancy and of little importance, and but little regarded, compared with that of the present day. Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction which have arisen in this court were not calculated to call its attention particularly to the one we are now considering." And Chief Justice Fuller adds: "Manifestly, as this court is clothed with the power and intrusted with the duty to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene."

Willis v. Owen, 43 Tex. 41, was a case raising the question of the constitutionality of a statute. It had already been sustained by the Supreme Court in several cases. The doctrine of stare decisis was interposed. It is said in the opinion of the court (page 49): "The questions to be considered in these cases have no application whatever to the title or transfer of property or to matters of contract. They involve the construction and interpretation of the organic law, and present for consideration the structure of the government, the limitations upon legislative and executive power, as safeguards against tyranny and oppression. Certainly it cannot be seriously insisted that questions of this character can be disposed of by the doctrine of stare decisis. The former decisions of the court in such cases are unquestionably entitled to most respectful consideration, and should not be lightly disregarded or overruled, and in case of doubtful interpretation, or even legislative or executive construction within their respective functions, might be sufficient to turn the balanced scale. But in such case the former decision or previous construction is received and weighed merely as an authority tending to convince the judgment of the correctness of the particu-

lar conclusion, and not as a rule to be followed without inquiry into its correctness."

With the foregoing authorities before, us, believing, as we do, that the plain letter of the Constitution of Ohio cannot be altered or amended by judicial construction, and believing, for the reasons given in *State ex rel. v. Yates*, that county offices are not local offices, and that, even if they were conceded to be such, the matter of their compensation is not necessarily local, and may become, and is, a matter of general public concern, as demonstrated in *State ex rel. v. Yates*, and believing, further, that the decision in *State ex rel. v. The Judges*, did not lay down a rule of property, and it not appearing that any vested rights have been acquired under it, we are constrained to formally overrule *State ex rel. The Attorney General v. Judges*, 21 Ohio St. 1. The circuit court should have sustained the demurrer to the answer, and should have awarded a peremptory writ of mandamus, as prayed in the petition.

The judgment of the circuit court in the case at bar is therefore reversed, and peremptory writ awarded.

BURKET, C. J., and SPEAR, SHAUCK, PRICE, and CREW, JJ., concur.

(161 Ind. 440)

JOYCE v. EVERSON.

(Supreme Court of Indiana. Nov. 24, 1903.)

SUPPLEMENTARY PROCEEDINGS — ORDERS — FAILURE TO COMPLY — CONTEMPT — FEMALES — IMPRISONMENT.

1. Burns' Rev. St. 1901, § 817, providing that no female shall be imprisoned on any order of arrest and bail, or on an execution against the body, applies only to arrest in proceedings in the nature of the common-law *capias ad satisfaciendum*, and does not prevent the imprisonment of a female for contempt in refusing to obey an order in supplementary proceedings directing her to pay over money in her hands belonging to the debtor.

2. Where a female refused to pay over money in her hands found to be applicable to a judgment against a third person, as ordered by the court in supplementary proceedings, the court had inherent power to punish her for contempt by imprisonment.

Appeal from Circuit Court, Hancock County; E. W. Felt, Judge.

Action by Ellen Joyce against Joseph Everson. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

David Smith, K. M. Hord, and Ed. K. Adams, for appellant. Marsh & Cook, for appellee.

HADLEY, J. False imprisonment. In a proceeding supplemental to execution instituted by appellee against his judgment debtor, appellant was summoned to answer concerning money in her hands belonging to the said debtor. On April 13, 1899, upon answer and trial, the court found that appellant had in her possession \$600, the property of said judgment debtor, which ought to be

applied to the satisfaction of appellee's judgment, and thereupon entered an order and judgment that appellant forthwith turn over to the clerk of the court said sum of \$600, or so much thereof as should be necessary to pay appellee's judgment. Appellant failing to comply with the order, appellee on September 7, 1899, filed his affidavit, and moved the court for an order against appellant to show cause why she should not be punished as for a contempt of court in failing and refusing to obey said order. Appellant failed to show cause, whereupon she was adjudged guilty of a contempt of court for disobedience of said order, and committed to the jail of the county until she complied therewith, or was discharged according to law. Under said contempt order the sheriff committed appellant to the county jail, where she was confined about 20 days, and when, with the consent of the appellee, and without complying with said order, or attempting to do so, she was released from custody, and brings this suit. She recites in her complaint the foregoing facts, and also that she is a female, and prays judgment for her damages in being illegally and wrongfully imprisoned. Appellee's demurrer was sustained to the complaint, and, appellant refusing to amend, judgment was rendered against her, from which she appeals.

The question for our decision is, did the trial court possess legal authority to commit appellant (being a female) to the county jail as for a contempt of court in refusing to obey its order? Appellant affirms that no such power existed, and directs attention to section 817, Burns' Rev. St. 1901, which provides that no female shall be imprisoned upon any order of arrest and bail, or upon an execution against the body, as sustaining her contention. It will be observed that the section referred to is one of a series which prescribes a procedure termed an "execution against the body," and which is in the nature of the old common-law writ of *capias ad satisfaciendum*, but which is limited to a particular class of cases, where, among other things, the execution debtor has in his possession money, credits, etc., with which the judgment might be paid, and which he fraudulently withholds or conceals for the purpose of delaying or defrauding the creditor. Section 804: An execution against the body is an extraordinary civil remedy. It can be invoked only in cases where the ordinary execution against property is shown to be unavailing on account of the debtor's fraud. It is a legal process provided by the Legislature as an efficacious agency against the wrongful practices of the execution debtor, and is claimed and issued as a matter of right when the creditor brings himself within prescribed conditions. *Baker v. State*, 109 Ind. 47, 9 N. E. 711. In a successful proceeding to procure an execution against the body, imprisonment of the fraudulent debtor in the county jail in default of obedience

to the court's order is as much a part of the fixed procedure as the filing of the original affidavit. In such case the court administers and the sheriff executes the law as written, and in such case the court has no authority of law to imprison a female. But the case we have before us rests upon a very different foundation. While a proceeding supplemental to execution—being the one complained of here—is analogous in many of its provisions to a proceeding for an execution against the body, those we have under review bear no likeness to the corresponding provisions of the latter. Relating to the supplemental proceeding, section 833, Burns' Rev. St. 1901, provides that upon the hearing the court may order any property of the judgment debtor or in the hands of himself or any other person applied to the satisfaction of the judgment, and "such court shall have full power to enforce all orders and decrees in the premises by attachment or otherwise." While this section occurs in the same act and chapter as the proceeding for an execution against the body, it is nevertheless a part of a separate and distinct scheme in aid of the collection of money judgments, and, in order of position, is subsequent to the former. The difference in the two schemes is in some respects so vital as to preclude the belief, in the absence of express words, that the Legislature intended that section 817, *supra*, should apply to attachment cases arising under section 833, *supra*.

In the first place, appellant was a stranger to appellee's judgment. No execution of any kind could issue against her or her property for its payment. But she was found in possession of money that belonged to the person who owed the judgment, and upon which she had no claim. She was commanded by the court to yield that possession to the law, and she refused. The court, in vindication of its authority, attached her for contempt, and ordered her commitment to the county jail. The order of commitment was in no sense such an execution against the body as the Legislature had in contemplation in the adoption of section 817, *supra*. The order was not a prescribed writ or process, nor in aid of a civil remedy. It proceeded directly and primarily from the court as a means of maintaining its authority. The foundation of the commitment was appellant's disobedience in refusing to obey the court's mandate, and not a fraudulent effort to circumvent the payment of one's own debt. The collection of the debt was only indirectly involved. But the authority of the court to commit appellant rests upon higher grounds. The judiciary is a co-ordinate branch of the state government, and possesses powers which were not given it by the Legislature, and which the Legislature cannot take away. Powers which are purely judicial, and essential to the existence and efficiency of courts of superior jurisdiction, are inherent; that is, they spring from the nature and constitu-

tion of the tribunal, to preserve its integrity and accomplish its objects. *Hawkins v. State*, 125 Ind. 570, 25 N. E. 818; *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; *Holman v. State*, 105 Ind. 513, 5 N. E. 556; *Stonehill v. Stonehill*, 146 Ind. 445, 45 N. E. 600; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224. It is said in the last case cited that "among the inherent powers of a court of superior jurisdiction is that of maintaining its dignity and securing obedience to its process and rules. * * * Without the power to punish for contempt, no other could be effectively exercised. There is no doubt but the power to punish for contempt is an inherent one, for, independent of legislation, it exists, and has always existed, in courts of England and America. It is, in truth, impossible to conceive a superior court as existing without such power." The law has always been liberal towards females, and considerate of their punishment, but the courts have never gone so far as to hold them immune from imprisonment for contempt. The Legislature has expressly sanctioned imprisonment for contempt (section 1022, Burns' Rev. St. 1901), in general terms, and without any exception of females. There can be no adequate reason why females should not be held to render the same respect and obedience to the rules and orders of superior courts as are required of men, and be coerced, when necessary, by the same means. Section 817, *supra*, as it relates to executions against the body, is, at least, of doubtful propriety, and we have no disposition to extend it to contempt proceedings. The reasons are further exemplified by the facts of this case. As the record comes to us, appellant makes no denial of the correctness of the court's finding, and no complaint of its order that she deliver the debtor money to the clerk for the satisfaction of appellee's judgment, but contumaciously defies its execution because she is a female. If she is exempt from imprisonment for this contempt, then she may indulge any disobedience or unseemly conduct towards the court, with impunity. That she might do so is absurd. She elected to go to jail rather than surrender the money, was released after 20 days' confinement without compliance or attempt at compliance with the order, or effort to purge herself of her contempt, and she should consider herself fortunate that she fared no worse.

Judgment affirmed.

(161 Ind. 452)

BALTIMORE & O. S. W. R. CO. v. HOLLENBECK.

(Supreme Court of Indiana. Nov. 24, 1903.)

EXEMPTION LAWS — EXTRATERRITORIAL FORCE—FOREIGN LAWS—PRESUMPTION.

1. Where there is nothing to show that a wage claim is exempt under the statute of a

ister state, it must be presumed that the common-law rule on the subject prevails there.

2. Exemption laws have no extraterritorial force or effect.

Appeal from Circuit Court, Jennings County; Willard New, Judge.

Action by Fred Hollenbeck against the Baltimore & Ohio Southwestern Railroad Company. From a judgment of the circuit court, on appeal from the justice's court, for plaintiff, defendant appeals. Reversed.

O. H. Montgomery, McMullen & McMullens, and Edward Barton, for appellant. S. A. Barnes and Lincoln Dixon, for appellee.

JORDAN, J. This action was commenced by appellee before a justice of the peace in the city of Seymour, Jackson county, Ind., to recover of appellant railroad company the sum of \$42.18, wages alleged to be due him from the company on account of labor performed upon its roadbed in said county and state. In addition to this amount, appellee sought to recover a penalty and attorney's fees as provided by sections 7056, 7057, Burns' Rev. St. 1901 (Acts 1885, p. 36). Appellant appeared before the justice of the peace and filed an offer to confess judgment for \$11.75, which amount, it claimed, was all that was due and unpaid to appellee. Upon a trial a judgment was rendered by the justice in the sum of \$52.18. Ten dollars of this amount was allowed as attorney's fees. Appellant appealed to the Jackson circuit court, from which the cause was venued to the Jennings circuit court, wherein, on a trial by jury, appellee was awarded the sum of \$67.18. This amount included \$25 attorney's fees. Over appellant's motion for a new trial, judgment was rendered against it for the amount assessed by the jury. Appellant, in the circuit court, filed a special answer whereby it set up as a partial defense that it had been garnished upon the same indebtedness in a proceeding before a justice of the peace in the state of Kentucky, and had been required thereby to pay the judgment of garnishment rendered in said claim. This answer was held sufficient on demurrer. The facts introduced in support of the issue tendered by this answer are as follows: Appellant is a railroad corporation owning and operating a railroad for the transportation of passengers and freight. Its road extends into the states of Indiana, Kentucky, Illinois, and Ohio. In the city of Louisville, Ky., it has and maintains an office, with an agent therein for the transaction of its business. Appellee was a resident householder of Jackson county, Ind.; said county being one through which appellant's line of railway passed. It seems to be conceded that on and prior to the 30th day of January, 1901, appellant was indebted to the appellee in the sum of \$35.45 as wages for labor performed by him upon its roadbed in the state of Indiana. Prior to the said 30th day of January, appel-

lee was indebted to a resident citizen of Jackson county, Ind., which indebtedness was evidenced by certain promissory notes executed by him in this state, and payable herein. These were assigned by the payee, by indorsement, to one Bartels, a citizen and resident of the city of Louisville, Ky. He, as the holder of these notes by assignment, on January 30, 1901, duly instituted thereon proceedings in attachment and garnishment, under and in pursuance of the laws of the state of Kentucky, against appellee, as the principal defendant, in the court of a justice of the peace of said city of Louisville, upon the ground that appellee (defendant therein) was not a resident of the state of Kentucky, and was absent from said state. Appellant was made a garnishee defendant in said action before the justice, and appears to have been duly notified and summoned as such in accordance with the laws of the state of Kentucky. Immediately after being garnished in the proceedings in question, it delivered or caused to be delivered to appellee a written notice apprising him of that fact, and notifying him of the place where and before what justice the action was pending, and the time the cause would be heard, and further informed him that it would only make such a defense as was necessary for its protection, and advised him, if he had any defense to the action, to appear and assert the same. It is disclosed that appellee received this notice on the 7th day of February, 1901, and that the judgment in the action of garnishment was not finally rendered until May 10th following. In addition to this personal notice which appellee received, there was a warning order issued to him in said proceedings by the justice of the peace and duly served, as required by the laws of the state of Kentucky. It appears that appellant filed its answer before the justice, and admitted that it was indebted to appellee in the sum of \$35.45; alleging that the amount was due to him as wages earned by him in the state of Indiana while in the employ of said company. The answer further averred that the railroad company was a foreign corporation—a common carrier; that appellee was a resident householder of the state of Indiana, and was at the time in the employ of appellant; and that, under the laws of said state, the wages of all persons in the employ of any person or corporation were exempt from garnishment, etc. Appellee failed to appear in said action, and was defaulted, and judgment was rendered therein against him and appellant, whereby it was ordered and adjudged that the plaintiff in said action recover the sum of \$28.35; and it was further ordered by the justice that appellee pay said amount into court, to be applied on the claim of plaintiff therein. Appellant complied with this order, and paid the money into court, and was thereupon discharged by the justice from all further liability in said action. The amount so paid by appellant was a part of the wages recovered by appellee in the case at bar. The

¶ 2. See Exemptions, vol. 22, Cent. Dig. § 2.

issue tendered by appellant under its answer in regard to the proceedings and judgment before the justice of the peace in the state of Kentucky is fully sustained by the evidence. The evidence upon this issue consisted of a certified transcript of the judgment and proceedings before the justice of the peace in the matter of garnishment and of the statutes of that state, and thereby established, beyond any conflict whatever, that the justice had jurisdiction of the res or subject-matter in that proceeding, and that all of the necessary steps in accordance with the laws of that state had been taken in the action to invest the justice with full and complete jurisdiction over all of the parties. There is nothing in the record tending to disclose that appellee's wage claim herein was exempt under the statute of Kentucky, and, in the absence of such a showing, we must presume that the rule of the common law upon this point prevailed in that jurisdiction. The exemption laws of Indiana have no extraterritorial force or effect; hence they could not avail appellee in the state of Kentucky. There is an entire absence of any showing that appellant failed to disclose any defense of which it had knowledge to the court in the proceedings before the justice of the peace in the latter state.

Appellant's counsel contend that the decision of the lower court, under the undisputed evidence, is contrary to law, because it does not give full faith and credit to the records and judicial proceedings of the state of Kentucky, as they are entitled to by virtue of section 1, art. 4, of the federal Constitution. The amount in controversy in this case being within the jurisdiction of a justice of the peace, therefore, under the act of March 12, 1901 (Laws 1901, p. 565), it is appealed directly to this court for the determination of such constitutional question, and for that purpose only. It is contended by appellant's counsel that, under the facts, the decision of this question must be ruled by the holding of this court in *Baltimore, etc., R. Co. v. Adams*, 159 Ind. 688, 66 N. E. 43, 60 L. R. A. 396. In this contention we concur. Appellant in this case was appellant in that appeal, and the two cases are to all intents and purposes identical. In that case this court, in passing upon the questions therein presented, among other things, said: "We need not here undertake to state the measure of the garnishee's duty in all cases, but it may be said, so far as the main action is concerned, that where the principal defendant has personal knowledge of the suit the former is not bound, in any event, to go further than to look to the jurisdiction, act fairly, and make a full disclosure."

Counsel for appellant seek to have us consider and determine the validity of sections 7056 and 7057, under which it is claimed appellee was allowed to recover attorney's fees in this case. We cannot determine that question, for the reason that it is not duly presented for our decision, because the facts averred in the complaint are not sufficient to bring

the case within the provisions of said sections. See *Baltimore, etc., R. Co. v. Harmon* (decided by this court on October 29, 1903) 68 N. E. 583.

It follows that the court erred in overruling appellant's motion for a new trial, for which error the judgment is reversed, and the cause is remanded to the lower court, with instructions to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

(162 Ind. 406)

LAKE ERIE & W. R. CO. et al. v. HOLLAND.*

(Supreme Court of Indiana. Nov. 24, 1903.)

RAILROADS — CARRIERS — LIABILITY — QUALIFICATION OF SPECIAL CONTRACT — CONSIDERATION — WHAT CONSTITUTES — INSPECTION OF CAR BY SHIPPER — LATENT DEFECTS KNOWN TO RAILROAD — INJURY TO LIVE STOCK — DUTY OF CARRIER — PLEADING — APPEAL — RECORD — INSTRUCTIONS.

1. Under the rule that, if a plaintiff recover, he must do so upon and in accordance with the allegations of his complaint, a suit against a common carrier for a breach of its common-law duty in the transportation of live stock must fail upon proof that the shipment was made under a special contract.

2. While a public carrier may, to some extent, limit by stipulation in the bill of lading his strict common-law liability, a contract qualifying such liability must be supported by a valuable consideration, apart from the mere acceptance of the property for carriage.

3. An actual reduction in the usual freight rate is a sufficient consideration for a contract qualifying a public carrier's common-law liability.

4. A mere recital or acknowledgment in a bill of lading that a reduction in the usual freight rate has been made and accepted in consideration of a qualification of the carrier's common-law liability is not conclusive, but the real transaction may be shown by parol.

5. A special contract by a railroad with a shipper of stock provided that the latter was to select his car, and to release the railroad from all liability for damages resulting from a defective condition of the car. Held that, even though the contract were valid, if the road knew at the time that the car selected was unsafe, and the shipper failed to discover such unsoundness by reason of the defects being hidden, proof of these facts would charge the road with damages accruing therefrom.

6. Freeing itself by contract from its usual common-law duties does not change the true character of a carrier's employment, and it is a public carrier still.

7. The duty to furnish a proper car rests on the carrier, not on the shipper; and the failure to discharge such duty is negligence, from the consequence of which the carrier is not permitted to free itself by contract or otherwise.

8. Where a railroad's special contract provided that a shipper was to inspect and select his own car, to send an attendant with the stock shipped, and to release the road from all liability for damages to the stock, including those resulting from a defective condition of the car, and the stock was injured by reason of defects in the car known to the road, but not to the shipper, the latter's failure to send an attendant did not relieve the road from liability.

9. A complaint good at common law or under the Code must contain a clear statement of all the facts necessary for the plaintiff to prove in the first instance, on an answer of general denial, to show that he is entitled to judgment.

¶ 3. See *Carriers*, vol. 9, Cent. Dig. § 643.

*Rehearing denied.

10. The mere fact that a complaint otherwise good sets out the defense does not make the pleading bad, if it goes far enough to exhibit sufficient matter in avoidance.

11. Where the first paragraph of a complaint against a railroad for damages to plaintiff's live stock in shipment, resulting from defendant's negligence in furnishing an unfit car, counted on its common-law liability; the second paragraph alleging that plaintiff was compelled to assent to a special contract of carriage, requiring him to select and inspect his own car, and releasing defendant from all liability, as a condition precedent to the shipment of the stock; there being no choice of rates, or reduction in the usual freight charges, or other consideration for such release, by reason of which the contract was void; and the third paragraph alleging that the car selected by plaintiff appeared to be safe, but in fact was unsound, which defendant knew—the facts alleged constituted a good cause of action.

12. As independent pleadings, the latter paragraphs were not invalid because the same things were alleged in the first paragraph.

13. Where the action of the court in the giving of certain instructions of its own motion, and in refusing to give certain instructions requested, was assailed, but what went with instructions requested by the respective parties, and given by the court of its own motion, was left to conjecture, it not appearing that they were filed or brought into the record by order of court or any other method recognized by law, a spreading of them on the court's minutes, and a copying of them into the transcript by the clerk of his own motion, gave the Supreme Court no authority to review them.

14. The record must affirmatively show that it embraces all the instructions given; otherwise it will be presumed that the substance of instructions asked and refused was embraced in charges given by the court, and not contained in the record, and that objectionable instructions given by the court of its own motion, and set out on the record, were corrected or withdrawn in others given, and not embraced in the record.

Appeal from Superior Court, Marion County; J. H. Leathers, Judge.

Action by Frank H. Holland against the Lake Erie & Western Railroad Company and others. Judgment for plaintiff, and defendants appeal. Transferred from the Appellate Court under section 1337c, Burns' Rev. St. 1901. Affirmed.

John B. Cockrum and Miller, Elam & Fessler, for appellants. Barrett, Brown, Bamberger & Feibleman, for appellee.

HADLEY, J. Appellee, at Kokomo, Ind., delivered to the Lake Erie & Western Railroad Company, and associate public carriers, 20 horses, to be transported to the Union Stock Yards, in the city of Indianapolis. A written and printed bill of lading was executed by the parties, and the stipulated freight paid by appellee. The animals were unaccompanied by an attendant, and on the journey a hole 8 by 14 inches was broken in the bottom of the car, through which 10 of the horses dropped some of their feet, and were injured, for which damage is claimed by appellee. The complaint is in three paragraphs. The first counts upon the common-law liability of appellant as an insurer of the safe delivery of the property at the point of destination. To the first paragraph of the complaint, appellants filed a gen-

eral denial. The second, in substance, charges the public character of appellants, and that at the time of the shipment, and for a long time theretofore, the appellants had one, and only one, rate of freight for the transportation of horses in car-loads lots from Kokomo to Indianapolis, to wit, 11 cents per 100 pounds, and had only one form of contract for the transportation of such animals; that appellee applied to appellants' agent at Kokomo to ship a car load of horses from that place to Indianapolis, and, before appellants would undertake to carry them, they required appellee, as a condition precedent thereto, to enter with them into a contract on their printed form, a copy of which is made a part of the complaint; and so much thereof as is important in this inquiry follows: "Limited Liability Live Stock Contract. * * * This agreement made this 25th day of March, 1899, by and between [appellants and appellee] Witnesseth: That the said shipper has delivered to said carrier live stock of the kind and number, and consigned, and destined by said shipper as follows: * * * for transportation from Kokomo to Indianapolis * * * subject to the official tariffs * * * and upon the following terms and conditions which are admitted, and accepted, by said shipper as just and reasonable, viz.: that said shipper is to pay freight thereon to said carrier at the rate of 11 cents per 100 pounds from Kokomo to Indianapolis which is the lower published tariff rate based upon the express condition that * * * said shipper is, at his own sole risk and expense, to load and take care of, and to feed and water said stock while being transported * * * and to unload the same, and neither said carrier, nor any connecting carrier, is to be under any liability, or duty with reference thereto, except in the actual transportation of the same; that said shipper is to inspect the body of the car in which said stock is to be transported, and satisfy himself that it is sufficient and safe, and in proper order and condition, and said carrier shall not be liable on account of any loss of, or injury to, said stock, happening by reason of any alleged insufficiency in, or defective condition of the body of said car, * * * and F. H. Holland [appellee] hereby acknowledges that he had the option of shipping the above described live stock at a higher rate of freight according to the official tariff, classifications, and rules of said carrier, and thereby receiving the security of the liability of said carrier, but has voluntarily decided to ship the same under this contract at the reduced rate of freight above mentioned." Appellee was to send an attendant with the horses, to feed, water, and care for them while in transit. The complaint avers that appellee, being thus obliged to execute said contract to secure the transportation of his horses, signed it, and paid the stipulated freight, and appellants thereupon took sole possession of the animals, and undertook to transport them to Indianapolis; that although

it was stated in said contract that the plaintiff had the option of choosing between two rates of freight—the higher furnishing a higher degree of security, and the lower a less degree—and that he voluntarily elected the lower rate, the fact is that no such option was offered him, nor did he have any knowledge that he could exercise such option, nor did appellants have a schedule rate of freight for such purposes, and each and every one of the exemptions from liability of appellants were exacted by them as a condition to said shipment, and inserted in said contract without any consideration; that, in pursuance of the contract, appellee loaded his horses into a car designated by appellants; that, because of the short distance, and the time necessary, to wit, 3 hours, to transport the said horses to their destination, they needed no food, water, or care en route; that while in transit a part of the floor of the car, by reason of latent defects in its construction, and by reason of being decayed and unsound, which defective and unsound condition was at the time of the shipment known to appellants, broke through, producing a hole 8 by 14 inches in size, by reason of which breaking of the floor 10 of appellee's horses fell with their feet and legs through said hole, and were thereby injured. The third paragraph is like the second, with the additional averments that, when the appellee applied to appellants' agent for a car, he was shown and required to choose between two cars; that one of these was wholly unfit, on account of ice frozen over the floor; that appellee inspected the other, and it appeared to be sound and safe, and he believed it to be sound and fit for the carriage of his horses. It is further charged that appellants knew that the car floor was decayed, weak, and unsound, and on account of which unsoundness the horses were injured. A demurrer to each of the second and third paragraphs was overruled, and the defendants answered by general denial. Trial; verdict and judgment for appellee. The rulings of the court upon the demurrers and in overruling appellants' motion for a new trial are properly questioned.

1. The general assault upon these paragraphs is that, being suits upon a special contract, they each fail to disclose an actionable breach of the contract sued on; the argument being that, as the paragraphs imperfectly count upon the violation of an express contract, there can be no recovery upon a contract implied. We readily acknowledge the rule to be that, if a plaintiff recover, he must do so upon and in accordance with the allegations of his complaint; and, in the application of this rule, a suit against a common carrier for a breach of its common-law duty in the transportation of live stock must fail upon proof that the shipment was made under a special contract. *Railway Company v. Bennett*, 89 Ind. 457; *Hall v. Pennsylvania Co.*, 90 Ind. 459. And vice versa, *Fry v. Railway Company*, 103 Ind. 265, 2 N. E. 744. But are these actions upon a special agree-

ment, within the purview of the rule? As we understand the paragraphs—and there is really no difference between them in respect to the general questions—they proceed upon the theory that the plaintiff was compelled by his situation to assent to what purports to be a special contract of carriage under such circumstances and conditions as render the special stipulations void. He alleges that he did not choose between two rates of freight; that he did not know he had a right to so choose; that appellants had no such thing as two rates of freight for the transportation of car loads of horses from Kokomo to Indianapolis, and that he was required by appellants to sign the bill of lading exhibited, exempting them from liability, as a condition precedent to the shipment of the horses; and that he received no consideration for relieving appellants of their common-law duty. It is well settled that a public carrier may, to some extent, limit by stipulation in the bill of lading his strict common-law liability. *Insurance Company v. Lake Erie, etc., Co.*, 152 Ind. 333, 53 N. E. 382. But it is equally well settled that a contract qualifying the responsibility imposed upon the carrier by the common law must be supported by a valuable consideration, apart from the mere acceptance of the property for carriage. *Rosenfeld v. Railway Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; *German, etc., v. Railway Co.*, 38 Iowa, 127; *Wehmann v. Railway Co.*, 58 Minn. 22, 59 N. W. 546; *Southard v. Railway Co.*, 60 Minn. 382, 62 N. W. 442, 619; *McFadden v. Railway Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; *Potter v. Sharp*, 24 Hun, 179; *Gardner v. Railway Co.*, 127 N. C. 293, 37 S. E. 328; *Schaller v. Railway Co.*, 97 Wis. 31, 71 N. W. 1042; *Railway Co. v. Gilbert*, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; *Railway Co. v. Wright* (Tex. Civ. App.) 58 S. W. 846; *Stewart v. Railway Co.*, 21 Ind. App. 218, 225, 52 N. E. 89. A reduction in the usual freight rate is a sufficient consideration, but such concession in charges must be actual, and not fictitious; and a mere recital or acknowledgment in the bill of lading that such abatement has been made and accepted is not conclusive, but the real transaction is always open to explanation and contradiction by parol. *McFadden v. Railway Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; *Railway Co. v. Weakley*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; *Railroad Co. v. Reid*, 91 Ga. 377, 17 S. E. 934; *Railway Co. v. Crawford*, 85 Ill. App. 113; *Railway Co. v. Reynolds*, 17 Kan. 251; *Railway Co. v. Carter*, 9 Tex. Civ. App. 677, 29 S. W. 565. Applying these principles to the averments of the complaint that there was no choice of rates, and no reduction in the usual freight charges, and no consideration for a waiver of appellants' legal liability, it follows, if these things are established, there was no valid contract to accept a qualified responsibility from appellants. It is contended on the third paragraph that it is bad because it

shows that appellee stipulated to inspect and select his own car, and to send an attendant with the stock, and to release appellants from all liability for damages to the animals, including those resulting from a defective condition of the car, and that, in accordance with the stipulation, he did inspect and select his own car, and that his failure to send a man to care for the stock precludes his recovery for their injury. Again, assuming the special contract as valid (which it was not, as we have seen), appellants extend their argument further than the law will warrant. If, as averred, appellants knew at the time the car selected was unsound and unsafe, and appellee failed to discover such unsoundness by reason of the defects being hidden, and the car appeared to him to be sound and safe, and he believed it to be so, his proof of these facts would charge appellants with the damages accruing therefrom. Freeing themselves by contract from their usual common-law duties did not change the true character of their employment. They were public carriers still. *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Railway Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239. And having accepted appellee's money for the transportation of his horses to Indianapolis, they were bound to furnish a car suitable for the purpose. With the knowledge that the car was unfit and unsafe, they could not rest upon appellee's agreement, induced by safe, but false, appearances, to take the risk. The duty to furnish a proper car rests upon the carrier, and not upon the shipper; and the failure to discharge this duty is negligence, from the consequences of which the carrier is not permitted to free itself by contract or otherwise. *Insurance Co. v. Lake Erie, etc., Co.*, 152 Ind. 333, 53 N. E. 382; *Railway Co. v. Pratt*, 89 U. S. 123, 22 L. Ed. 827; *Railway Co. v. Davis*, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143; *Railway Co. v. Harwell*, 91 Ala. 340, 8 South. 649. Furthermore, it is alleged that the floor of the car, by reason of being decayed, weak, and unsound, and known to be so by appellants, broke, and the horses were injured by falling through the hole. If this was the cause of their injury—and it is so admitted by the demurrer—then the animals were not injured for want of feed, water, or care in transit, which appellee agreed to bestow, and appellants would be liable for their negligence in furnishing an unfit car. *Railway Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239.

We now return to appellants' insistence that appellee's right of recovery is confined to the bill of lading under which the horses were shipped, and which they assert is the foundation of the second and third paragraphs of complaint. We recognize the familiar rule of pleading that a plaintiff should not set forth in his complaint matters that should come more properly from the other

side; that a plaintiff should not anticipate the defense, but be content with making his own case, and leave the defendant to choose his own line of defense. *Stephen*, Pl. 350; *Bliss*, Code Pl. § 200. It is also elementary that a plaintiff having suffered an actionable injury must aver in his complaint all the facts essential to a disclosure of his right of recovery, or suffer a nonsuit. In brief, it may be affirmed that a complaint good at common law, or under the Code, must contain a clear statement of all the facts necessary for the plaintiff to prove in the first instance, under an answer of general denial, to show that he is entitled to judgment. And under the operation of this rule, it has been held in some cases, where the relation of the facts seem to require it, that a necessary and incidental disclosure of a defense in stating a cause of action is permissible, and should not be regarded as anticipating a defense, within the rule. *Latta v. Miller*, 109 Ind. 302, 306, 10 N. E. 100; *Hunt v. State*, 93 Ind. 311, 316. But in this case we are not called upon to define the limits of this rule of pleading. For it is undoubtedly true that a complaint which contains facts sufficient to constitute a cause of action is good on demurrer, though it also contains additional immaterial matter. So the mere fact that a complaint otherwise good sets out the defense does not make the pleading bad, if it goes far enough to exhibit sufficient matter in avoidance. *Morgan v. Railway Co.*, 130 Ind. 101, 28 N. E. 548; *Latta v. Miller*, 109 Ind. 302, 306, 10 N. E. 100; *Railroad Co. v. West*, 87 Ind. 211. We conclude, therefore, that the facts set forth in the second and third paragraphs of the complaint, and which are admitted to be true by the demurrers, show that the pretended special contract of shipment was void, and left the transaction standing precisely as if no contract, other than the one implied by law, had been attempted by the parties. So it cannot be accurately said that the paragraphs were founded on a written contract, for no such thing existed in this case. Each of the paragraphs avers the public character of appellants, a delivery to them of the horses for transportation, payment of the freight, negligence in furnishing an unsuitable car, and injury and damages thereby. These facts constitute a good cause of action, and the demurrers were properly overruled. As independent pleadings, the latter paragraphs are not invalid because the same things are alleged in the first paragraph.

2. Appellants assail the action of the court in the giving of certain instructions of its own motion, and in refusing to give certain instructions requested by them. The instructions are not brought into the record by bill of exceptions, but are attempted to be brought in by order of the court; the only reference to the subject of instructions being the following recital of the clerk, and noted copy of entry: "Come again the parties,

* * * and the plaintiff and defendants each file their request for instructions, and, the argument being heard, the court instructs the jury, which retires to consult of the verdict; * * * and the instructions asked and refused and the exceptions noted thereon, and the instructions given by the court of its own motion, are now filed and made a part of the record herein by order of the court, and are as follows, viz." It will be observed that the clerk informs us that two classes of instructions, namely, those "asked and refused," and those "given by the court of its own motion," were filed and made part of the record by order of court, and which he says "are as follows." Then next appears in the transcript what purport to be three series of instructions—one series requested by the plaintiff, one by the defendants, and one as given by the court of its own motion. Of all those requested by the parties, Nos. 1 and 6 of the series requested by the defendants are the only ones that appear to have been "asked and refused." What went with the instructions requested by the respective parties, and given by the court, is left to conjecture, since it does not appear that they were filed or brought into the record by order of court, or any other method recognized by the law. A spreading of them upon the court's minutes, and a copying of them into the transcript by the clerk of his own motion, amounts to nothing, and gives us no authority to heed them. Here, then, we have a record which affirmatively shows that all of the instructions given by the court are not in the record. We cannot, therefore, consider an objection to the giving or refusing to give any instruction that may be properly in the record. The settled rule of this state goes even further than applies to this record, namely, that the record must affirmatively show that it embraces all the instructions given to the jury; and, upon failure to do so, we must presume that the substance of instructions asked and refused was embraced in charges given by the court, and not contained in the record, and that objectionable instructions given by the court of its own motion, and set out in the record, were corrected or withdrawn in others given and not embraced in the record. *State v. Winstandley*, 151 Ind. 495, 51 N. E. 1054, and cases cited. See, also, *Board v. Gibson*, 158 Ind. 473, 490, 63 N. E. 982.

It is suggested, but not argued, that the court erred in permitting an agent of the consignee of the horses to testify, as a witness for appellee, to what was said over the telephone between him and some one whose voice was not recognized, but who answered a call for appellants at their office in Indianapolis. The substance of the communication is that the witness notified the person who answered for appellants that the car floor had broken and some of appellee's horses had been injured; and appellants

should give the matter attention, and the response over the wire was that they would send a man over and attend to the matter. We need not decide whether or not the evidence was competent, since it is apparent that appellants could not have been injured by anything said over the telephone.

Judgment affirmed.

(162 Ind. 386)

KEISER et al. v. MILLS et al.*

(Supreme Court of Indiana. Nov. 24, 1903.)

DRAINAGE PROCEEDINGS—CHANGE IN LAW—FILING REMONSTRANCE—APPEAL—ASSIGNMENT OF ERRORS.

1. Proceedings for construction of a ditch under the drainage law, instituted before passage of the amendatory act of March 8, 1901 (*Acts* 1901, pp. 161-170; *Burns' Rev. St.* 1901, §§ 5623, 5624, 5626, 5628), are by express provision of section 4 thereof (*Burns' Rev. St.* 1901, § 5628) not affected thereby.

2. Assignments of error need not give the names of parties other than those necessary to the appeal.

3. Where an assignment of errors complains of the refusal to strike out the remonstrance "of James A. Commons, signed * * * J. A. Commons," it will be presumed, in the absence of a showing to the contrary, that James A. Commons is the correct full name of the J. A. Commons named in the record.

4. Though *Sup. Ct. rule* 6 (55 N. E. iv), requiring the assignment of errors to contain the full names of the parties, does not apply in proceedings under the drainage law, the giving in the assignment of the full name is not ground for dismissing the appeal.

5. Under *Burns' Rev. St.* 1894, § 5623, providing that the petition for drainage is sufficient to give the court jurisdiction over all the lands described and to fix the lien, if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer, it cannot be presumed that no land belonging to a petitioner and appellant was assessed with benefits merely because his name was not given in the report of the drainage commissioners as the owner of land benefited by the ditch.

6. That persons not named in a drainage petition, but who are interested in lands affected by the proposed ditch, may file a remonstrance after the original parties have lost the right under *Burns' Rev. St.* 1894, § 5624, by lapse of time, they must show that their failure to act sooner was not due to lack of diligence.

Appeal from Circuit Court, Hamilton County; R. K. Kane, Special Judge.

Petition by Frank H. Keiser and others under the drainage law. William A. Mills and others filed a remonstrance, and there was judgment for them. Certain petitioners appeal. Reversed.

Stuart & Reagan, for appellants. Roberts & Vestal, for appellees.

MONKS, J. A petition was filed by appellants and others on January 24, 1901, in the clerk's office of the court below, for the construction of a ditch under the drainage law of 1885 and the amendments thereto (sections 5622-5631, 5644-5646, *Burns' Rev. St.* 1894). Notice was given to the owners

† 2. See *Appeal and Error*, vol. 3, Cent. Dig. § 2992.

*Rehearing denied.

and occupants of the several tracts of land described in the petition in the manner prescribed by law, and the case was docketed. No remonstrance having been filed, the same was referred to the drainage commissioners as required by section 5624, *supra*. Said commissioners afterwards made their report to the court, from which it appeared that lands were named as affected by said drainage which were not named in the petition. The court fixed February 15, 1902, as the time for the hearing of said report, and the petitioners gave notice to the owners of such lands of the filing of said report and the date fixed by the court for the hearing thereof. The notices were served on such landowners, which included appellees, on January 29 and 30, 1902. On February 15, 1902, appellees filed a verified application for leave of court to file a remonstrance against the construction of said ditch, signed by more than two-thirds of the landowners named in the report of the drainage commissioners. On the same day appellees, who were owners of land named in the report of the drainage commissioners and not named in the petition, each filed a separate verified remonstrance against the report of said drainage commissioners, for the first, fifth, eighth, ninth, and tenth statutory grounds of remonstrance provided in section 5625, *supra*. On March 3, 1902, the court denied the motion of appellees asking leave to file the remonstrance of two-thirds of said landowners, and refused to permit said remonstrance to be filed, to which ruling of the court appellees jointly and severally objected and excepted. Afterwards appellants filed a separate motion to strike from the files each remonstrance of appellees setting up said statutory causes, upon the ground that the same was not filed within the time required by statute, which motion the court, on April 11, 1902, overruled, to each of which rulings of the court appellants at the time objected and excepted. A trial of said cause resulted in a judgment in favor of appellees. Each of said rulings of the court on the motions to strike out said remonstrances is challenged by appellants jointly.

It will be observed that the report of the drainage commissioners was filed in October, 1901, and the report of the drainage commissioners was set for hearing on February 15, 1902, long after the taking effect of the act approved March 8, 1901 (Acts 1901, pp. 161-170, being sections 5623, 5624, 5626, 5628, Burns' Rev. St. 1901), but as these proceedings were instituted before the passage of said amendatory act of March 8, 1901, by the express provision of section 4 of said act (being section 5628, Burns' Rev. St. 1901) said act does not apply to this case, but the same is governed by the law in force when this proceeding was begun.

Appellees insist that the appeal should be dismissed "for the reason that appellants have not given the names of all the parties

to the record in their assignment of errors." Only parties to the judgment appealed from are necessary parties to an appeal. Moore v. Franklin, 145 Ind. 344, 44 N. E. 459; Lowe v. Turpie, 147 Ind. 652, 690-693, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; Capital National Bank v. Reid, 154 Ind. 54, 55 N. E. 1023; McClure v. Shelburn Coal Co., 147 Ind. 119, 46 N. E. 349. This was a term-time appeal, and appellants were not required to make their co-parties to the judgment co-appellants with them in this cause. Burns' Rev. St. 1901, §§ 647a, 647b; Lowe v. Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; Roach v. Baker, 145 Ind. 330, 43 N. E. 932, 44 N. E. 303; Goodrich v. Stangland, 155 Ind. 279, 281, 282, 58 N. E. 148.

Objection is made that the names of appellees in the assignment of errors are not the names by which they are known in the record. In the transcript the initials of the Christian names of many of the appellees are given, while in the assignment of errors the first Christian name is given in full. For example, lands of "J. A. Commons," whose name appears in the assignment of errors as "James A. Commons," were assessed with benefits, and he filed a separate remonstrance to the report of the drainage commissioners, signed "J. A. Commons." Appellants' motion to strike out this remonstrance was overruled by the court. This ruling of the court was challenged by the assignment of errors in this language: "The court erred in overruling the motion of appellants to strike from the files and reject the remonstrance of James A. Commons, signed by the name and style of J. A. Commons." As it is not shown that James A. Commons is not the correct full name of the J. A. Commons named in the record, we must presume that it is.

Rule 6 of this court (55 N. E. iv), requires that the assignment of errors shall contain the full names of all the parties. In giving the full names of all appellees in the assignment of errors, said rule was complied with. This court has refused to dismiss appeals in drainage cases under the act of 1885 and amendments when this rule was not complied with, on account of the fact that it is only necessary, in proceedings under the circuit court drainage law (section 5623, Burns' Rev. St. 1894), to describe the lands affected as belonging to the person who appears to be the owner according to the last tax duplicate or transfer book kept by the county auditor. Goodrich v. Stangland, 155 Ind. 279, 58 N. E. 148; Gunn v. Haworth, 159 Ind. 419, 421, 64 N. E. 911. This, however, furnishes no ground for dismissing an appeal in such cases when said rule is complied with by giving the full names.

It is claimed by appellees that the record does not show that any land belonging to Thomas C. Lennen, a petitioner and appellant, was assessed with benefits, and that, therefore, no error was committed by the

court against him in overruling the joint motions of appellants to strike out said remonstrances; that for this reason the assignment of errors is not good as to him, and, being joint by all the appellants, must fall as to all of them, under the rule that a joint assignment of error must be good as to all or it is good as to none. *Armstrong v. Dunn*, 143 Ind. 433, 436, 437, 41 N. E. 540. Under the liberal provision made by section 5623, Burns' Rev. St. 1894, that it is sufficient to give the court jurisdiction over all the lands described and the power to fix the lien, "if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer," we cannot presume that no land belonging to the petitioner, Thomas C. Lennen, was assessed with benefits merely because the name of Thomas C. Lennen was not given in the report of the drainage commissioners as the owner of land benefited by the construction of said ditch. For aught that appears from the record, said appellant, Thomas C. Lennen, was the owner of several tracts of land assessed with benefits, but described as belonging to the person who appeared to be the owner according to the last tax duplicate or record of transfer.

Many other objections are made to the record by appellees, as reasons why the judgment should be affirmed, but all of them fall within the rule that parties to an appeal can bring before the court only such questions as affect their rights, and not such as affect the rights of others. *Poundstone v. Baldwin*, 145 Ind. 139, 143, 144, 44 N. E. 191; *Cooper v. Shaw*, 148 Ind. 313, 316, 47 N. E. 679.

Appellants insist that the said remonstrances for statutory causes filed by appellees on February 15, 1902, were not filed within the time required by statute, for which reason the court erred in overruling appellants' motion to strike out the same. This question was decided by this court in favor of appellants' contention in *Goodrich v. Stangland*, 155 Ind. 279, 285, 58 N. E. 148. In that case the report of the drainage commissioners, which named lands as affected by said proposed ditch which were not named in the original petition, was filed on January 4, 1898, and the court fixed Monday, March 7, 1898, for hearing the report, and directed notice accordingly, as required by section 5624, Burns' Rev. St. 1894. Notices containing the information of the filing of said report and the date of the hearing thereof were served on or before February 23, 1898. On March 7, 1898, the day fixed for the hearing of said report, the appellants in that case each filed a remonstrance. A motion to strike out said remonstrances for the reason that they were not filed within the time required by the statute was sustained by the trial court. On appeal this court held that said ruling was correct. This court said on page 285, 155 Ind., and page 150, 58 N. E.: "The remonstrance was ordered to be stricken out. This was right. It was not filed within ten days after

the service on the appellant of the notice of hearing the report." It follows that, said remonstrance not being filed within ten days after the service of notice on appellees, the court erred in overruling said motions to strike them from the files.

Appellees, by an assignment of cross-errors, question the action of the court in refusing to permit them to file said remonstrance of two-thirds of the landowners named in the report of the drainage commissioners, as provided in the first proviso in section 5624, Burns' Rev. St. 1894. It is admitted by appellees that under the law as declared in *Yancey v. Thompson*, 130 Ind. 585, 30 N. E. 630, the new parties brought in by the report of the drainage commissioners have no right to file a remonstrance under said first proviso of said section 5624, supra. Appellees, however, seek to avoid the effect of the statute by alleging in their application to file said remonstrance that "the petitioners, for the fraudulent purpose of preventing said petition from being dismissed by the filing of a remonstrance signed by two-thirds of the persons named in the petition, failed to name forty-five owners of land named in said report as the owners of land benefited by said proposed drain; that petitioners well knew, if they named in the petition all the owners of land that would be benefited, that such a remonstrance would be filed, and that their petition would be thereby dismissed; that by said failure to name all the persons whose lands would be benefited by said proposed drain the petitioners have sought to practice a fraud upon the court and those remonstrators whose names are signed to the attached remonstrance."

It was held by this court in *Bell v. Cox*, 122 Ind. 153, 23 N. E. 705, that persons not named in the petition for drainage under said act of 1885 (sections 5622-5631, 5644-5646, Burns' Rev. St. 1894), if they have an interest in the lands affected by the proposed ditch, may be admitted to defend on application to the court, and, if made parties at the proper time, may attack the petition or remonstrate under said first proviso the same as if they had been named in the petition, their rights being substantially the same as those of the original parties, except in so far as they are limited or qualified by law.

Under the decision in the case last cited, appellees had the right to be admitted on application and to file said remonstrance; if the time for filing the same had not expired, and it was their duty to make said application at the first opportunity. If they knew of such drainage proceedings and the facts alleged in their application before the original parties by lapse of time lost their right to file the remonstrance under said first proviso, and failed to take the necessary steps to be made parties and to file said remonstrance, they will not be permitted to file the same after that time has expired. The proceedings in this case were commenced in January, 1901, and for aught that appears in appellees' application they then

knew all that they knew on February 15, 1902, when the application was filed. The rule is well settled that in cases where a party is entitled to relief from the fraud of another he must act promptly upon its discovery, and, to render his pleading sufficient, the facts stated therein must be such that the court can say therefrom that he has so acted, and that by the exercise of ordinary diligence the discovery could not have been before made. Even if appellees' application to file said remonstrance were otherwise sufficient—a question we need not and do not decide—it is clear that no facts affirmatively showing diligence were alleged. It follows from what we have said that the court did not err in refusing to permit appellees to file a remonstrance under the first proviso of section 5624, Burns' Rev. St. 1894.

Judgment reversed, with instructions to sustain appellants' motion to strike out said remonstrances for the statutory causes named in section 5625, Burns' Rev. St. 1894, filed on February 15, 1902, and for further proceedings in accordance with this opinion.

(163 Ind. 230)

STRAYER et al. v. TAYLOR et al.¹

(Supreme Court of Indiana. Dec. 11, 1903.)

DRAINS—ESTABLISHMENT BY COUNTY—COUNTY COMMISSIONERS—JUDGMENTS—PROCEEDINGS—JURISDICTIONAL DEFECTS—BURDEN OF PROOF—STATUTES—CONSTRUCTION—OBJECTIONS—WAIVER.

1. Burns' Rev. St. 1901, § 5678, relating to the construction of drainage ditches through more than one county, provides that the county commissioners of each county shall act in the establishment of a joint ditch, and that each board shall render separate judgments conforming to the one rendered by the county having original jurisdiction. *Held* that, where a ditch was to be constructed in several counties, the proceeding in the county or counties other than the one where the proceeding was commenced was of an administrative nature, and hence the failure of the commissioners of such counties to enter a final order for the establishment of the ditch was not fatal to the jurisdiction of the circuit court of the county of the origin of the ditch to entertain an appeal from an order overruling objections thereto.

2. On appeal by remonstrants in proceedings for the establishment of a drainage ditch no objections except those which go to the jurisdiction of the county commissioners over the subject-matter can be considered, unless they were raised in the commissioners' court.

3. Burns' Rev. St. 1901, § 5655, authorizes county commissioners to construct drainage ditches within the county under certain circumstances. Section 5656 provides that the viewers shall cause stakes to be set along the line, numbered progressively down stream at each 100 feet, and that the viewers shall give the depth of the cut, width of bottom, and width of top of the source and outlet and at each 100-foot stake of the ditch; and section 5688 provides that the statute shall be liberally construed. *Held*, that where the line of a ditch passed through a natural water course or pond, etc., the failure of the viewers to place stakes along the water course and give the depth of the cut, etc., therein, was not a jurisdictional defect in the proceedings.

4. Though the circuit court drainage act of 1885, authorizing the construction of drains for the drainage of wet marshy lands, does not au-

thorize the drainage of fresh-water lakes, the fact that in the construction of a projected drain one or more small bodies of water described as lakes, but which in fact were nothing more than ponds, were proposed to be drained, did not deprive the court of jurisdiction over the subject-matter.

5. Where, in a proceeding to establish a county drain, an objector alleged that the board of county commissioners had no jurisdiction, the burden was on him to show that the board had no jurisdiction over the subject-matter by more than a mere suggestion in the record of a possibility that the board was without authority.

6. Where an objector to the jurisdiction of a board of county commissioners to establish a drain waived his right to the appointment of reviewers, such waiver did not estop him from maintaining his objection that the board had no jurisdiction.

Appeal from Circuit Court, Noble County; Anthony Diehl, Special Judge.

Proceeding by John N. Strayer and others for the construction of a drainage ditch. From a judgment sustaining objections of Henry L. Taylor and others, applicants appeal. Reversed.

T. A. Redmond and L. H. Wrigley, for appellants, H. G. Zimmerman, J. W. Hanan, Taylor & Woods, and Rowland Evans, for appellees.

GILLETT, C. J. This proceeding was instituted by appellants under the act of April 21, 1881, and the amended and supplemental legislation based thereon (section 5635 et seq., Burns' Rev. St. 1901), to establish and construct a ditch having its head or source in Noble county and its outlet in La Grange county. The transcript in the court below was filed therein by the auditor of Noble county, and such facts as appear concerning the proceedings prior to the filing of such transcript we take therefrom. There was a petition filed, which described in a general way the proposed ditch. It was averred in said petition that the construction of such ditch would improve the public health, benefit public highways, drain large areas of wet, swamp, and overflowed lands, and that the work would be of public utility. It is shown by said petition that the proposed ditch runs in a westerly direction from the point of commencement to Shockopee Lake, thence in a northwesterly direction to Hardy Lake, thence in a northerly direction across said lake to the water course leading from said lake, thence following said water course to the commencement of what is denominated the "county line ditch," thence following said ditch to its termination on the county line, thence west to Navoo Lake, thence across said lake in a northwesterly direction, and thence in a westerly direction to a certain natural water course. The petition was addressed to the boards of commissioners of said counties. A bond was filed by the petitioners, as required by said act. The board in Noble county appointed three viewers, and they and two other persons subsequently joined in a report as viewers. This docu-

ment recites that they were appointed as viewers by the action of the two boards, and is addressed to them. Said report definitely describes the proposed drain, gives the size thereof, the amount of excavation at each station, fixes the levels, and shows that the route has been staked except where it extends across lakes. The report also states facts from which it appears that the work will be of public utility. It further appears from said report that the route along the county line ditch extends across Tamarack and Mud Lakes. Neither the petition nor the report shows that it is proposed to drain or lower any lake. None of said five lakes is described in any particular in either of said documents. The depth and width of the ditch are given in some instances at the points of exit from the lakes, but, as neither of said papers advises us as to the levels of the natural outlets to said lakes, we cannot affirm, as a physical fact, that any lake will be lowered by the construction of the ditch. It is stated in the report that it will be necessary to remove a certain milldam, but there is no description of it, and no statement that it was in use. The transcript shows that after the filing of said report a notice was duly published of the pendency of the proceeding, which notice was signed by the auditors of said counties. As the next step it is shown that the auditor of Noble county presented to the board thereof a certified transcript of a remonstrance filed by appellee William L. Taylor in the office of the auditor of La Grange county, addressed to said boards. This remonstrance is based on 14 grounds, some of which purport to be a challenge to the jurisdiction of said boards, others relate to matters of irregularity, and others relate to matters which should properly be referred to reviewers. It also appears that in connection with said remonstrance the auditor of Noble county presented a certified copy of a bond filed by said Taylor with the auditor of La Grange county, which bond appears to have been approved by him. Subsequently said Taylor appeared by counsel before the board of commissioners of Noble county, and made what appears to have been oral objections to the jurisdiction of said board, and moved said board to set aside the report of the viewers and dismiss the petition. The motion was overruled, to which ruling said Taylor objected and excepted. The record of said board then shows the following entry: "The remonstrant, by his attorney, John W. Hanan, states to the board that the remonstrant does not ask that reviewers be appointed in this cause. The board therefore does not appoint reviewers." The petitioners then filed a motion to dismiss the remonstrance on the ground that said Taylor, by waiving the appointment of reviewers, had lost his standing to remonstrate. This motion was sustained by said board, and the ditch was ordered established and constructed as provided in the re-

port of the viewers. Taylor prosecuted an appeal from said judgment.

In the court below the petitioners renewed their motion last mentioned, and said Taylor filed a motion to dismiss the proceeding on jurisdictional and other grounds. The motion of petitioners was overruled, and the motion of Taylor was sustained. The principal question argued in this court is as to the propriety of the latter ruling. The first claim made by appellee Taylor is that the proceeding was properly dismissed, because it does not appear that there was any proceeding or judgment had in the matter of said ditch by the board of commissioners of the county of La Grange. As the drain was to be constructed in two counties, it was required that an order establishing it should be made by each of the two boards. Sections 5677-5678a, Burns' Rev. St. 1901. The latter section provides that said section 5678 shall "be construed to provide that each board of commissioners required to act in the establishment and construction of a joint ditch, shall act by itself, sitting alone in its own county; all rendering like judgments conforming to the one rendered in the county having original jurisdiction." Section 5677, *supra*, provides that the auditor of the county containing the head or source of the proposed ditch (in which county the petition is to be filed) shall transmit a certified copy of the petition to each of the other counties interested. It is to be presumed that the auditor of Noble county performed the statutory duty stated; and not only does the proceeding in Noble county suggest in various ways that the proceeding was also pending in La Grange county, but the acts of appellee Taylor also suggest that fact. It is true that it does not appear that a final order was made by the board of commissioners of the county of La Grange, but we do not think that this was necessary to the jurisdiction of the Noble circuit court on appeal. A legislative judgment is a solecism. Under the statute from which we have quoted the proceeding in the county or counties other than the county where it is commenced is of an administrative nature. The historic character of boards of commissioners warrants the assertion that they may be invested with powers of a judicial nature. *Board of Com'rs Huntington Co. v. Heaston*, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192; *Board of Com'rs Monroe Co. v. Conner*, 155 Ind. 484, 58 N. E. 828; *Elliott, Gen. Prac.* § 197. The purpose of section 10, art. 6, of the state Constitution was to authorize the conferring upon such boards of powers of a local, administrative character. There is therefore no constitutional objection to the view that in the construction of a ditch in two counties the governing board may act judicially, while the duties of the other board respecting the particular subject-matter are purely administrative. The performance of the duties enjoined upon the latter board may be

compelled by mandamus. The whole jurisdiction or power is in the board where the proceedings are commenced, and it is only from its judgment that an appeal can be prosecuted. The views above expressed find partial support, at least, in *Denton v. Thompson*, 136 Ind. 446, 35 N. E. 264, and *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225.

There having been a final judgment by the board of commissioners of Noble county, whereby one or more of the matters mentioned in section 5671, Burns' Rev. St. 1901, was determined, appellee Taylor was authorized to appeal, and the matters that he might present on appeal were not limited by said section to the matters mentioned in the four subdivisions of said statute. *Trittip v. Beaver*, 155 Ind. 652, 58 N. E. 1034. It is, however, a rule that the cases in this state thoroughly enforce in appeals by remonstrants in drainage and highway proceedings that, with the exception of objections that go to the jurisdiction of the board over the subject-matter, such remonstrants cannot present any question that was not raised in the commissioners' court. *Makeever v. Martindale*, 156 Ind. 655, 60 N. E. 341; *Trittip v. Beaver*, supra; *Forsyth v. Wilcox*, 143 Ind. 144, 41 N. E. 371; *Steel v. Empson*, 142 Ind. 397, 41 N. E. 822; *Indianapolis, etc., R. Co. v. Hood*, 130 Ind. 594, 30 N. E. 705; *Budd v. Reidelbach*, 128 Ind. 145, 27 N. E. 349; *Metty v. Marsh*, 124 Ind. 18, 23 N. E. 702; *Wells v. Rhodes*, 114 Ind. 467, 16 N. E. 830; *Washington, etc., Co. v. Lay*, 103 Ind. 48, 2 N. E. 222; *Forsythe v. Kreuter*, 100 Ind. 27; *Breitweiser v. Fuhrman*, 88 Ind. 28; *Green v. Elliott*, 86 Ind. 53; *Turley v. Oldham*, 68 Ind. 114; *Sowle v. Cosner*, 56 Ind. 276; *Fisher v. Hobbs*, 42 Ind. 276; *Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329; *Wilson v. Whitsel*, 24 Ind. 306; *Daggy v. Coats*, 19 Ind. 259. In *Metty v. Marsh*, supra, it was said: "We are of the opinion that it was the intention of the Legislature that all grievances growing out of the establishment and construction of a ditch like this should be presented to the board of commissioners, and settled in that tribunal, where they could be settled cheaply." Many of the questions sought to be presented by remonstrant Taylor related to matters that might have been properly adjusted by referring the proceeding to reviewers, and it must be held that all questions that reviewers might have passed on were impliedly waived by his relinquishment of the right to have reviewers appointed, since it led, as the record affirmatively shows, to the omission of the board to take that statutory step.

We now take up the question as to the jurisdiction of the board of commissioners over the particular subject-matter, as that was not an inquiry to refer to reviewers. A wrong decision by the board in determining as to its jurisdiction would not oust its authority in the premises, but, as the matter reached the circuit court by appeal, it is

evident that we are not here to be embarrassed by a consideration of the consequences, when the question is raised collaterally, of the exercise of jurisdiction by a tribunal duly called on to inquire of its authority to proceed. Under section 5655, Burns' Rev. St. 1901, the board of commissioners is authorized in certain circumstances "to cause to be constructed * * * any ditch, drain or water course" within the county. Section 5656 of said statutes provides that the viewers "shall cause stakes or monuments to be set along said line, numbered progressively, down stream, at each hundred feet," and they are required to "give the depth of cut, width of bottom and width of top at the source and outlet, and at each one hundred feet stake or monument of said ditch, drain or water course." Section 5688 of the statutes provides that "this act shall be liberally construed to promote the drainage and reclamation of wet or overflowed lands." The circuit court drainage act of April 8, 1881, provided that the drainage commissioners "may determine that the method of drainage shall be by removing obstructions from a natural water course; by deepening, widening, straightening or changing its natural channel." Section 4275, Rev. St. 1881. This provision is also found in the circuit court drainage act of 1885. Section 5624, Burns' Rev. St. 1901. The act of March 7, 1891 (section 5690 et seq., Burns' Rev. St. 1901), expressly authorizes the lowering of any lake, but this proceeding does not conform to said act, and therefore is not governed by it. In the case of *Baltimore, etc., R. Co. v. Ketring*, 122 Ind. 5, 23 N. E. 527, which was a drainage proceeding commenced under the circuit court act of 1881, it was said: "A majority of the court have reached the conclusion that the subject-matter involved in this proceeding does not fall within the purview and scope of said acts of the Legislature; that the Legislature, in the passage of said acts, did not intend to provide a system of drainage for the fresh-water lakes of the state; that the statutes apply, and were only intended to apply, to wet and marshy lands, swamps, ponds, and the like; and therefore that the circuit court of Kosciusko county had no jurisdiction, and erred in overruling the motion in arrest of judgment." From the case of *Goodrich v. Stangland*, 155 Ind. 279, 58 N. E. 148, which arose under the circuit court drainage act of 1885, we take the following: "The petition did not ask for the drainage of any lake. The line of drainage passed through several small bodies of water described as lakes, and, as they were natural water basins or water courses on the route proposed, it was lawful to drain the lands above into and through them. *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230, citing *Hebron, etc., Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199; *Munkres v. Kansas City, etc., R. Co.*, 72 Mo. 514. Even if the drainage of one or more small lakes and the reclamation of

the land covered by them was intended, we are not prepared to say that this circumstance would vitiate the proceedings, or deprive the court of jurisdiction over their subject-matter." The effect of this decision is that a small lake or water basin may be a water course, and, if it is such, it may properly be used as a part of a system of public drainage under the express provision of the circuit court act. Other decisions in this state show that it is not competent to wrest drainage statutes from the purview of their enactment. *Scruggs v. Reese*, 128 Ind. 399, 27 N. E. 748; *Royse v. Evansville, etc.*, R. Co., 160 Ind. 592, 67 N. E. 446. The provision of the drainage act of April 21, 1881, relative to the construction of a ditch, drain, or water course, the direction of said act that it is to be liberally construed to promote the drainage of wet or overflowed lands, and the provisions concerning the location of stakes at each 100 feet along the route, and the recording of the depth of cut at such points, indicates that it was not intended to authorize under such act the drainage of what may properly be termed a lake, of any considerable depth and size, in contradistinction to wet or overflowed land. A consideration of the cognate statutes we have mentioned, which contain broader grants of power, and the course of adjudication by this court, tend to enforce this conclusion. In view of the legislative provision that the act under consideration is to be liberally construed to promote the drainage and reclamation of wet or overflowed lands, we think that the existence of comparatively small and shallow water basins on a selected course of drainage will not prevent the establishment of a drain along such course under said act. It is not jurisdictional that a stake should be driven at every station, that the depth of cut at such points should be indicated in every instance, or that there should be excavation along the entire line of drainage. Matters of this character are referred to in the act in the course of giving direction for the laying out and performing of the work. Minor departures from these requirements, made necessary by the topography of the country along which the line of drainage is laid, are to be disregarded, and we have only referred to such matters as evidences leading to a comprehension of the general framework of the act.

The above observations on the extent of the power under said act are somewhat general, there being wanting a concrete case on which the court can pass. As pointed out, there was nothing in the petition or the report of the viewers showing any facts which necessarily ousted the board of its jurisdiction. This statement applies both to the matter of lakes and the milldam.

Where the authority of a board of commissioners is invoked by a petition which does not necessarily disclose that the proceeding is without the scope of the board's

jurisdiction of a general subject-matter, and the board causes notice to be given to acquire jurisdiction over adversary parties, and undertakes to enter a judgment, we think that upon appeal the burden is upon the party who objects to the jurisdiction of the board over the subject-matter to show a want of such jurisdiction, and that he cannot rely upon a record that merely suggests the possibility that the board was without authority in the premises. See *Gold v. Pittsburgh, etc.*, R. Co., 153 Ind. 232, 53 N. E. 285. If it were granted that the board of commissioners erred in overruling the objections made to its jurisdiction, instead of hearing evidence relative to the nature of the proposed drain, it would not follow that the board thereafter proceeded without jurisdiction, and its judgment on appeal was as impervious to the assault of a motion that was unsupported by evidence as it would have been on collateral attack.

Appellants have assigned as error the overruling of their motion, rendered in the circuit court, to disregard the remonstrance and establish the ditch. As before stated, this motion assigned as a ground for such action that said remonstrant's waiver of the right to have reviewers appointed left him without any standing to object to the proceeding. It was not competent for reviewers to pass on the jurisdiction of the board, and therefore his objections to the jurisdiction, whether sufficiently presented or otherwise, still remained. If such objections were insufficient on their face, the court might have disregarded them, but error cannot be predicated on the overruling of a motion that assigns an insufficient ground therefor. Appellant should have raised an issue of law on said objections had he desired to question their validity.

The judgment of the Noble circuit court dismissing the petition and the report of the viewers and adjudging costs against the petitioners is reversed.

(161 Ind. 495)

LOWE et al. v. LAWRENCEBURG ROLLER MILLS CO. et al.

(Supreme Court of Indiana. Dec. 10, 1903.)

MUNICIPAL CORPORATIONS—STREETS—VACATION—POWER OF COUNCIL—EFFECT OF OBJECTION BY PROPERTY OWNERS—COLLATERAL ATTACK.

1. Burns' Rev. St. 1901, § 3648, provides that, if any property owner immediately on the line of a street or part thereof sought to be vacated shall object to such vacation, the commissioners shall report such fact to the common council; section 3649 directs the commissioners to report to the council the names of property owners objecting, and the nature of their interest therein; and section 3650 declares that the council shall have no power to order the vacation "when objected to by the property owners adjacent thereto." *Held*, that the council could not reduce the width of a street by vacating a part of it on one side, when the owners of property abutting on the opposite side of the street object thereto.

2. An order of a city council vacating a part of a street in spite of the objections of adjacent property owners is void, and is open to collateral attack by injunction.

Appeal from Circuit Court, Dearborn County; E. G. Bielby, Judge.

Action by Roger W. Lowe and others against the Lawrenceburg Roller Mills Company and others. From a judgment for defendants rendered on sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

W. H. Bainbridge and McMullen & McMullen, for appellants. Roberts & Johnston and W. N. Hanck, for appellees.

JORDAN, J. This action was commenced and prosecuted by appellants in the lower court to enjoin the city of Lawrenceburg and its codefendants from carrying into force and effect an ordinance or order of the common council vacating a part of a public street of said city. A demurrer for want of facts was sustained to the complaint, and judgment was rendered against appellants on demurrer, and from this judgment they appeal. The validity of an ordinance being in question, the appeal is properly in this court.

The facts disclosed by the complaint, briefly stated, are as follows: The city of Lawrenceburg, in Dearborn county, Ind., is duly organized and is acting under the general laws of this state relative to the incorporation or organization of cities. On January 23, 1902, appellees the Lawrenceburg Roller Mills Company, the Lawrenceburg Elevator Storage Company, and George M. Roberts duly petitioned the common council of said city to vacate that part of High street lying between Maple street and a line dividing lots 21 and 22. The strip or part which the petitioners desired to have vacated was particularly described in their petition. The matter was duly referred by the common council to the city commissioners for action and report thereon. Appellants at the proper time appeared before said commissioners, and presented their written remonstrance and objections to the proposed vacation. The commissioners, after considering the matter in question, made their report to the council, whereby they recommended that the prayer of the petition be granted. In their said report they stated, among other things, that appellees objected to the proposed vacation: that they, as shown, were the owners of parts of lots 53 and 54 in said city, which lots or real estate fronted on said High street, but were more than 62 feet distant from that part thereof which was sought to be vacated. They further reported that appellants' property was not adjacent to that part of the street proposed to be vacated. At the proper time appellants appeared before the common council, and renewed and urged their objections, but the council disregarded the same, and by ordinance or resolution adopted the report of the commissioners, and ordered that the part of the street in question be vacated. Lots 53 and 54 were owned by appel-

lants at the time the proceedings to vacate were instituted, and they continued to be the owners thereof up to the time this action was commenced. High street is shown to be 64 feet and 4 inches wide, and the above lots abut thereon. The strip or part of the street in question sought to be vacated lies and extends along the side of the street immediately opposite to the side on which these lots front or abut. The proceedings to vacate were had under the provisions of an act of the Legislature passed at the special session of 1875 (Acts Sp. Sess. 1875, p. 17). Sections 18 and 21 of the original act were amended in 1885, and section 19 was amended in 1895. These three sections, as amended, are embraced in sections 3647, 3648, 3650, Burns' Rev. St. 1901. Section 3648, as amended, provides, as it did originally, that, "in case any property owner immediately upon the line of said street * * * or part thereof sought to be vacated who is directly interested therein shall object to such vacation, the city commissioners shall report such fact to the common council." Section 3649, Burns' Rev. St. 1901 (being section 20 of the original act), provides that the city commissioners shall report in writing to the common council within the time therein prescribed, stating in their report, *inter alia*, "the names of property owners or persons who may object to the vacation of such street, * * * and the nature of their interest therein." Section 3650, as amended, provides that the common council, within the time therein prescribed, shall either refer the report back to the commissioners or accept or reject it. It is expressly declared in this section that "the common council shall have no power to order such vacation when objected to by property owners adjacent thereto." Under this section as it existed previous to the amendment thereof in 1885, it was provided "that the common council shall have no power to order such vacation when objected to by property owners adjacent thereto, or by those having a direct or substantial interest therein." This latter clause, viz., "by those having a direct or substantial interest therein," was eliminated from the section by the amendatory act of 1885.

In the case of *House v. The City of Greensburg*, 93 Ind. 533, this court, in construing the section as it existed previous to the amendment of 1885, held that the provision in section 21 of the original act, which declared that the "common council shall have no power to order such vacation when objected to by property owners adjacent thereto or by those having a direct or substantial interest therein," must be construed along with the provision in section 19, which provided that, "in case any property owner immediately upon the line of said street * * * who is directly interested therein shall object to such vacation, the city commissioners shall report such facts to the common council," which the court in that case said was for the guidance of the city commissioners in making their report to

the common council, and further held therein that any property owner immediately upon the line of the street, etc., who was directly interested therein, was competent to object to the proposed vacation. It is not essential that we determine in this appeal whether a property owner immediately upon the line of the street, and who has a direct interest therein, may, by objecting to a proposed vacation, absolutely defeat it, for that is not the question herein involved. By the amendment of section 21 in 1885 (section 3650, *supra*), the Legislature has declared that the common council shall have no power to order the proposed vacation over the objections of an owner or owners of property adjacent thereto. The mere fact that the objector is the owner of such property alone enables him to defeat the proposed vacation without assigning or establishing any other reasons or grounds for his objections. By the averments of appellants' complaint, and also by the map and the report of the city commissioners filed in the proceedings to vacate, all of which are embodied in and made a part of the complaint herein, it is fully disclosed that appellants are the owners of property adjacent to the strip or part of High street proposed to be vacated within the meaning of the statute. The word "adjacent" as employed in section 3650, must, in compliance with the well-recognized rule, be accorded its ordinary and popular meaning. *Massey v. Dunlap*, 146 Ind. 350, 44 N. E. 641, and authorities cited. Webster's International Dictionary defines the word "adjacent" to mean: "Lying near, close, or contiguous; neighboring, bordering on, as a field adjacent to a highway. Things are adjacent when they lie close to each other, not necessarily in actual contact; as adjacent fields, adjacent villages, etc." In Worcester's Dictionary it is said: "What is adjacent may be separated by the intervention of some other object; what is adjoining must touch in some part, and what is contiguous must touch one side; an adjacent field, a neighboring village; lands may be adjacent to a house or town," etc. In the Century Dictionary the word "adjacent" is defined to mean: "Lying near, close or contiguous; adjoining; neighboring, as a field adjacent to a highway." The lots of appellants, as shown, abut upon the side of High street immediately opposite to the part thereof vacated. Counsel for appellees insist that appellants cannot, under the circumstances, be considered as adjacent owners to that part of the street vacated, for the reason that the strip in question did not embrace the entire width of the street. Because a portion thereof intervened between appellants' property line and the part vacated, it is contended that they were not adjacent owners within the meaning of the statute, and therefore were not competent objectors. There certainly is no force or merit in this view of the case. To say the least, appellants had the right to demand that the street

in controversy be maintained to its full width in front of their property, and the mere fact that only a part on the side opposite to their property line was proposed to be vacated did not render them incompetent to object and thereby deprive the council of all power to ultimately act in the premises. The power conferred upon the council by the statute to vacate the street in whole or in part was upon the express condition that adjacent property owners, as were appellants, did not object. Their objections served to wholly oust or deprive the common council of any and all power to vacate the part of the street proposed, and its order, therefore, under the circumstances, was absolutely null and void, and was open to a collateral attack by injunction. *Spiegel v. Gansburg*, 44 Ind. 418; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726; *Sims v. City of Frankfort*, 79 Ind. 446-455; *City of Terre Haute v. Evansville, etc., R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189, and cases cited.

The court erred in sustaining the demurrer to the complaint, and the judgment is therefore reversed, and the cause remanded, with instructions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

(162 Ind. 452)

BROWN et al. v. CENTRAL BERMUDEZ CO.*

(Supreme Court of Indiana. Dec. 9, 1903.)

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—JURISDICTION OF COUNCIL—STATUTES—FRONT-FOOT RULE—DETERMINATION OF BENEFITS—ATTORNEY'S FEE.

1. Burns' Rev. St. 1894, § 4292, provides that the common council of a city, with the concurrence of two-thirds of the members thereof, may order certain specified improvements of streets. *Held*, that where a resolution for an improvement was not made by a two-thirds vote, but the requisite vote was obtained on motion to enter into the contract, and the assessment for the improvement was confirmed, the assessment was not open to collateral attack in a suit against a property owner for the foreclosure of a lien based on the assessment.

2. The fact that a resolution of a city council for the making of a public improvement submitted a proposition to improve on the basis of charging the property owner according to the front-foot rule did not show the assessment made arbitrarily, inasmuch as it was for the property owners to convince the council of its right and duty to apportion the cost on the basis of benefits.

3. Though a city council, on the final hearing as to benefits from a street improvement, erroneously regards itself as bound by the front-foot rule, such fact does not render the proceedings open to collateral attack.

4. The fact that a city council confirmed the report of the engineer on a proposed improvement on the same evening that a special committee met, pursuant to notice, to afford a hearing to property owners, could not be said to have prevented a hearing before the council, inasmuch as the property owners had a right to go before the council and demand a hearing, or, if necessary, compel one.

5. The provision of the statute providing for

¶ 5. See *Municipal Corporations*, vol. 24, Cent. Dig. § 1286.

*Rehearing denied.

the allowance of an attorney's fee on foreclosure of a lien based on an assessment for a public improvement is not unconstitutional, but valid, as the imposition of a penalty for delay of the property owner to discharge his obligation, so as to render a suit necessary.

Appeal from Circuit Court, Cass County; D. H. Chase, Judge.

Suit by the Central Bermudez Company against Lizzie W. Brown and another. From a decree in favor of plaintiff, defendants appeal. Affirmed.

G. M. Ross, for appellants. Kistler & Kistler and McConnell, Jenkins, Jenkins & Stuart, for appellee.

GILLETT, C. J. This action was brought by appellee to foreclose a lien against the property of appellant Lizzie W. Brown, based on a proceeding for the improvement of a street, had by the common council of the city of Logansport. Appellants demurred to the complaint, but their demurrer was overruled. Issues of fact were afterwards joined, and there was a trial, which resulted in a finding in appellee's favor, and a decree of foreclosure.

It appears from the record that after the cause was put at issue, and before the submission, the parties filed a stipulation in the action as follows (omitting the caption and signatures): "It is stipulated between the parties hereto that all matters of defense, both legal and equitable, shall be heard under the general denial. It is likewise stipulated that all matters in support of plaintiff's cause of action and in avoidance of defendant's defense, both legal and equitable, shall be heard under the complaint as it now is." This agreement proceeds on the theory that the complaint may be defective, and the parties, in effect, stipulate that it may be aided upon the trial. In view of this, we regard ourselves at liberty to disregard the demurrer, and examine the evidence, in determining whether a right result was reached.

It is first objected by counsel for appellants, on the question as to the sufficiency of the evidence, that the proceeding was void for the reason that the record of the common council affirmatively shows that the resolution of that body ordering the improvement made was not passed by a vote of two-thirds of its members, but was passed by a vote of six yeas to four nays. The proceeding was instituted by a resolution declaring the necessity of making the improvement in accordance with the profile, details, drawings, and specifications on file in the office of the city civil engineer, and directing the clerk to give notice of the passage of the resolution as required by law. This resolution was passed on the 17th day of August, 1898, by the vote of nine councilmen. Notice of the adoption of the resolution was duly published, and on the 21st day of September, 1898, a resolution purporting to order the improvement made, and to direct the clerk to adver-

tise for bids, was introduced, with the result indicated by the above-stated objections. Treating the resolution as adopted, the clerk advertised for bids for the completion of the work. On the 16th day of November, 1898, a committee of the common council reported to said council that the committee had examined the bids for doing the work, and that it found that the bid of the Central Bermudez Company was the best bid therefor, and recommended that the work be let to said company for the amount of its bid. This resolution received six votes. The record shows that afterwards, and at the same meeting, one of the members of said council submitted what purports to be a contract between the city and appellee for the doing of the work by the latter, duly signed by it, and also a bond in the sum of \$5,000 for the performance of the contract tendered, which bond purported to be signed by appellee and a surety. The record of the common council then shows the following entry: "In connection with the above, Mr. Palmer submitted the following resolution, approving contract and bond: 'Be it resolved by the common council of the city of Logansport, Indiana, that the contract and bond of the Central Bermudez Company, of Indianapolis, Indiana, contractor for the paving with asphalt and the paving with cement the roadway on Market street between the east side of Second street and the east side of Eel River Bridge, as read, be, and the same are hereby, approved and adopted, and ordered placed on record, by the following vote.'" Eight yeas and two nays are recorded upon this resolution. Following this, and as a part of the proceedings of said meeting, the record shows that the councilmen above mentioned submitted appellee's written request for an extension of time for the completion of what said writing terms "our Market street contract, from Second street to Eel river," until September 20, 1899. It was moved that the request be granted, and this motion received nine votes, no councilman voting in the negative. From this point it may be said that the record of the common council concerning said proceeding is regular on its face, and that it culminated in the act of the council, after due notice by publication in a newspaper, in an order confirming the assessments which the city civil engineer had reported. At the time of said proceeding the city of Logansport had 10 councilmen. It is further shown by the evidence that at such time appellants were husband and wife, and that appellant Lizzie W. Brown was the owner of the real estate against which appellee was seeking to foreclose.

As there was no petition filed for the improvement of said street, we look to section 4292, Burns' Rev. St. 1894, to ascertain the authority of the common council in the absence of a petition. That section provides that "the common council of such city, or the

board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, and repairs of any kinds of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed and collected, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town." It is insisted by counsel for appellants that ordering the work done by at least a two-third vote was an essential requirement to the invoking of the jurisdiction of the tribunal in the particular case. On the other hand, counsel for appellee argue that, as there were such proceedings in the particular instance as amounted to an attempt to exercise jurisdiction, the determination of the common council that it was authorized to proceed amounted to an act of jurisdiction, and that its decision is conclusive as against this collateral attack. As the grant of authority to improve streets at the expense of the adjoining property owners is a provision for the exercise of the taxing power, it seems scarcely necessary to say respecting such law that each provision thereof regarding the steps to be taken which it can properly be said was intended for the protection of the property owner was made to be obeyed substantially as enacted. This much as to the course that the common council ought to pursue. On the other hand, the fact must not be disregarded that, under the law of this state respecting the improvement of city streets by means of local assessments, the common council has been created a tribunal, and vested with exclusive original jurisdiction or power in that behalf. *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768. It is not the notice of the passage of the declaratory resolution which gives jurisdiction over the persons of the property owners. *Quill v. City of Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436; *Hughes v. Parker*, 148 Ind. 692, 48 N. E. 243; *Pittsburg, etc., R. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454. Not until the final notice, when the property owners have been brought in, can it be said that the tribunal acts in a quasi judicial capacity. Until then the common council proceeds in the exercise of a business or administrative power. *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Town of Greenwood v. State ex rel. Lawson*, 159 Ind. 267, 64 N. E. 849. It takes the prior steps by virtue of its jurisdiction over the subject-matter, which is the authority to act in the particular class of matters to which

the one in question belongs. There must, of course, be a particular proceeding pending, and the power to spread the assessment upon the property depends upon the taking of each step which may properly be denominated as jurisdictional.

While acting within the confines of its jurisdiction, the errors of the council do not afford a basis for a collateral attack, but, if the proceeding has not been inaugurated by petition, it is indispensable to the making of the assessment that two-thirds of the members of the council should order or cause the improvement to be made. *Lux & Talbott Stone Co. v. Donaldson* (at this term) 68 N. E. 1014. See *Van Sickle v. Belknap*, 129 Ind. 558, 28 N. E. 305. It is evident that the provision referred to was intended as a limitation upon the power of the council. The tribunal in question is not a court, and we should hesitate to apply to it the extreme doctrine on collateral attack relative to intermediate steps that has been applied to boards of county commissioners when acting in a judicial capacity. Within limits, the power of common councils to judge of their jurisdiction has been recognized. *Evansville, etc., R. Co. v. City of Evansville*, 15 Ind. 395; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431; *Bass v. City of Ft. Wayne*, 121 Ind. 389, 23 N. E. 259; *McEnaney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540; *De Puy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016; *City of Camden v. Mulford*, 26 N. J. Law, 49; *Kuhn v. Port Townsend*, 12 Wash. St. 605, 41 Pac. 923, 29 L. R. A. 445, 50 Am. St. Rep. 911. But in a case where it appears on the face of the proceeding of such a tribunal that a requirement plainly jurisdictional has been in no wise complied with, the order of assessment would be void, as there would be no basis on which an adjudication could rest. If this proceeding can be upheld when attacked collaterally, it must be on the ground that the statute has been substantially complied with, and that therefore there was but an irregularity in acquiring jurisdiction. In *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501, it was said: "Where it affirmatively appears that the jurisdictional steps have been taken, upon which the power of the common council to contract depends, a contractor may rely upon the record, even though the jurisdictional facts may appear imperfect and irregular. After he has entered upon the work, and expended money and labor for the benefit of the property owner, the latter will not be permitted to impair or break down the jurisdiction upon which the contractor may have relied, by bringing forward merely incidental matters, or by proof of extraneous facts, unless fraud or collusion be shown."

To make the proceeding in this case regular, the common council should, by a vote of at least two-thirds of its members, have ordered the work done before it advertised for bids, but we do not think that the omis-

sion to make such order at that particular time affords a ground for collateral attack. As the council was acting ministerially at the time, even the failure of the former resolution did not necessarily terminate the proceeding, for it was competent, within a reasonable time, since no vested rights had attached, to reconsider the question. *Ross v. Stackhouse*, supra; *Town of Greenwood v. State ex rel. Lawson*, supra. The requisite vote was obtained on the motion to enter into the contract, and this, it seems to us, was, in substance, an ordering or causing the work to be done, within the statute. If any third person had desired to bid on the work, he might properly have made his bid conditional upon the council taking the jurisdictional step. With such a record as the one before us, involving only an irregularity in the acquiring of jurisdiction, we think that it was competent for the common council to consider as to its authority when the property owners were before it; and, as it confirmed the assessment, its order, under the circumstances, is impervious to collateral attack.

The mere fact that the declaratory resolution submitted to the property owners a proposition to improve on the basis of charging them, respectively, with the cost of the improvement, according to what is termed the "front-foot rule," did not render the proceeding invalid. When appellants had their opportunity for a hearing, it was for them to convince the council of its right and duty to apportion the cost on the basis of benefits. To show that the assessment was, in point of fact, made according to frontage, does not show that it was made arbitrarily; but if the council, on the final hearing, misinterpreted the law, and regarded itself as tied down by the provisions thereof to what has been termed the *prima facie* test or standard, that would not render the proceeding open to collateral attack, for, having jurisdiction, the power of the council was as ample to decide wrong as to decide right. *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004; *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447; *Jones v. Cullen*, 142 Ind. 385, 40 N. E. 124. In such a case as this it will be presumed that the lot was benefited to the extent of the assessment. *Wray v. Fry*, supra.

That the council confirmed the report of the engineer on the same evening that the special committee met, pursuant to notice, to afford a hearing to the property owners, cannot be said to have prevented a hearing before the council. Appellants had a right to go before that body and demand a hearing, and, if necessary, invoke the power of the courts to secure the right. *Hibben v. Smith*, supra; *Shank v. Smith*, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564. It does not appear, however, that appellants even sought the opportunity for a hearing.

It is finally objected that the court erred in refusing to strike out of the judgment an

allowance that had been made for appellee's attorney's fees. It is claimed that the provision of the statute purporting to authorize such allowance is unconstitutional. A street assessment is laid by virtue of the power of the state to tax, and we think that a statute providing for the allowance of an attorney's fee on foreclosure in such a case can be upheld on the ground that the state may provide for a penalty if the delay of the property owner to discharge such an obligation renders it necessary to commence suit. The enactment upon this subject may be compared to the provisions of statute made for the benefit of purchasers at tax sales. See *Terre Haute, etc., R. Co. v. Salmon* (Ind. Sup.) 67 N. E. 918.

Judgment affirmed.

(161 Ind. 496)

BOWLIN v. COCHRAN et al.

(Supreme Court of Indiana. Dec. 8, 1903.)

HIGHWAYS-IMPROVEMENT-CONSTITUTIONALITY OF STATUTE-TITLE OF ACT.

1. Acts 1903, p. 255, c. 145, empowering the county commissioners, on petition signed by a majority of the landholders abutting on a road, to improve the same, providing for the making of assessments for benefits, requiring the giving of notice to all persons affected, and providing for a hearing with the right of appeal to the circuit court, is not in violation of Const. Bill of Rights, § 12, declaring that every man for injury done him in his property shall have a remedy by due course of law.

2. Acts 1903, p. 255, c. 145, empowering county commissioners to macadamize any county or state road on petition signed by a majority of the resident landholders of the county whose lands abut on the road proposed to be improved, is not invalid as class legislation because it permits a majority of the abutting landowners to initiate the proceedings to improve the road.

3. Acts 1903, p. 255, c. 145, entitled "An act concerning gravel and macadamized roads," the provisions of which empower the county board of commissioners, on petition signed by a majority of the landholders abutting on a road, to improve it by macadamizing the same or otherwise, and authorize an assessment for benefits, and permit the persons affected by the improvement to remonstrate and to appeal to the circuit court, is not in conflict with Const. art. 4, § 19, declaring that every act shall embrace but one subject, to be expressed in the title.

Appeal from Circuit Court, Tipton County; James F. Elliott, Judge.

Action by Melvin L. Bowlin against James Cochran and others. From a judgment rendered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

J. M. Purvis and Gavin & Davis, for appellant. Oglebay & Oglebay and Gifford & Gifford, for appellees.

JORDAN, J. Action to perpetually enjoin appellees from constructing a certain gravel road in Tipton county, and to enjoin the collection of assessment of benefits against the real estate of appellant. The demurrer to the complaint was sustained, and from a judgment thereon this appeal is prosecuted.

The proceedings before the board of commissioners to construct the gravel road in controversy are based upon an act of the Legislature approved March 9, 1903 (Acts 1903, p. 255, c. 145). This act is entitled "An act concerning gravel and macadamized roads." By the first and second sections thereof the board of commissioners of any county in this state, upon the presentation of a petition "signed by a majority of the resident landholders of the county whose lands abut upon the particular improvement," is empowered "to lay out, construct or improve by straightening, grading, draining, graveling or macadamizing any state or county road or any part thereof within the limits of the county." Provisions are made for notice by publication to be given of the pendency of the petition, and for the appointment of viewers, etc. The viewers are authorized to assess benefits upon lands benefited by the improvement within the prescribed taxing district, and are required to make their report to the board of commissioners. The statute also provides for the giving of notice of the time and place when and where a hearing before the board of commissioners will be had upon the report of the viewers, and persons affected by the improvement are authorized to remonstrate for reasons or grounds designated by the statute, and are granted the right of appeal from the decision of the board to the circuit court.

It is conceded by counsel for appellant that, if the validity of this act can be upheld, the appeal herein cannot be maintained, as all of the proceedings had before the board of commissioners to construct the gravel road in question were in all things regular. But they insist that this statute violates the Constitution of this state for two reasons: (1) That the title thereof is not sufficient, because it does not fairly express the subject of the legislation, as required by section 19, art. 4, of the Constitution; (2) that the act provides for the taking of private property for public purposes without due course or process of law, and therefore is violative of section 12 of the Bill of Rights. We will consider these objections in their inverse order.

As previously said, landowners who are affected by the contemplated improvement are authorized to remonstrate against the report of the viewers for the following causes: (1) That the report of the viewers is not according to law; (2) that the lands of the party remonstrating are not benefited, or are assessed too high; (3) that his lands are damaged, and that the damages assessed are inadequate; (4) that it is not practicable to construct the proposed work without exceeding the aggregate benefits; (5) that the improvement will not be of public utility or convenience. It will be seen that, in addition to a hearing before the board of commissioners upon the report of the viewers and the remonstrance thereto, the right of appeal

to the circuit court is awarded to an aggrieved remonstrator. In a word, it may be said that the statute provides for giving proper notice to all persons affected by the improvement, and further accords to them a hearing before the board of commissioners, with the right of appeal to the circuit court. Certainly, therefore, the law may be said to be far within the principle of due course of law as construed by the higher courts. *Cleveland, etc., Co. v. Backus*, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; same case, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Kizer v. Town of Winchester*, 141 Ind. 694, 40 N. E. 265.

It is further claimed by appellant that, because the act in question permits a majority of the abutting landowners to initiate or put in motion before the board of commissioners the proceedings to improve the highway or road, it therefore must be considered as class legislation, or as granting privileges to such landowners which are denied to others within the taxing district. This proposition is wholly without merit. The number of petitioners and the particular situs of their property within such district who may be authorized to initiate the proceedings before the board in such cases are matters largely within the discretion of the Legislature. In regard to the first objections, counsel for appellant advance the argument that the title is not sufficient to advise any one whether the proposed legislation relates to roads in esse or those to be constructed in the future. They say, is "the act one concerning the construction of gravel and macadamized roads, or is it one concerning the repair or vacation of such roads"? The title of an act is not required to be an index to the legislation thereby proposed, and, although the title may be in the imperfect present tense, nevertheless the provisions of the act may refer to the future. The title in question may be said to fairly express the subject of the legislation therein proposed, and any and all members of the Legislature upon hearing the title read certainly in reason might infer that the legislation contemplated related to the future construction of gravel and macadamized roads, and an examination of the first section fully reveals that fact. In *Lewis v. The State*, 148 Ind. 346, 47 N. E. 675, we said: "The degree of particularity with which the title of an act is to express the subject thereof is not defined by the Constitution, and rests with the Legislature. Courts, in this respect, are inclined to entertain and adhere to a liberal rule, and will not condemn an act of the Legislature for the reason alone that the subject thereof is not as fully expressed as it otherwise might have been." In fact it may be said that the sufficiency of this title is no longer an open question under the decisions of this court. In *Wishmier v. The State*, 97 Ind. 160, the statute therein assailed was entitled "An act

concerning drainage." The title was held to be sufficient. In *Hedderich v. The State*, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768, the title in dispute was "An act concerning public offenses and their punishment." This was held to come within the requirements of the Constitution, and was sufficiently comprehensive to embrace all offenses of a public nature. In *Barnett v. Harshbarger*, 105 Ind. 410, 5 N. E. 718, the contention was that the statute entitled "An act concerning husband and wife" was not sufficiently expressed in the title. The court, by Elliott, J., in that appeal said: "We do not deem it necessary to enter upon a discussion of this question, for we regard it as conclusively settled against the appellant." As to the sufficiency of the titles of various acts of the Legislature, see the following cases: *Maule Coal Co. v. Partenheimer*, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710, and cases there cited; *State v. Bailey*, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435, and cases there cited. In the latter appeal an act entitled "An act concerning the education of children," approved March 8, 1897 (Acts 1897, p. 248, c. 165), was involved. The objection, among others, was that the title of the act in question was so vague and uncertain as to render it nugatory. This court, in considering the question as there presented, said: "We think the title of the statute in question specific enough to guard against the evils intended to be prevented by the Constitution. It sufficiently indicates 'some particular branch of legislation as a head under which the particular provisions of the act might reasonably be looked for.' The subject of the act, as expressed in the title, is 'the education of children.' Is this any less specific than 'drainage' or 'highways'?" In *Bright v. McCullough*, 27 Ind. 223, this court, in passing upon the title of the statute therein involved, among other things said: "The words 'an act concerning highways' would express but a single subject, and yet would constitute a comprehensive title, under which almost any desired provision relating to highways might be enacted."

We conclude that the statute in controversy is not open to the objections urged against its validity, and the judgment is therefore affirmed.

(161 Ind. 491)

STATE ex rel. STRASS v. TANCEY.

(Supreme Court of Indiana. Dec. 9, 1903.)

QUO WARRANTO—INFORMATION—SUFFICIENCY.

1. An information in the nature of a quo warranto to oust defendant from the office of justice of the peace, which avers substantially that plaintiff and another were duly elected and commissioned as justices in a certain township, and that defendant, who was not elected, obtained a certificate of election and a commission, and proceeded to perform the duties of justice in such township, but which fails to

show that the office which defendant claims and the duties of which he performs is the office to which relator is entitled, is insufficient.

Appeal from Superior Court, Allen County. O. N. Heaton, Judge.

Proceeding in the nature of a quo warranto by the state on the relation of Emanuel Strass against Michael Tancey. From a judgment for defendant, relator appeals. Affirmed.

T. W. Wilson, J. B. Harper, and Olds & Doughman, for appellant. Breen & Morris, for appellee.

DOWLING, J. This is a proceeding in the nature of quo warranto by the state on the relation of Emanuel Strass against Michael Tancey to oust the latter from the office of justice of the peace of Wayne township, in Allen county. A demurrer to the information was sustained, and, the plaintiff refusing to amend, judgment was rendered for the defendant. Error is assigned upon this ruling.

The information stated, in substance: That the relator was, on November 4, 1902, and ever since has remained, a bona fide resident and elector of Wayne township, Allen county, Ind., and eligible to the office of justice of the peace of said township. That the terms of office of the several justices of the peace of said township expired November 10, 12, and 14, 1902. That by a change of the statute fixing the number of justices of the peace in said township only two justices were to be elected in and for said township at the general election held on November 4, 1902. That at said election the said relator, one Benjamin W. Skelton, the defendant, Michael Tancey, and one Harry F. France were candidates for said office, and each of them received votes therefor. That said Skelton received 4,643 votes, the relator, Emanuel Strass, received 4,360 votes, the defendant, Michael Tancey, received 4,143 votes, and Harry F. France 4,104 votes at said election for justice of the peace of said township, and that each of them received a higher number of votes therefor than any other person for whom votes were cast for the said office. That at said election the relator and said Skelton each received a higher number of votes for said office than did either the said Tancey or the said France. That returns of the votes so cast were regularly made by the several boards of election of said township to the proper officers constituting the canvassing board. That said board canvassed the said votes, and declared that the relator and the said Skelton had each received a higher number of votes at said election for the office of justice of the peace of Wayne township than either the said Tancey or the said France, who were the other candidates voted for; and that said relator and said Skelton were each duly elected to the office of justice of the peace of said township. That said board of canvassers issued to said re-

¶ 1. See *Quo Warranto*, vol. 41, Cent. Dig. § 51.

lator and said Skelton each a certificate of election to such office, and also certified such election of said relator and said Skelton to the clerk of the Allen circuit court. That said clerk certified the election of said relator and said Skelton to the Secretary of State, and that thereupon the Governor of this state issued to the relator and to Skelton each a commission to serve as justice of the peace for said township for the term of four years from November 14, 1902. That the relator on November 17, 1902, duly qualified as such justice of the peace by executing his bond and taking the oath prescribed by law, as also did said Skelton. That the board of commissioners of said Allen county, by order entered of record, designated No. 125 East Main street, in the city of Ft. Wayne, in said township, as the place where the relator should hold his office; and that the relator accepted said office, and thereupon entered upon the discharge of its duties at the place so designated. That the board of commissioners, without authority of law, issued to the defendant, Tancey, also a certificate of election, and certified the fact to the clerk of the Allen circuit court. That the clerk certified the same to the Secretary of State, and that the Governor issued to Tancey a commission as a justice of the peace of Wayne township for the term of four years from November 14, 1902. That the said Tancey thereupon qualified as such justice of the peace, and thereby unlawfully intruded into and usurped the functions of said office, which belong exclusively to the relator and said Skelton. That said Tancey was an acting justice of the peace of said Wayne township for four years next preceding November 14, 1902, and was then, and yet is, in possession of the books, dockets, and papers belonging to a justice of the peace of said township, and that he continues to perform the duties of a justice of the peace for said township, and to collect and appropriate the fees in cases brought in his court, which have amounted to \$100, although the relator and said Skelton have the exclusive right to hear and determine such cases and to take the fees therein. That before the commencement of this action the relator demanded from said Tancey the books, dockets, and papers of said office in the possession of said Tancey, but the demand was refused; and that Tancey continues to perform the duties of a justice of the peace of said Wayne township, to the damage of the relator \$200. The information concludes with a demand that Tancey be adjudged an intruder into and usurper of the said office; that he be ousted therefrom; that he be ordered to surrender to the relator the books, dockets, and papers in his possession belonging to the office of justice of the peace of said township; and that the relator have judgment for \$200 and his costs. The grounds of the demurrer were that the information did not state facts sufficient to constitute a cause of action, and

that there was a defect of parties, Skelton being a necessary relator or defendant.

Assuming the truth of all the matters stated in the information, the situation is this: Two justices of the peace for Wayne township, Allen county, were to be elected at the general election held November 4, 1902, and the relator and Skelton were regularly chosen and commissioned as such officers. A third, who was not elected, obtained a certificate of election and a commission, and proceeded to perform the duties of a justice of the peace in the same township. It does not appear that he holds, or claims to hold, the office to which the relator was elected, or that he has intruded into or usurped such office. He may assert title to the office to which Skelton was elected, or he may take the position that the township was entitled to three justices of the peace, and that he received the next highest number of legal votes after the relator and Skelton. In any event, the information fails to show that the office which the appellee claims, and whose duties and functions he performs, is the one to which the relator is entitled. As the information was filed by Strass on his own relation, it was incumbent on him to show by proper averment not only his interest in the office which is the subject of the information, but also that the defendant had intruded into or usurped that office. He does show his interest in an office, but he does not show that the defendant has in any manner intruded into that office, or exercised any of its functions. By the demurrer and brief of the appellee there is in question, and the question is duly presented, the constitutionality of the act of March 6, 1899, p. 510, Burns' Rev. St. 1901, §§ 1481a-1484e, but, as the information must be held insufficient upon other grounds, it is not necessary to decide the question of the validity of the statute.

Judgment affirmed.

(161 Ind. 484)

EWING v. EWING et al.

(Supreme Court of Indiana. Dec. 8, 1903.)

APPEAL—WAIVER OF ERRORS—ESTOPPEL.

1. Where a partner, after judgment was entered against him decreeing certain land to be firm property, and ordering a receiver to take possession of and sell the same, and collect the rents and profits until sold, entered into an agreement with the other parties to the action, by which he was to have the rents to a certain date, and was to surrender any claim to such rents thereafter, under which agreement he received the rents specified, he thereby waived any error in such judgment.

Appeal from Circuit Court, Huntington County; James C. Branyan, Judge.

Action by James Ewing against William Ewing and another. From a judgment for plaintiff, defendant Ewing appeals. Transferred from Appellate Court under Burns' Rev. St. 1901, § 1337u. Dismissed.

B. M. Cobb, for appellant. Spencer & Bran-
yan, for appellees.

MONKS, J. This action was brought by appellee, James Ewing, against appellant, for an accounting and dissolution of partnership, and to quiet title to certain real estate in the partnership which was held in the name of appellant and claimed by him to be his individual property, and for the appointment of a receiver to dispose of the property of the firm, collect claims, and pay its debts. A trial of the cause by the court resulted in a special finding, conclusion of law, and judgment against appellant, and the appointment of a receiver to take charge of and sell the partnership property, collect the claims due said firm, and pay its debts. Said special finding was made, conclusion of law stated, and final judgment rendered November 25, 1901. On the same day the receiver filed his bond and entered upon the discharge of his duties. This appeal was perfected by filing a transcript in this court on September 27, 1902, without filing any appeal bond. Appellee has filed a verified answer in bar of the assignment of errors, and demands that the appeal be dismissed.

It appears from the record that several tracts of real estate in Huntington county, Ind., which appellant claimed to own, were adjudged by the court to be the property of the firm, and the receiver was ordered by the court in said judgment to sell the same and apply the proceeds to the payment of the debts of said firm, and that, until said real estate was sold, said receiver was to collect the rents and profits thereof. It is alleged in said verified answer that on the day said final judgment was rendered the parties to this cause entered into a written agreement under which appellant's attorney was to collect the rents for said real estate from that date until May 1, 1902, and that in consideration thereof appellant surrendered any claim to collect rents thereafter, and that rents amounting to \$108.97 were received by appellant's attorney under said agreement. By virtue of the judgment the receiver was entitled to receive the rents of said property until sold. Under the agreement, however, appellant was given the rents until May 1, 1902, after which date appellant surrendered all claim thereto. By said contract, appellant in effect agreed that the rights of the parties to said judgment should be determined thereby, except as changed by said agreement. Having recognized said judgment by said contract, and having obtained the consideration therefor, appellant is estopped from asking its reversal for alleged error. Said agreement and the receipt of the rents must be treated as a release or waiver of error, if any. *Stauffer v. The Salmonie, etc., Co.*, 147 Ind. 71, 46 N. E. 342, and cases cited; *Manlove v. State*, 153 Ind. 80, 53 N. E. 385, and cases cited; *McGrew v. Grayston*, 144 Ind. 165, 167, 41 N. E. 1027,

and authorities cited; *Glassburn v. Deer*, 143 Ind. 174, 183, 41 N. E. 376, and authorities cited; *Sonntag v. Klee*, 148 Ind. 536, 47 N. E. 962.

The motion to dismiss the appeal is therefore sustained, and appeal dismissed.

(161 Ind. 504)

STATE v. KATZMAN.

(Supreme Court of Indiana. Dec. 11, 1903.)

CRIMINAL LAW—PLEA IN ABATEMENT—DEMURRERS—SUFFICIENCY.

1. In a criminal case the proper form of demurrer to a plea in abatement is that it does not state facts sufficient to quash the indictment, information, or writ, or to abate the action; and an objection that the "facts stated are not sufficient to constitute a plea in abatement" does not present any statutory ground of objection thereto, and no question of law can be raised on the decision of the court overruling the same.

Appeal from Circuit Court, Tippecanoe County; R. P. De Hart, Judge.

Information against George Katzman for malicious mayhem. From a judgment entered on defendant's plea in abatement after overruling a demurrer thereto, the state appeals. Affirmed.

Edgar D. Randolph, for the State. Thompson & Storms, for appellee.

DOWLING, J. An information was filed in the Tippecanoe Circuit Court by the prosecuting attorney of that county, charging the appellee with the crime of malicious mayhem. The appellee filed a plea in abatement of the information on the ground that the grand jury had previously investigated the occurrence, and had returned an indictment against the appellee for simple mayhem, which was still pending in said court, etc. A demurrer to the plea was filed by the prosecuting attorney, and the objection thereto was stated to be that "the facts stated are not sufficient to constitute a plea in abatement." The demurrer was overruled, judgment was rendered upon the plea, and the state appeals upon the reserved question of law.

It has been held that the question of the right to prosecute by information may be raised by plea in abatement. *Nichols v. State*, 127 Ind. 406, 413, 26 N. E. 839; *Hobbs v. State*, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774; *Lankford v. State*, 144 Ind. 428, 43 N. E. 444. There is no express provision in the Criminal Code for a demurrer, but such pleading has been recognized as proper in numerous cases. The general rules governing demurrers in civil actions and the form of that pleading have been held applicable in such cases. It is provided in the Civil Code that, "when the facts stated in any paragraph of the answer are not sufficient to constitute a cause of defense, the plaintiff may demur to it under the rules prescribed for demurring to a complaint." *Burns' Rev.*

St. 1901, § 349. The approved form of a demurrer to a plea in abatement is that the plea does not state facts sufficient to quash the complaint or writ. In a criminal cause the proper form would be that the plea did not state facts sufficient to quash the indictment, information, or writ, or to abate the action. 1 Chitty, Pl. 698. It is never proper to allege that a pleading does not state facts sufficient to constitute a complaint, an answer, or a reply. *Pine Township v. Huber Co.*, 83 Ind. 121; *Grubbs v. King*, 117 Ind. 243, 20 N. E. 142; *Firestone v. Werner*, 1 Ind. App. 293, 27 N. E. 623. The supposed demurrer did not present any statutory ground of objection to the answer in abatement, and no question of law could be reserved upon the decision of the court overruling it.

Judgment affirmed.

(161 Ind. 500)

GWINNUP v. SHIES.

(Supreme Court of Indiana. Dec. 10, 1903.)
CONTRACTS—PERFORMANCE OF LABOR—ACCEPTANCE—PLEADING—GENERAL DENIAL—DEFENSES ADMISSIBLE.

1. In an action for services performed in the construction of a walk and steps, defendant may, under the general denial, prove plaintiff's failure to execute the work in a workmanlike manner, as required by the contract.

2. That defendant walked from necessity over a walk and steps from his door to the street does not show a constructive acceptance of plaintiff's work in building such walk and steps.

3. One who furnishes the material and labor for a walk and steps, but performs the work so that the walk is lowest in the middle, and collects rain water half an inch deep, and is three inches above grade and above the contract specification, and leaves the steps unfinished, is not entitled, in the absence of an acceptance of his work, to recover anything under his contract.

Appeal from Superior Court, Madison County; H. C. Ryan, Judge.

Action by Amos C. Gwinnup against John Shies. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court under Burns' Rev. St. 1901, § 1337u. Affirmed.

Ellison & Ellis, for appellant. E. D. Rear-don, for appellee.

HADLEY, J. Appellant furnished the material and constructed a cement yard walk and steps for appellee, and brings this suit to recover therefor. In his first paragraph of complaint he counts on a special contract, and demands the stipulated price. In the second paragraph he sues for the quantum meruit. Answer, the general denial. Trial by the court, and finding and judgment for the defendant. But one question is reserved for our decision, and that is, is the finding of the court, under the issues, contrary to law?

The defense relied upon was the failure

of appellant to execute the work in a workmanlike manner, as the contract required. There is in the record sufficient evidence of defective levels and grade of the walk, and of defective form and finish of the steps, to support the court in its finding, but appellant insists that it was improperly received under the general denial. In this we think appellant is mistaken. The record discloses that the defendant's evidence touching the quality of the work done was given without a single exception being reserved that we have been able to discover, and our attention has not been directed to any; but, assuming that appellant has the right to raise the question, it must be decided against him. Any defense which goes to a denial that the cause of action set forth in the complaint exists may be properly pleaded by way of general denial. *Works, Pr. § 579*. The rule prevailing in this state is clearly stated in *Jeffersonville, etc., Co. v. Riter*, 146 Ind. 526, 45 N. E. 699, thus: "A defendant, under the general denial, is not confined to negative proof in denial of the facts stated in the complaint as a cause of action, but may, upon the trial, introduce proof of facts independent of those alleged in the complaint, but which are inconsistent therewith, and tend to meet and break down or defeat the plaintiff's cause of action."

There was no evidence offered by either party as to the value of the work as it was performed, but appellant insists that the evidence shows it was of some value, for which he should have recovered, and in support of his claim cites *Everroad v. Schwartzkopf*, 123 Ind. 35, 23 N. E. 969, and *Gastlin v. Weeks*, 2 Ind. App. 222, 28 N. E. 331. It is undoubtedly true, as held in these cases, that if a contractor performs his work in an inferior manner, or uses unfit material, or fails in any way to do the work as he agreed, if the work is of a fixed or permanent character, and of some value, and, notwithstanding the noncompliance with the contract, the other party accepts and uses the work, the law will require him to pay whatever the work, as done, is reasonably worth. See authorities cited in *Everroad's Case*, supra. In this case, however, there is not only an absence of evidence as to the value of the work as done, but there is also no evidence of an acceptance or of use by appellee, further than his statement that he walked over it from his door to the street "because he could not help it." It appears that appellee was absent from home while the work was being done, and, upon his return and inspection, at once made an earnest protest against acceptance; and the impelled use, as shown by the evidence, is not sufficient to constitute a constructive acceptance. It may seem harsh to hold that a man who has furnished the material and done a job of work for another shall receive no pay for it. But on the other hand, if, as the evidence tends to prove, the walk was lowest

¶ 1. See *Contracts*, vol. 11, Cent. Dig. § 1726.

in the middle, and collected storm water half an inch deep, and the grade was three inches higher than the contract provided, and three inches higher than the yard grade when completed, and the steps unshapely and unfinished, it is probable that appellee would prefer to have his premises as they were before the work was done. In such cases it is clear that the fault is with the one who voluntarily violates his contract.

Judgment affirmed.

(161 Ind. 503)

BOARD OF COM'RS OF PULASKI COUNTY v. HAYWORTH.

(Supreme Court of Indiana. Dec. 10, 1903.)

COUNTIES — COUNTY AUDITOR — COUNTY REFORM LAW—ADDITIONAL COMPENSATION.

1. County Reform Law (Acts 1899, pp. 343-365, c. 154, Burns' Rev. St. 1901, §§ 5594-5594e2) provided that the county council should make suitable allowance to the county auditor for any additional work that might be imposed on his office by the operation of the statute, provided that it should not be less than \$200 nor more than \$600 a year. *Held*, that the county council had authority to make an allowance for additional work done by the county auditor prior to January 1, 1900, as well as for additional work performed after that date.

Appeal from Circuit Court, Pulaski County; G. W. Beeman, Judge.

Action by James N. Hayworth against the board of commissioners of Pulaski county. Judgment in favor of plaintiff, and defendant appealed to the Appellate Court, from which the cause was transferred. Transferred from the Appellate Court under the act of 1901 (Acts 1901, p. 590, c. 259), being section 1337u, Burns' Rev. St. 1901.

H. A. Steis, for appellant. Spangler & Son, for appellee.

MONKS, J. The only question presented by this appeal is whether or not a county auditor was entitled to receive any compensation for additional work imposed upon him by the act of 1899 (Acts 1899, pp. 343-365, c. 154), being sections 5594-5594e2, Burns' Rev. St. 1901, known as the "County Reform Law," from the date said law took effect to January 1, 1900, where the county council has made an "allowance" therefor under section 50 of said act, being section 5594d2, *supra*. If he was entitled to such compensation when the county council had made an allowance therefor, this cause must be affirmed; otherwise it must be reversed.

Said act took effect April 27, 1899, and section 50 (section 5594d2, Burns' Rev. St. 1901) thereof provides that the county council "shall make suitable allowance to the county auditor for such additional work as may be imposed upon his office by the operation of" the county reform law, "provided, that in no case shall such allowance be less than two hundred dollars nor exceed six hundred dollars a year." Appellant insists that said section authorizes payment for such

work done on and after January 1, 1900, and that for such services performed by a county auditor prior to that day no recovery can be had. The additional work imposed by said county reform law upon the office of county auditor commenced before January, 1900, and said section 50 (5594d2), *supra*, expressly authorized the county council to make the allowance therefor, whether done before or after January 1, 1900. There is nothing in said act limiting the authority of the county council over said subject to additional work imposed on said officer, done on and after January 1, 1900. It is clear that the county council had as much power under said section to make allowance for such additional work performed before January 1, 1900, as for that performed afterwards.

It follows that the judgment must be affirmed. Judgment affirmed.

(161 Ind. 554)

STATE ex rel. TIPPECANOE COUNTY COM'RS v. FLYNN et al.

(Supreme Court of Indiana. Dec. 18, 1903.)

CLERK OF COURT—OFFICIAL DUTIES—LIABILITY ON BOND.

1. The preparation of hand bar dockets for printing for convenience of the court and bar is not a part of the official duty of a clerk of court, not being included in Acts 1895, p. 336, c. 145, § 114, fixing fees for his entries in a bar docket, or Burns' Rev. St. 1901, § 7931 (Horner's Rev. St. 1901, § 5845), making it his duty to procure bar dockets; these referring only to bar dockets kept in his custody as permanent records.

2. On the official bond of a clerk of court, conditioned to pay to the proper persons "all moneys that may come into his hands as such circuit court clerk by virtue of his office," there is no liability for money paid him in compensation for unofficial acts directed by the court, whether the court had authority to direct such acts or not.

3. In view of Burns' Rev. St. 1901, §§ 588, 1382, 591, 689, 7941, 7940, 599, and 1907, providing for record by the clerk of court of all judgments and fees in actions, including sheriff's fees, and under the direct provisions of Burns' Rev. St. 1901, § 7936 (Horner's Rev. St. 1901, § 5850), it is part of a clerk's official duty to receive fees in actions, including sheriff's fees, and he is liable on his official bond for money so received.

4. Under the direct provisions of Laws 1895, p. 352, c. 145, § 122, fees received by the clerk of court in actions belong to the county, unless they have been previously paid by the plaintiff.

5. Though it is proper for a clerk to pay sheriff's fees collected by him to the sheriff, where he refuses to pay them either to the sheriff or his successor or the county he is liable on his official bond to the county.

6. The county clerk is entitled to retain the per diem allowed by Acts 1895, p. 336, c. 145, § 114, for attending sessions of court, such per diem not being referred to in section 124, Acts 1895, p. 355, c. 145, providing for the payment by the clerk to the treasurer of the amount of "fees" collected.

Monks, J., dissenting in part.

Appeal from Circuit Court, Tippecanoe County; W. O. L. Taylor, Judge.

¶ 2 See Clerks of Courts, vol. 16, Cent. Dig. § 124.

Action by the state, on the relation of the board of commissioners of the county of Tippecanoe, against David H. Flynn and others. From a judgment sustaining demurrers to the paragraphs of the complaint, the relator appeals. Reversed.

Daniel E. Storms, Charles E. Thompson, J. Frank Hanly, and Will R. Wood, for appellants. Haywood & Burnett and Kumler & Gaylord, for appellees.

JORDAN, J. This action was commenced and prosecuted by the state, on the relation of the board of commissioners of the county of Tippecanoe, to recover against David H. Flynn, as principal, and his co-appellees herein, as sureties, on his official bond as clerk of the circuit court of that county. The amount in controversy herein being in excess of \$6,000, and as the case was pending in this court at the time of the passage of the act of March 12, 1901 (Acts 1901, p. 565, c. 247), we, under section 12 of that statute, retained jurisdiction over the appeal.

The complaint originally consisted of five paragraphs. The second, however, was withdrawn, and is not involved in the appeal. Separate demurrers for insufficiency of facts were filed by the appellees to each paragraph of the complaint. These demurrers, over the exceptions of appellant, were sustained to each of the paragraphs, and upon its refusal to further plead judgment was rendered against it upon the several demurrers. The errors discussed and relied upon for a reversal are based upon the rulings of the court in sustaining the several demurrers. Each paragraph discloses that at the general election in 1894 David H. Flynn was elected clerk of the Tippecanoe circuit court in and for Tippecanoe county, state of Indiana. On the 15th day of November of that year, he, as principal, together with his codefendants, as sureties, executed to the state of Indiana his official bond as such clerk in the penal sum of \$40,000, conditioned for the faithful discharge of the duties of his office, and the payment to the person or persons entitled to receive the same of "all moneys that may come into his hands as such clerk." This bond was duly approved by the board of commissioners of said county, and on the — day of November, 1894, Flynn, having been duly qualified, entered upon the discharge of his official duties, and continued to hold said office until the 21st day of November, 1898. We will state the material facts embraced in the several paragraphs of the complaint, and consider the same outside of their regular order.

By the third paragraph the relator sought to recover certain sheriff's fees taxed by said clerk in his office as sheriff's costs against certain litigants in causes heard and determined in the circuit and superior courts of said county. It is alleged in this paragraph that Flynn, as such clerk, after the expiration of the term as sheriff of one William A.

Gaddis, whose term expired on the 21st day of August, 1895, collected and received a certain amount of costs and fees of record in his office which had been charged and taxed as sheriff's fees and costs during the time served by said Gaddis as sheriff. These fees and costs so taxed and charged it is alleged were, and still are, the property of Tippecanoe county, and ought to have been, when received, turned over by the clerk to the immediate successor of said Gaddis, or paid by him into the county treasury, for the use and benefit of the "sheriff's fund." It is further disclosed that the clerk, after he collected and received said money as sheriff's costs, failed and refused to pay the same over to Gaddis as sheriff, and failed and refused upon demand to pay the same, or any part thereof, into the county treasury, but retained and wholly converted the money to his own use.

Under the fourth paragraph appellant seeks to recover a certain sum of money arising out of and received by Flynn for services performed by him during his term of office upon the orders of the circuit and superior courts, respectively, of said county, for arranging and preparing certain hand bar dockets for the use and convenience of the court and the members of its bar, and all other persons having business therein. It is shown that he prepared and arranged these dockets and made them ready to be placed in the hands of the printer for the purpose of being printed. He entered upon said hand bar dockets the title, number, and nature or character of each cause of action pending in court, inserting also therein a list of the attorneys practicing at the bar of the court, the names of the several court officers, and the rules which had been adopted for the control of the business in court. For the services in preparing these dockets, as alleged, he presented bills to the respective judges of the circuit and superior courts, which bills were from time to time allowed, and ordered to be paid to him out of the county treasury by an order of court duly entered of record. In pursuance of these orders a warrant was drawn by the county auditor, and Flynn was paid for the services so performed in making and preparing these dockets out of the county treasury. He failed to report such allowances as fees taxed and received by him as clerk, and failed to pay the money so collected by him back into the county treasury, but wholly converted the money allowed by the court for these services to his own use.

The fifth paragraph of the complaint is substantially the same as the fourth. The material difference seemingly is that it proceeds upon the theory that the allowances made by the court to Flynn for his services in preparing the hand docket in question were unlawful; or, in other words, the difference between the fourth and fifth paragraphs is that the latter alleges that Flynn claimed

as such clerk to have performed the services for which he was allowed by the court. As the purpose of appellant under either of these paragraphs is to have the question determined in respect to appellees' liability on the official bond of the clerk for the failure of Flynn to account for and pay over to the county the money allowed and received by him for the services in question, we will consider the fourth and fifth paragraphs together. Conclusions of law are averred in each of these paragraphs and likewise in the first and third paragraphs; hence under the well-settled rule of pleading the demurrers thereto must be regarded as admitting as true only such facts as are well pleaded and not conclusions of law.

The breach assigned upon the bond and relied upon for a recovery under the first paragraph of the complaint is the failure and refusal of Flynn to account for and pay over to the county certain amounts of money arising out of allowances to him by the circuit and superior courts for services in attending by himself or a deputy, during his term of office, the sessions of these respective courts. For each day which he attended these courts by himself or deputy it appears he was allowed \$2. At the close of each term of court he presented a bill for his per diem services to the respective judges thereof, and the same were allowed, and ordered by the court to be paid to him out of the county treasury. In pursuance of these orders, upon warrants issued by the county auditor, he was paid for his per diem services, as hereinbefore stated, out of the county treasury, and has converted this money to his own use.

The contention of counsel for appellees is that the services performed by Flynn in preparing and arranging the hand bar dockets were not required of him as clerk. It is asserted that he performed such services unofficially, by virtue of the employment of the court under its order in his private, and not in his public, capacity. Counsel further contend that the mere fact that he performed the work during the time he was the incumbent of the clerk's office lends no support to the relator's claim in this action to the money in question. On the other hand, counsel for appellant insist that the services in controversy were officially performed by him as clerk of the court, and that the money received therefor from the county must be considered as arising out of fees within the provisions of the fee and salary law of 1895, and should therefore have been reported by him as such, and turned back into the county treasury; and for the conversion of the money it is claimed that this action can be maintained on his official bond. It is insisted that, if the allowances made to him by the court were outside of the statute, then they were illegal, and he violated the law by accepting the money and converting it to his own use, for which he is liable on his bond. Counsel, however, do not point to any stat-

ute which can be said to sustain or substantiate their claim that the preparation of the dockets in controversy was imposed either expressly or impliedly upon Flynn as duties pertaining to his office. In fact, we think that the statutes of this state will be searched in vain in order to discover any provision whereby the duties of preparing the dockets for the printer, as shown, is imposed upon the clerk of the circuit court. It will be observed that the work for which he was allowed the money sought to be recovered was performed, as charged, in preparing and arranging for the printer certain hand bar dockets, which, when printed, were for the use of the court and members of the bar and all other persons having business in court, and was not for keeping or entering causes pending in the courts in any regular bar docket contemplated by statute. The services in question certainly do not fall within the provisions of section 114 of the fee and salary law of 1895 (Acts 1895, p. 336, c. 145), which reads as follows: "For entering the title and nature of each action in full on each docket, court docket, bar docket, numbering same, noting names of attorneys appearing therein, the date of filing and issuance of process, when returnable, sheriff's return on writ, and status of cause as to issue formed or pleadings pending, ten cents." This provision evidently contemplates or applies to the regular bar dockets required to be procured and kept in the office of the clerk by section 7931, Burns' Rev. St. 1901 (section 5845, Horner's Rev. St. 1901), and has no reference whatever to hand dockets made for the temporary convenience of the court and members of the bar, etc. By section 7931, supra, the clerk of each circuit court is required to procure at the expense of the county "all necessary judges', appearance, bar, and execution dockets." This section applies to bar dockets to be kept in the custody of the clerk as permanent records of his office, in like manner as execution dockets and other books of record therein. We may assume that the several courts of Tippecanoe county, under the above section, were supplied at the expense of the county with the bar dockets therein contemplated, and that the clerk of the court, as a part of his official duties, made the entries therein required by law. It is asserted by counsel for appellees that the several circuit and superior courts of this state, outside of any statute, in the due administration of justice, possess the inherent power to order, when necessary for the purpose of expediting and properly conducting the business of the court, the preparation of hand bar dockets, and to employ some one to perform such services, and may allow such person a reasonable compensation for his work, to be paid out of the county treasury as court expenses. That these courts are invested with such power, which they, in their discretion, when reasonably necessary, may

exercise, is settled by the decisions of this court. This power springs from or arises out of the necessity of the particular case or occasion. *Board, etc., v. Stout*, 136 Ind. 53, 35 N. E. 683, 22 L. R. A. 398, and cases cited; *Board, etc., v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402, and cases cited. In 8 Am. & Eng. Ency. of Law (2d Ed.), the authors say: "Every regularly constituted court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction." Possibly it may be said, however, that the power of the court in the employment of persons to perform necessary services is, since the enactment of the statute of 1899 concerning county business, subject to the regulation or restriction provided by section 27 of that act (Act 1899, p. 352, c. 154). As to this question we need not and do not decide. See, however, *Turner v. The Board*, 158 Ind. 166, 63 N. E. 210.

The official bond executed by Flynn and his sureties was conditioned, as provided by law, that he should faithfully discharge the duties of the office of clerk of the circuit court, and should pay over on demand to the person or persons entitled or authorized to receive the same "all moneys that may come into his hands as such circuit court clerk by virtue of his office." The liability of appellees in this case arises *ex contractu*, and they cannot be held liable beyond the letter and terms of their contract. Their obligation under the bond is *strictissimi juris*, and cannot be extended by construction or implication. *Jenkins v. Lemonds*, 29 Ind. 294; *Carey v. The State*, 34 Ind. 105; *Scott v. The State*, 46 Ind. 203; *State v. Flynn*, 157 Ind. 52, 60 N. E. 684; *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157; *Mechem's Pub. Officers*, § 282. When a public officer is sued upon his official bond, the liability of the obligors must, under the law, be brought clearly within that instrument; and the liability of the principal is identically the same as that of his sureties. *Bowers v. Fleming*, 87 Ind. 541; *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157; *State v. Givan*, 45 Ind. 267. In *Carey v. The State*, 34 Ind. 105, which involved the liability of the clerk on his bond for money paid into open court as a tender, this court said: "The clerk is a creature of the state Constitution, but his duties are defined only by statute. His bondsmen are presumed to know the law fixing their liability when they executed the bond; and they have a right to its protection, whether they did or did not in fact know it. There is no law in this state rendering the sureties liable in such a case, there being no law making it the duty of the clerk to receive such money."

The claim is made by counsel for appellant that if the services in preparing the dockets in controversy were not rendered by Flynn in his official capacity, and if the allowances of money made by the court in pay-

ment thereof were independent of any statute, then, and under such circumstances, the allowances were unlawful, and may be recovered by the county in a suit upon the clerk's official bond. This contention is untenable, and cannot be sustained. If the court, during the time Flynn was in office, unlawfully made to him allowances out of the county treasury, which he accepted and converted to his own use, then under the rule affirmed and enforced in *Board, etc., v. Heaston*, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192, the county might, in an action against him personally, recover the money; but in such a case there would be no liability on his official bond. *Bowers v. Fleming*, 87 Ind. 541. Flynn as clerk of the Tippecanoe circuit court and Flynn in his own proper person as an individual are in a legal sense two separate and distinct persons, and it certainly would be absurd to assert that services performed by him individually or in his private capacity were performed by him as clerk of the circuit court. Neither the Tippecanoe circuit court nor the superior court of that county, in the absence of legal authority for so doing, could prescribe or fix the official duties of its clerk; and if either made him an allowance of money out of the public treasury for the performance of unofficial duties—that is to say, services or duties not imposed upon him by any law, express or implied—a liability for money so received and converted to his own use under such circumstances could not be created against his bondsmen.

The bond in suit is conditioned substantially in accordance with section 7923, Burns' Rev. St. 1901 (section 5842, Horner's Rev. St. 1901), and we may again assert that, in order to establish a liability thereon in this action, the money in controversy must be shown to have come into the hands of Flynn as clerk, and that his failure to pay it over to the relator as charged was a breach of the bond. It certainly may be said that preparing the hand dockets in controversy for the printer was not work of such a nature or character as no one but the clerk, as such official, was authorized to perform. The court, under the circumstances, had as much power to have employed any competent attorney at law or other person to do this work as it had to employ Flynn. *Board, etc., v. Mitchell*, 131 Ind. 370, 30 N. E. 409, 15 L. R. A. 520. If immediate necessity had arisen for the repair of the elevator to the courtroom, and the court had employed him to make the necessary repairs, and allowed him therefor a reasonable compensation out of the county treasury, in reason it could not be asserted that he rendered official services in making such repairs, and must account to and pay over the money so received to the county, by reason of the mere fact that at the time he performed the work in repairing the elevator he was the incumbent of the office of clerk.

In the case of Board, etc., v. Mitchell, supra, the board of commissioners of the county of Tippecanoe, under the "Public Necessity Act" of 1879 (section 7853, Burns' Rev. St. 1901; section 5768, Horner's Rev. St. 1901), entered into a contract with Mitchell, while he was clerk of the circuit court of that county, to index, arrange, and preserve by boxing, etc., certain papers on file in his office. In that appeal this court, speaking through Elliott, J., in considering and affirming the right of Mitchell to recover against the county for his services, said: "If the appellee's claim is to be regarded as one for extra services as an officer, the appeal must be sustained. If the claim is for compensation for duties performed by him as clerk, he cannot recover. Or, again, if the order of the board is to be construed as an attempt to add new official duties, and give compensation for their performance, the appellee must fail. The cases supporting this doctrine indicated are numerous, and we strictly adhere to them. [Citing cases]. The appellee's claim is founded upon a contract to perform work required by 'indispensable public necessity.' His whole right grows out of the contract. His claim is not for extra compensation, not for official services, nor for added official duties. The claim is solely and exclusively for compensation due under a contract. On that contract rests his claim. The board might certainly have made such a contract with a private individual, and, if it could do this, it may make such a contract with the clerk. There are, indeed, strong reasons why it is proper to make the contract with the clerk rather than with a stranger. There are instances in which in the strictest sense of the term there is an 'indispensable public necessity' for making such a contract; as, for instance, where there is a removal caused by the destruction of a courthouse, or by the construction of a new one. As the right of the appellee rests entirely upon a special contract made by the board because of the demands of 'an indispensable public necessity,' the case is not within the scope of the doctrine of the cases declaring that extra compensation cannot be paid to county officers. That cases exist in which a valid contract may be made by the board of commissioners with a county officer has been adjudged."

We are of the opinion that the court, if the necessity arose, had the power to employ Flynn unofficially to prepare and arrange the hand dockets in dispute for the use and purposes of the court, and had the authority, therefore, to allow him a reasonable compensation for such services out of the county treasury as court expenses. Consequently the money allowed him under such circumstances would be his own, and he would not be required to turn it over to the county. If the allowances in question were unlawfully made by the court to him, and he received the money either in his own private

capacity or under the mere color of office, then no right to recover by the county would arise on his official bond. On this point, see the authorities hereinbefore cited. Consequently, upon neither view of the case under the facts alleged in either the fourth or fifth paragraph, is the relator entitled to recover, and the demurrers of appellees to each were properly sustained.

Counsel for appellees argue, in effect, that there can be no recovery by the county under the facts alleged in the third paragraph of the complaint. This contention, in our opinion, is wholly untenable. The gravamen of this paragraph it will be observed, is that Flynn, as clerk, collected and received money in payment of certain fees and costs of record in his office. The official services out of which these fees and costs accrued were performed by one Gaddis, as sheriff of the county. It appears that the clerk failed and refused to pay the money so received by him either to Gaddis as sheriff, or to the latter's successor in office, or to the county, upon demand, but wholly converted such money to his own use. They advance the argument (1) that it was the duty of the successor of Gaddis as sheriff to collect and receive the uncollected fees earned by his predecessor; (2) that, in the event the clerk collects them, he is not required by law to pay them over to the county treasury. They therefore contend that the default of the clerk in the premises does not entitle the relator to recover upon his official bond. It is claimed that, if he is liable upon his bond for the money received and converted as shown, that the liability is created in favor of the sheriff, and not in favor of the county. It is insisted that neither section 123 nor section 124 of the fee and salary act of 1895 (Acts 1895, p. 355, c. 145) refers to any fees collected by one officer which belong to another official. Such money, when collected, counsel assert, should, under the above provisions of the salary law, be turned over to the proper officer, and he should report the amount thereof at his quarterly settlement, and pay it into the county treasury for the use of the fund to which it was appropriated under the law. It may be conceded that such method is the orderly one, in the first instance, for turning the money through the hands of the sheriff into the public treasury. But this cannot avail appellees in this action. It is true that it is disclosed that after the expiration of Gaddis' term as sheriff, the clerk collected and received the money in payment of certain fees and costs earned by Gaddis as sheriff, but it further appears that, after the money was so received by the clerk, he failed to pay it over to any person entitled thereto, but wholly converted it to his own use. An examination of some of the statutes of this state enacted prior to the fee and salary law of 1895, which impose certain duties upon the clerk of the circuit court, will be instructive in dealing with the question

here involved. The clerk of the circuit court is required to draw up all judgments rendered and other proceedings of the court, and enter them in the proper order book or record. Sections 588, 1382, Burns' Rev. St. 1901. It is made his further duty to keep in his office the following dockets: A judgment docket, in which, among other things, he must enter a statement of the amount of the judgment and costs, etc. Section 591, Id. An execution docket, in which he must enter all executions, showing the amount of the judgment upon which they were issued, interest, and costs. In this docket he enters at length the return of the sheriff upon the execution. Section 689, Id. The clerk is also required to keep a register of fees or feebooks in which he enters all fees accruing in every case or proceeding in court, or accruing in other matters connected with his office. Section 7941, Id. He is also required to keep a cashbook, and must enter therein the amount of money received on all fees, including his own, as provided by section 7940, Id. All process or writs, etc., issued by the clerk to the sheriff are required to be returned by that officer to the clerk, and the fees taxed and charged by the sheriff for his services therein are indorsed upon such writs or process, and made a part of the return thereof, and are entered of record by the clerk in the proper fee books and other books in his office. In all civil actions a party recovering judgment is entitled to recover his costs laid out and expended, except, etc. Section 599, Id. By section 1907 the accused party in a criminal prosecution, if convicted, is liable for the payment of all costs unless exempt as therein provided.

We have referred to these various provisions of our statutes in order to show that thereby, in connection with the fee and salary law of 1895, a complete system is created by which the clerk is required to enter of record in his office all judgments, fees, costs, dues, and other demands arising out of any action or proceeding in any of the courts of his county of which he is clerk, or growing out of any business or matter connected with the office of clerk of the circuit court. In order to authorize the clerks of the various courts of this state to officially receive money in the payment of all judgments, dues, and demands whatever of record in their respective offices, together with all funds ordered to be paid into court, the Legislature of 1875 enacted a statute whereby such authority is expressly granted, and it is therein declared that such clerks shall be liable on their official bonds for the money so received by them. Acts 1875, p. 37, c. 24, § 7936, Burns' Rev. St. 1901 (section 5850, Horner's Rev. St. 1901). The words "dues and demands," as employed in this statute, are sufficiently broad and comprehensive to include money received by the clerk in payment of all fees and costs of record in his office. *Henry v. The State*, 98 Ind. 381; *Hammann v. Mink*, 99 Ind. 279.

In the latter case this court held that this act embraced costs. A judgment is an entirety, and the costs recovered by the judgment plaintiff are a part thereof, and under the rule affirmed by this court previous to the passage of the fee and salary laws of 1891 and 1895 such costs belonged to the judgment plaintiff on the theory that he had either paid them as they accrued or was liable for the payment thereof. *Martindale v. Tibbetts*, 16 Ind. 200; *Church v. Hay*, 93 Ind. 323; *Keifer v. Summers*, 137 Ind. 106, 35 N. E. 1108, 36 N. E. 894, and cases there cited. The rule, however, affirmed in *Hays v. Boyer*, 59 Ind. 341, *Miller v. The State*, 61 Ind. 503, and *Keifer v. Summers*, supra, whereby it is held that a judgment in favor of a party for costs is as much his own property and under his control as is the judgment recovered for the debt or damages, has been abrogated by the fee and salary laws of 1891 and 1895, at least so far as it concerns costs accruing by reason of the official services performed for litigants by the sheriff and clerk. It is only in the event that such costs have been previously paid by the judgment plaintiff that they can become his when collected. By section 122 of the salary act of 1895 (Laws 1895, p. 352, c. 145) it is provided that sheriffs, on behalf of their respective counties, shall, for the services performed by them, tax and charge the fees provided by law. It is further provided that "the fees and amounts so charged shall be designated 'sheriff's costs,' but they shall in no sense belong to or be the property of the sheriff, but they shall belong to and be the property of the county, except," etc. By virtue of this provision of the statute such costs, arising out of fees for official services performed by the sheriff for the judgment plaintiff, on recovery by the latter from his adversary, neither belong to such officer nor to the judgment plaintiff; but from the time such services are rendered they become and are the property of the county by virtue of this legislative declaration, and when the money is paid in satisfaction of any and all such costs or fees it must be turned over into the county treasury as provided by the fee and salary law of 1895. While executions may be issued upon judgments to enforce the collection thereof, including costs thereon and accruing costs, and while fee bills may issue to enforce the collection of fees, nevertheless a party liable for the payment of any judgment, costs, or fees whatever of record, in the office of clerk of the circuit court, may, without being coerced by an execution or fee bill, pay the money in satisfaction thereof to such clerk. But it is insisted by appellees' counsel that so far as section 7936, supra, may have, prior to the passage of the fee and salary law of 1895, authorized the clerk of the circuit court to receive fees earned by the sheriff and of record in the office of the clerk, it is to that extent repealed by the provisions of the salary law of 1895, which makes it the duty of the

sheriff to collect and report his fees and turn them into the county treasury. Before the passage of the salary act it was the right of the sheriff to collect his fees, and the fact that that act expressly enjoined upon him the duty to collect his fees and pay them into the public treasury does not in any sense change the provisions of section 7936, supra, so as to deprive the clerk of the authority thereunder to receive money in satisfaction of any of the fees of the sheriff which are of record in his office. It is true, as we have previously conceded, that it is the duty of the clerk, when he receives money in payment of sheriff's fees of record in his office to pay it over to the sheriff for the latter to dispose of as the law exacts; but if the clerk omits to discharge this duty, but converts the money to his own use, certainly neither he nor the sureties on his bond are in a position to deny the right of the county in an action on the bond to recover the money, since it is ultimately to be paid to the county in any event. Of course, we do not intend to affirm that it is the duty of the clerk to enforce the collection of the sheriff's fees, but what we do hold is that under the provisions of section 7936 he is authorized to receive money on all fees and costs which are of record in his office.

To recapitulate, the money in controversy, as disclosed by the third paragraph of the complaint, was, under the law, officially received by the clerk. It, as we have seen, belonged to and was the property of the county of Tippecanoe. Under the circumstances, therefore, the failure of the clerk to pay it over to either Gaddis as sheriff, or to the successor of the latter, or to the county, and in converting it to his own use as he did, was a violation of the obligation of his official bond, for which the relator can maintain this action. *Landers v. Fisher*, 2 Ind. App. 64, 28 N. E. 204, and cases cited; *Henry v. The State*, 98 Ind. 381, and cases cited. The decisions in the cases of *Weisenborn v. The People*, 53 Ill. App. 32, and *People v. Barnwell*, 41 Ill. App. 617, are directly in point, and fully support our conclusion. It follows, therefore, that the court erred in sustaining the demurrers to the third paragraph.

The first paragraph of the complaint, under the facts therein alleged, presents the question in respect to the right of the clerk to retain as his own, under the fee and salary law of 1895, the money allowed him by the circuit and superior courts of Tippecanoe county as a per diem for attending their sessions. This paragraph seemingly proceeds upon the theory that the per diem allowances made by the several courts of that county to the clerk for attending their sessions by himself or a deputy must be regarded as fees taxed and charged by the clerk in behalf of the county in accordance with the provisions of the aforesaid act, and that thereunder the money arising out of his services in attending the sessions of the court belonged to the county, and should have been reported by

him, and paid into the county treasury. And this is the contention of counsel for appellant, who insist that the compensation of the clerk of the Tippecanoe circuit court was limited to the annual salary, as provided and fixed by the act in question, and that the clerk thereunder was prohibited from retaining as his own any and all fees and emoluments of his office from whatever source derived. By section 114 of this law (see Acts 1895, p. 342, c. 145), it is provided that "for attending court in person or by deputy, the clerk *shall receive for each day* the court is actually in session two dollars. (Our italics.) The same section again provides that "for each day actually in attendance upon any session of the circuit, superior or criminal courts by himself or deputy to be paid out of the county treasury, two dollars." These two provisions may be properly read together. The section further provides that "all allowances made by the court during any term, except," etc., "shall be at the close of each term included in one general certificate by the clerk, duly attested and sealed, for payment out of the county treasury." In *Seller v. The State*, 160 Ind. 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448, the question therein involved was as to whether the per diem awarded out of the county treasury to the county auditor under the amendment of the tax statute of 1895 for serving as a member of the county board of review, was a fee which that officer, by virtue of the provisions of the fee and salary law of 1895, was required to charge and tax on behalf of the county, and, when collected, to be turned back into the county treasury. It was contended in that appeal, as it is in this, that the auditor in question was confined to the annual salary provided by the fee and salary law, and that all allowances and emoluments of the office must be reported and paid into the county treasury, under section 124 of that statute. In that case, after a full consideration of the fee and salary act of 1895, this court held that the money received by the auditor for his per diem services upon the county board of review could not be regarded as fees which he was required under the law in question to turn back into the county treasury, but, upon the contrary, he was entitled to retain the money as his own. It is not necessary that we repeat all that is said in that appeal, but it is sufficient to assert that the decision in that case in respect to the construction or interpretation of the fee and salary law herein involved in respect to what constitutes a fee or fees within the intent and meaning thereof must rule the determination of the question presented by the first paragraph of the complaint. It is true that it may be said that prior to the decisions in the *Seller Case*, supra, the proposition as to whether the clerk of the circuit court was entitled to hold as his own the per diem allowed him by the court for attending its

sessions under the fee and salary act in question had not been decided either directly or indirectly by this court.

The contention of appellant's counsel that said salary act must be so read as to provide that not only fees earned by the clerk must be accounted for by that official and turned back into the county treasury, but also all emoluments of his office whatsoever received by him, except his annual salary, must be accounted for, reported, and paid over to the county treasury for the purpose of constituting a fund for the payment of his annual salary. Certainly no such words or terms as "fees and all emoluments of office whatever" received by the clerk can, under any reasonable interpretation or construction, be read into the statute. Had the Legislature intended to include emoluments of office other than fees, we may assume that it would have given expression to its will in this respect by the employment of apt and appropriate words and terms. Counsel for appellant, to support their contention in this respect, cite us to *People v. Foster*, 133 Ill. 496, 23 N. E. 615, and *Legler v. Paine*, 147 Ind. 181, 45 N. E. 604. It is true that it was held in the first case cited that a county sheriff under the laws of the state of Illinois was required to account for the per diem allowed him as sheriff for attending the sessions of the court. The statute under consideration in that appeal, however, in respect to the money which the sheriff was required to account for and turn over to the public treasury was in its language, words, and terms of wide scope, and quite different in this respect from the law now under consideration. The statute in controversy in that appeal made it the duty of the sheriff to keep in his office "a full, true and minute account of all fees and emoluments of his office earned by him of every name and character," and of all moneys received on account thereof. Such money he was required to report and pay over to the public treasury. Our Legislature, however, in giving expression to its will in regard to what should be charged and taxed by the clerk and paid by him into the county treasury to constitute a fund for the payment of his salary, was content to employ only the word "fees." In *Legler v. Paine*, supra, the question in issue was the constitutional validity of the salary act of 1895. As to whether the per diem of the clerk of the circuit court was a fee or an allowance which was required to be turned back by him into the county treasury was not therein involved, and what was said by the writer of the opinion in that case which can be said to have any bearing on the question as now presented is clearly obiter. As held and shown in the *Seller Case*, supra, the words "fee or fees," at and prior to the passage of the fee and salary act of 1895, had been, by the decisions of this court, given a well-defined meaning.

By the canons of law governing the con-

struction of statutes all parts thereof are required to be construed together, and harmonized, if possible, and no such interpretation or construction is to be placed upon an act of the Legislature as will lead to inconsistency or absurdity. The authorities affirm that the words and terms employed by the lawmakers in the enactment of a statute should be first considered in their literal and ordinary signification. As was said in *Seller v. The State*, supra: "Words and phrases employed in the law must be considered in their literal and ordinary signification, and, where technical words and phrases are used which have a peculiar and appropriate meaning, these must be understood according to their technical import, unless in so doing the intent of the Legislature will be defeated"—citing many authorities. In the case of *Board of Com'rs v. Reissner*, 58 Ind. 260, it was held that "fuel furnished by the sheriff for prisoners forms no part of the expense of boarding of prisoners, and is not compensated by the allowance per diem for such boarding, nor by the sheriff's fees prescribed by law." The court in that case, in further referring to the fee and salary act of 1875, said: "The latter act makes no provisions for paying the sheriff for fuel furnished by him for the jail, but fixes his per diem compensation for boarding prisoners."

* * * Section 16 (Laws 1875, Sp. Sess. p. 38, c. 8), in relation to sheriffs, provides that 'the sheriffs of the several counties of this state shall tax and charge the following fees and none other, to wit,' etc. But the claim of the sheriff for fuel furnished for the jail is not a fee, and is not embraced in the above provision." In *Feagin v. The Comptroller*, 42 Ala. 518, the statute there in controversy prescribed the fees and allowances to which sheriffs were entitled in criminal cases, among which it was provided that he should be allowed for boarding white prisoners in jail 50 cents for each day, and for boarding colored prisoners 40 cents per day. The court held in that appeal that the per diem allowed to the sheriff for boarding such prisoners was not a fee. In *Alexander v. Harrison*, 2 Ind. App. 47, 28 N. E. 119, Judge Crumpacker, speaking for the court, said: "The term 'fees' and 'costs' are often used interchangeably, as having the same application; but, accurately speaking, the term 'fees' is applicable to the items chargeable by law as between the officer or witness and the party whom he serves, while the term 'costs' has reference to the expenses of the litigation as between litigants. *Musser v. Good*, 11 Serg. & R. 247." This latter case and *Cowdin v. Huff*, 10 Ind. 85, from which we quoted in the *Seller Case*, supra, serve to disclose the meaning accorded to the term "fees" by the higher courts of this state prior to the passage of the fee and salary law in controversy. That the clerk's per diem for attending court cannot be considered a fee within the acceptance and meaning of that

term when applied to county officers, see *Jefferson County v. Johnson*, 64 Ill. 149, and *Knox County v. Christianer*, 68 Ill. 455, in each of which it is held that a per diem allowance by statute to county superintendents of schools could not be regarded as fees.

It is claimed by counsel for appellant that the Legislature, by providing salaries for the officers, intended to limit them to their salaries, and thereby remove all temptations which formerly existed for such officials to acquire fees by constructive services. But this argument is not of force in regard to the question presented for the reason that the per diem of the clerk was not, under former laws, open to this mischief or evil. Under previous laws, in like manner as under the present, this compensation allowed to the clerk was not a matter which he on his own motion was authorized to charge and tax, but the court formerly, as it does under the present law, determined the number of days actually served by the officer in attending the court, and allowed him accordingly for each day's services what the law prescribed. Therefore under the former laws there was not, and is not under the law in dispute, any room or opportunity to tax and charge for constructive services in such cases. The fee and salary law of 1891 was wholly silent as to the clerk's per diem for attending the sessions of the court. The introductory part of section 114 of the act in controversy provides that "the clerks of the circuit," etc., "courts of this state on behalf of the county in which said courts are held, shall tax and charge upon proper books to be kept in their offices for that purpose, the fees and amounts provided by law, which amounts so taxed shall be designated as 'clerk's costs,' but they shall in no sense belong to and be the property of the clerks, but shall belong to and be the property of the county. The clerk shall tax and charge: For filing each paper, except, * * * five cents." Here is further enumerated other items of specific services for which the fees as prescribed are to be taxed and charged. It is contended, among other things, by counsel for appellant, that, inasmuch as the provision fixing the clerk's per diem is a part of this section, necessarily therefore it is a fee which, under the introductory provision, must be taxed and charged by the clerk on behalf of the county as "clerk's costs" to be turned back into the county treasury. It will be observed that the provision of the section prescribing the per diem does not provide that the clerk shall tax and charge \$2 for each day actually in attendance upon the court by himself or deputy, but it declares that he "shall receive" this compensation, which is to be allowed by the court out of the county treasury as part of the court expenses. It is not taxed and charged as "clerk's costs," but is allowed in like manner as are other court expenses. The particular provision provides the compensation to be allowed for each day, but

the number of days actually served by the clerk is judicially determined, and the certified order or judgment of the court in the matter is the authority by which the county auditor draws his warrant on the county treasury for the payment of the amount allowed. It is only the amount of fees which the clerk is to tax and charge as "clerk's costs" upon proper books as the property of the county, and not all allowances from whatever source derived, as we shall hereinafter more fully show. Counsel insist that the phrase "fees and amounts" must be construed so as to embrace all allowances including the clerk's per diem for attending court. This contention is untenable, and would contravene the plain intent of the statute. The word "amounts," which is in conjunction or connected with "fees," is limited to fees. The face of the statute discloses that some of the fees enumerated which are to be taxed and charged by the clerk are specific, and the amount thereof does not depend upon a calculation, while the amount of others is to be ascertained and determined by a calculation. To illustrate: For making up a complete record, etc., 8 cents per 100 words. Other instances may be noted where the amount of the fees is measured by the number of words, as for making up records, issuing alternative or peremptory writs of mandate, 10 cents per 100 words. Other illustrations might be given, but these will serve to show what was intended by the phrase "fees and amounts." This phrase was not first used in the act of 1895, but it will be found that it was employed in every fee and salary law enacted in this state during the past 40 years and over.

Sections 114 and 122, the latter of which prescribes the fees to be taxed and charged by the sheriff, are each somewhat confused or inappropriately drafted, and embrace not only fees, but also all allowances to said officials as a compensation for expenses incurred in the performance of public services. To illustrate our meaning: By a provision in section 122, the sheriff, who is ex officio the jailer of the county, is allowed a per diem of 40 cents for boarding prisoners, and again it is provided that in counties where there are no sheriff's residence or jail he is to be allowed a reasonable amount for house rent and fuel. Neither of these allowances, as we have shown under the decisions of this court, can be regarded as fees. Again, by a provision of section 114 the clerk is to be allowed "for going to and returning from the office of the Governor of the state to receive state ballots, for each mile necessarily traveled, five cents." To hold that these respective allowances must be taxed and charged as fees on behalf of the county and paid into the public treasury because they are contained in sections of the law along with what may be properly denominated fees would, in effect, be imputing to the Legislature the inconsistency of requiring the

clerks of the several counties to go to the office of the Governor and procure the official ballots at their own expense. This certainly would impose upon clerks of counties remote from the capital city the payment out of their own pockets of at least an appreciable sum of money, and to this extent their salaries would thereby be reduced. By force of the same construction the sheriff would be compelled to tax and charge as a fee his per diem for boarding prisoners in his custody, and return the money received therefor to the county treasury. These compensatory allowances arise out of or attach to the office of clerk or sheriff, as the case may be. If all of the provisions of the act in question are to be construed as "*ita lex scripta est*," and are not open to a construction or interpretation, as counsel for appellant insist, then it can be asserted with as much reason that the allowances to the clerk and sheriff above mentioned must be regarded as compensatory fees to be charged and taxed as such and paid back by the officers to the county as it is to claim that the clerk's per diem which the law apparently allows to reimburse him for the expenses of deputies must be returned to the county. We may at least assume that the Legislature intended to be just. The illustrations which we have given will suffice to show that, if the construction for which appellant contends, that the clerk under the law must look wholly to his salary to compensate him for all services performed and for all duties discharged as required by law, was adopted, it certainly would lead to inconsistency and absurdity, and such a construction the authorities affirm ought not to receive the sanction of the court. The clerk, under the law of this state, is required to be at his office by himself or deputy on each business day, and to keep it open between the hours prescribed for the transaction of business. He is not only required to be at his office, but the law exacts of him the further duty of attending the sessions of the circuit, superior, and criminal courts of his county. In some counties, where two or more of these courts exist, all may be in session at the same time. It cannot be supposed that the Legislature assumed that the clerk of the circuit court would be an ubiquitous person; hence that body, as we may presume, knew that these exactions of the law would necessarily compel him to incur the expense of employing and paying out of his own pocket one or more deputies in order that the requirements of the law might be fulfilled. For many years before the passage of the act of 1895 the clerk of the circuit court, under the law, was allowed a per diem for attending the sessions of the courts mentioned, and as the Legislature under the law in question has prohibited him from taxing, charging, and receiving as his own any fees, and does not allow him a deputy, therefore, under the circumstances, it is not unreasonable to presume that it intended the per diem

compensation to partly aid in paying the expenses to which he was necessarily subjected by the employment of a deputy or deputies.

Counsel urge that, if the Legislature had intended that the per diem which it declared the clerk should receive was not to be taxed and charged as a fee to be returned to the county treasury, then it certainly would have expressed its will in this respect in apt and positive language. But experience justifies the assertion that the Legislature does not always in the enactment of a statute give a positive expression of its will in regard to every particular matter or matters therein embraced. This is manifest, otherwise the courts would not be so frequently invoked to construe or interpret the intent or meaning of our laws.

The argument is further advanced that, if the clerk be permitted to retain the money arising out of his per diem services in attending court, then his salary, by this method, will be increased. But this claim is no more reasonable or true than would be the contention that the salary of the judge of the court was in fact increased by a law allowing him his necessary expenses incurred in travelling over his circuit for the purpose of holding court. The clerk of the circuit court, as we have shown, is allowed no deputy, and he is required to be at his office each day, and attend all of the courts of his county when in session. These duties cannot in reason be performed without incurring the expense of deputy hire. Especially is this true in many of the more populous counties of the state. If his per diem for attending court must be returned to the county, then his salary in effect is reduced to the amount at least which he is compelled to pay to a deputy to assist in the discharge of public business. It would no more increase his salary than it does to allow him his mileage to compensate him for the expense incurred in going to and returning from the Governor's office to receive official ballots. Such compensatory allowances do not serve to increase the officer's salary, but simply serve to prevent it from being expended in part by the official in the performance of public business.

Of course, it must be conceded, and cannot be successfully denied, that the clerk, under the requirements of the act of 1895, must charge and tax, on behalf of the county, and account to the latter as therein provided, for all fees which arise out of official services performed by him for any person or for the county or any other municipality. The mere fact that the fees which the law exacts shall be charged and taxed by the officer are to be paid by the county does not exempt him from reporting them at his quarterly settlement if collected, and returning or paying the money into the county treasury as provided by section 124 (Laws 1895, p. 355, c. 145) of the statute in controversy. What shall be taxed by the clerks of the circuit court under section 114 (Laws 1895, p. 334, c.

145) as clerk's costs? The section furnishes the answer "fees." What must be reported by the clerk at his quarterly settlement with the county auditor and paid into the treasury as provided by section 124? In plain language it is declared to be "the amount of fees collected during the preceding three months." The condition upon which the amount of the clerk's quarterly salary can be paid to him in full as provided by section 126 (Laws 1895, p. 356, c. 145) is that he has turned into the county treasury out of the fees collected an amount sufficient for that purpose. If, as provided by section 127 (Laws 1895, p. 356, c. 145), any portion of the clerk's salary is due and unpaid at the close of his official term, and he has not collected an amount of fees sufficient to pay it, then the balance is subsequently to be paid out of the fees, when collected, which were earned by him during his term of office. By section 128 (Laws 1895, p. 356, c. 145) it is further provided that, if any officer named in the act shall tax any fee or shall charge, tax, or collect any other fee than is specified by law, he shall be fined not less than \$25, to which may be added imprisonment in the county jail. An examination of the act in question fully reveals the fact that the Legislature was intending to deal with the question of fees, and that the amount of the latter taxed, charged, and collected by the officer was to constitute a fund out of which his annual salary was to be paid; and it is fees, and fees alone, which he is prohibited from taxing and receiving for his own use. This intent of the law is clearly emphasized by section 136 (Laws 1895, p. 358, c. 145), whereby it is expressly declared that "nothing herein contained shall be so construed in any event as to allow any of the officers * * * the salaries herein provided and also the fees required to be taxed, except as otherwise specified." That the Legislature intended to accord to the term "fee and fees" the meaning which previously had been well defined by the decisions of our higher courts cannot in reason be controverted. If any doubts could be entertained in regard to the construction of the act of 1895 and the interpretation of the term "fees" as therein used, as given in the case of *Seller v. The State*, supra, certainly they would be removed by the fact that some two months after this decision the Legislature, with full knowledge, as we may assume, of the construction or interpretation which this court placed upon the act in controversy, passed a supplemental statute wherein the term "fees" is again used to indicate what is required to be charged and taxed and paid into the county treasury by the clerk and sheriff, respectively. Acts 1903, p. 140, c. 67. This action of the legislative department is certainly, under the circumstances, significant.

Without further consideration of the question involved, we are constrained to conclude that the per diem allowances received

by the clerk in this case for attending the sessions of the circuit and superior courts of his county as set out in the first paragraph are, under the law in controversy, awarded to him for his own use, and therefore the relator is not entitled to recover upon this paragraph. The demurrers thereto were properly sustained.

For the error of the court in sustaining the demurrers to the third paragraph of the complaint the judgment below is reversed, and the cause is remanded.

DOWLING, J., concurs in the result on the third paragraph of the complaint. MONKS, J., concurs in the result as to the third, fourth, and fifth paragraphs of the complaint, and dissents as to the first.

(23 Ind. App. 18)

WESTERVELT et al. v. NATIONAL MFG. CO.*

(Appellate Court of Indiana, Division No. 1.
Nov. 24, 1903.)

DISCLOSURE OF SECRET INVENTION—INJUNCTION—VIOLATION—DAMAGES—ADMISSIBILITY OF EVIDENCE—FORMATION OF CORPORATION—EFFECT—SUPPRESSION OF EVIDENCE—PRESUMPTION—TRIAL—OFFER TO PROVE.

1. Where a party suppresses evidence in his control, the presumption arises that its production would be against his interest.

2. In an action for damages for the violation of an injunction restraining defendant's manufacture and use of a machine invented for plaintiff by his employé, where evidence has been introduced to show that plaintiff's business had suffered by diminished sales, testimony is admissible to show the cost of manufacturing the article the machine was intended to make.

3. Available error cannot be predicated upon an offer to prove which is not responsive to the rejected question.

4. One who has been enjoined from manufacturing and using a machine invented by another's employé cannot escape the effect of the injunction by organizing a corporation, which he controls, for the purpose of making and using the machine.

Appeal from Circuit Court, Elkhart County; Joseph D. Ferrall, Judge.

Action by the National Manufacturing Company against Edmund C. Westervelt and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Lucius Hubbard, Anderson, Du Shane & Crabill, and Bond, Adams, Pickard & Jackson, for appellants. Van Fleet & Van Fleet, for appellee.

HENLEY, C. J. About three years prior to the commencement of this action, the National Paper & Supply Company, a corporation of Elkhart, Ind., commenced an action in the Elkhart circuit court, in which action the appellants in this appeal were joined, amongst others, as defendants. It was charged in the complaint that the appellant John Taggart had been employed by the plaintiff to invent and devise a machine which

*1. See Evidence, vol. 20, Cent. Dig. § 92.

*Rehearing denied.

would make paper bags, and that under such employment the said Taggart had produced such a machine for said company. It was further charged in the complaint of said company that the construction of this machine was a trade secret, and that Taggart had wrongfully divulged such secret to the defendants, amongst whom were the appellants Edmund C. and Herbert E. Westervelt, and that the defendants were wrongfully engaged in making a machine like that made for the plaintiff's company. Injunctive relief was demanded. Upon the trial of the cause the court rendered judgment, which, omitting the parts immaterial here, was as follows:

"It is therefore ordered, adjudged, and decreed by the court that the defendants, Edmund C. Westervelt, Herbert E. Westervelt, John Taggart, Henry F. Young, Harry I. Lahr, Ferdinand A. Buescher, the Buescher Manufacturing Company, and Melvin Huston, their agents, servants, employés and attorneys, be, severally and jointly, perpetually restrained and enjoined from proceeding to make or construct a machine which will fold and paste one end of a paper tube so as to form a bag by means of any devices or inventions substantially as made or devised by the defendant John Taggart, and now used by the plaintiff in a machine now in the plaintiff's factory in Elkhart, Indiana. The said defendants, Edmund C. Westervelt, Herbert E. Westervelt, John Taggart, Henry F. Young, Harry I. Lahr, Ferdinand A. Buescher, the Buescher Manufacturing Company, and Melvin Huston, their agents, servants, employés and attorneys, are also, severally and jointly, perpetually restrained and enjoined from divulging to any other person the principle or principles upon which said machine acts or works, in so far as those principles were the invention or discovery of said John Taggart.

"It is further adjudged and decreed by the court that the defendants, Edmund C. Westervelt, Herbert E. Westervelt, John Taggart, Henry F. Young, Harry I. Lahr, Ferdinand A. Buescher, the Buescher Manufacturing Company, and Melvin Huston, do immediately deliver up to the sheriff of this county all sketches, draftings, drawings, blue prints and patterns, and all portions or parts thereof, of the plaintiff's said machine; and the sheriff is hereby ordered to bring all of said articles and things, except the frames, immediately into court for further orders.

"It is also considered and adjudged by the court that the plaintiff, the National Paper & Supply Company, do have and recover of and from the defendants, Edmund C. Westervelt, Herbert E. Westervelt, John Taggart, Henry F. Young, Harry I. Lahr, Ferdinand A. Buescher, the Buescher Manufacturing Company, and Melvin Huston, the sum of one dollar damages, and all costs and accruing costs, and that it have execution therefor."

Upon appeal to the Supreme Court, this judgment was in all things affirmed. *Westervelt v. National Paper & Supply Co.*, 154 Ind. 673, 57 N. E. 552.

Afterward the National Paper & Supply Company sold all rights which it had acquired under this judgment to the appellee, the National Manufacturing Company. Afterward, and on the 19th day of October, 1900, appellee commenced an action, which resulted in the judgment herein appealed from, in which action the appellants and the Atlas Paper Bag Company were made defendants. In appellee's complaint, after averring facts covering the rendition of the judgment in favor of the National Paper & Supply Company, its transfer to appellee, and its affirmation by the Supreme Court, it is further averred that appellants Edmund C. and Herbert E. Westervelt and John Taggart, shortly after the rendition of the judgment enjoining them from so doing, built, or caused to be built, a machine which they caused to be sold to the Elsas Paper Company, of New York City; that they built, or caused to be built, four other machines which they used or procured to be used by the Prairie State Paper Company of Taylorville, Ill.; that the appellants the two Westervelts were interested in the Prairie State Paper Company and in the Atlas Paper Bag Company; that the Prairie State Paper Company made large quantities of paper bags upon said four machines, which bags were by procurement of the said Westervelts sold by said Atlas Paper Bag Company, the said company knowing that the bags were being made in violation of the before-mentioned judgment. It is also averred that each of said machines was capable of making, and appellee believes that each machine did make and is still making, an average of two tons, in weight, of paper bags per day. The complaint concludes as follows: "That the profits on said bags were more than \$10 per ton, all of which profits this petitioner would have realized if said defendants had not made said bags; that the profits on said machines were \$1,000 each, all of which profits the said defendants realized; that this petitioner could have made and sold all the bags so made and sold by the defendants and realized a profit therefrom of \$10 or more for each 25,000 bags sold. This petitioner further says that each of the machines so made by the defendants would and did and does fold and paste one end of a paper tube so as to form a bag, by means of devices and inventions substantially as made and devised by the defendant John Taggart, and used, at the time the said action was commenced and judgment was rendered, by the National Paper & Supply Company aforesaid in a machine then in its factory at Elkhart, Ind. The premises considered, the petitioner prays that the defendants be punished by a fine of \$50,000, to be paid to this petitioner to compensate it for losses sustained, and that the defendants

Edmund C. Westervelt, Herbert E. Westervelt, and John Taggart be imprisoned until said fine shall be paid, and that the court will order the sheriff to seize and sell all the property of the defendant the Atlas Paper Bag Company to make the said fine. And this petitioner prays for all other and proper relief."

Each appellant, except the Atlas Paper Bag Company, which company was never served with notice or appeared to the action in any manner, filed separate answers. All the pleadings were verified, and no question as to their sufficiency is raised by this appeal. The questions presented by appellants arise under the motions for a new trial, and relate solely to the sufficiency of the evidence to sustain the finding and judgment, and the alleged error of the court in admitting and excluding certain evidence upon the trial.

In appellants' brief, counsel contend that the judgment of the trial court should be reversed because: "First. That there is no evidence to show that the machine examined in New York by Brown and Collins was the same machine which we have designated as the 'Elsas Machine,' and therefore there is no evidence showing that the appellants, or either of them, in any way violated the injunction of the Elkhart circuit court. Second. That even if the appellants, or either of them, have violated their injunction, they are liable to the appellee only for the amount of profit actually realized through the violation of the injunction. Third. That there is no evidence whatever that the appellants, or either of them, realized any profit through the making of the Elsas or Atlas machines. Fourth. That there is no evidence that the appellants, or either of them, realized any profit through the use of the two Atlas machines. Fifth. That there is no evidence showing that the appellee has been damaged either by the making and selling of the Elsas machine, or by the making and using of the Atlas machines, by appellants, or that appellee would have made profits if appellants had not made machines or bags. Sixth. That the court below erred in allowing the appellee to prove, by the testimony of Brown, what profit it had realized by the making of paper bag machines or by the use of paper bag machinery. Seventh. That therefore, for the reason aforesaid, even if it should be held that the appellants had violated the injunction, they are only liable for nominal damages, and the judgment rendered was excessive in amount. Eighth. That the court below erred in rejecting the evidence of E. C. Westervelt and Mr. Taggart, tending to show that the machines made by the Atlas Company contained no invention or device made or devised by John Taggart. Ninth. That the court below erred in its construction of the original decree, contempt of which was alleged, by refusing to permit the appellants to prove that the machines made, sold, and used by them did not contain any

invention of John Taggart. Tenth. That no judgment should have been rendered against Edmund C. Westervelt."

This action must be regarded as a civil action in equity to compel appellants to pay to appellee whatever damage it has sustained, either in loss of business to appellee or profits made by appellants, by reason of the violation of the injunction. Appellee claims no rights under the patent laws of the United States, but bases its claim wholly upon the rights growing out of the injunction. It is the law, as settled and decided in *Westervelt v. National Paper Co.*, etc., supra, and cases therein cited, that injunction will lie to restrain former confidential employes, and others engaged with them, from divulging or using trade secrets or inventions which were devised or invented by such employes in the course of their employment.

We think there is evidence which justified the trial court in finding that appellants made and sold the machine spoken of in the argument and evidence as the "Elsas Machine," and that in so doing they violated the injunction. It is admitted that appellants made and sold the Elsas Paper Company a machine to be used in making satchel bottom paper bags. Two witnesses, Brown and Collins, testified that they visited the factory of the Elsas Paper Company in New York and found in use there, for the purpose of making satchel bottom paper bags, a machine exactly the counterpart of appellee's machine. Appellants testified that the machine sold to the Elsas Paper Company was not like the one devised by Taggart for the National Paper & Supply Company, which machine and the secret of its construction became appellee's property. Appellants testified that the machine sold to the Elsas Paper Company did not contain, when shipped by them, an intervening gear. Witnesses Brown and Collins testified that the Elsas machine examined by them contained, and was operated by means of, an intervening gear. The complaint upon which the injunction was granted, and the opinion of the Supreme Court sustaining the judgment of the trial court therein, were admitted in evidence. In the opinion of the Supreme Court we find the following: "It is not alleged that appellee's machine for pasting the bottoms of said paper bags was like those used by other parties; on the contrary, it is expressly averred that 'there are no other machines like it'; nor does the mere fact that appellee's machine performed the same work as the machines referred to raise any presumption that it was the same. It appears from the complaint that said machines cannot be constructed except by the use of information furnished by Taggart in violation of his duty and agreement with appellee. As we have shown, the divulgence and use of such information can be enjoined."

The facts proven certainly raised a strong presumption that the machine described by

Brown and Collins was the one made under the supervision of Taggart and sold by appellants to the Elsas Paper Company. The evidence also shows that appellants had in their possession blue prints from which the Elsas machine was made. These blue prints were not introduced in evidence. Their introduction in evidence would have been conclusive proof upon the question of whether or not the Elsas machine, as constructed and sold by appellants, contained substantially the inventions and devices made by Taggart which were within the operation of the injunction. It is a general rule that, where a party suppresses evidence, the presumption may be indulged that its production would be against the interest of the party suppressing it. *City of Warsaw v. Fisher*, 24 Ind. App. 46, 55 N. E. 42, and cases there cited. And although the court in the last-mentioned case, in the opinion of the writer, carried the doctrine beyond the true meaning of the rule, nevertheless both the majority and minority opinions agree upon the rule of law as here stated and applied. If the evidence relating to the intervening gear is not considered, there is sufficient evidence remaining to show that the Elsas machine contained more than 20 other points covered by the injunction, and was substantially the same machine that appellants had been enjoined from making and using. There is also evidence to the effect that a machine like the Elsas machine could have been constructed for \$500, and that it was sold by appellants for \$1,700. The evidence also shows that, under the direction of Mr. Taggart, the Medart Patent Pulley Company of St. Louis, Mo., built in the year 1897 at least three machines for making paper bags; that one of these was sold to the Elsas Paper Company; that all the machines were the same in construction, except that the Elsas Machine was arranged to make mail bags. These machines were all made for the Atlas Paper Bag Company, of Taylorville, Ill. The Atlas Paper Bag Company was a corporation, with a capital stock of \$5,000, organized for the purpose of making paper bags. Of the capital stock the appellant Edmund C. Westervelt was the owner of \$4,100, and the remaining \$900 was owned by appellant Herbert E. Westervelt, C. L. Hammond, and Frank Brewer. Two of these paper bag machines were used by the Atlas Company from about the 1st of September, 1897, until May 1, 1900. Appellant Herbert E. Westervelt, in May, 1900, having prior to that time purchased the stock held by his brother Edmund, and also the stock owned by Brewer and Hammond, moved the machines to South Bend, and continued to use them up to the time of the trial of the cause. There was evidence produced at the trial, covering all of this time, which tended to prove the number of tons of paper bags made upon these machines, the cost of manufacturing per ton, and the selling price. The profits of appellants, fairly deducible from

this evidence, was in excess of the judgment rendered. There was also evidence to the effect that appellants had damaged appellee by diminishing appellee's sales, and lessening the number of its customers, and diverting the business from appellee to appellants. Under the long-established rule that this court will not weigh the evidence—and the appellants' assignment of error does not require us to do so—we cannot disturb the verdict.

Objection is made that the witness Brown was permitted to testify concerning the cost of manufacturing paper bags. Evidence had been introduced to prove that appellee's business had suffered by diminished sales. This being true, the evidence objected to by appellants was undoubtedly competent for the purpose of showing that appellee had been damaged by the loss of customers and business in the sale of an article which was being manufactured and sold at a profit. The questions raised upon the evidence at the trial which are properly brought before the court by counsel for appellants are without merit. Available error cannot be predicated upon an offer to prove that is not responsive to the rejected question.

Finally, it is contended that no judgment should have been rendered against Edmund C. Westervelt. In *Jewelers' Association v. Rothschild* (Sup.) 39 N. Y. Supp. 700, it was held that where certain persons, defendants, had been enjoined from the publication of a directory because the directory contained information taken from plaintiff's directory, the fact that they had transferred their business to a corporation in which they were controlling stockholders was no defense to an action against them for a violation of the injunction. And in the case under consideration it seems to us that the injunction would fall far short of giving the relief and protection intended if the persons against whom it was directed could, by becoming stockholders in a corporation which they control, use the corporation as a shield to protect them from the consequences growing out of its violation of the injunction.

We find no error. Judgment affirmed.

(32 Ind. App. 28)

POND v. WOOD et al.

(Appellate Court of Indiana, Division No. 1.
Nov. 24, 1903.)

REMARRIAGE OF WIDOW—CONVEYANCE OF LAND—RATIFICATION BY CHILDREN OF FORMER MARRIAGE.

1. Burns' Rev. St. 1901, § 2641, provides that if a widow shall remarry, holding real estate in virtue of a previous marriage, and there be a child alive by such previous marriage, the widow may not, during the subsequent marriage, with or without the husband's assent, alienate such real estate, and if, during such subsequent marriage, the widow should die, the real estate shall go to the children by the marriage in virtue of which property came to her. *Held*, that such children by a former marriage had no ownership of or interest in, and attempted to be conveyed by their mother to her then

husband in exchange for other realty, and therefore the children's acceptance, on their mother's death and their majority, of the property received from her husband, and sale thereof, and appropriation of the proceeds, did not constitute a ratification of the transaction, precluding them from recovering their mother's property from the husband.

Appeal from Circuit Court, Wells County; E. C. Vaughn, Judge.

Action by Kelley B. Wood and others against John F. Pond. Judgment for plaintiffs, and defendant appeals. Affirmed.

C. E. Sturgis and Mock & Sons, for appellant. W. H. Eichhorn and Burns & Emshwiller, for appellees.

HENLEY, C. J. Appellees commenced this action by a complaint in two paragraphs, making the appellant and one Thompson Gilbert defendants thereto. The first paragraph was one to quiet title to real estate. The second paragraph asked for a partition of the real estate, alleging that appellees were each the owner in fee simple of an undivided one-fourth thereof, and that Thompson Gilbert, who was made a defendant, was the owner of an undivided one-fourth thereof. It was alleged that the appellant, John F. Pond, was claiming an interest adverse to the interests of appellees, and that his claim was without right and unfounded, and a cloud upon their title. The appellant and the appellees claim title to the real estate in controversy through Susan A. Pond, wife of the appellant. The said Susan A. Pond, now deceased, was formerly the wife of one Gilbert. The appellees and Thompson Gilbert were the children of Susan A. Pond by her marriage with the said Gilbert, and it was through the marriage to said Gilbert that she became the owner of the real estate in controversy; it being the one-third of said Gilbert's estate given her by the law of descent in this state. Afterward, and during her second marriage to the appellant herein, the said Susan conveyed the real estate in controversy to her said second husband in the following manner: She and her husband joined in a conveyance to one George H. Seabold, who immediately conveyed the real estate to appellant. After the conveyance of the real estate to appellant, the said Susan A. Pond died, leaving no children surviving her by her second marriage. At the time of her death she was the owner in fee simple of certain other real estate, which appellant had conveyed to her at the same time that he received the deed for the real estate in controversy. The appellees, as the children of the said Susan, took, under the laws of descent, all of the real estate of which she died seised, because of an antenuptial contract made between appellant and his said wife, Susan, in which it was agreed that neither party should receive or inherit any part of the estate of the other. The defendant Thompson Gilbert was defaulted. Ap-

pellant answered the complaint in two paragraphs; the first being an affirmative answer, alleging certain facts on which he based his claim to ownership of the fee simple title to the real estate in controversy. The second paragraph was a general denial. Afterward the appellant filed a third paragraph of answer, alleging the facts fully upon which he based his claim to title. Appellant also filed a cross-complaint against the appellees and Thompson Gilbert, alleging, amongst other facts, that he was the owner of the one-fourth interest of Thompson Gilbert by purchase and deed of conveyance from him. Appellees demurred separately to appellant's first and third paragraphs of answer, and also to appellant's cross-complaint. Thompson Gilbert appeared to the cross-complaint, and filed a disclaimer. Appellant thereupon withdrew his answer in general denial. The separate demurrer of appellees to the first and third paragraphs of appellant's answer and to his cross-complaint were sustained by the court. The appellant refusing to plead further, the court rendered judgment in favor of appellees, as prayed in their complaint.

The only question presented by this appeal arises out of the ruling of the trial court in sustaining appellees' demurrer to appellant's third paragraph of answer. All the other alleged errors are expressly waived by appellant's counsel. The averments of the third paragraph of answer are substantially as follows: That appellant, John F. Pond, and one Susan A. Pond, now deceased, were on the 5th day of August, 1887, husband and wife; that at said date the said Susan was the mother of appellees and Thompson Gilbert by virtue of a former marriage; that on said date the said Susan, through and by virtue of said former marriage, was the owner of certain real estate in Wells county, Ind., and which is the real estate described in appellees' complaint. It is further averred that on said date the appellant was the owner of certain real estate in Wells county, Ind., which is particularly described in the answer, and which it is averred was at said time of the value of \$800, and that the land which was owned by the said Susan by virtue of her said first marriage was at that date of the value of \$500; that on the 5th day of August aforesaid this appellant and the said Susan exchanged or traded land in the following manner: Appellant conveyed his land to one George H. Seabold, the said Susan joining in said conveyance, and the said Susan conveyed her land to the said Seabold, the appellant joining in the conveyance, and that thereupon Seabold conveyed to his said wife Susan the tract of land so conveyed to him by appellant, and conveyed to appellant the tract of land so conveyed to him by the said Susan; that the tract of land which appellant received contained 13½ acres of land, and the tract which the said Susan received contained 40 acres of land, and that the conveyance to appellant of the 13½ acres was all

the consideration appellant received for the 40-acre tract of land so conveyed to her as aforesaid; that prior to appellant's marriage to the said Susan they entered into an antenuptial contract in writing, wherein they mutually agreed that each party thereto should not receive or inherit any part of the estate of the other; that on the 8th day of July, 1901, the said Susan died intestate, the owner of the real estate conveyed to her by said appellant as aforesaid, leaving appellees and the said Thompson Gilbert, her children by her first marriage, surviving her, all the said children being over the age of 21 years at the time of her death; that at the time of the said Susan's death the tract of land containing the 13½ acres was not worth more than \$500, and that the 40-acre tract was worth more than \$1,000; that, immediately after the conveyance to the appellant of the 13½ acres, he entered into possession and has ever since remained in possession thereof, and has made valuable and lasting improvements thereon; that immediately after the death of their said mother the appellees and Thompson Gilbert entered into possession of the 40-acre tract of land, claiming the same as their own by virtue of inheritance from their mother, with full knowledge of the facts as herein set out, and with full knowledge that the 13½-acre tract of land was the only consideration which appellant had received for said 40-acre tract of land, and that said 40-acre tract was the full consideration which their mother had received for the 13½-acre tract of land conveyed to appellant; that on the 4th day of December, 1901, appellees, with full knowledge of all the foregoing facts, sold and conveyed their three-fourths interest in the said 40-acre tract to the defendant Gilbert for the sum of \$750, which sum was appropriated to their own use, thereby ratifying the sale and conveyance of the said 13½-acre tract; that on the 2d day of December, 1901, the defendant Thompson Gilbert agreed with appellees that he would purchase their three-fourths interest in the said 40 acres if the appellant would execute to him his quitclaim deed for said tract of land, and that appellant on said 2d day of December did execute his quitclaim deed to said 40-acre tract, whereupon the said Thompson Gilbert purchased appellees' three-fourths interest in said land as aforesaid, the conveyance thereof being made on the 4th day of December, 1901; that the only consideration which appellant received for said quitclaim deed was the 13½ acres. Upon the facts as above set forth, appellant contends that appellees are estopped from claiming any interest in the 13½-acre tract described in the complaint.

Appellees claim the real estate in controversy by descent from their deceased mother, Susan A. Pond. Section 2641, Burns' Rev. St. 1901. Appellant claims by purchase from said Susan A. Pond. The facts, which are not disputed, make a case of peculiar hard-

ship upon appellant, but we do not see how any relief can be granted him in this action. We think the case of *Horlacher et al. v. Brafford*, 141 Ind. 528, 40 N. E. 1078, decisive of the questions here involved. It was held in the case cited, under facts not materially different from the case at bar, that the appellees would not be estopped from claiming the real estate at the death of the mother, the court saying: "Appellee had no ownership or interest whatever in the land attempted to be sold by his mother at the time she sold it. There was therefore no sale of his property which he could ratify on becoming of age. He afterward did become the owner of the land on the death of his mother, and by descent from her. Had his mother outlived her second husband, she could have disposed of the land by her own deed, and it would never have come into possession of appellee. On her death, however, the land became his sole property, just as if it were then conveyed to him by deed. The case may seem one of peculiar hardship, but the law itself is just and equitable. The fault was in the parties to the quitclaim deed. They proceeded in ignorance or in disregard of the law. If appellee feels that he can conscientiously take the land, having already received from the guardian the proceeds of the sale of her land by his mother, the law, notwithstanding the erroneous sale under the quitclaim deed, will give appellee the land which he here claims."

The answer does not bring appellant within the amendment to section 2641, *supra*, which became operative May 31, 1879 (*Laws* 1879, p. 123, c. 44). It is not averred that appellees were of the age of 21 years at the time the conveyance was made, nor that they joined in the conveyance.

We find no error. Judgment affirmed.

(32 Ind. App. 1)

CHAPIN v. DU SHANE.

(Appellate Court of Indiana, Division No. 1.
Nov. 24, 1903.)

SPECIAL FINDINGS—FAILURE TO FILE—EFFECT —SECOND TRIAL—SUBMISSION ON FORMER TESTIMONY—WAIVER OF OBJECTIONS.

1. In view of the statute concerning special findings, which requires that the court shall first state the facts in writing, and then the conclusions of law upon them, the failure to file the special findings in the case, or bring them into the record by bill of exceptions or order of court, precludes the consideration on appeal of an exception to the conclusions of law.

2. Where special findings are not filed or brought into the record by bill of exceptions or order of court, they will be treated on appeal as a general finding in favor of the successful party.

3. Where parties stipulate that a second trial before another judge shall be had on the evidence submitted on the former trial alone, on which findings are to be made, it amounts to a waiver of any objections to the admission or exclusion of the evidence.

Appeal from Circuit Court, Elkhart County;
John M. Van Fleet, Special Judge.

Suit by James Du Shane against Charles A. Chapin. Judgment for plaintiff. Defendant appeals. Affirmed.

Brick & Bates and Deahl & Deahl, for appellant. Anderson, Du Shane & Crabill, for appellee.

BLACK, J. There were two paragraphs of the appellee's complaint, in the first of which he alleged that May 20, 1899, the appellant received the sum of \$1,550.84, belonging to the appellee, which the appellant was to hold for the use of the appellee, and pay to him when requested thereto; and March 22, 1900, the appellee demanded of the appellant that he should pay that sum of money to the appellee, and the former refused to do so. In the second paragraph it was alleged that on or about May 20, 1899, the appellee and appellant, and certain other persons named, were the owners of all the stock of the South Bend Electric Company, and on that day they entered into a contract with one Slocum whereby they agreed to sell the stock to Slocum for a certain price, stipulated in an article of agreement then signed by them; and it was further provided in the article of agreement that Slocum should pay said stockholders the sum of \$20,000, as a first payment on the sale, and that, in the event that he should fail to carry out the contract and make certain other payments provided for therein, then said stockholders should have, hold, and retain as their own all of said sum of \$20,000; that Slocum did fail to carry out the contract or to make any other payments; that he did at said time pay to the appellant the sum of \$20,000, out of which the appellee was entitled to an amount proportionate to his share of the stock of the electric company, and, of the sum so paid, \$1,507.95 belonged to him; that said money was not divided between the various stockholders, but was left in the hands of the appellant, and before the commencement of this action the appellee demanded of the appellant that he pay to the former his proportionate share thereof, but the appellant wrongfully retained all of said money, and had expended it for his own uses, and had failed to account to the appellee for said sum of \$1,507.95, or any part thereof, to his damage, etc. The appellant answered by a general denial. Later, by leave of court, he filed an amended answer in two paragraphs, the first being a general denial. In the second paragraph the appellant admitted that on or about May 20, 1899, the parties hereto and the other persons named in the complaint were the owners of all the stock of the electric company, and on that date they entered into a contract with Slocum whereby they agreed to sell said stock to Slocum at and for a price stipulated in the contract then signed by them, whereby it was provided that Slocum should pay said stockholders the sum of \$20,000 as a first payment on the sale, and that, in the event that he should fail to carry out the contract and make certain other pay-

ments provided for therein, said stockholders should have, hold, and retain, as their own, said \$20,000; that Slocum failed to carry out the contract or to make the other payments thereon; that Slocum paid the appellant the sum of \$20,000, and, under the terms of the contract with Slocum, the appellee had an interest in that sum so paid to the appellant. It was alleged that, before the appellee's share of that money had been paid to him by the appellant, the appellee notified the appellant, on or about December, 1899, that he did not desire to hold said money as a forfeiture under said contract with Slocum, and then and there requested and authorized the appellant to return said money to Slocum; that immediately thereafter, and long before the beginning of this suit, and before any demand was made by appellee upon the appellant for said money, the appellant, acting and relying upon said consent, request, and authority of the appellee that the money be returned to Slocum, did repay the money to Slocum by selling to him an interest in a dam and water power that was then about to be constructed across the St. Joseph river at Berrien Springs, Mich., which interest so sold was of the value of \$20,000. Wherefore, etc. The appellee having replied by general denial to the second paragraph of answer, the appellant withdrew his answer in denial; and thereupon the cause was tried by jury, the verdict being in favor of the appellant. The appellee's motion for a new trial having been sustained, the cause was submitted for trial at a subsequent term before another and special judge, the parties filing and making part of the record their written stipulations, wherein they stipulated and agreed that the cause should be submitted to the court, and tried without the intervention of a jury; that no new evidence of any kind should be submitted on the trial; that no witnesses should be heard, but that the court reporter of the court below, who took the evidence submitted in the former trial of the cause, should make a true, complete, and correct transcript of all of said evidence, and should duly certify to its correctness and that it contained all of said evidence, and thereupon said certified copy of the evidence should be read to the court as the evidence upon the retrial of the cause, and no other or further evidence should be introduced, and the findings of the court should be made upon said evidence as it should be set out and certified in said transcript, and, upon appeal from the finding and judgment of the court, should be duly certified and made a part of the record by a bill of exceptions in the same manner as if the testimony therein set out had been given orally in the retrial.

The court, upon the request of the parties for a special finding, stated the facts as follows: "(1) That the plaintiff never authorized the defendant to return said money to said Slocum. (2) That the defendant never did repay said money to said Slocum, nor did he ever sell to said Slocum an interest in a dam

or water power in payment or satisfaction of said money. (3) That the defendant still holds the share of the plaintiff in said twenty thousand dollars. (4) That the share of the plaintiff so withheld by defendant is \$1,507.95, and interest from March 20, 1900, to wit, \$1,670." Here followed the signature of the special judge as such. The record then proceeds as follows: "As conclusions of law, the court finds that the plaintiff ought to recover from the defendant the sum of sixteen hundred and seventy dollars. The defendant excepts to this conclusion of law." Then, without an additional signature of the judge, followed the judgment.

The appellant has assigned in this court that the trial court erred in its conclusions of law on the findings, and erred in overruling the motion for a new trial.

The statute concerning a special finding by the court provides that the court "shall first state the facts in writing and then the conclusions of law upon them." This form of finding is provided for in order that there may be exception taken to the decision of the court upon the questions of law involved in the trial; that is, that a party may except to the conclusions of law. The statute does not expressly provide that the special finding shall be signed by the judge, but our courts have long held it necessary, unless the special finding be made part of the record by bill of exceptions or order of court. In *Peoria, etc., Co. v. Walser*, 22 Ind. 73, 86, it was said: "A special finding must be in writing, so that an exception may be taken; and it must be filed with the clerk, so that he can enter the special finding and the exception to it of record. And as evidence of its genuineness, to the appellate court, it should be signed by the judge, or incorporated in a bill of exceptions signed by him. We think, when it is signed and filed, it may be regarded as one of the papers in the cause," etc. "Signature is evidence of genuineness and authenticity." See, also, *Smith v. Davidson*, 45 Ind. 396, 400. In *Wallace v. Kirtley*, 98 Ind. 485, it was said: "The special finding and conclusions of law thereon become part of the record, if signed by the judge, without a bill of exceptions. But if not so signed, a bill of exceptions is necessary to make them a part of the record." In *Smith v. State ex rel.*, etc., 140 Ind. 343, 349, 39 N. E. 1060, it was said: "Neither the special finding of facts nor the conclusions of law were signed by the judge of the trial court, nor were they embodied in a bill of exceptions, nor made part of the record by order of court. It is settled law that such a finding can only be regarded as a general finding, and no question can be presented to this court on the conclusions of law stated." In *O'Neal v. Hines*, 145 Ind. 32, 57, 43 N. E. 946, the conclusions of law immediately followed the finding of facts, and the signature of the trial judge followed the conclusions of law. It was held to be proper for the judge to so

sign. It was said: "The finding of facts and conclusions of law in the case constitute one written instrument, signed and filed as such by the trial judge." In *Martin v. Marks*, 154 Ind. 549, 57 N. E. 249, it was said: "If there is no signature of the trial judge to the finding of facts and the conclusions of law stated thereon, the same must be treated as a general finding." In that case the finding of facts and the conclusions of law constituted one written instrument. In *Winstandley v. Breyfogle*, 148 Ind. 618, 48 N. E. 224, it was said: "The judge is to state both the facts and the conclusions of law in writing—the conclusions immediately following and in connection with the facts—and his signature after the conclusions will be sufficient." In *Ferris v. Udell*, 139 Ind. 579, 592, 38 N. E. 180, it was said: "It is true, as contended by appellee's counsel, that the law requires the special finding to be signed by the judge, where, as here, it is not made part of the record by bill of exceptions or order of court. * * * So he is to state both the facts and the conclusions of law in writing. Whether his signature is to immediately follow the statement of the facts, and also the conclusions of law, or whether his signature is to be attached alone to the finding of facts, and not to the conclusions of law, the statute is silent." It might have been added that the statute is wholly silent as to the signature of the judge. It was further said: "The practice in many of the trial courts of the state of signing the special finding of facts alone by the judge has been adopted, without any signature to the conclusions of law. No good reason is perceived why the signature of the judge may not follow the conclusions of law, and constitute a sufficient signing by him of the special finding." It would seem that the reason for requiring the signature of the judge, stated in the cases which express a reason therefor, applies as strongly to the conclusions of law, as constituting a portion of the special finding defined by the statute, as to the statement of the findings specially of the facts. If the special finding, as an entirety, including the statement of the facts and the conclusions of law, be signed and filed, the party who desires to except to the conclusions of law may simply cause it to be noted at the end of the decision that he excepts. However this may be, the authorities—some of them being cases already cited—abundantly require that the record shall show that the special finding was filed, unless it be made part of the record by bill or order. In the transcript of the record before us, there is no showing that the special finding was filed, and no attempt has been made to bring it into the record by bill or order of court. Therefore it cannot be treated as presenting for our consideration the exception of the appellant to the conclusion of law.

The appellant having withdrawn his answer in denial, and having gone to trial in the attitude of admitting all the material

avermments of the complaint, except so far as they were inconsistent with the affirmative allegations of matters of fact by way of defense in the second paragraph of answer—the only questions of fact to be tried by the court being those concerning which the appellant had the burden, and on which the court stated its findings—it is insisted on behalf of the appellant that, to authorize a conclusion of law favorable to the appellee, the court should have stated in its finding of facts all the material facts constituting the appellee's cause of action, including those admitted by the appellant in the pleadings, as well as those involved in the controverted matters tried. Inasmuch as we must treat the special finding as amounting to no more than a general finding in favor of the appellee, we, perhaps, ought not to take space for the discussion of a matter which we are not required to decide.

Among the grounds in the appellant's motion for a new trial are a number of assignments of rulings of the court in the admission or the rejection of evidence on the former trial of the cause before a jury. Those rulings were not made by the judge who rendered the finding involved in this appeal, or on the trial in which that finding was made. It was expressly stipulated by the parties that, upon the trial by the court, no new evidence of any kind should be submitted, and no witnesses should be heard, but that the evidence submitted on the former trial, certified by the reporter, should be read to the court as the evidence upon the retrial, and that the finding should be made upon the evidence so certified. We think that, in thus submitting the cause upon definite, ascertained evidence, the appellant must be regarded as having waived, for the purposes of the decision upon the trial by the court, any questions concerning the admission of testimony by which that evidence was elicited on the trial by jury, and any questions as to the admissibility of other testimony rejected on the former trial.

The evidence has been much discussed by counsel. It was too voluminous and contradictory and involved to admit of a statement here of its purport. We are of the opinion not only that the court was warranted in its conclusion by the evidence, but that it could not properly have reached a contrary result.

Judgment affirmed.

(31 Ind. App. 691)

THE NO. FIVE FIDELITY BLDG. & SAV. UNION v. DRIVER et al.

(Appellate Court of Indiana, Division No. 1.
Nov. 24, 1903.)

BUILDING AND LOAN ASSOCIATIONS — MORTGAGES — ASSUMPTION — DEFENSES — FALSE REPRESENTATIONS—PLEADING—EVIDENCE.

1. In an action by a building association to foreclose a mortgage, an answer alleging that, in order to induce defendants to take stock in the association and accept the loan, plaintiffs'

officers falsely represented that they were well acquainted with the condition of plaintiff's business affairs, and that it was then earning and paying large dividends, and would continue to pay such dividends so that in less than 72 monthly payments on the stock it would mature and satisfy the loan, and that defendants, being entirely ignorant of such facts, believed and relied on such representations, and subscribed for stock, and borrowed the money, which they would not otherwise have done, etc., was not insufficient as charging representations relating to mere matters of opinion of future events, but was a sufficient allegation of fraud to constitute a defense.

2. Where a note for a building association loan provided that, if the maker should pay all installments which became due, and all fines and monthly payments, until his stock became fully paid and of the value of \$100 a share, and before any of the interest or monthly payments should have been past due for three months, then, on surrender of the stock, the note should be deemed paid, and the mortgage provided that the interest, premiums, and installments were to become due on a specified day of each month until the shares should be matured and become of the value of \$100, such provisions were not so inconsistent with representations of the association's officers that by reason of the large dividends that were being paid and would be paid in the future the stock would be matured before an amount equal to the par value thereof had been paid by the borrower as to apprise him of their falsity.

3. In an action to foreclose a mortgage securing a loan made by a building association, evidence held insufficient to establish the falsity of alleged misrepresentations made by the officers of the association to a grantee of the property mortgaged, who assumed and agreed to pay the same.

Appeal from Superior Court, Madison County; H. C. Ryan, Judge.

Action by the No. Five Fidelity Building & Saving Union against James Driver and others. From a judgment in favor of defendant Bronenberg, plaintiff appeals. Reversed.

David L. Bishopp, John R. Thornburgh, Robert W. McBride, and Caleb S. Denny, for appellant. Bagot & Bagot, for appellee.

BLACK, J. The appellant, a building and loan association incorporated in this state, in process of liquidation under the statute, sued upon a note and to foreclose a real estate mortgage, both executed by the appellees James and Luella Driver, who had conveyed their real estate to the other appellee, Samuel T. Bronenberg, who, as a part of the consideration, agreed to pay the appellant the amount due on the note and mortgage. Upon trial the court found in favor of the appellant against the appellees Driver and Driver in the sum of \$201.40, and found in favor of the appellee Bronenberg, and that the certificate of stock on which the loan was made by the appellant to the Drivers should remain in force as to them, but should be canceled as to the appellee Bronenberg; and judgment was rendered accordingly. No question is made here concerning the result reached as to the Drivers, but the judgment in favor of Bronenberg is attacked. It is contended on behalf of the appellant that the court erred in overruling its demurrer

to the amended fifth paragraph of answer, in which it was alleged that the appellant, by its agents and servants, procured and induced the appellees Driver to make and execute the note and mortgage sued on, and to subscribe for the stock mentioned in the complaint, by fraud and collusion in this: that, the defendant Driver being then and there entirely ignorant of the business and affairs of the appellant, the appellant and its servants and agents, knowing this fact, at and prior to the execution of the mortgage and bond and the subscription for the stock, falsely and fraudulently represented to the Drivers that the appellant was making earnings and paying great dividends; that they were well and thoroughly acquainted with the conditions of its business and affairs; that it would continue to pay large dividends, so that in less than 72 monthly payments on the stock it would mature and satisfy the loan; that the appellees, being entirely ignorant of these facts, believed and relied on said representations, and, so believing and relying, and not otherwise, subscribed for the stock and borrowed the money and executed the bond and mortgage, as alleged in the complaint; that soon afterward, the Drivers being desirous to sell the mortgaged real estate to the appellee Bronenberg, and the appellant being desirous to have Bronenberg purchase it for the reason that the Drivers were unable to make the payments on the stock, the appellant, by its agents and servants, then and there falsely and fraudulently stated and represented to Bronenberg that the appellant was in a flourishing condition, that it was paying large dividends, and that its earning capacity was very great, and that it was paying such dividends that the stock in question would be matured within less than 72 monthly payments, and the bond and mortgage would be thereby canceled and paid; that Bronenberg was entirely ignorant of the affairs of the corporation and its earning capacity and as to whether or not it was earning dividends, and believed and relied on said statements and representations, and believed them to be true, and, so relying, and not otherwise, he purchased the property and assumed the payment of the bond and mortgage as part of the consideration, and took an assignment of the stock from the Drivers; that in truth and in fact the appellant was not in a flourishing condition, and never had a great earning capacity, and was not making or earning large dividends, or any dividends at all; that the agents and servants who made said representations were a number of persons named; that in truth and in fact the appellant was organized, doing business, and operating for the purpose and object of paying its officers large salaries and consuming and exhausting all its earnings in salaries to its officers; that at the time of said representations, and at all times prior thereto and ever since, the appellant had been and was paying all its earnings in large

salaries to its officers—all of which facts were known to the appellant and its said agents and servants at the time said representations were made, and they were knowingly and falsely and fraudulently made for the purpose of cheating and defrauding the appellees as aforesaid; that the appellees did pay to the appellant at maturity more than 72 payments on the stock as aforesaid; wherefore, etc.

It is suggested that the representations alleged in this answer were not such that a charge of fraud could be based thereon. The representations did not relate alone to future events, and were not merely expressions of opinion concerning existing conditions or values. The then existing condition of the corporation was falsely represented to be flourishing, and its business was stated to be such that, if the statement had been true, a person in the situation of the appellees might not unreasonably rely upon promises or predictions based thereon by those who made the representations. In the note it was stipulated that if the maker should pay all installments which became due thereon, and all fines and monthly payments which became due on the stock until it became fully paid in and of the value of \$100 per share, and before any of the interest or monthly payments should have been past due for three months, then, upon surrender of the stock, the note should be deemed fully paid; and the mortgage provided that the interest, premium, and installments were to become due on a specified day of each month until the shares should mature and become of the value of \$100. Unless the appellees were apprised by these provisions of the note and mortgage of the falsity or unreasonableness of the representations, there does not appear to have been anything of which they were bound to take notice so inconsistent with the representations as to make it unreasonable for the appellees to rely and act upon the representations.

We do not perceive any such irreconcilability of the representations with the provisions of the written contract. In *Hartman v. International, etc., Ass'n*, 28 Ind. App. 65, 62 N. E. 64, where the answer was held to be sufficient, the false representation (not inconsistent with the contents of the bond and mortgage, and no by-law to the contrary appearing or being referred to in the pleadings) was that, if the defendant would become a member and contract the loan and pay the dues, interest, and premiums, the bond and mortgage would be paid and canceled by a specified number of payments. It was held that this representation was not merely a statement of intention or an expression of opinion, but was a representation of a fact. The answer now before us is different in some respects. The language relating to Bronenberg, construed according to its ordinary meaning, is to the effect, not that it was represented that, as an absolute fact, the stock would be matured, and the debt would

be paid by a certain specified number of payments of installments, but that the association was then in a flourishing condition, and paying large dividends, and having very great earning capacity, and by reason of the fact that it was paying such dividends the stock would be matured within less than a specified number of monthly payments, and thereby the bond and mortgage would be canceled and paid. The things of which it was alleged Bronenberg was ignorant were the affairs and earning capacity of the corporation, and whether or not it was paying dividends. The things alleged to be true were that the association was not in a flourishing condition, and it never had great earning capacity, and it was not making or earning large dividends, or any dividends, but it was organized and operated to pay large salaries, and always paid all its earnings in large salaries to its officers. Material facts stated were, it was alleged, falsely and fraudulently represented as then existing, and it was upon their existence that the speedy maturity of the stock was predicated, as an expectation that might reasonably be entertained from such facts represented as then existing, and not as an absolute fact that at all events would take place.

In considering the action of the court in overruling the appellant's motion for a new trial we have been required to look into the evidence. We find it to the effect that some of the officers did not receive salaries, and that the salaries paid, so far as has been shown by the evidence, which, on the subject of salaries, related only to a comparatively recent date, were not great; that at some time or times the stock in question earned dividends amounting to \$63.60; but as to the time or times when the dividends were earned or credited there was no evidence. The appellee Bronenberg testified that he talked with agents of the appellant before he purchased the real estate, and that they said, the way it was paying at the time, there would not be over 64 payments, and guaranteed there would never be over 72; also, that he relied on what they said to him in 1892 about its being paid out in 72 months. Being asked concerning a certain agent, with whom he said he had talked, if the agent said probably it would take 72 months, the witness answered, "No, probably 64 months, and not to exceed seventy-three months. Question. That was his speculation? Answer. He said that was guaranteed." He testified that he bought the property and assumed the mortgage relying on these statements made by the agents and the literature they showed him. No "literature" on this subject was introduced. The defense was not based on a guaranty, or a positive unqualified assertion that the stock would mature within a definite period; and we have been unable to find in the record any evidence showing the condition of the business of the appellant at the time when the representations relating to its

condition were made. It was not proved that it was not then in such a flourishing condition, for the time being, that, if its existing condition should continue, the stock might mature as predicted. The material facts alleged to have been misrepresented were not shown in evidence as alleged in the answer. The appellee Bronenberg should have taken the trouble to go into this material part of his defense.

The judgment in favor of the appellee Bronenberg is reversed, and the cause is remanded for a new trial as to him.

(32 Ind. App. 14)

BALTES LAND, STONE & OIL CO. et al v. SUTTON.

(Appellate Court of Indiana, Division No. 1.
Nov. 24, 1903.)

CONTRACT—ASSIGNMENT—LIABILITY OF ASSIGNEE—EVIDENCE—ADMISSIBILITY—HARMLESS ERROR—NECESSITY FOR DEMAND BEFORE SUIT—APPEAL—PARTIES.

1. Burns' Rev. St. 1901, § 647a, provides that when a part of co-parties, against whom judgment is taken appeal during the term when the judgment is rendered it is not necessary to make the others parties to the appeal. *Held*, that an appeal in which all co-parties are named as appellants should not be dismissed because part of them file their refusal to join as appellants.

2. Where a contract for the purchase of land is assigned on the consideration that the assignee promise to pay notes given under the contract, the assignee is liable on the notes to the payee, though his promise has not been accepted.

3. A witness may testify that a paper shown him was one he took an assignment of, over objection that the instrument was mutilated, and torn into three pieces, this being merely an identification of it.

4. In an action on a contract for sale of land and machinery thereon against the purchaser's assignee, evidence that the assignee took possession and removed the machinery, and what the land was used for, was admissible.

5. A witness' statement that the consideration of the assignment of a contract for the purchase of land was the payment of notes given therefor was a statement of fact, and not a conclusion.

6. The consideration of a written contract may be shown by parol.

7. A witness may testify as a fact whether he ever executed a deed to a person named.

8. The admission of evidence, in an action on a contract of sale of land and machinery thereon, as to what machinery and fixtures were on the land, was harmless error.

9. Admission of a witness' statement that parties with whom he negotiated concerning a sale of land represented themselves to be acting for a corporation was not prejudicial when it had ratified their acts by taking possession of the land and continuing in possession.

10. Demand of payment of notes assumed by the assignee of a contract of purchase of land as the consideration of the assignment is not necessary before bringing suit on them.

Appeal from Circuit Court, Blackford County; H. J. Paulus, Judge.

Action by James M. Sutton against the Baltes Land, Stone & Oil Company and others. From a judgment overruling a demurrer

¶ 1. See Evidence, vol. 20, Cent. Dig. § 1922.

to the complaint and to a cross-complaint by George W. and Ira B. Spaulding, defendant Baltes Land, Stone & Oil Company appeals. Affirmed.

Cantwell & Simmons, W. & E. Leonard, and R. B. Dreibelbliss, for appellant. Hindman & Powell, for appellee.

ROBINSON, J. Appellee's complaint avers that W. D. Cook executed to him seven promissory notes; that No. 6 thereof is due and unpaid; that as a part of the same transaction Cook entered into a written contract with appellee, for the consideration expressed in the notes, that appellee would convey to Cook certain real estate, but, if default were made in the payment of any note, then the contract should be a lease, and the money to be paid should be rent. The terms of the agreement were extended to assigns. Cook took possession of the land, on which was located a stone quarry. He assigned the contract to George W. and Ira B. Spaulding, and the Spauldings thereafter assigned the same to appellant. It is averred that the only consideration for the assignment to the appellant was the agreement to perform all the covenants of the contract, and that appellant promised and agreed to pay all unpaid notes and installments; that by virtue thereof appellant took possession of the land, and converted its emoluments to its own use, and still holds the land. Cook filed a cross-complaint against the Spauldings, and asked that they be first held liable. The Spauldings filed a cross-complaint against all the parties. In the first paragraph they set out the note, the contract, its assignment, and aver a promise on the part of appellant to pay deferred payments. The second paragraph alleges that appellant took possession of the land in question by virtue of the assignment of the contract to it, and still holds the same. The third paragraph alleges that appellant agreed in writing to pay the deferred payments, the writing having been executed by the agents of appellant. The fourth paragraph alleges a mutual mistake in the written assignment by the Spauldings to appellant, and that the agreement of appellant to pay the deferred payments was omitted. The Spauldings also filed a single paragraph of cross-complaint against their codefendants, the appellee, and the persons who had signed the writing mentioned in the third paragraph of cross-complaint above as having signed the paper as officers of appellant, alleging that the writing referred to was executed for and in behalf of appellant. Appellant's demurrer to the complaint, and also its demurrer to the cross-complaint of the Spauldings, were overruled, which rulings are assigned as error. The court made a special finding of facts with conclusions of law. Appellant's motion for a new trial was overruled, and judgment rendered in conformity with the conclusions of law. The court rendered judgment in fa-

vor of appellee that he recover from Cook, Spaulding, and Spaulding and appellant the sum of \$770 and costs. It was further adjudged that this amount be first collected from appellant before levying on the property of Spaulding and Spaulding, or either of them, and, in the event that the property of appellant be insufficient to satisfy the same, then one-half of the residue be collected from each of the Spauldings before levying on the property of Cook. And it is also adjudged that, if the property of appellant and the property of the Spauldings be insufficient, the sum remaining unpaid be collected from Cook.

In the assignment of errors, in the caption, the Baltes, etc., Company, Cook, and the Spauldings appear as appellants. But the Baltes Company alone assigns error. It is the sole appellant in this appeal. Merely naming a party in the caption as an appellant does not make them an appellant. Cook and the Spauldings have filed refusals to join or to be joined as appellants. The motion to dismiss the appeal because Cook and the Spauldings have not been made appellees was postponed until the hearing at this time. This is a term-time appeal. In such appeals the statute provides that "whenever a part of any number of co-parties against whom a judgment has been taken shall appeal * * * it shall not be necessary to make such co-parties not appealing, parties to the appeal, and it shall not be necessary to name them as appellants or appellees in the assignment of errors, but they shall be bound by the judgment on appeal to the same extent as if they had been made parties." This statute also gives any co-party not joining all the rights, within the year, in relation to the appeal, that he would have had if he had joined in the appeal originally. Section 647a, Burns' Rev. St. 1901. This being a term-time appeal all the parties to the judgment were in court when the appeal was taken, and must take notice of the appeal. The judgment rendered was against the Baltes Company, the Spauldings, and Cook. They were co-parties against whom the judgment was taken. One of them appeals. The statute says it shall not be necessary for him to make his co-parties, not appealing, parties to the appeal, nor to name them as appellants or appellees in the assignment of errors. Such co-party may within one year from the date of the judgment assign errors for himself, and have all questions decided which are properly presented. The statute also provides that such co-parties shall be bound by the judgment on appeal to the same extent as if they were parties. The motion to dismiss is overruled. *Smith v. Wells Mfg. Co.*, 144 Ind. 270, 43 N. E. 131; *Anderson Glass Co. v. Brakeman*, 20 Ind. App. 238, 47 N. E. 937; *Evans v. Odem* (Ind. App.) 65 N. E. 755.

The first objection urged to the complaint is that the action is based upon a note not signed or assumed by appellant. But the

complaint avers that the only consideration for the assignment of the contract by the Spauldings to appellant was a promise and agreement by appellant to perform all the requirements to be performed under the terms of the original contract, and that the only consideration for the assignment of the contract, together with the rights and privileges therein conferred, was that appellant promised and agreed to pay all the notes and installments mentioned in the contract at that time remaining unpaid. The assignment by the Spauldings to appellant was in writing, and says nothing about assuming the payment of the deferred payments. This assignment, standing alone, would not give a right to a personal judgment. *Baltes, etc., Co. v. Sutton*, 25 Ind. App. 695, 57 N. E. 974. But the complaint avers what the consideration for the assignment was—appellant's promise to pay these notes.

It was not necessary that the complaint should aver that appellee accepted appellant's promise to pay the deferred indebtedness. Appellant received the consideration for its promise to pay the deferred payments, and appellee may enforce the fulfillment of the promise. In the case of *Talbert v. The Berkshire, etc., Ins. Co.*, 80 Ind. 434, cited by counsel, mortgaged land was attempted to be conveyed to Talbert, who assigned the payment of the mortgage debt to appellee. Because of a mistake in the deed the grantor and Talbert rescinded the sale, and the question of appellee's acceptance of Talbert's agreement to pay the mortgage debt became material, as without such acceptance no rights of appellee had intervened to prevent a rescission of the contract by the grantor and Talbert. In that case it is held that, if there had been no mistake in the deed, and Talbert had received the consideration for his promise, the insurance company might sue for foreclosure, and unite with the complaint a claim for judgment against Talbert on his promise to pay the mortgage debt.

Each paragraph of cross-complaint by the Spauldings asks that the property of appellant be exhausted before execution be levied upon the property of the cross-complainants. What is said above on the sufficiency of the complaint is applicable to some of the objections urged against the cross-complaint. The rule declared in *Baltes, etc., Co. v. Sutton*, 25 Ind. App. 695, 57 N. E. 974, applies to some of the questions presented. Other questions raised under objections to the sufficiency of the cross-complaint may properly be considered in connection with certain questions discussed under the evidence and the special finding. The court found: That Sutton sold the land to Cook for \$3,500 by a written contract, Cook executing seven notes for \$500 each. At the time of the execution of the notes and contract Cook took possession. Cook assigned the contract to George W. and Ira B. Spaulding, the assignments

stating that the assignees assumed to pay the obligations expressed in the contract that were then unsatisfied. Afterwards the Spauldings assigned the contract to appellant. That prior to and on the date of this assignment appellant, as the consideration, and the only consideration, for the interest, right, and title in and to the contract and land, so assigned to it by the Spauldings orally agreed to pay each and all of the seven notes executed by Cook to Sutton, including the sixth note sued on. Previous to this assignment, appellant, a corporation, through its agents and officers, and the Spauldings, entered into a written contract whereby the Spauldings sold to appellant certain land for a sum stated, and also agreed to turn over to appellant the title bond of the land formerly owned by Cook, for which appellant agreed to assume an indebtedness of \$3,000. At that time six of the notes executed by Cook to Sutton remained unpaid, and the \$3,000 indebtedness which appellant assumed to pay was the six notes of the series of seven then due, which included the note in suit. The Spauldings fully complied with this contract. Appellant immediately, under this contract, took possession of the land sold by appellee to Cook, and has retained possession ever since; and after taking possession paid to appellee the second note of the series, falling due July 26, 1896. That there is due appellee \$770, which is the amount due on note No. 6 of the series. As conclusions of law the court stated that personal judgment should be rendered against appellant, Cook, and the Spauldings; that Cook should be liable only after the exhaustion of the property of appellant and the Spauldings, and the Spauldings liable only after the exhaustion of the property of appellant.

There was no error in permitting a witness to testify that a paper shown the witness was the instrument that he took an assignment of from Cook, although objection was made that the instrument was mutilated, and torn into three pieces. The instrument was not then offered in evidence, but the witness was asked simply to identify it.

It was proper to permit a witness to testify that appellant took possession of the land, what the land was used for, that it had retained possession of the land and the machinery thereon used for stone quarry purposes, and that the company had since moved away a part or all of the machinery.

A witness—Ira B. Spaulding—was asked what the consideration was that the Spauldings received or were to receive for the transfer of the property. His answer—the payment of the notes Sutton held for \$3,000—was the statement of a fact, and not a conclusion. The consideration of a written contract may be inquired into by parol. See *Lowry v. Downey*, 150 Ind. 364, 50 N. E. 79; *Maris v. Iles*, 3 Ind. App. 579, 30 N. E. 152.

A witness may testify as a fact whether he ever executed a deed to a person named.

Testifying to the fact that a deed was made is not attempting to prove the contents of the deed.

The contract between appellee and Cook, and assigned through the Spauldings to appellant, was to convey certain land and all machinery, fixtures, and fittings belonging and appertaining to a stone quarry situated on the premises. The complaint avers that appellant took possession of the land, the quarry, and the machinery, and has operated the quarry continuously ever since. This machinery was part of the property to be conveyed by appellee to Cook and assigned to appellant. The admission of the testimony of a witness as to what machinery and fixtures there were on the land was not harmful error. It is true appellant's liability for the debt depended upon its relation to the contract, rather than upon the amount of property it received, but we fail to see how the admission of the evidence was prejudicial to appellant.

The court found that appellant is a corporation. It could act only through its officers and agents. Objection is made to the statement of a witness that certain parties with whom he negotiated concerning the land and the notes represented themselves to be acting for appellant. It is unnecessary to inquire into the proper method of proving agency, or as to the authority of an agent to act for his principal, for the reason that appellant afterwards ratified the acts of the persons assuming to act by taking possession of the land and continuing in possession, and also by paying one of the series of notes.

It was not necessary that appellee should demand payment before suit was brought. Appellant contracted to pay the notes, and the written contract assigned to appellant stated the amount of the notes, and when due. Taking the transaction as a whole, we think it may be said that the money was due appellee on a contract. *Olvey v. Jackson*, 106 Ind. 286, 4 N. E. 149; *Bertha v. Sparks*, 19 Ind. App. 431, 49 N. E. 831.

Whether appellee's cause of action was adjudicated in a former action brought by appellee on installment No. 3 under this contract was determined adversely to appellant in *Baltes, etc., Co. v. Sutton* (Ind. App.) 66 N. E. 916.

We find no error in the record for which the judgment should be reversed. Judgment affirmed.

(31 Ind. App. 664)

BLAIR v. WHITAKER.

(Appellate Court of Indiana, Division No. 2
Nov. 24, 1903.)

VENDOR AND PURCHASER—NOTICE—TO AGENT—SUFFICIENCY—EVIDENCE—DEEDS—RECORDING—NECESSITY—DISAFFIRMANCE—MARRIED WOMEN—RESTORATION OF CONSIDERATION.

1. In a suit to quiet title, evidence examined, and held sufficient to warrant a finding that defendant's agents had notice of the convey-

ance to plaintiff before the conveyance to defendant.

2. Notice to an agent for the purchase of land of the rights of another therein is notice to the principal.

3. Whatever puts a party on inquiry amounts, in law, to notice.

4. The recordation of a deed is not essential to its validity between the parties thereto.

5. A conveyance by a married woman, after reaching majority, of land previously conveyed by her while a minor, cannot be considered as a disaffirmance of her former conveyance, where it was shown that she did not intend to include the land formerly conveyed, but specifically affirmed the former conveyance by acknowledging the deed after majority.

6. Under the express provisions of the statute, a married woman cannot disaffirm a conveyance made during minority, in which her husband, being of full age, joined, without first restoring the consideration received.

7. Actual possession of land under a claim of title is sufficient notice of such claim to put others on inquiry as to its nature and existence.

Appeal from Superior Court, Vanderburgh County; John H. Foster, Judge.

Action by Florence Whitaker against Samuel D. Blair. From a judgment for plaintiff, defendant appeals. Affirmed.

A. P. Twineham and Chas. M. McRoberts, for appellant. W. E. Stillwell, Thomas W. Cullen, and Henry Kister, for appellee.

WILEY, P. J. Suit by appellee to quiet title. The cause originated in the Gibson circuit court, where a trial resulted in her favor. Appellant took a new trial, as of right, under the statute, and thereupon the venue was changed to the court below, where it was again tried, with a like result. Appellant moved for a new trial on the ground that the finding was contrary to law and was not supported by sufficient evidence, and for alleged error in admitting certain evidence. Appellant grounds his right to a reversal solely on the insufficiency of the evidence. Appellee claims title by virtue of deeds which were not recorded within the statutory period, but avers in her complaint that appellant purchased the real estate with full knowledge of the unrecorded conveyances to her while she was in possession. In view of the facts as disclosed by the evidence, it is important to state the material averments of the complaint. It is alleged that on February 19, 1897, Henry Robinson, John Robinson, and Julia A. Jordon were the owners of the undivided two-thirds of the real estate in controversy, which on said day was conveyed to appellee; that said deed was executed before one Gilmore, a justice of the peace; that it was sent to the recorder's office to be recorded; that the recorder returned it to appellee to be corrected; that she immediately delivered it to said Gilmore for correction; that while in his possession he died, and that after his death said corrected deed was found, dated February 19, 1897, but not until after appellant had obtained a deed to the same land from a part of the said parties; that, immediately after the purchase of said

¶ 4. See Deeds, vol. 16, Cent. Dig. § 117.

real estate, appellee took possession of it; that she has ever since remained in possession and occupied it, and that she has made valuable improvements thereon; that on the 26th day of June, 1897, Julia A. Jordon, Mack Lucas, and Julia Lucas, formerly Julia Robinson, were the owners of the other undivided one-third interest in said real estate, and on said day conveyed the same to one William M. Stewart, who conveyed the same to appellee on or about the 1st of July, 1897; that said deed had been lost, without any fault of appellee, and cannot be found; that she immediately took possession of said one-third interest in said real estate so conveyed, and has remained in possession ever since; that before said deed was corrected as aforesaid, and after appellee had purchased all of the land in controversy, appellant quietly and secretly obtained, with full knowledge of appellee's rights therein, a warranty deed from the said John and William Robinson, Mack Lucas, and Julia Lucas to said real estate, together with other lands in the immediate vicinity thereof, subject to the life estate of said Julia A. Jordon, and had such deeds properly recorded. It is averred that said deeds to appellant are a cloud upon her title, etc. Both parties claim title by purchase from the heirs and devisees of one William J. Jordon, deceased.

The decision of the case rests upon the application of the law to the following facts: William J. Jordon died testate, the owner of several tracts of real estate, including the 40 acres in dispute. By his will he bequeathed to his wife, Julia A. Jordon, in fee, certain of his real estate, and gave her a life estate in all of his lands. The lands in which he gave a life estate to his wife at her death vested in fee in William H. Robinson, John Robinson, and Julia Robinson, who were children of the testator's sister. February 19, 1897, Julia A. Jordon and William H. and John Robinson conveyed by warranty deed to appellee the undivided two-thirds of the real estate in question. That deed was executed before one Gilmore, a justice of the peace, and was tendered to the recorder to be recorded within the statutory period, but he refused to record it because of some defect. It was thereupon returned to the justice of the peace before whom it had been acknowledged for correction; was, in fact, corrected, but never recorded until August 27, 1900. June 26, 1897, Julia A. Jordon, Mack F. Lucas, and Julia Lucas, née Robinson, conveyed by warranty deed to William M. Stewart all their interest in and to the 40-acre tract in controversy. This deed was not recorded, and when it was executed Julia Lucas was a minor, while her husband was over the age of 21 years. About July 1, 1897, William M. Stewart conveyed the same land to appellee, which deed was lost, and hence not recorded. July 31, 1897, John Robinson conveyed to appellant all of his interest in the real estate, subject to the life estate of Julia A. Jordon. August 2, 1897, William H. Jordon made a like conveyance to appellant. De-

cember 27, 1897, after Julia Lucas had arrived at full age, she conveyed—her husband joining her—to appellant all the interest Julia A. Lucas had in and to the real estate under the will of William J. Jordon, subject to the life estate of his widow. These three last deeds were duly recorded. When the deeds above specified were executed to appellee, she took possession of the real estate, made valuable improvements thereon, and has remained in possession ever since. Appellant owned other real estate in the same vicinity, and he and his son, who was his agent in purchasing the interest that the Robinson boys and their sister had in the real estate under the will of Jordon, were frequently in the neighborhood; and, to our judgment, the evidence clearly shows that they knew appellee was in possession of the real estate here in dispute. On the day that Mrs. Lucas and her husband executed their deed to appellant, she reacknowledged the deed which she had made to Stewart. These facts all stand unchallenged, and the disputed question of fact is, did appellant have notice or knowledge of the several conveyances from the Robinsons and Mrs. Lucas to appellee before he received his deeds of conveyance from them? A mixed question of law and fact also arises on appellant's assumption that the conveyance of Mrs. Lucas to him after she became of age was a disaffirmance of her former conveyance to Stewart.

We will first consider the disputed question of fact as to appellant's knowledge. The evidence does not bring notice to appellant himself, and, if he had notice, it was through his agents. Both of the Robinson boys were ignorant and illiterate. They could neither read nor write, and their signatures to all of the deeds are by mark. Their sister, Mrs. Lucas, could barely write her name and read. The evidence does not disclose any dishonesty on their part, for it is not pretended that they sold their interests in this land to appellee, and afterward tried to dishonestly profit by again selling it to appellant. On the contrary, the evidence shows that in their conveyances to appellant they did not know this particular tract was included, and in fact did not intend to include it. In the negotiations leading up to and including the execution of deeds to appellant and the payment of the money, John Blair, a son of appellant, and one Edward Moore, were representing him as his agents. The evidence establishes beyond all question such agency. On the day that William H. Robinson executed his deed to appellant, Guy Whitaker, husband of appellee, had a conversation with John Blair, in which he told him of the trade by which he (meaning his wife) had bought the land; that the deed had not been recorded, and that John Blair said to him that he understood that trade, and understood that they had bought the land; that Whitaker said to him he was afraid there would be trouble about it, and he replied there would not be; that he put

that tract in the deed for fear there should be a mistake; that he wanted to wait until he bought the next heir, Julia Lucas, and then he would deed back to Whitaker. John Robinson, who executed his deed to appellant on July 31, 1897, testified that he told John Blair before the deed was made that he had deeded the 40 acres in controversy to appellee. Julia Lucas testified that the real estate which she conveyed to Stewart was not to be included in what she deeded to appellant. The deed she made to appellant was not read over to her, and, in the light of her evidence, it is clear that she had not intended to include the tract in controversy. This fact may become important when we come to consider the question of her disaffirmance of the Stewart deed, as claimed by appellant. John Blair admitted in his evidence that John Robinson told him that the 40 acres he deeded to appellee was not to be included in appellant's deed, but says that he told him that after the deed was executed to his father, and after the money was paid. Ed Moore testified, in substance, that he knew that John Robinson had deeded his interest in this particular 40-acre tract to appellee, and that, as he was selling his interest in the Jordon lands to appellant, the latter conveyance would not affect the former deed. The evidence also clearly shows that Moore knew that John Robinson had deeded to appellee his interest in the 40-acre tract adjoining her place. Mack Lucas testified that, before he and his wife and the Robinsons made their deeds to appellant, he told John Blair that his wife had deeded her interest in the land to Stewart, and that John replied: "He didn't care much about it. All he cared for was the hill land." This evidence is not contradicted, except in a general way, and appellant's agents, his son and Moore, testified, in substance, that they had no knowledge of the several transfers to appellee until, after the conveyances to appellant. From this evidence the trial court was fully warranted in finding, as it must have found, that appellant's agents had notice of the several conveyances to appellee before they made the conveyances to appellant. The general rule is that notice to an agent is notice to the principal of any matter that is within the scope of the agency. *Marion Mfg. Co. v. Harding*, 155 Ind. 649; 58 N. E. 194; *Supreme Ct., etc., v. Sullivan*, 26 Ind. App. 60, 59 N. E. 37. It has many times been declared that, in the relation of the principal and the third party, the rule is that notice to an agent is notice to the principal, if the agent comes to the knowledge of facts while he is acting for the principal. *Huffcut on Agency*, §§ 141, 142. In 1 *Am. & Eng. Encycl. of Law* (2d Ed.) p. 1144, it is said: "It may be stated as a broad proposition of law that notice to an agent is, in contemplation of law, notice to the principal." See, also, 1 *Am. & Eng. Encycl. of Law* (1st Ed.) p. 419. This doctrine has been recognized in repeated de-

cisions both in England and most of the states of the Union. The same rule prevails in the federal courts. We will not cite the many cases so holding, but reference is here made to them in the above-cited volumes of the *Am. & Eng. Encycl. of Law*, supra. In Illinois it was held that if an agent has notice at the time of his purchase for his principal of the equitable rights of another, and of the claim of the latter to have previously purchased the subject-matter of the sale, such fact would be notice to the principal. *Whitney v. Burr*, 115 Ill. 289, 3 N. E. 434. In Missouri it was held that he who takes with notice of an equity takes subject to the equity. This is not necessarily positive information brought directly home, but a fact that would put an ordinarily prudent man on inquiry. Also that the party will be as much bound by notice given to his agent as if it was given to himself personally. *Meier v. Blume*, 80 Mo. 179. The rule is that whatever puts a party on inquiry amounts, in law, to notice. Private inquiry would lead to the knowledge of the requisite fact by the exercise of diligence of an ordinarily prudent man. Ind., etc., *R. Co. v. McBroom*, 114 Ind. 198, 15 N. E. 831; *Wilson v. Hunter*, 30 Ind. 466; *Case v. Bumstead*, 24 Ind. 420; 16 *Am. & Eng. Encycl. of Law*, p. 792.

Under the rules stated, and the facts as disclosed by the record, it is evident that appellant took the conveyances from John and William Robinson and Mrs. Lucas, charged with the knowledge of appellee's right under her unrecorded deeds. The recordation of a deed is not essential to its validity as between the parties, and they are bound by it in the absence of such recordation. If it is recorded, it is considered notice to all the world; and, if it is not recorded, it cannot prevail against a subsequent innocent purchaser without notice. *Tiedeman on Real Property*, § 816. *Washburn on Real Property* states the rules as follows: "The proposition may be regarded as applicable to all the states that actual notice has the same effect in determining the right of precedence between parties claiming under different deeds from the same grantor as the record thereof, regularly made, would itself have. * * * If the grantee in the second deed, which is recorded, knew of a prior unrecorded deed when he took it, the latter will take precedence of the former, though the real purchaser and the one who paid the consideration and had the deed made to such grantee did not know of the prior deed." See, also, *Murphy v. Nathans*, 46 Pa. 512; *Givan v. Tout*, 7 Blackf. 210.

It is urged by appellant that Julia Lucas disaffirmed her deed to Stewart after she arrived at her majority by the execution of her deed to appellant. True, the rule is that one who executes a deed during her or his minority may, upon arrival at majority, under certain conditions, disaffirm said deed; and the execution of a deed to another after

such majority is, in law, a disaffirmance. *Losey et al. v. Bone et al.*, 94 Ind. 67; *Riggs v. Fisk*, 64 Ind. 100. In this case, however, under the evidence, the subsequent conveyances by Mrs. Lucas to appellant after her majority would not amount to a disaffirmance, for two reasons: First, because it is shown that she did not understand or intend that the land in controversy was to be included in the deed to appellant; and, second, she specifically affirmed the conveyance to Stewart after her majority by reacknowledging the deed to him. Again, it is provided by statute that in "all sales by an infant feme covert of lands belonging to her, and in which sales and conveyances her husband joins, he being of full age, said infant shall not be permitted to disaffirm said sale until she shall first restore to the person owning said real estate the consideration she received for said lands." No pretense is made that Mrs. Lucas restored or offered to restore the consideration she received from Stewart. There was no disaffirmance in this case.

There is another reason why appellant was put upon inquiry, and hence is not in a position to take advantage of appellee's unrecorded deeds: The latter was in possession under a claim of title. It is the rule both in this country and in England that actual possession of lands under a claim of title is sufficient notice of such claim to put others on inquiry as to the existence and nature of the claim. *Dyer et al. v. Eldridge*, 136 Ind. 658, 36 N. E. 522; *Jeffersonville, etc., R. Co. v. Oyler*, 60 Ind. 383; *Tuttle v. Churchman*, 74 Ind. 311; *Jeffersonville, etc., R. Co. v. Oyler*, 82 Ind. 394; *Campbell et al. v. Indpls., etc., R. Co.*, 110 Ind. 490, 11 N. E. 482; 4 Cent. L. J. 122; *Am. & Eng. Encycl. of Law*, p. 800; *Vaughn v. Tracy*, 22 Mo. 415. While the record may fail to show by positive and direct evidence that appellant or his agents knew appellee was in possession, a reasonable inference from all the facts and circumstances leads conclusively to that result. It is the general rule in the United States that possession of the grantee under a prior recorded deed is constructive notice of title under which he holds. *Tiedeman on Real Property*, and authorities there collected and cited.

What we have said disposes of all questions discussed by counsel adversely to appellant, and the judgment is affirmed.

(32 Ind. App. 428)

GOSHORN v. PEOPLE'S NAT. BANK OF WASHINGTON.*

(Appellate Court of Indiana, Division No. 2.
Dec. 9, 1903.)

BANK—TRANSMISSION OF MONEY—EMBEZZLEMENT BY CASHIER—LIABILITY TO DEPOSITOR.

1. A depositor, desiring to withdraw his bank deposit and commit it to a trust company, received from the bank cashier a suggestion as to a particular trust company, and, drawing a check, delivered it to the cashier, with instructions

to deposit the amount named with the company suggested. Instead of doing so, the cashier substituted the depositor's money for paid checks of his own on the bank, which he was carrying as cash. Held that, even on the theory that the cashier was the depositor's agent for the transmission of the fund, the bank was liable for its misappropriation, the transaction amounting to a payment of the depositor's check merely with the evidences of the cashier's indebtedness, and the bank, moreover, being cognizant of the fraud through its cashier.

2. The transmission of money being an essential function of a commercial bank, and its cashier being clothed with apparent authority to act for it therein, a cashier, on receiving a depositor's check, with instructions to transmit the amount named to a trust company for deposit, is the agent of the bank, and not of the depositor, and the bank is liable for the cashier's misappropriation of the fund.

Appeal from Circuit Court, Daviess County; H. Q. Houghton, Judge.

Action by Noah J. Goshorn against the People's National Bank of Washington. Judgment for defendant, and plaintiff appeals. Reversed.

Hastings, Allen & Billhelmer and Elmer E. Hastings, for appellant. Ogden & Inman and Elliott, Elliott & Littleton, for appellee.

ROBY, J. Appellant avers in his complaint that appellee, a national bank, owed him \$5,000, which it refuses, on demand, to pay. The trial court made a general finding for appellee, and rendered judgment thereon. Error is assigned upon its action in overruling appellant's motion for a new trial. The grounds upon which the motion was based were that the decision is not sustained by sufficient evidence, and is contrary to law.

The facts out of which the controversy arises are that appellant was a depositor and had an account with appellee, the balance therein being in his favor on June 23, 1903, to the amount of \$3,000. He was also one of its stockholders. On the day named he went to the bank for the purpose of securing a draft of \$5,000, and depositing that amount with the St. Louis Trust Company. He told appellee's cashier that the balance was larger than he desired to carry without receiving interest, and that he was going to deposit with the St. Louis Company in order to obtain interest. The cashier suggested that he make the deposit with a Louisville trust company named, saying that "they are friends of ours." Appellant concluded to do so, and executed a check, in the form of a receipt, as follows: "Washington, Ind., June 23rd, 1900. Received of The People's National Bank Five thousand Dollars Cash on account of money due me as a depositor. \$——. *Dep. Columbia Trust and Finance Co. Lou. Ky.* N. J. Goshorn." The instrument was made by the use of a blank form, the italicized words being written by the cashier, after which appellant affixed his signature and delivered the receipt to the cashier, with instructions to deposit the amount named with the trust company designated. A week or so later the cashier told the ap-

*Rehearing denied February 17, 1904.

pellant that "the certificate of deposit was among some other papers that I had." No remittance or deposit was made. August 31st following, the cashier destroyed certain checks which he had theretofore made upon the bank, and which after payment he was carrying as cash, and supplied the deficiency so created by appellant's \$5,000. Appellant's passbook was balanced thereafter, and a charge entered therein as follows, "Dep. Col. F. & T. R. Co. \$5,000." More than a year later he discovered the fraud, and attempted to induce the cashier to make him whole, but was unable to do so. He then brought this action. The trial court found against him, apparently upon the theory that, in undertaking to transmit the funds, the cashier ceased to be the agent of the bank and became the agent of the depositor, his fault being one, therefore, for which he alone was responsible, the bank being thereby exonerated, as having made payment to the depositor through his agent selected for that purpose.

It is argued that there is some evidence to support the decision, and reference is made to expressions by appellant, when he learned of the fraud practiced upon him, relative to the liability of the cashier to him therefor. The facts upon which the rights of the parties depend are established without substantial dispute, and are not affected by such statements. In the absence of other directions, it was the duty of the bank to pay to appellant or his agent the amount named in money. *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396; *Vansickle v. Furgeson*, 122 Ind. 450, 23 N. E. 858; *Born v. Bank*, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; *Loan Co. v. Railroad Co.*, 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740. It appears that the bank did not pay any money to appellant, or to any one for him. The cashier merely used the receipt to cover up his own previous embezzlement. The assets of the bank were not decreased, and the juggling of accounts did not constitute payment. *Railroad Co. v. Burke*, 13 Ind. App. 35, 41 N. E. 70; *Cutter v. Bank*, 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328; *Bank v. Brightwell*, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608; *Fowler v. Wallace*, 131 Ind. 347, 353, 31 N. E. 53. If the bank were directed to pay to an agent of a depositor entirely disconnected from it, such direction would not authorize it to pay in evidences of indebtedness held by it against the agent, to which the depositor was a stranger. The bank has in this case parted with nothing, except certain evidence against the person whom it insists was at the time acting as agent for the depositor. More than this, it had through its cashier full knowledge of a fraud that was about to be perpetrated upon the depositor, the consummation of which was dependent upon its active assistance. So that if the premise that the cashier, for the purpose of making the remittance, was acting as agent for the de-

positor, were granted, the conclusion that the bank had made payment to him would not follow. The premise cannot, however, be conceded. An important and essential function of commercial banks is found in the transmission of funds. Such transmission is usually accomplished by the issuance of drafts. It may, and frequently does, call for transportation in specie. Whether the one or the other method is pursued, the result is the same. For a consideration the customer is enabled to utilize his means at another place. This was within the power possessed by the appellee bank. *Rev. St. U. S. §§ 5136, 5137* [U. S. Comp. St. 1901, pp. 3455-3460]; *Bank v. Mining Co.*, 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; *Bank v. Cooper*, 137 U. S. 473, 11 Sup. Ct. 160, 34 L. Ed. 759. The transaction in question called for the transmission of appellant's \$5,000 to the Louisville Trust Company. The receipt was prima facie evidence of payment. When appellee had complied with the directions given to it, such payment would cease to be controvertible. This it never made any attempt to do. It neither issued a draft, nor delivered specie to a carrier. Had it done so, and parted with value, the question of liability for the default of some intervening agency would be wholly different from that here presented.

If it were granted that as between appellee and its officer the latter had no authority to undertake to transmit funds to the trust company, the concession would not be sufficient to sustain the judgment. *Leach v. Hale*, 31 Iowa, 69, 7 Am. Rep. 112; *Bank v. O'Hare*, 119 Ill. 646, 10 N. E. 380. Appellee selected its own cashier, and held him out to the world as deserving of confidence. Those who deal with persons occupying such responsible positions have a right to rely upon their integrity, and do so constantly. Depositors do not deal at arm's length with the cashier. In language used by Justice Paxton of the Supreme Court of Pennsylvania, "It would be monstrous to allow them to take advantage of the ignorant and unwary by reason of their position and the confidence it inspires." *Ziegler v. Bank*, 93 Pa. 393, 397; *Steckel v. Bank*, 93 Pa. 376, 39 Am. Rep. 758; *Bank v. Martin*, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632. Appellee received the money of appellant as a deposit. A large part of such deposit reached it through the delivery by him to it of government bonds, their sale to parties in Chicago, their transmission to a Chicago bank, and the return by that bank of the purchase price to appellee. It was appellant's debtor, and cannot be permitted to cancel the obligation through the fraud of its officer acting within the scope of his apparent duty and according to the general course of business. *Case v. Bank*, 100 U. S. 446, 25 L. Ed. 695; *Minor v. Bank*, 1 Pet. 46, 7 L. Ed. 47.

Judgment reversed, and cause remanded, with instructions to sustain motion for a new trial, and for further proceedings.

(33 Ind. App. 63)

**INDIANAPOLIS & G. RAPID TRANSIT CO.
v. HAINES.**¹(Appellate Court of Indiana, Division No. 1.
Dec. 10, 1903.)**STREET RAILROAD—INJURY—PLEADING—EVIDENCE—INSTRUCTIONS.**

1. A cause of action is stated by a complaint alleging that a street car company negligently carried on the front of its car a banner for advertising purposes, calculated to frighten horses, and that it caused plaintiff's horse to become frightened and unmanageable, resulting in the injuries complained of.

2. It is sufficient if contributory negligence is proved by a preponderance of the evidence, whether it is given by plaintiff or defendant, or both.

3. A charge that the burden is on defendant to prove contributory negligence is harmless error, where no evidence of contributory negligence was given by plaintiff.

4. A charge that plaintiff's theory is that his injury was caused by his horse being frightened by an unnecessary banner on the front of defendant's car, and he cannot recover unless it is proven both that the horse was frightened from that and no other cause, and that the banner was not necessary, is not erroneous, though incomplete in its statement of plaintiff's theory.

5. A charge in an action for injuries caused by fright of a horse from a banner carried on a street car that if the company was running its cars in the ordinary way, and the horse became frightened at the running or appearance of the car aside from the banner, the company is not liable, is not objectionable as requiring proof that the car was run in the ordinary way.

6. Where plaintiff had testified that a banner on a street car by which his horse was frightened was an advertisement of a carnival, and it appeared that all the carnival banners were alike, testimony of other witnesses as to the size of these banners was properly admitted.

7. Where testimony of plaintiff's witnesses concerning banners other and different from the one which frightened his horse was brought out only on cross-examination, it was not reversible error to exclude defendant's evidence contradicting this testimony.

Appeal from Circuit Court, Henry County;
W. O. Barnard, Judge.

Suit by Jacob M. Haines against the Indianapolis & Greenfield Rapid Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Wm. A. Brown and Binford & Walker, for appellant. Forkner & Forkner and Marsh & Cook, for appellee.

ROBINSON, J. Suit for personal injuries. Appellee avers in his complaint that the appellant's track runs along and upon a public highway known as the "Old National Road"; that appellant's cars are propelled by electricity, and the usual speed at which the cars are run is about 25 miles per hour; that on the 8th day of October, 1900, appellee was driving along the highway in a spring wagon, with a top attached, drawn by one horse; that he was driving in a prudent and careful manner, and had the horse completely under his control; that while so driving one of appellant's cars approached appellee, which car had attached to the front end

thereof a large banner, composed of white cloth or muslin, upon which were printed large, black letters, advertising a street carnival which was at that time about to be given or was being held in the city of Indianapolis; that the place where appellee received his injuries, as hereinafter stated, was in the public highway, and upon the railroad track, at a point about 3½ miles west of the city of Greenfield, to which place appellee was traveling; that the body of the car was painted a light ochre, "which was a strong background for displaying the banner or advertisement, which, together with the motion and speed of the car, agitated the same in such a manner as rendered it highly dangerous, and well calculated to attract the notice, and frighten horses unaccustomed thereto," passing along the highway; that appellee's horse was gentle, and accustomed to the approach and passage of cars in the ordinary way, but was not accustomed to the carrying of any extraordinary contrivances for the purpose of attracting the attention of the public; that the banner was not necessary for the proper management or running of the car, or in any manner required in the operation of the road, but was a method negligently and carelessly adopted and being used by the appellant of advertising the street carnival along its route; that when appellee observed the approach of the car, anticipating that the horse might become frightened, he had the horse under complete control, but, when the horse saw the same rapidly approaching, he became and was frightened by such sign, and became uncontrollable, turned upon the railroad track, and upset the wagon in which appellee was sitting, throwing appellee upon the track and under the wagon, all through the fault, negligence, and carelessness of the appellant as aforesaid; that appellee, through the appellant's "fault, negligence, and carelessness as aforesaid," sustained serious and permanent injuries. The theory of the pleading is that the injury was caused by reason of appellee's horse becoming frightened at a sign or banner on the car which appellee met while driving along the highway, and that the sign or banner was not necessary to the operation of the car. It is averred that the banner, together with the speed and motion of the car, which agitated the banner, made it dangerous, and calculated to attract the notice of and frighten horses unaccustomed thereto, passing along the highway; that the banner was not necessary in the proper management and running of the car, or in any manner required in the operation of the road, but was purely a method negligently and carelessly adopted and being used by appellant of advertising a street carnival along its route. The complaint sufficiently shows appellant's negligence, and states a cause of action.

It is argued that certain instructions were erroneous, and that certain evidence was erroneously excluded.

¹Rehearing denied. Transfer to Supreme Court denied.

The court gave the following instruction: "(4) The burden is upon the defendant to prove contributing negligence, if any, upon the part of the plaintiff." In *Indianapolis, etc., Ry. Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456—an opinion written since the case at bar was tried—an instruction reading, "But the burden of proving contributory negligence on the part of the plaintiff rests on the defendant," was held erroneous. "It is sufficient," said the court in that case, "to call attention to the inaccuracy of any instruction that requires, in express terms or impliedly, that the contributory negligence of a plaintiff must be proved by the defendant. The jury should be informed that it is sufficient if the contributory negligence of the plaintiff is proved by a preponderance of the evidence, without regard to whether such evidence was given by the plaintiff or defendant, or by both." In the above case it was said that an examination of the record might show that the giving of the instruction did not mislead the jury, and was harmless error; and it was there held that, as the judgment should be reversed because of other erroneous instructions, it was not necessary to examine the record for that purpose. A careful examination of the evidence in the case at bar fails to disclose any evidence given by appellee or his witnesses that could be construed as showing contributory negligence on the part of appellee. The court properly instructed the jury that if appellee was injured as alleged, and appellant's negligence was the proximate cause of the injury, he could not recover, if by his own fault or negligence he contributed thereto. As there was no evidence given by appellee or his witnesses that could reasonably be said to show contributory negligence, and as the only evidence upon that question was from appellant's witnesses, we must conclude that, while the instruction would seem to be erroneous under the above ruling, the error in giving it was not harmful to appellant. See *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, and cases cited in 8 *Rose's Notes*, 969, 970; *Washington, etc., R. Co. v. Tobriner*, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284.

Complaint is made of the following instruction: "The theory of the plaintiff's cause is that his injury was caused by reason of his horse being frightened at a sign or banner on the front end of the car of defendant, which he met while driving said horse on said highway, and that said sign and banner was not necessary to the operation of said car. If the plaintiff recovers, he must recover upon the theory of his complaint, and unless it is proven by a fair preponderance of all the evidence given in the cause that such horse became frightened at the sign and banner on said car, and not from any other cause, and that it was not necessary to the proper and successful operation of said railroad that the defendant should have placed said sign and banner on said car." The instruction might

be said to be incomplete, but is not for that reason erroneous. It purports only to give briefly the theory of appellee's cause of action, and does not undertake to enumerate the facts necessary to be proven to entitle appellee to recover. When taken in connection with the other instructions given, there is nothing in it that would tend to mislead the jury.

Instruction No. 8 given by the court is as follows: "If the defendant was operating an interurban railroad on and along a public highway, and if, while running its cars along and upon its said railroad, plaintiff's horse became frightened at the running of said car, or at the appearance of said car, aside from said sign or banner, and said car was being run and operated in the ordinary way of operating said car, then the court instructs you that such fright of said horse under such condition could not be chargeable to the defendant." It would be a strained construction of the language used in this instruction to say that the jury would understand it to mean that appellee might recover if his horse became frightened at the running of the car unless it was shown that the car was being run and operated in the ordinary way of operating the car. The court, in other instructions, correctly told the jury the theory of appellee's action, and correctly enumerated the facts necessary to be proven by appellee to entitle him to recover. A careful consideration of the instructions discloses nothing prejudicial to appellant. The instructions requested and refused, so far as applicable, were included in those given by the court. The instructions given by the court are sufficiently full, and are clear, concise, and brief—a practice to be commended in instructing juries.

Complaint is made of certain evidence admitted, and excluding certain evidence offered by appellant. Appellee testified that the banner at which the horse became frightened was an advertisement of the carnival at Indianapolis, and was about three feet square. Certain witnesses introduced by appellee testified as to the size of these carnival banners, or advertisements of the carnival. Their examination in chief was confined to a description of these particular banners or advertisements, and it seems, from the evidence, that all these carnival banners or advertisements were alike. There was no error in permitting these witnesses to describe the banner or advertisement. The court stated that similarity could not be proven, but that it could be shown the kind of banners that were on the cars for the purpose of proving the kind of banner in question. The evidence of these witnesses upon direct examination was not to the effect that different advertisements were used on other cars at the time of the accident and subsequent thereto. Upon cross-examination by appellant, statements were made by the witnesses, in answer to questions, concerning

other banners on the cars during the same week. Excluding evidence afterwards offered by appellant for the purpose of contradicting these statements was not reversible error. It was not the theory of the complaint that an unusual banner was being carried at the time, but, as stated by the court in an instruction, it was that the injury was caused by reason of the horse becoming frightened at a sign or banner on the front end of the car which he met on the highway, and that the sign or banner was not necessary to the operation of the car. The jury answered to interrogatories that the advertisement on the front end of the car was 22 by 30 inches, made of white paper, with black letters and figures for dates; that the evidence shows that the horse became frightened at the advertisement; that the car was about 200 feet away from appellee when the horse first became frightened, and was about 100 feet away when the accident happened; that the car was standing still, and had been standing a few seconds, when the accident occurred; that appellant's track was on the south side of the highway, which was 80 feet wide, and practically level; that appellee could not have driven north of the graveled part of the road, and by so doing have avoided the injury; that appellee was not attempting to force the horse into close proximity to the track. There is evidence to support the conclusions reached by the jury. What did in fact frighten the horse was a question solely for the jury. There is some evidence authorizing the jury to conclude as it did. We cannot interfere with the conclusion there reached. We find no error in the record authorizing a reversal.

Judgment affirmed.

(32 Ind. App. 33)

L. T. DICKASON COAL CO. v. PEACH.

(Appellate Court of Indiana, Division No. 2.
Dec. 8, 1903.)

INJURY TO EMPLOYE IN COAL MINE—CONTRIBUTORY NEGLIGENCE.

1. An employé sent into a room in a coal mine to remove from a car track slate which had fallen from the roof knocked out a prop of the roof to get the slate by it, made no attempt to replace the prop, and made no examination of the roof, though it was low, and he had a lamp in his cap, and soon after slate fell where the prop had been, and injured him. *Held*, that he was guilty of contributory negligence.

Appeal from Circuit Court, Sullivan County; O. B. Harris, Judge.

Action by William Peach against the L. T. Dickason Coal Company. Judgment for plaintiff. Defendant appeals. Reversed.

John S. Bays and L. F. Bays, for appellant. John A. Riddle and Seymour Riddle, for appellee.

COMSTOCK, J. Appellee brought this action under section 7472, Burns' Rev. St. 1901

(section 5480m Horner's Rev. St. 1901), against appellant, a corporation duly organized under the statute of the state of Indiana, engaged in mining and shipping coal from its plant in Greene county, in this state, to recover damages for personal injuries alleged to have been suffered by reason of the negligence of appellant. The cause was put at issue by general denial. A trial resulted in a verdict and judgment in favor of appellee for \$700. With the verdict the jury returned answers to interrogatories. The assignment of errors questions the sufficiency of the complaint, the action of the court in overruling appellant's motion for judgment on the answers to the interrogatories notwithstanding the general verdict, and the overruling of appellant's motion for a new trial.

The complaint is lengthy, but may be fairly summarized as follows: Appellant was the owner and operator of a coal mine in which there was a main entry running west from the bottom of appellant's coal shaft some 300 or 400 yards; that there was also another main entry running east from the bottom of the shaft several hundred feet. Two entries were driven from these east and west main entries as follows: one to the south off the main east entry, and one to the south from the main west entry running parallel. Some distance from where these two parallel south entries left the east and west main entries, two working rooms had been turned off opposite each other, one running toward the west and the other running toward the east. Appellant mined out the coal from the two rooms known as "Room No. 5" off the first south entry off the east and the first south entry off the west until they came together and made a continuous opening from the south entry to the other. That, in order to cause the ends of the iron tracks or rails running into each of the said rooms (and used for propelling the cars) to meet so the electric mining machines could run over same from one of these south entries to the other, it was necessary for the appellant to remove some of the props and timbers which supported the slate and roof of said rooms, and that appellant, after having necessarily removed said props, carelessly and negligently failed and neglected to replace the same, and make said rooms a safe place for its employes to work. Certain railroad tracks and switches were constructed upon the surface of said mine and immediately over the place where appellee was compelled to work, and that appellant's machinery was also immediately over said place. That the great and unusual power of the railroad locomotives, cars, and machinery was so great that it "jarred, vibrated, shook, disturbed, loosened, and disintegrated the earth, slate, and roof over and above the said rooms above mentioned, making and rendering the earth, slate, and roof above said rooms insecure, unsafe, and dangerous,

and making same liable to give away, fall, and cave in at any time." It is further alleged that, after appellant had rendered the room No. 5 in an unsafe condition by reason of the above methods, appellee was sent in room No. 5 to work before it had replaced the props and timbers it had removed from supporting the roof, and which had been taken out in order to enable the appellant to construct its track in the rooms as herein indicated. It is also claimed that appellee had been taken out of his regular working place and put in room No. 5.

We need only refer to the recognized rule that every presumption is indulged in favor of the general verdict, and that special findings prevail over the general verdict only when there is an irreconcilable conflict between the two. In seeking to avoid this conflict, courts may take the special findings, and add to them other facts that might have been proven under the issues. *Rhodus v. Johnson*, 24 Ind. App. 405, 56 N. E. 942, and cases there cited. Applying this rule, the irreconcilable conflict claimed to exist may be avoided. The first, second, and third reasons for a new trial are, respectively, that the verdict is contrary to law, contrary to the evidence, and is not sustained by sufficient evidence. The following facts are shown by the evidence: On the 4th day of October, 1901, William Peach was working in the mine of the L. T. Dickason Coal Company, at Linton, Ind., and had been working there since the June before. He was 51 years old, and for over 40 years he had worked as a coal miner in different coal mines. He was a practical coal miner, and thoroughly understood the business of mining coal in all of its departments. During the time he was working for the appellant coal company he had worked at either jerry work or machine work. On Friday, October 4th, while working his machine, the machine became disabled, and Peach was not able to mine coal with it. He did not work on Saturday, but on Sunday evening there was some cleaning up to do in room No. 5 on the first south entry off the east entry of the coal mine. Peach wanted work, and was given the job as assisting Charles Board, William Stevenson, and R. T. Jones. The evidence clearly discloses that William Peach was not taken away from his regular work and sent elsewhere, but that he desired to do the work he was engaged in at the time he was hurt. The work was simple, and consisted in the act of shoveling some fallen slate from off the track in room No. 5, and also taking from the track in said room No. 5 a large piece of slate that had fallen thereon. In removing the slate from the track they edged it up on the end, and rested it against one of the props. They then ascertained that the mining machine could not pass over the track on the trucks that carried it, because the large piece of slate was

too near the track. There were two ways in which the piece of slate could be removed from its then position, viz., one by breaking it up, and another by knocking out the prop so that they could get it by the obstructing timber. The latter method seemed to have been chosen, and the prop was knocked out, and the slate moved past where the prop was, and out of the way of the track. Very soon after this prop was knocked out, the slate fell where the prop had been. It is also shown by the evidence that the mine boss had visited the room where the appellee was injured on the 5th day of October—the day preceding the day in which the injury happened. That after his visit to the room some shots had been fired to shoot down the coal, and these shots had caused some of the slate to fall from the roof on the track. These parties were engaged in cleaning up this fallen slate at the time Peach was injured. At the time they went into the room to do this work, they made no examination whatever of the roof or its condition, but sat around a while, pushed down a prop, moved away some slate, and shoveled some slate off the track before Peach was hurt. That it is always proper and necessary for a person going into a new working place in a coal mine to examine the roof to ascertain whether or not there is any overhanging loose slate before commencing to work. The evidence also shows that the running of the train over the surface and the operation of the machinery had nothing to do with the falling of the slate at any time, and that it was not calculated to cause the slate to come "loosened, jarred, vibrated, shaken, disturbed, and disintegrated." Appellee testified that at the time of the accident he was working as a jerryman; that a part of his duty as jerryman was to move the slate off the track; that it was customary for a jerryman at work in a mine to examine the roof, and see if it was safe. He wore a cap with a miner's lamp on it, and he could see the roof by the reflection of the light. The roof of the room was so low that he could touch it with his hands. After the prop had fallen, he did not attempt to replace it. He made no examination of the roof. It affirmatively appears from the evidence that appellee used no care whatever to avoid injury. He was clearly guilty of contributory negligence.

Counsel for appellant rely strongly upon *Davis Coal Co. v. Pollard* (Ind. Sup.) 62 N. E. 492, in which the assumption of risk under the statute and contributory negligence are discussed and distinguished. The foregoing opinion is founded upon the facts exhibited by the record, and is not in conflict with *Davis Coal Co. v. Pollard*, supra. It follows that the evidence is not sufficient to sustain the verdict. It is not necessary to consider other alleged errors.

Judgment reversed, with instruction to sustain appellant's motion for a new trial.

(32 Ind. App. 189)

REPUBLIC IRON & STEEL CO. v. JONES.¹

(Appellate Court of Indiana, Division No. 2.

Dec. 8, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—ACTION—GENERAL VERDICT—ANSWERS TO INTERROGATORIES—INCONSISTENCY—QUESTION FOR JURY.

1. In an action against a master for injuries sustained by a servant employed in a rolling mill, owing to plaintiff having collided with a post near a furnace while introducing iron into the furnace, the fact that plaintiff, though he knew of the existence of the post, was absorbed in the work he was doing, was a fact to be considered by the jury.

2. A servant in a rolling mill, while putting iron into a furnace by means of an instrument eight feet long which held the iron, was injured by colliding with a post about a foot east of the mouth of the furnace and seven feet south thereof. The servant knew of the location of the post, and had complained of it. *Held*, that the question of contributory negligence was for the jury.

3. The question as to due care on plaintiff's part being uncertain, an answer to a special interrogatory finding that plaintiff could have avoided the post by the exercise of due care rendered general verdict in favor of plaintiff reversible.

Appeal from Circuit Court, Clay County; P. O. Colliver, Judge.

Action by Thomas W. Jones against the Republic Iron & Steel Company. From a judgment in favor of plaintiff, for damages in the sum of \$1,999.95, defendant appeals. Reversed.

Miller, Elam & Fesler and Saml. D. Miller, for appellant. Coffey & McGregor, for appellee.

ROBY, J. Action by appellee to recover damages from appellant on account of personal injuries received by him while in its service. He is alleged in the complaint to have been employed as a heater in appellant's rolling mill, part of his duty being to put iron in a furnace by means of an iron instrument about eight feet long, one end of which was flattened so that the iron would lie thereon, there being a ring or handhold on the other end. It is alleged that appellant failed to furnish appellee a safe place in which to work, in that one foot east of the mouth of the furnace and seven feet south thereof was an oak post six inches thick and twelve inches wide, a part of the building, and that by reason of appellant's negligence in locating said furnace and post there was not sufficient room to perform the work, and appellee's working place was rendered dangerous on account of the liability of the operator to strike his person against said post while handling said iron instrument. It is alleged that appellee discovered the unsafe condition of said place, and complained thereof to appellant's superintendent, who promised to make the place safe by taking out the post and putting in a hanger; that appellee continued to work in reliance upon said promise, but within two days thereafter he struck his knee against said post, receiv-

ing the injury complained of. The cause was submitted to a jury for trial, and a general verdict returned for \$1,999.95, together with answers to interrogatories.

Appellant's motion for judgment on the interrogatories and their answers notwithstanding the general verdict was overruled, and judgment rendered on the general verdict. No other question raised need be decided than that arising upon this motion, which is based upon the claim that such interrogatories and answers establish contributory negligence. The answers to interrogatories show facts as follows: Appellee had been a heater for 12 or 13 years. He was an efficient man; had worked 5 years in the mill before he was injured, and at the furnace where he was hurt 2 or 3 days. He was charging iron into the furnace when injured, using a "peel," an instrument 8 feet 1 inch long, of 2-inch iron, flattened at the end for 18 inches to a width of 3¼ inches. The furnace door was 2½ feet from the ground. The fore plate of the furnace door was 5½ inches wide. The package of iron he was putting into the furnace when injured was 2 feet long, 4 inches wide, and 4½ inches thick. It was placed on the "peel" by a helper; one end of the "peel" resting on the fore plate of the furnace, the other being held by appellee. The furnace opened to the south. There was a post 11 inches square located about 8 feet from the furnace door, and 6 inches east of the east side thereof. Said post was open and apparent to appellee's observation. He knew its location. He was injured while working at the east door of the furnace. He was in constant danger of being injured by reason of such post while at his work. He knew of the danger. He failed to pay any heed to the post, his attention being upon his work. It was possible for him to have avoided coming in contact with the post. He was injured August 2, 1899. "Q. 39. Could the plaintiff, by the exercise of ordinary care, have avoided coming in contact with said post? A. Yes." The utmost that can be said of the facts, as exhibited, excluding interrogatory 39, is that the question of contributory negligence is left in doubt. Appellee's knowledge of the danger, his experience and skill, the character of the work, the distance of the post from the furnace door, were facts which it was the province of the jury to consider and weigh. That appellee was absorbed in the work he was doing was also a fact to be considered by it. *C., I., St. L. & C. Ry. Co. v. Long*, 112 Ind. 171, 13 N. E. 659. The general verdict includes a finding by the jury that appellee was guilty of no negligence contributory to his injury. If interrogatory 39 calls for, and the answer thereto states, a "mere conclusion," this court cannot say that the jury, in view of the facts detailed, had no right to find for appellee. On the other hand, if interrogatory 39 and its answer are to be considered, the general verdict can-

¹Motion to modify mandate denied.

not stand, for the standard for appellee's conduct was one of ordinary care, and the failure to exercise it was contributory negligence. The distinction between "ultimate facts" and "mere conclusions" is an interesting one, as is evidenced by the following extract: "It sometimes happens that facts are so close to the line dividing inferential facts from evidentiary facts that the only safe plan is to put them in the special verdict, where they can do no harm if they should turn out, in the opinion of the court, to be evidentiary facts, and where their absence might be fatal if they should turn out to be inferential facts." *L., N. A. & C. Ry. Co. v. Miller*, 141 Ind. 550, 37 N. E. 348. The rule by which the effect of the answer to interrogatory 39 must be determined is stated as follows: "First and foremost the jury must find the ultimate facts. If these are such that only one inference may be drawn from them, viz., negligence or no negligence, the jury need not find the inferential fact also, and the court will determine as a matter of law, from such facts found, whether there was or was not negligence. If, however, the ultimate facts are such that reasonable men of equal intelligence may honestly and rationally differ as to the inferences and conclusions to be drawn from such facts, it is for the jury to determine the inferences also; and in such cases these must be stated in the verdict." *C., C., C. & St. L. Ry. Co. v. Hadley*, 12 Ind. App. 519, 40 N. E. 760; *Railway v. Hoffbauer*, 23 Ind. App. 622, 56 N. E. 54; *Keller v. Gaskill*, 20 Ind. App. 502, 50 N. E. 363; *Keller v. Gaskill*, 9 Ind. App. 670, 36 N. E. 303; *C., C., C. & St. L. R. R. v. Dugan*, 18 Ind. App. 440, 48 N. E. 238; *Board of Com. v. Bonebrake*, 146 Ind. 319, 45 N. E. 470; *Smith v. Wabash R. R.*, 141 Ind. 92, 40 N. E. 270; *L., N. A. & C. R. R. v. Miller*, supra; *C., I., St. L. & O. R. R. v. Grames*, 136 Ind. 39, 34 N. E. 714; *Ind. Pipe Line Co. v. Neusbaum*, 21 Ind. App. 369, 52 N. E. 471. The facts are fully stated. They leave the conclusion uncertain. It was therefore the province of the jury to settle the question. The answer to the Thirty-Ninth interrogatory settles it adversely to the appellee. The conflict between the general verdict and the answers is irreconcilable upon this one vital proposition.

Judgment reversed. Cause remanded, with instructions to sustain motion by appellant for judgment notwithstanding the general verdict.

(33 Ind. App. 153)

In re GRIFFIN. 1

(Appellate Court of Indiana, Division No. 1.
Dec. 10, 1903.)

**ATTORNEYS—DISBARMENT PROCEEDINGS—
CHANGE OF VENUE—RIGHT TO.**

1. Under Burns' Rev. St. 1901, § 988, providing that in proceedings to disbar an attorney "pleadings may be filed and trial had as in other cases," the accused in disbarment proceed-

ings is entitled to a change of venue from the county and from the judge on proper application, as in civil actions.

Appeal from Circuit Court, Hamilton County; J. F. Neal, Judge.

Proceedings for the disbarment of Samuel W. Griffin from the practice of law. From a judgment of disbarment, defendant appeals. Reversed.

Shirts & Fertig, for appellant. Theo. P. Davis and Ralph K. Kane, for appellee.

HENLEY, C. J. This was a proceeding commenced by certain attorneys appointed by the judge of the Hamilton circuit court to disbar appellant from the practice of law. The proceeding was commenced under section 988, Burns' Rev. St. 1901, which is as follows: "The proceedings to remove or suspend an attorney may be commenced by the direction of the court or on motion of an individual. In the former case the court must direct some attorney to draw up and prosecute the accusation; in the latter case it may be drawn up by any person and sworn to by the person making it. Such accusation may be filed in any court in which the attorney practices; and after five days' notice of the filing, the attorney shall be bound to appear and plead to the same or suffer judgment by default. If he appear pleadings may be filed and trial had as in other cases." The accusation, in this case, consisted of 18 specifications. A demurrer was sustained to the first and second; the tenth and fourteenth were dismissed by the accusers at the trial; and the eighth, ninth, eleventh, twelfth, thirteenth, and fifteenth specifications were dismissed on appellant's motion. The case was tried upon the fourth, fifth, sixth, seventh, sixteenth, seventeenth, and eighteenth specifications of charges, upon issues made by an answer of general denial, and an answer of former adjudication as to the sixth, seventeenth, and eighteenth specifications. The cause was submitted to trial by the court and jury, who found the appellant guilty of all the charges preferred; whereupon the court rendered a judgment on the verdict that "appellant be disbarred from the practice of law, now and henceforth, in the state of Indiana."

One of the specifications of appellant's assignment of errors in this court is that the trial court erred in overruling his motion for a new trial. Two of the causes stated in appellant's motion for a new trial are that the trial court erred in overruling appellant's motion for change of venue from the county and his motion for a change of venue from the judge. Each of these motions should have been sustained, and we think it matters not in arriving at this conclusion whether we regard this proceeding as a civil action or as a special proceeding. Regarding it as a special proceeding, appellant would have all the rights granted in civil actions, unless and except the statute providing for this action

¹Rehearing denied. Transfer to Supreme Court denied.

specially otherwise provided. *Weakley v. Wolf*, 148 Ind. 220, 47 N. E. 470. In the case cited the court said: "But it is said that this is a special proceeding, and not a civil action, and that the statute under which the proceeding is brought does not provide for change of venue. In the early decisions there seems to have been a disposition to refuse changes of venue in all special proceedings where the special statute giving the right of action did not provide for such change; but our later decisions have extended the general provisions of the Code to such special proceedings, in so far as the particular statutes have not provided a different or inconsistent procedure of their own." In consonance with this rule the Supreme Court have held that changes of venue should be granted in applications for liquor licenses, in bastardy proceedings, in claims against decedents' estates, in actions to determine the question of suretyship, proceedings supplementary to execution, drainage proceedings, and to establish guardianships. *Berry v. Berry*, 147 Ind. 176, 46 N. E. 470; *Bass v. Elliott*, 105 Ind. 517, 5 N. E. 663; *Evans v. Evans*, 105 Ind. 204, 5 N. E. 24, 768; *Burkett v. Bowen*, 104 Ind. 184, 3 N. E. 768; *Williams v. Fleenor*, 77 Ind. 36; *Lester v. Lester*, 70 Ind. 201; *Saint v. State*, 68 Ind. 148; *State v. Vierling*, 33 Ind. 99.

It will be observed that the statute under which this proceeding is prosecuted provides that "pleadings may be filed and trial had as in other cases," and it has been held that the attorney against whom the charges are preferred is entitled to a trial by jury. *Reilly v. Cavanaugh*, 32 Ind. 214. And in every case where persons are entitled to a trial it is certainly the intention of the law that the trial shall be fair and if before a judge that he should be unprejudiced, and if by a jury that the jury should be fair, unprejudiced, and impartial. In the case of *Evans v. Evans*, 105 Ind. 204, 5 N. E. 24, 768, the court said: "Changes of venue are provided for in order that parties may have fair and impartial trials, and hence the provisions for a change of venue from the county where one of the parties may have an undue influence over the citizens, or where an odium may be attached to one of the parties, or to his cause of action or defense, on account of local prejudices. The parties to a litigated case are entitled to a trial in a forum where the scales of justice may balance evenly, unaffected by the influence of either party or the odium that may result from local prejudice."

It cannot be said that appellant was not a party to a litigated case. The case of *Slemmer v. Wright*, 46 Iowa, 705, is very much in point. In that case the defendant was an attorney practicing in the courts of the state of Iowa, and a proceeding was brought against him under a statute of that state for the purpose of disbarring him. There was a trial, and a judgment disbarring him. The trial court had refused to grant the defendant

a change of venue from the county, and this question was presented by the appeal to the Supreme Court. The court said: "The application was in all respects in due and proper form, as required in civil actions. The application was overruled. This ruling constitutes error." And in *State v. Clarke*, 46 Iowa, 155, it was held "that a proceeding upon charges preferred by a private prosecutor to disbar an attorney is a special proceeding, wherein a change of venue, on account of prejudice of the judge, may be granted upon the same conditions and upon compliance with the same rules as in ordinary civil actions." *Peyton's Appeal*, 12 Kan. 398, was an action brought for the purpose of disbarring an attorney. The Supreme Court of that state reversed the judgment of the trial court for the reason that the trial court had overruled a proper application made by the defendant for a change of venue from the judge. We think it unnecessary to further discuss this question. The same statement might be made by us as was made by the Supreme Court in *Evans v. Evans*, supra, where that court said, speaking of an action for divorce: "It can hardly be supposed that the Legislature intended such cases, fraught with such consequences, and in which the public have an interest aside from the parties, should be tried in a less impartial form than ordinary civil actions." The trial court erred in refusing to change the venue from the county, and in refusing to change the venue from the judge, on proper application made therefor.

The judgment is reversed, with directions to the trial court to sustain appellant's motion for a new trial, and for further proceedings not in conflict with this opinion.

(32 Ind. App. 38)

McCOY et ux. v. McCOY et al.

(Appellate Court of Indiana, Division No. 2.
Dec. 9, 1903.)

STATUTE OF FRAUDS—ORAL CONTRACT FOR SALE OF LAND—ENFORCEMENT OF VENDOR'S LIEN—PLEADING—PRESUMPTION AS TO ORAL CONTRACT—ACCEPTANCE OF CONVEYANCE—EXECUTION OF MORTGAGE—ACTION TO CANCEL CONTRACT OF SALE—INCONSISTENT REMEDIES—RIGHT OF THIRD PERSON TO ENFORCE CONTRACT—NOTICE OF ACCEPTANCE.

1. Where no written contract for a sale of land is pleaded, the presumption is that the contract was oral.

2. Burns' Rev. St. 1901, § 6629, prohibiting the enforcement of parol contracts for the sale of land, does not prevent an action to enforce a vendor's lien on land conveyed pursuant to an oral contract to exchange.

3. Executing a mortgage on land conveyed to a grantee constitutes a sufficient acceptance by him of the conveyance.

4. A vendor is not precluded from maintaining an action to enforce a lien for the purchase money because he previously prosecuted an unsuccessful suit to avoid the sale, on the ground that the delivery of the deed was pro-

¶ 1. See *Frauds*, Statute of, vol. 22, Cent. Dig. §§ 354, 356, 373.

cured from a depositary by the fraud of the vendee.

5. One who is a beneficiary under, though not a party to, a contract, may maintain an action on the agreement without notice of acceptance or demand other than the commencement of the action.

6. One who is a beneficiary under, though not a party to, a contract, may enforce it, though no consideration moves from him to the original contracting parties or either of them.

Appeal from Circuit Court, Decatur County; Francis T. Hord, Judge.

Action by James F. McCoy against Curtis McCoy and wife and Arabella McCoy. From a judgment for plaintiff and Arabella McCoy, Curtis McCoy and wife appeal. Affirmed.

Ewing & Ewing, for appellants. Cortez Ewing and John F. Goddard, for appellees.

WILEY, P. J. Appellee James T. McCoy was plaintiff below, and appellants Curtis and Carrie McCoy and appellee Arabella McCoy were defendants. Appellee's complaint was originally in ten paragraphs, the seventh, eighth, ninth, and tenth of which were dismissed. A demurrer to each of the others was overruled. Curtis McCoy answered in nine paragraphs, all of which were dismissed but the second and fourth. Appellee Arabella McCoy filed a cross-complaint, to which a demurrer was overruled. Appellants' first and second paragraphs of answer were held bad on demurrer. Trial by the court, and a general finding for appellee James T. on his complaint, and for the appellee Arabella on her cross-complaint. All of the rulings on the pleadings which were unfavorable to appellants are assigned as errors.

Curtis and Arabella McCoy are son and daughter of James T., and Carrie McCoy is the wife of Curtis. Appellee James T. contends that the record affirmatively shows that the finding and decree are based on the fourth and fifth paragraphs of the complaint, and hence the ruling on the demurrer to the other paragraphs is not available, even though they might not be good as against a demurrer for want of facts. We cannot concur in this contention. The several paragraphs of complaint are substantially the same, and it does not affirmatively appear from the record upon which particular paragraph or paragraphs the court based its finding. We think it is proper for us to say, in view of the prolixity of the complaint before us, that there is no defensible reason or excuse for incumbering a record by so many paragraphs of complaint, when every fact relied upon and pleaded might properly have been grouped in one, and at most two, paragraphs. Such practice is not to be commended, and is not productive of healthful results.

In the first paragraph of complaint it is alleged that on December 12, 1896, appellee James T. McCoy was the owner in fee simple of a certain described tract of land, consisting of 239⁶⁶/₁₀₀ acres; that on that day he sold and conveyed, by warranty deed, the

same to appellant Curtis McCoy for the agreed price of \$12,000 upon the following terms, viz., \$2,000 cash, \$1,000 to be paid by appellant Curtis to appellee Arabella McCoy, \$2,000 as an advancement by James T. to Curtis, and the conveying by Curtis to James T. of certain described real estate of the agreed value of \$7,000, which said real estate was to be conveyed free and unincumbered; that at the time the said Curtis agreed and promised to pay and satisfy a certain mortgage for \$2,000 on part of the real estate he was to convey to his father; that he tendered to James T. deeds of conveyance for said real estate purporting to convey the same free and unincumbered, which appellee James T. refused to accept until the said mortgage lien should be discharged; that the said Curtis refused to pay and satisfy said mortgage, and still refuses; that said real estate has since been sold on a decree of foreclosure of said mortgage, and said Curtis has failed to pay the balance of \$7,000 of the purchase price of the real estate conveyed to him, and that the same is due; that, after the acceptance of the conveyance to him by appellee James T., the said Curtis, on March 6, 1899, conveyed and mortgaged said real estate to his wife and co-appellant Carrie McCoy for the alleged sum of \$7,350, due three months from date; that when said mortgage was executed to her the said Carrie had full knowledge that her co-appellant Curtis had failed and refused to pay appellees James T. and Arabella the \$2,000 and \$1,000, respectively, which he agreed to pay as a part of the purchase price for the real estate conveyed to him, and that he had failed and refused to pay and discharge the incumbrance upon the real estate which he agreed to convey to his father, and also knew that the latter would not accept a conveyance thereof until said incumbrance was discharged. It is also averred that appellant Curtis has no other property subject to execution. The prayer of this paragraph is that appellee have judgment for \$10,000; that a vendor's lien for the same be declared; that said lien be declared superior to the mortgage of appellant Carrie; and that it be foreclosed against the real estate conveyed by James T. to Curtis. The second paragraph is so similar to the first that we do not discover any material difference between them, and it is useless to restate its averments. The third paragraph contains all the essential averments of the first, and some additional averments as to that part of the contract by which Curtis was to pay, as a part of the purchase money, \$1,000 to his sister. These additional averments are not essential in determining the sufficiency of this paragraph of complaint. As to the fourth, fifth, and sixth paragraphs the most careful scrutiny has failed to disclose any substantial difference between them and the first. Counsel have not pointed out any difference, and in

their brief, and also in oral argument, they have urged the same objections to all. The scope and tenor of each paragraph of the complaint is to obtain a decree to enforce a vendor's lien for unpaid purchase money. The facts upon which appellee bases his right to equitable relief are fairly well pleaded, and the demurrer questions their sufficiency.

The principal objection urged to the complaint, and we think the most important one, is that it affirmatively appears that the contract relied upon was in parol, and, as it was for the exchange of lands, was within the statute of frauds, and for that reason not enforceable. The statute relied upon by appellant in specific terms prohibits the enforcement of parol contracts for the sale of real estate. Burns' Rev. St. 1901, § 6629. The provisions of the statute apply with equal force to contracts for the exchange of real estate. *Bradley v. Harter*, 156 Ind. 499, 60 N. E. 139. Appellant's position is therefore impregnable, unless, from the facts pleaded, we can say the contract has been taken out of the statute of frauds; for, as no written contract is pleaded, the presumption is that it was oral. *Langford v. Freeman*, 60 Ind. 46; *Goodrich v. Johnson*, 66 Ind. 258; *Carlisle v. Brennan*, 67 Ind. 12. Because a contract is, in the first instance, voidable under the statute of frauds, it does not necessarily follow that it cannot be enforced, for some subsequent act of the parties may vitalize it and take it without the inhibition of the statute. Thus it has been held that when that part of the contract for the sale of lands which is within the statute is executed by the vendor, by which he vests in the vendee title, thus securing to him that for which he contracted orally, and the deed is accepted by him, he is bound for the purchase money, for the promise to pay the purchase price is not within the statute. *Stephenson v. Arnold*, 89 Ind. 426; *Arnold v. Stephenson*, 79 Ind. 126; *Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76; *Sands v. Thompson*, 43 Ind. 18, 22; *Huston v. Stewart*, 64 Ind. 388, 395; *Schlerman v. Beckett*, 88 Ind. 52. This is not an action for specific performance, but to enforce a vendor's lien for purchase money where the vendor has in fact parted with his title, which he agreed orally to convey.

Counsel for appellant do not seriously controvert the announced rule that part performance may be sufficient to avoid the statute of frauds, but seek to parry its force and effect by asserting that the complaint does not show part performance, in that it does not show an acceptance of the deed from father to son. It is urged that the mere averment that he accepted the deed is a conclusion of law, and not the statement of a substantive fact. Without stopping to consider this assumption, we are clear that there is another averment in each paragraph which conclusively shows an acceptance. It is averred that after the execution of the

deed from James T. to Curtis the latter executed to his wife a mortgage for \$7,350 upon the real estate so conveyed to him. This fact, like all other facts well pleaded, is admitted by the demurrer, and, regardless of the averment of acceptance, it clearly appears that he did in fact accept the conveyance so made.

Appellants are presumed to have known the law, and must have known that a mortgage executed by Curtis to his wife, in the absence of title in him, would have been worthless, and hence without benefit to her. By this mortgage they both treated the real estate as vested in him, and they cannot now successfully assert nonacceptance of the conveyance. To declare a contrary rule would open the door for the perpetration of unwarrantable frauds. Courts are not organized and maintained to lay down rules of law under and by which designing persons may perpetrate frauds upon their neighbors or those with whom they deal, but, on the contrary, one of the highest duties of courts, and especially courts of equity, is and should be to sacredly guard and protect against fraud, and in case of fraud to secure to the injured party his legal and equitable rights. The maxim that for every wrong there is a remedy should not be lost sight of in the administration of the law and the application of the principles of equity.

Under the averments of the complaint, the appellee James T. McCoy parted with valuable property, and therefore lost a substantial right, for he has not received any consideration or thing of value in return. To this extent he has suffered a wrong, and by the terms of his complaint his only remedy is that which he here seeks to enforce, viz., a vendor's lien. If he has brought himself within the rules of pleading—for the sufficiency of his complaint is now the only question we are considering—then the court would be remiss of its duty if it did not enforce his remedy. It would be a travesty upon the law to declare that if John Doe and Richard Roe would agree orally to exchange lands, and the latter should accept a conveyance from the former of his lands, and then refuse or for some reason be unable to convey to Doe the latter's lands, the injured party should lose his property, and not have the right to enforce any remedy against the one that wronged him; and yet that is the very doctrine for which appellants are contending. We cannot adopt such a rule, and the authorities will not warrant it. See *Shirk v. Lingeman*, 28 Ind. App. 630, 59 N. E. 941. The legislative branch of the state government never intended that, in passing the statute of frauds, it should become a shield for the perpetration of fraud, but rather an impregnable bulwark against its perpetration. *Caylor v. Roe*, 99 Ind. 1.

Other objections are urged to the complaint, but, in our judgment, they are not

well taken, and need not be considered. There was no error in overruling the demurrer.

The next question discussed is the ruling of the court in sustaining the demurrer to the second paragraph of answer to the complaint. The material averments of this paragraph of answer are that after the execution of the contract set up in the complaint, and before the commencement of the present action, appellee James T. McCoy brought and prosecuted to an unsuccessful termination an action in the Decatur circuit court against appellee Curtis McCoy to cancel and annul the contract now sued on; that in his complaint in that action he set up the same contract he now seeks to enforce, and averred that deeds were executed from Curtis McCoy and wife to James T. McCoy for the two tracts of land Curtis was; under the contract, to convey to him; that a deed was executed by James T. to Curtis for the 239⁶⁶/₁₀₀-acre tract; that said deeds were left with one Lambert in escrow, upon certain conditions specified; that said Lambert violated said conditions by delivering the deeds to Curtis McCoy, and that they were procured by the fraud of Curtis; that no title passed by said deeds; and asked that said deeds be canceled, and Curtis be compelled to convey, etc. Upon these facts the prayer of the answer was that James T. be estopped to plead the matters set up in his complaint. Appellant claims that this paragraph of answer is good upon the sole ground that appellee James T. in that action selected his remedy, and by reason thereof is estopped from pursuing a different one.

The controlling question that arises under this paragraph of answer is this: Was the election of the remedy first chosen by appellee inconsistent with the remedy he now seeks? If it was, then he would be estopped from pursuing the latter. If an action to cancel a contract, wherein the complaining party fails, is inconsistent with an action to enforce his rights under the contract, it would create an estoppel. We are unable to see any inconsistency between them. The action for cancellation in this instance was based upon fraud. By the decree of the court that issue was determined adversely to appellee, and left the contract in force as the parties made it.

A party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one, which is not inconsistent with his true and effectual remedy, which he should have pursued in the first instance. *Bunch v. Grave et al.*, 111 Ind. 351, 12 N. E. 514; *Lee v. Templeton*, 73 Ind. 315; *Kelsey v. Murphy*, 26 Pa. 78, 83; *Morris v. Rexford*, 18 N. Y. 552. Election of remedies is the act of choosing between the different modes of procedure and relief allowed by the same state of facts, which modes

may be termed coexisting remedies. 7 *Encycl. of Pl. & Pr.* p. 361. The result of appellee's first action left him where he was in the first instance, and his present action to enforce his only remedy is not inconsistent therewith. The answer was insufficient to stand against the attack of a demurrer.

The sufficiency of the cross-complaint of appellee Arabella McCoy is brought in review by the overruling of the demurrer to it. In the cross-complaint she sets up the facts stated in the complaint by which it is averred that under the contract between her father and brother, for exchange of lands, the latter, as a part of the consideration, agreed and promised to pay her \$1,000. With the cross-complaint a copy of the deed from James T. to Curtis is filed as an exhibit. That deed contains this provision: "As a part of the consideration for the above-described real estate the grantee is to pay Belle McCoy, daughter of Grantor, the sum of \$1,000." The objection urged to the cross-complaint is that it does not show any election of the cross-complainant to claim the benefit of the contract, or that she notified the parties that she had elected or would claim any benefits under it. The purpose and legal effect of that part of the contract between the contracting parties was to bestow a benefit upon a third person. There was a valid and sufficient consideration moving from the grantee in the deed to support his promise to pay his sister \$1,000. In such case the promisee may maintain an action on the promise without notice of acceptance or demand, and the commencement of an action to enforce the promise is both an acceptance and demand. *Rodenbarger v. Bramblett*, 73 Ind. 213-216; *Copeland v. Summers*, 138 Ind. 219-223, 35 N. E. 514, 37 N. E. 971; *Risk v. Hoffman*, 69 Ind. 137-139. It was not necessary, as contended by counsel for appellants, that the cross-complaint should aver that some consideration moved from the promisee to the original contracting parties or one of them. *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590; *Harrison v. Wright*, 100 Ind. 515, 533, 58 Am. Rep. 805; *Rodenbarger v. Bramblett*, 73 Ind. 213. We find no error in overruling the demurrer to the cross-complaint.

The remaining question for consideration is the sufficiency of the second paragraph of answer to the cross-complaint. The substance of the answer is that the cross-complainant never served notice on the parties, and that in the action between them to cancel the contract she aided and abetted her father; that she did not thereafter elect, by notice or otherwise, that she would claim any rights thereunder, and by reason of which she waived her rights. What we have said in discussing the sufficiency of the cross-complaint is applicable here, and the demurrer was properly sustained.

Judgment affirmed.

(32 Ind. App. 58)

CINCINNATI & H. SPRING CO. v. BROWN.(Appellate Court of Indiana, Division No. 1.
Dec. 11, 1903.)**NEGLIGENCE—DANGEROUS PREMISES—CON-
TRIBUTORY NEGLIGENCE.**

1. Whether an owner of land who knowingly suffered his barbed-wire fence on the boundary thereof, in a populous district, to go to ruin and become dangerous to the children playing in the vicinity thereof, without serving any useful purpose, and who knew that children were accustomed to play on its land and the adjoining land in the vicinity of the fence, was guilty of actionable negligence to a child coming in contact with the fence while playing on the adjoining land, was for the jury.

2. Whether a child who, while playing with other children, ran into a wire fence at the boundary of a third person's land, the existence of which she did not know, was guilty of contributory negligence precluding a recovery for the injuries sustained, was for the jury.

Appeal from Circuit Court, Lake County;
Willis C. McMahan, Judge.

Action by Beatrice Brown, by Calvin Brown, her next friend, against the Cincinnati & Hammond Spring Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Stinson Bros., for appellant. A. F. Knotts and F. M. Conroy, for appellee.

BLACK, J. The appellee, suing by her next friend, sought and recovered a judgment against the appellant for a personal injury suffered by her through its alleged negligence. The appellant's manufacturing establishment was located on a large parcel of ground which was immediately north of Michigan avenue and immediately east of Oakley avenue, in the city of Hammond. There was no sidewalk along the eastern side of Oakley avenue, and the eastern portion of that street and the adjoining western portion of the grounds of the appellant were covered with a thick growth of trees and bushes. A barbed-wire fence on the line dividing the company's grounds from Oakley avenue ran among the trees, and outside of it was a pathway, winding among the trees, on Oakley avenue. The fence had been constructed some years before the appellee's injury. It had never been repaired, and was broken down in many places, leaving large spaces through which access might be had to the appellant's grove. In some places there were still a number of wires, in others but few wires, in some places one wire, and in others none. In the condition in which this fence was thus suffered to be, it served no useful purpose whatever as a fence. The factory was in one of the most thickly populated portions of the city, a place of about 18,000 inhabitants, and there were a great many children living in the neighborhood, who were accustomed to play at their childish sports in the grove on both sides of the fence. The appellant, through its servants, knew of the dilapidated condition of the

fence, and knew that the children of the neighborhood were accustomed to play as above mentioned. The appellee was a girl about 12 years old, who lived on Michigan avenue some short distance west of Oakley avenue. She was playing at "hide and seek" with a number of her playmates of like age, or younger, on Oakley avenue. With some other children, she had hidden in a sand hole there, in the twilight, between sundown and dark. In the course of the play, and as a part of it, she and the other children ran out of the sand hole in different directions. She ran toward the fence, of whose existence she did not know, having been accustomed to play at another place. She ran against the barbed wire, and was severely and permanently injured. The foregoing facts were in substance alleged in the complaint, and proved on the trial.

It is true, as contended by the appellant, that a complaint for personal injury through negligence must show a legal duty or obligation of the defendant toward the person injured, existing at the time and place of the injury and arising out of some relation existing then and there between them, which the defendant failed to perform or fulfill, and that the injury was occasioned by such failure. *Thiele v. McManus*, 8 Ind. App. 132, 28 N. E. 327, and cases there cited. It is also a general rule of law that the owner or occupant of premises is not under any legal duty to keep them free or safe from the danger of obstructions for persons who go upon, into, or through the premises, not by his invitation, express or implied, but for their own pleasure or convenience, though by his acquiescence or permission, and who, therefore, are mere licensees, enjoying the license subject to the attendant risks. *Id.*

In seeking the solution of such a case as the one at bar, it is proper to keep in view the rule of law that one should so use his own as not to injure another. The gratification of the natural disposition of healthy children to engage in innocent sports, such as that in which the appellee was engaged when injured, cannot be regarded as a fault; and one who maintains a place thus inviting to such persons of immature minds, and has knowledge that they are accustomed to resort to his exposed grove so situated, and the immediately adjoining grove, for the indulgence of their natural inclination to engage in sports to which such a place is peculiarly adapted, cannot be said to have no duty, with reference to his property, concerning the personal safety of the children so engaged. As was said in *Bransom's Adm'r v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193: "As a general rule, the owner of land may retain to himself the sole and exclusive use and occupation of it; but as property in lands depends upon municipal law for its recognition and protection, the individual use and enjoyment of it are subject to conditions and restraints imposed for the public good, and

from a reasonable and humane regard for the welfare and rights of others. Hence, according to the maxim, *Sic utere tuo ut alienum non laedas*, a party may be made liable for the negligent use of his property whereby the person or property of another has been injured. It is held that a party is guilty of negligence in leaving anything in a place when he knows it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third person. 1 *Add. Torts*, 511. And said a learned judge: 'It appears to us that a man who leaves in a public place along which persons, and among them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion.' 39 B. Din. 339." See, also, *Kansas Central R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508. The liability of the owner of the premises in such case must depend upon the nature of his act or omission, and the question as to the probability that such act or omission would occasion the injury which ensued. If, under the circumstances, the probability of such injury was strong enough to make it the duty of the owner of the premises and maintainer of the obstruction which caused the injury, having reasonable regard for the safety of other persons, to remove the cause of the injury, the owner could not be regarded as free from actionable negligence. In determining what was the duty of the owner, his knowledge of the use of the locality as a playground by the children of the neighborhood, and the fact that the remnants of the wire fence served no purpose of use or ornament, but by reason of the sharp barbs upon the wire were dangerous to any one coming in contact therewith, forcibly and without knowledge of their presence, were facts to be considered by the triors for the purpose of arriving at a conclusion as to the reasonableness or prudence of making such a use of the premises. In *Penso v. McCormick*, 125 Ind. 116, 25 N. E. 156, 9 L. R. A. 313, 21 Am. St. Rep. 211, it was said to be a well-recognized doctrine that persons are required to use greater care in dealing with children of tender years than with older persons who have reached the age of discretion, and that greater care is required to avoid injury to them, even when they are trespassers.

In the case before us the appellee was not upon the premises of the appellant when injured, though but for the barbed wire with which she came in contact she would have entered the part of the grove which constituted a portion of the factory grounds. The appellant suffered its fence to go to ruin,

and thus maintained on the border of its grounds, stretched between posts, a wire barbed so as to be highly dangerous to the children playing in its vicinity. We cannot but conclude that it was proper to leave to the determination of the jury, from all the facts of the case, both the question as to the negligence of the appellant, and the question whether the appellee proximately contributed to the injury by her own fault.

Judgment affirmed.

(32 Ind. App. 43)

NORTON-REED STONE CO. v. STEELE.

(Appellate Court of Indiana, Division No. 2.
Dec. 11, 1903.)

MASTER AND SERVANT—INJURY TO SERVANT
—NEGLIGENCE—COMPLAINT—SUFFICIENCY
—VERDICT FOUNDED ON COMPLAINT CONTAINING DEFECTIVE PARAGRAPH.

1. The complaint in an action for injuries sustained by a servant by reason of defective appliances should charge that the use of such defective appliance was dangerous, and that the defects were known to the master.

2. The paragraph of a complaint in an action against a master for the death of a servant which alleged that a belt was defective, and that it had been broken twice during the day of the accident, and prior thereto and on days before the accident, of which the master had full knowledge, and of which insufficiency and breaking the servant had no knowledge, was defective for failing to aver that the use of the defective belt was dangerous, or its use negligent.

3. The paragraph of a complaint in an action against a master for negligently causing the death of a servant by being caught by a belt, which alleged that the belt was defective and insufficient for the purpose for which it was used, that the belt had been cut, split, and broken by reason of defects in the pulley and other machinery over which it passed, that the pulley had an uneven surface, which cut and wore the belt and rendered it weak, of which defects the master had full knowledge and the servant no knowledge, was defective for failing to aver that the use of the belt was dangerous, or its use negligent.

4. Where it is claimed that the verdict is founded on a good paragraph, so that the ruling of the court in overruling demurrers to defective paragraphs is harmless, the record must show affirmatively that the verdict is exclusively on the good paragraph, or it will be set aside.

5. The complaint in an action against a master for negligently causing the death of a servant, which alleged that the master negligently left a protrusion from a pulley, and negligently used the defective pulley, that because of the protrusion the belt was caught and the servant was killed, that the servant was acting in obedience to orders, that the servant was doing extrahazardous work by order of the master, and that the master knew of the danger and the servant did not, sufficiently stated a cause of action against the master at common law.

6. The complaint was also sufficient under the employers' liability act (Acts 1893, p. 294, c. 130, § 1), making corporations liable for personal injury suffered by an employé when the injury is suffered by reason of any defect in the machinery, when such defect was the result of negligence.

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 532.

Appeal from Circuit Court, Orange County; Thos. B. Buskirk, Judge.

Action by Dath Steele, administrator of Wilbur Mason, deceased, against the Norton-Reed Stone Company. From a judgment for plaintiff, defendant appeals. Reversed.

E. K. Dye and Duncan & Batman, for appellant. W. P. Kappes and Matson & Giles, for appellee.

COMSTOCK, J. Appellee instituted this action in the circuit court of Lawrence county against appellant for negligently causing the death of appellee's decedent, Wilbur Mason. A change of venue was taken to Greene county, and from Greene county to Orange county, where a trial resulted in a verdict and judgment in favor of appellee for \$——. With the general verdict the jury returned answers to interrogatories. Counsel for appellee at considerable length earnestly and ably argued that the record presents no question on appeal because of the alleged lack of proper authentication of the transcript by the clerks of Lawrence and Greene circuit courts respectively. The point is decided adversely to appellee's claim in *Southern Indiana R. Co. v. Martin* (Ind. Sup.) 66 N. E. 887.

The complaint is in three paragraphs. A demurrer to each was overruled, and each ruling assigned as error. The first paragraph alleges that the defendant is a corporation, engaged in quarrying, sawing, and planing limestone in Lawrence county, Ind., and owned and operated a stone saw and planing mill; that a great many persons were employed, among whom the plaintiff's decedent, who was an able-bodied man, rendering the defendant much valuable service; that he had been in the defendant's employ about two years prior to the 13th day of August, 1900, and had worked as a scabbler of stone in its yard at \$1.50 per day, and for a few days prior thereto he had been working as a planer for the sum of \$2 per day, and while so employed it was his duty to work at the planing machine, and, when required, to grind the tools for small repairs, and while decedent was so employed in grinding tools for small repairs so stated, under and by direction of the superintendent of said mill, one Richard Roberts, under whose direction he was required by said defendant to work, by reason of a defective belt on main lift shaft running the emery wheel the clothes of the decedent were caught and whirled rapidly over the main lift shaft and wheel, and was then and there thrown upon the machinery and belting surrounding the machinery and wheel, so as to bruise and mangle him, and from the effects thereof to kill him instantly; that the belt so used by the defendant as aforesaid was defective, and of insufficient strength for the purpose for which it was used; that the said belt had been broken, by reason of its insufficient strength, twice during the day of the acci-

dent, and prior thereto on days before the same, of which the defendant had full knowledge and of which breaking and insufficiency the decedent had no knowledge whatever. The only defect charged in the first paragraph is that the belt "was defective and of insufficient strength for the purposes for which it was used." The breaking of the belt prior to the accident is averred, and decedent's want of knowledge is stated as follows: "But of which breaking and insufficiency the decedent had no knowledge." Said paragraph does not charge negligence upon the part of appellant. It charges that decedent's clothes were caught by a defective belt, but it does not charge that the use of a defective belt was dangerous, or its use negligent. The second paragraph sets out practically the same facts with reference to the defendant, the business in which engaged, the employment and service of the decedent, and says: "And the plaintiff alleges that one Richard Roberts was then and there the superintendent of said mill and in charge of said mill for the defendant, and intrusted by the defendant with the duty of keeping the planer, tools, and machinery of said mill in proper condition, and had authority to direct said decedent in the performance of his work, and was then and there acting in the place of and performing the duty of said defendant in that behalf, and the said decedent was then and there in the exercise of due care and diligence. And this plaintiff further avers that Roberts, superintendent as aforesaid, then and there had authority from the defendant to hire and discharge the men in the service of the defendant in said mill, including said decedent; and, further, the plaintiff alleges that on the occasion of the grievances hereinafter complained of the said decedent was obliged to conform and did conform to the orders of said superintendent as aforesaid, and was then and there acting in obedience to the particular instructions given by said superintendent. And the plaintiff says that on the 13th day of August, 1900, his said decedent being employed as aforesaid as a planer in defendant's stone mill, and it being then and there his duty under said employment to plane stone on the planers in said mill and to grind the tools used by him in said work where small repairs were needed by the use of machinery for that purpose provided by the defendant in said mill, and being engaged in grinding his tools and standing at the proper and usual place for that purpose, and at that time acting under the express orders and directions of said superintendent as aforesaid, so clothed with authority as aforesaid, while engaged in grinding his said tools as aforesaid, by reason of certain defects in said machinery as hereinafter set out, so used for grinding tools, and then and there used by the defendant in its business as aforesaid, the belt used on said machinery for grinding tools was broken, and thereby the clothes of the dece-

dent were caught by the broken belt and other machinery of said mill and grinding apparatus, and said decedent was thereby whirled over the main lift shaft and wheel of said machinery, and was thrown with great violence upon the machinery and belting and other things surrounding said shaft and wheel, and was thus so bruised and mangled that from the effects thereof he died instantly. And the plaintiff alleges that the belt so used by said defendant on said wheel was defective and insufficient in strength for the purpose for which it was used; that said belt had been cut, split, and broken by reason of the defects in the pulley and other machinery over which it passed; that said pulley had an uneven surface, which cut and wore said belt and rendered it weak, and had broken twice on the day prior, and that all on account of defects hereinafter set out; and of which defects and breaking the defendant had full knowledge, but of which defect and breaking the decedent had no knowledge whatever; and the said plaintiff charges that the death of decedent as aforesaid was the direct result of the negligence of the defendant as charged as aforesaid." The second paragraph alleges that the belt was "defective and insufficient in strength for the purposes for which it was used," and states how its strength was impaired, but does not connect the injury with the defect. It avers that "the death of decedent was the result of the negligence of the defendant as charged aforesaid," but negligence had not been charged. Neither of said paragraphs contains averments that the alleged defects made the place in which the decedent was working dangerous, or that they endangered the safety of the decedent. A complaint against a master for injuries received by his servant on account of defective appliances should charge that the use of such appliances was dangerous, and that such defects were known to the master. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235; *Creamery, etc., Co. v. Hotsenpiller*, 24 Ind. App. 122, 58 N. E. 250. Neither of the said paragraphs shows the negligence of the defendant, or the acts of negligence of the servant for which it is sought to hold the defendant liable, to be the proximate cause of the injury. The court erred in holding said paragraphs sufficient.

But appellee, while insisting that each of said paragraphs is sufficient, makes the point that the answers to interrogatories show that the verdict was founded on the third paragraph, and that, if the paragraphs in question were defective, the ruling on the demurrer thereto was harmless. To sustain appellant's claim the record should show affirmatively that the verdict was exclusively on the good paragraph. *Perry v. Turnpike Co.*, 43 Ind. 321; *Wolf v. Schofield*, 38 Ind. 175. The record shows that the verdict rests on all the paragraphs. The objection made to the amended third paragraph is that it does not

allege that the defendant's negligence caused the death of the decedent. It is alleged in said paragraph that the defendant negligently "left a protrusion from said pulley on the side thereof," and then negligently used said defective pulley; that because of the protrusion the belt was caught and decedent killed. This is a statement of proximate cause.

It is claimed that the said amended third paragraph does not come within the employers' liability act. As showing negligence at common law, it is alleged that the decedent, as defendant's servant, was acting in obedience to orders, and defendant negligently furnished defective machinery, specifically describing it; that the decedent was doing extrahazardous work by order of the defendant; that the defendant knew of the danger and the decedent did not; that by reason of the defect decedent was caught and killed. These allegations are sufficient as a cause of action.

This paragraph is good, too, under the employers' liability act, for it shows, following the words of the statute, that "the injury was suffered by reason of the defects in the condition * * * of machinery * * * in use of the business of such corporation and that such defect was the result of the negligence of such corporation." Acts 1893, p. 294, c. 130, § 1, cl. 1.

It not appearing that the judgment proceeds upon the one good paragraph, it must be reversed. The consideration of other alleged errors is unnecessary. The trial court is instructed to sustain appellant's demurrer to the second and third paragraphs of complaint.

(32 Ind. App. 54)

WEBB v. SWEENEY.

(Appellate Court of Indiana, Division No. 2.
Dec. 11, 1903.)

EVIDENCE—INTRODUCTION FOR A CERTAIN PURPOSE.

1. Defendant in an action for contract price of land sold introduced, for the sole purpose of showing that both parties agreed to abandon the contract, the award of arbitrators, with which plaintiff had refused to abide, finding, inter alia, the rental value of the land for the time defendant occupied it. Held that, though it was not competent for any purpose, had it been properly objected to, yet, having been introduced, it was in the record for all purposes, and could be considered on the rental value.

Appeal from Circuit Court, Perry County; E. M. Swan, Judge.

Action by Louise Sweeney against John M. Webb. From the judgment, defendant appeals. Affirmed.

Patrick & Minor, for appellant. Charles A. Weathers, for appellee.

WILEY, P. J. December 26, 1896, appellant and appellee entered into a contract in writing whereby the latter agreed to convey to the former certain real estate upon conditions named. The consideration appellant

was to pay was \$100, for which he executed three notes. He paid one of said notes, amounting to \$34, and took possession of the real estate. He made valuable improvements thereon, but refused to pay the balance of the purchase price on the ground that appellee did not have, and could not convey to him, a good title. After occupying the real estate for some time, and after having made valuable improvements thereon, appellant surrendered his possession. Thereupon appellee brought this action on the contract, and to enforce specific performance. As to the complaint, issues were joined by answer and reply. Appellant filed a cross-complaint or counterclaim, asking affirmative relief for the money he had paid and the improvements he had made. By one paragraph of appellee's reply, she set up the fact that appellant had been in possession and occupied the premises from January 1, 1897, until the 1st day of August, 1900; that the rental value of said premises during said time was \$6 per month, for which she demanded judgment. Upon the issues thus joined, the cause was tried by the court, resulting in a finding and judgment for appellant on his cross-complaint for \$138.42. Appellant's motion for a new trial on the ground that the decision of the court was contrary to law, and not sustained by sufficient evidence, and that the assessment of the amount of recovery was erroneous—being too small—was overruled, and such ruling presents the only question under the assignment of error which counsel have discussed.

There is no substantial conflict in the evidence as to the value of the improvements put upon the real estate by appellant. Three or four witnesses testified as to their value, and they differed only as to the value of such improvements according to their individual judgments, and there was very slight variation in the amounts fixed by them. The lowest amount fixed by any witness for such improvements was \$249, and the highest amount by any one witness was about \$275.

It seems to be conceded by the appellee that, under appellant's cross-complaint, he was entitled to be allowed, as against appellee's cause of action, the reasonable value of the improvements he put upon the real estate, in addition to the \$34 which he had paid under his contract. As against the amount thus due appellant, appellee was entitled, under her fifth paragraph of reply, to have set off the reasonable rental value of the premises during appellant's occupancy thereof, provided any evidence was introduced of what such rental value was. It is appellant's contention that there is no evidence in the record as to that value. Before the beginning of this action, the appellant and appellee entered into a written agreement to submit the matters in controversy between them to arbitration. The arbitrators were selected, heard evidence, and made their award. They found that the improvements

made by appellant were of the value of \$275, and that the rental value of the real estate for the time he occupied it was \$4 per month. Appellee refused to abide by this award. Upon the trial of the cause the award was introduced in evidence, over appellee's objection, for the sole purpose, as disclosed by the record, to establish the fact that both parties had agreed to abandon the contract sued on. Appellant himself introduced this award over the objection of the appellee. Upon proper objection, the introduction of the finding of the arbitrators should not have been introduced in evidence, for it was not competent; but, the appellant having introduced it, it must be regarded as in the record, and there for all purposes, and he is not entitled now to say that there was not some evidence in the record as to the rental value of the premises. It is the established rule that objections not made to evidence in the trial court will not be considered on appeal. *Chandler et al. v. Beal et al.*, 132 Ind. 596, 32 N. E. 597; *Elliott's App. Pro.* 779. The grounds of objection to the introduction of the award were not well taken, and any other objections that might have been made are waived. *Elliott's App. Pro.* 775; *Chandler et al. v. Beal et al.*, supra; *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042; *Bingham v. Walk*, 128 Ind. 164, 27 N. E. 483; *Stout v. Rayl*, 146 Ind. 379, 45 N. E. 515; *Lauter v. Simpson*, 2 Ind. App. 293, 28 N. E. 324. In the case of *Bohr v. Neuenschwander*, 120 Ind. 449, 22 N. E. 416, it is held that the report of drainage commissioners in a ditch proceeding is inadmissible in evidence in a proceeding where a remonstrator is contesting both the report and the petition. But it was held, also, that when it was introduced in evidence it was before the court for consideration with other evidence in the case. The court said: "When the court overruled the appellant's objection and allowed the commissioners' report to be read in evidence, this was a decision that it was competent evidence. If competent evidence, when the court came to make up its finding it was its duty to consider it and weigh it as part of the evidence in the case, and we must presume that it did so weigh and consider it." While the report of the arbitrators was not competent evidence for any purpose if proper objections had been made, we must hold, under the decision last cited, that when it was introduced it became a part of the evidence in the cause, and the court was authorized to consider it with other evidence. No other evidence was introduced showing the rental value of the premises while they were occupied by appellant, but it can make no difference, under the rule declared in that case. Appellant contends, however, that even though the report of the arbitrators, finding the rental value of the premises, is considered as evidence, the judgment is wrong. It is possible that the amount determined by the court as due ap-

pellant, after deducting from the amount due him on account of improvements made and money paid the rental value of the premises, as determined by the report of the arbitrators, is not mathematically correct, but the difference is so small that we do not think the judgment should be disturbed on that account. Courts do not deal in trifles, and it is the policy of the law to put an end to litigation. We think that justice will be done both parties by allowing the judgment to stand.

Judgment affirmed.

ROBY, J. (concurring). The party offering evidence cannot, in my opinion, by the statement that he offers it for a certain purpose, deprive his adversary of the benefit thereof, and of the legitimate inferences therefrom.

(32 Ind. App. 533)

MERCER v. COOMLER et al.*

(Appellate Court of Indiana, Division No. 1.
Dec. 9, 1903.)

**EXECUTION—LAND PURCHASED WITH PRICE
OF OTHER LAND.**

1. Where C. gives M. a warranty deed of land, and with the purchase price buys land, taking title by the entirety in himself and wife, the latter land is not bought with money of M., so as to subject it, as land held in trust, under Burns' Rev. St. 1901, §§ 3396-3398, to execution of M., though M. obtains judgment against C. for breach of covenant of warranty.

Appeal from Superior Court, Howard County; Hiram Brownlee, Judge.

Supplementary proceedings by James Mercer against John H. Coomler and others. From an adverse judgment, plaintiff appeals. Affirmed.

B. C. Moon, for appellant. Blackledge, Shirley & Wolf, for appellees.

BLACK, J. In his proceeding supplementary to execution, the appellant's verified complaint showed that in 1898 the appellee John H. Coomler (his wife, the other appellee, Susan Coomler, joining) executed to the appellant a general warranty deed of conveyance for certain land in Howard county; that this land was incumbered, and in 1899 the appellant recovered in the court below a judgment against the appellee John H. Coomler for a breach in the covenant of warranty in the deed in the sum of \$250, which judgment remained due and wholly unpaid. The issuing of two executions, and returns thereon of "No property found," and the filing by the execution defendant of a schedule of property of the value of \$297.35, claimed as exempt, being shown, it was alleged that persons named, not parties, in 1898 conveyed certain land in Grant county to the appellees, John H. and Susan Coomler, and thereafter the other defendant in this proceeding, the Chicago, Indiana & Eastern Railroad Com-

pany, entered upon the land in Grant county, and constructed its railway across it; that in 1899, in the superior court of Madison county, John H. Coomler recovered a judgment against the railroad company for \$1,000 by reason of the construction of the railroad on this land, and this judgment remained wholly unpaid. It was alleged that the interest of John H. Coomler in the judgment against the railroad company, together with other property owned by him, and claimed as exempt from execution, exceeded in value \$600, the amount allowed by law as exempt, and he unjustly refused to apply the judgment, or any part thereof, to the satisfaction of the appellant's judgment above mentioned, etc. The railroad company filed pleadings admitting the rendition of the judgment against it, and, by leave of court, paid the amount of the judgment (\$1,156.83) into court, subject to the further order of the court, and was discharged. The appellees, John H. and Susan Coomler, having each answered by general denial, the court, upon trial, found in their favor.

The overruling of the appellant's motion for a new trial is assigned as error. It appeared in evidence that the judgment recovered by John H. Coomler against the railroad company had been assigned by him to one Holloway, who at the same time assigned it to the appellees "by entirety." It also appeared that the Grant county land held by the Coomlers as tenants by entirety had been purchased for \$4,000, part of the purchase money of \$11,000 paid by the appellant for the land in Howard county conveyed to him by the appellees; the remainder of that money having been used in the payment of debts of John H. Coomler. At and before the conveyance of the Howard county land to the appellant, it was agreed by the Coomlers that the title of any land bought with the proceeds should be taken in the names of both of them.

The controlling question is whether or not the judgment against the railroad company, rendered for the taking for its railway of the land owned by the appellees as tenants by entirety, which judgment is owned by the appellees, should be treated as being held by them as tenants by entirety, and therefore not subject to execution against the husband alone. It is well established that land held by husband and wife as tenants by entirety is not liable to be sold on execution to satisfy a judgment against the husband alone. *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. 909, 51 Am. St. Rep. 213; *Humbert v. Collings*, 20 Ind. App. 93, 50 N. E. 314. In *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254, it was decided that a crop raised on land held by husband and wife by entirety was held by them in the same manner and subject to the same law as the land itself, and therefore was not subject to levy and sale on execution against the husband.

*Rehearing and motion to transfer to Supreme Court denied.

Concerning this decision, it was said in *Fogleman v. Shively*, supra, that its effect is that the wife is entitled to the enjoyment of the land while it is held by her and her husband as tenants by entireties, and that the taking of the crop, without her consent, for her husband's debt, would be an invasion of that right—an interference with her rights as a tenant of the entirety; that the decision does not reach the case of a voluntary sale and conveyance of the land by the husband and wife for money or other personal property; that by such a sale and conveyance the husband and wife cease to have an estate in the land, and it is not necessary to treat the proceeds of the sale as being held by them in the same manner, and subject to the same law, in order to secure to either of them the enjoyment of the land; that neither is entitled longer to enjoy the land as such; that, having lost their estate in the land, not involuntarily or by proceedings in invitum, but by their voluntary conveyance, the personality received therefor must be regarded, not as land, but as personal property; and that the interest of the husband in such proceeds could be subjected to the payment of his separate indebtedness. In the case now at bar the judgment against the railroad company, rendered nominally in favor of the husband, and assigned, through a trustee, to the husband and wife "by entireties," thereby being placed in the names of its rightful owners, represented the value of a portion of the land held by the husband and wife by entireties. The tenancy by entireties of that portion was not broken by any voluntary act of the tenants. If the proceeds of the judgment, or any part of such proceeds, without the consent of the wife, should be taken and applied to the satisfaction of the individual indebtedness of the husband, the benefit to her of the creation of the tenancy by entireties would, as to such portion, be lost without her concurrence. She, as well as he, is to be regarded in such connection as a tenant of the entire land taken, and, the taking being without her consent, it would seem that she, as well as he, should be regarded as the owner of the whole proceeds; that is, that they should be considered as holding the judgment as tenants by entireties, so as to prevent the forcible application of any part of it to the debts of the husband.

The learned counsel for the appellant, in argument, protests that it is not claimed on behalf of the appellant that the appropriation proceeding by which the land was taken in Grant county, and in which the judgment for damages therefor was awarded, severed the unity of interest of husband and wife in the money realized from the land held by them; and it is urged by counsel that the underlying theory of the appellant's case is that he had an equitable right against the Grant county land of the Coomlers, because

his money went into it—because it was purchased in part with money which was equitably his; and that his equity in the land followed the fund derived therefrom into court; that the money in court as a result of the condemnation of a right of way across the Grant county land is but the substitute for the land; and that as the land was purchased by the Coomlers with his money to the extent of \$250, he having involuntarily furnished the money to buy the land, his right to be repaid is superior to any right of Susan Coomler. When Mrs. Coomler, by joining in the execution of the deed of conveyance to the appellant, relinquished her inchoate interest in the Howard county land, it was agreed that any lands bought with the proceeds should be taken as the land in Grant county was taken, the title being conveyed to the husband and wife. It was not necessary to prove any other consideration proceeding from her. The greater part of the purchase money derived from the Howard county land was used, pursuant to agreement between the husband and wife, in paying the debts of the husband. No fraudulent intent to take the title in the name of the husband and wife for the purpose of cheating the appellant or other creditors appears; and the case did not proceed upon the theory that the debtor had purchased the Grant county land with his own money, and had caused the conveyance to be made to him and his wife with intent to defraud the appellant or other creditors. Appellant claims to have proceeded upon the theory that his money went into the Grant county land, and that he should be permitted to follow it, so as to subject the judgment against the railroad to his execution. What is thus called the appellant's money is the amount of damages represented by a judgment against the husband alone in an action at law against him for his breach of his covenant of warranty against incumbrances. The appellant had no claim for any money or upon any covenant against the wife, who effectually released all her inchoate interest in all the land. It cannot properly be said that any money of the appellant went into the Grant county land. He paid the purchase money for the Howard county land to John H. Coomler, and it then ceased to be the appellant's money. He retained no ownership in it, or right to control its use. It was, as to the appellant, the property of John H. Coomler. The appellant received for his money the title to the Howard county land, which was subject to a right of way across the land for a pipe line for oil and gas. Because of the existence of this right of way, the appellant sought and obtained a general judgment at law upon the covenant of the husband. If the theory of counsel in argument be correct, the appellant has the right to subject to his execution not merely the judgment against the railroad company, but also, and for the same reason,

the land held by the appellees as tenants by entireties, on a theory, if we rightly understand his position, that he has traced particular money owned by him into the Grant county land. We have a statute which provides that when a conveyance for a valuable consideration is made to one person, and the consideration therefor is paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, subject, however, to the following provisions: First, every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration therefor, and, when a fraudulent intent is not disproved, a trust shall in all cases result in favor of prior creditors, to the extent of their just demands, and also in favor of subsequent creditors, if there be sufficient evidence of fraudulent intent; second, the provision that no use or trust shall result in favor of the person by whom the purchase money was paid shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid, or when the alienee, in violation of some trust, shall have purchased the land with moneys not his own, or where it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land, or some interest therein, in trust for the party paying the purchase money, or some part thereof. Sections 3396-3398, Burns' Rev. St. 1901. The appellant's complaint seems to proceed upon the theory that the conveyance of the Grant county land gave title to the appellees, and that the interest of the husband, the execution debtor, in the judgment against the railroad company, ought to be subjected to the execution. Such a theory would seem to recognize some valid interest in the wife, but, if she had a valid interest in the land as against her husband's creditor, it was an interest as tenant by the entirety; and none of the land, and therefore, as conceded in the argument of the appellant, none of the judgment against the railroad company, could be subjected to the execution. The argument of the appellant based upon the theory that the Grant county land was purchased in part with the money of the appellant, and that therefore the interest of both husband and wife, to such extent, ought to be subject to the execution, cannot prevail, for the reason that the consideration for the Grant county land, as we have sought above to show, was not paid by the appellant, or with his money, but was paid with money owned by John H. Coomler; the title being taken in the names of him and his wife, as agreed between them when the wife joined in the conveyance of the Howard county land.

Judgment affirmed.

NORTHWESTERN MUT. LIFE INS. CO. v. KIDDER.*

(Appellate Court of Indiana, Division No. 2.
Dec. 10, 1903.)

INTERPLEADER—FORM OF PROCEEDING— SHOWING TO BE MADE—INDE- PENDENT LIABILITY.

1. Under Burns' Rev. St. 1901, § 274, providing that defendant to an action may, on affidavit that one not a party makes demand for the same debt or property, "apply to the court for an order" to substitute such person in his place, and discharge defendant from liability, such application should be procured upon petition in the nature of a complaint, and motions to make more specific and demurrers may be directed thereto.

2. Under Burns' Rev. St. 1901, § 274, providing for an order of interpleader, at defendant's instance, on affidavit that a person not a party to the action, and without collusion with him, makes demand for the same debt or property, defendant need not state the details of the claim made by the person to be impleaded, but must show a bona fide demand, such as to throw a real doubt as to plaintiff's asserted right, so that he is unable to pay either party without hazard.

3. An insurance company which has given the beneficiary under the policy a check for the amount thereof has thereby incurred a liability to such beneficiary, independent of the policy, and cannot, when sued on the check, question the beneficiary's ownership thereof, pay the money into court, and obtain release from liability by an interpleader stating claims of persons asserting equities adverse to the beneficiary in the proceeds of the policy.

Appeal from Circuit Court, Vigo County; James E. Piety, Judge.

Action by Kate Kidder against the Northwestern Mutual Life Insurance Company, in which defendant filed an interpleader. From a judgment for plaintiff after sustaining a demurrer to the interpleader, defendant appeals. Affirmed.

B. D. Marshall and Baker & Daniels, for appellant. McNutt & McNutt, for appellee.

ROBY, J. Appellee brought suit upon a bank check made by appellant to her on July 25, 1902, for \$10,000. Appellant filed an interpleader admitting the execution of the check; setting up that it was given in settlement of an amount due from it upon an insurance policy upon the life of E. W. Kidder, and payable to appellee, said Kidder having theretofore died. It further represented that on January 26, 1902, before the presentation of said check for payment, certain persons named, claiming that they were entitled to said sum, demanded that said money be paid to them, and that appellant stop payment of said check. That thereupon payment upon said check was stopped by it. It avers its willingness to pay said sum to the parties entitled thereto, but it says that demands therefor are made upon it by both appellant and said other persons without collusion upon its part; that it is ignorant of

* 2. See Interpleader, vol. 29, Cent. Dig. § 47.

*Superseded by opinion in Supreme Court, 70 N. E. 489.

the rights of the parties to said money, which it has brought into court for the use of the parties found to be entitled thereto; wherefore it prays that it be allowed to pay said money into court and go hence. A motion to make this pleading more specific having been sustained, an amendment thereto was filed, in which the contents of the various communications between it and those claiming against appellee were given. It also averred that it did not know the facts upon which such claim was based, except as the attorney for said parties asserted that the assured was at his death practically the only stockholder in "W. L. Kidder & Son"; that he had for a considerable time been largely indebted to it; that he had for a long time been insolvent, and that portions of its money had by said Kidder been wrongfully diverted from the creditors of said corporation to the payment of the premiums upon said policy; that said claimants, being creditors, asserted ownership, by reason of such unlawful diversion of funds under the circumstances existing, of the whole proceeds of the said insurance policies; that said creditors have filed their application to be admitted as parties defendant to such action, to the end that they may set up their claims as creditors; that such application was denied by the court, but that said claim is still persisted in. A demurrer was sustained to this pleading, and appellant refused to plead further, whereupon a judgment was rendered against it for \$10,000, from which it appeals.

The statutory provision relative to interpleader is as follows: "A defendant, against whom an action is pending upon a contract, or for specific real or personal property, may, at any time before answer, upon affidavit that a person, not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct, and the court may, in its discretion, make the order." Section 274, Burns' Rev. St. 1901.

Preliminary to the consideration of the right to the relief sought is a question of practice. The statute is that the defendant may "apply to the court for an order." Appellant contends that such application should be by motion supported by affidavit—"a summary and simpler method substituted for the bill of interpleader in equity." This is the view adopted by the authors of various works on Code Practice. In the *Encyclopedia of Pleading & Practice*, pp. 478, 479, it is said that "a code complaint of interpleader will lie upon the same grounds as those which sustain a bill of interpleader in chancery," and "the rules of pleading and

practice incidental to bills of interpleader differ so little that what has been said in respect to the first may be considered as applicable to both, except when a distinction has been specifically pointed out." The number of cases involving this statute which have reached the Indiana courts of appeal is noticeably small. *Nofsinger v. Reynolds*, 52 Ind. 218, was a bill in the nature of an interpleader. The statute was held to apply only to pending actions, and not to exclude a resort to equitable remedies. *Ketcham v. Coal Co.*, 88 Ind. 515, was an equitable action. In *Mansfield v. Shipp*, 128 Ind. 55, 27 N. E. 427, the question was considered and not decided; it being held to be immaterial whether filing a demurrer to the "bill of interpleader" was proper practice or not, inasmuch as the pleading was not good, and the demurrer had been sustained. We are disposed to hold that the order named in the section quoted should be procured upon petition in the nature of a complaint, and that motions to make the pleading more specific and demurrers may be directed thereto. If appellant's position were correct, it would not be damaged by the action taken. The motion enabled it to present a much stronger showing than it would otherwise have done or attempted to do, while an exception to the ruling on the demurrer preserved all its rights. *Bonfoy v. Goar*, 140 Ind. 292, 39 N. E. 56; *Mansfield v. Shipp*, supra; *Long v. Ruch*, 148 Ind. 74, 47 N. E. 156.

The action, as heretofore stated, was founded upon a check made by appellant to appellee, and delivered to her, as the beneficiary of an insurance upon the life of her husband. She claimed, and the face of the policy sustained her claim, that the insurance was payable to her. The creditors of the deceased husband claimed that because of facts connected with the transaction, and extrinsic to the terms of the contract, they were, in equity, entitled to the proceeds of the policy. The statute does not require that the details of the claim made by the person sought to be impleaded should be set up. It is necessary, as a basis for the order, to show that a bona fide demand is made, and that the stakeholder is unable to pay without hazard to himself. The character of the claim made by the plaintiff in the pending suit may ordinarily be determined from his complaint. The intervening petition ought to show some reasonable ground for the conflicting demand on account of which the order is asked. Of course, the rights of the disputing parties cannot be determined or affected by such showing. The petitioner cannot have the order unless it is shown that he cannot determine to whom he should pay the fund, and there must be something stated to throw a real doubt upon the asserted right of the plaintiff. *Hinsdale v. Insurance Co. (Sup.)* 76 N. Y. Supp. 448; *Insurance Co. v. Lea*, 7 Ohio N. P. 399. The conflicting claims to the insurance were such as to logically entitle

the appellant, in an action upon the policy, to be released from liability and litigation by the payment of its debt into court. Such procedure would be to the interest of both contending parties, inasmuch as their contention could not thereafter imperil the collection of the sum in question. *Bank v. Insurance Co.* (C. C.) 25 Fed. 531; *Merchant v. N. W. Ins. Co.* (Sup.) 68 N. Y. Supp. 406; *McCormick v. Benevolent Legion* (Sup.) 39 N. Y. Supp. 1010; *Woolworth v. Insurance Co.* (Sup.) 49 N. Y. Supp. 512; *Morrill v. Ins. Co.*, 183 Ill. 260, 55 N. E. 656; *Id.*, 82 Ill. App. 410. The action is not brought upon the policy. It is true that the sum for which the check was given represents the proceeds of the policy, and that the relative rights of the widow and the creditors may not be at all affected, as between themselves, by its execution, but the question here is as to the right of the insurance company to pay the money into court and be discharged. It is thoroughly established that, where a different statutory provision has not been made, the party seeking to be so released by interpleader must have incurred no independent liability to either of the claimants. Sections 1322, 1326, *Pomeroy, Eq.*; *Bassett v. Leslie* (Sup.) 10 N. Y. Supp. 483; *Id.*, 123 N. Y. 396, 25 N. E. 386; *Trust v. Wiley*, 41 Barb. 477; *Coal Co. v. Hodges*, 59 Fed. 836, 8 C. C. A. 305. The execution of the check in settlement of the amount due upon the policy created an individual liability in favor of appellee, different from that that could be claimed by the creditors. As against her, the company is estopped to deny that she is the owner of the check. *Offutt v. Rucker*, 2 Ind. App. 350, 27 N. E. 589; *Johnson v. Conklin*, 119 Ind. 109, 21 N. E. 462; *Blacker v. Dunbar*, 108 Ind. 217, 9 N. E. 104. The cases go to the extent of holding that, even if the check was secured by appellee's fraud, appellant could not set up the existence of such fraud in a proceeding of this sort. *Mitchell v. Car Co.*, 26 Ill. App. 295; *Pomeroy, Eq.* § 1326. Sustaining, therefore, a different relation to one party than to the other, because of the independent liability so incurred by it, the appellant was not, under our statute, entitled to the relief sought.

Other propositions discussed become unimportant, in view of the conclusion constrained by the authorities cited.

Judgment affirmed.

(35 Ind. App. 562.)

CITY NAT. BANK v. GOSHEN WOOLEN MILLS CO. et al.¹

(Appellate Court of Indiana, Division No. 1.
Dec. 8, 1903.)

CORPORATIONS — INSOLVENCY — PREFERRING CREDITORS — RIGHTS OF DIRECTORS.

1. A director of an insolvent corporation, who resigned after it had been agreed he should resign and have a preference, could not escape being counted an officer in determining the validity of the preference contained in the deed of trust executed on the day he resigned.

¹Transferred to Supreme Court, 71 N. E. 652.

2. While a corporation is a going concern its directors are the trustees primarily of the stockholders, who are the real parties in interest, and the directors of an insolvent corporation hold the assets in trust for the creditors, who have the exclusive interest, for the payment of the debts, either pro rata or preferentially.

3. Though it be conceded that a corporation may prefer its creditors, it may not do more in this regard than an individual may do.

4. The creditors of an insolvent corporation are the proper parties to complain of the acts of the directors in making unlawful preferences.

5. An insolvent manufacturing corporation cannot prefer its directors or creditors, on whose claims the directors are sureties, where the votes of such directors are necessary to make the preference.

Henley, O. J., dissenting.

Appeal from Circuit Court, St. Joseph County; Lucius Hubbard, Judge.

Action by the City National Bank against the Goshen Woolen Mills Company and others. From a judgment granting insufficient relief, plaintiff appeals. Case transferred to the Supreme Court under the provisions of Burns' Rev. St. 1901, § 1337j.

A. L. Brick and Miller & Drake, for appellant. Van Fleet & Van Fleet, for appellees.

ROBINSON, J. The court stated the facts as follows: On the 7th day of January, 1896, the Goshen Woolen Mills Company, a corporation, executed to appellant its promissory note, payable on or before January 12, 1897, which note was indorsed by Edmund R. Kerstetter and James L. Kerstetter. That there is due on the note in principal, interest, and attorneys' fees \$5,325.24. That at the time of the maturity of the note the Goshen Woolen Mills Company was insolvent, and was insolvent on January 5, 1897, for months prior thereto, and ever since has been insolvent. That at the time of the maturity of the note the appellee company had \$23,000 indebtedness past due and unpaid, and which it was unable to pay, and assets \$13,000. On the 9th day of January, 1897, appellees Edmund R. Kerstetter, James L. Kerstetter, Alice M. Kerstetter, Susan E. Kerstetter, and Edward Schilling were the directors of the Goshen Woolen Mills Company, and on that day Susan E. Kerstetter resigned as a director, in order that she might be preferred as a creditor of the company, and at the same time she assigned all her stock in the company to Alice M. Kerstetter in consideration that such assignee would pay to her just what Alice might realize out of the stock. That prior to the resignation of Susan E. Kerstetter, and while she was still a director, it was agreed by the board of directors that she should have a preference, and on the same day the deed of trust was executed with the active procurement of James L. Kerstetter, Edmund R. Kerstetter, and Edward Schilling; Alice M. Kerstetter, the fourth director, being then

¹ See *Corporations*, vol. 12, Cent. Dig. §§ 2170, 2172.

sick, and not acting. The deed of trust conveys to a trustee named all the property of the woolen mills company, and directs the sale of the property by the trustee, and the application of the proceeds in the following manner: (1) Payment of taxes, assessments, and expenses of the trust; (2) for work and labor; (3) the unliquidated debt of Van Fleet & Van Fleet, attorneys; (4) a note of \$3,500, payable to Susan E. Kerstetter; (5) notes of \$1,400 and \$1,434.38, to the Elkhart National Bank; (6) a note to Alexander Gordon, \$1,434.38, to the State Bank of White Pigeon, Mich., a note for \$1,147.50, a note to the First National Bank of Hillsdale, Mich., for \$1,606.50, a note to the First National Bank of Quincy, Mich., \$2,868.75, a note to the Salem Bank of Goshen, Ind., \$573.75, and a note to A. M. Lewis & Co. for \$1,500; (7) any funds remaining to be paid to the grantor; (8) right to appoint a new trustee reserved to the grantor. The court further found that it was the intention of the woolen mills company and of the board of directors in the execution and delivery of the deed to secure the directors James Kerstetter and Edward Schilling whatever amount might be due to them for work and labor; also to secure the firm of attorneys named for the preparation of the trust deed, the claims of Susan E. Kerstetter and the Elkhart National Bank and the other parties and banks above named; that James L. Kerstetter was bound as an indorser on the notes held by the Elkhart National Bank, and James L. Kerstetter and Edmund R. Kerstetter were bound as indorsers on the other obligations held by the persons and banks named in the trust deed; that at that time Edmund R. Kerstetter was the president and James L. Kerstetter was the secretary, treasurer, and general manager of the woolen mills company, and at that time Edmund R. Kerstetter was the owner of \$33,000 of the capital stock of the Elkhart National Bank, and was the cashier and manager of the bank, whose entire capital stock was \$50,000; that James L. Kerstetter was the husband of Susan E. Kerstetter; that Edmund R. Kerstetter was the husband of Alice M. Kerstetter; that Edward Schilling was the salesman for the company, and the trustee named was a clerk in the Elkhart National Bank. It is further found that it was intended that appellant and other unsecured creditors, not mentioned in the deed of trust, should take no part of the assets of the corporation, and should be entirely unable to collect their debts, or any part thereof; that it was the expectation of the directors that the trustee would leave the actual possession, control, and management of the company in their hands, and would act as trustee nominally, and that the trustee would compensate the directors for their services in the care and management of the property as a part of the expenses of the trust; that at the time of the execution of

the deed the woolen mills company had debts outside of the ones named therein to the amount of \$7,000, including appellant's claim; that all the property of the company was continued in the possession and control of James L. Kerstetter, who continued to handle the business of the company as he had handled it before the execution of the deed; that the mill was idle when the deed was made, and had been idle for several months, and had been operated only a small portion of the time since May, 1893; that Schilling was employed by James L. Kerstetter to assist him in managing the property, and that Kerstetter and Schilling were paid for their services; that Edmund R. Kerstetter, James L. Kerstetter, and Edward Schilling, and the trustee were at the time of the execution of the trust deed, and ever since have been, insolvent, and that the directors of the woolen mills company, at the time of the execution of the trust deed, knew that the woolen mills company was insolvent, and had known of such insolvency for at least one year prior thereto; that James L. Kerstetter and Edward Schilling, under the employment of the trustee, were at the time of the commencement of this action converting the property of the company into cash, to pay their claims; that to further prevent appellant and other unsecured creditors from collecting their claims, the woolen mills company confessed a judgment in favor of Susan E. Kerstetter for \$3,586.10, and a judgment in favor of the Elkhart National Bank for \$2,924.76; that the debts due to Susan E. Kerstetter and the Elkhart National Bank and the other creditors named in the trust deed are bona fide debts of the Goshen Woolen Mills Company. As conclusions of law, the court stated: (1) That appellant was entitled to a judgment against the woolen mills company and Edmund R. Kerstetter and James L. Kerstetter for \$5,325.24; (2) that as to the other appellees appellant take nothing.

It is insisted that the facts found show active and constructive fraud. The question presented upon the second conclusion of law is the right of the directors of an insolvent corporation to prefer themselves as creditors in a case where the votes of the directors preferred are necessary to make the preference. Of the five directors, one, Susan E. Kerstetter, resigned on the day the trust deed was made, after it had been agreed on the same day that she should resign and have a preference. But by this act she could not escape being counted an officer. *Mallory v. Kirkpatrick*, 54 N. J. Eq. 50, 33 Atl. 205. Of the four remaining directors, one took no part in the action. Of the three directors who authorized the execution of the deed of trust, two were directly preferred, and one of these and the third director were indorsers on most of the preferred debts. *Savage v. Miller*, 56 N. J. Eq. 432, 36 Atl. 578, 39 Atl. 665. The vote of each of the three di-

rectors who did act was necessary to authorize the execution of the deed.

The question presented is not the right of a solvent corporation, continuing business, to execute a valid security to a director or officer; nor the right of a director or officer holding a security executed while the corporation was solvent to enforce such security after insolvency; nor the validity of a security given a director or officer in case of threatened insolvency, but given in consummation of a promise made to obtain means to continue business in a just and reasonable belief that the business may be thus continued; nor the right of an insolvent corporation to prefer one or more of its officers by a vote of its directors sufficient without counting the votes of those preferred. But the question here presented is whether a majority or all of the directors of an insolvent corporation may prefer each one of themselves to the exclusion of its other creditors. Not only were two of the directors acting directly preferred, but one of these and the third director were indorsers on most of the obligations preferred. A preference where the directors are indorsers for the insolvent corporation and a preference where the insolvent corporation is indebted to its directors differ only in that in the one case the directors are indirectly preferring themselves, and in the other they are directly doing so. Not only was one of the directors preferred an indorser on many of the preferred obligations, but a preference was given a bank, more than three-fifths of the stock of which was owned by this director. The finding shows that the claims mentioned in the trust deed were bona fide debts of the corporation. It is held that an insolvent corporation may prefer its bona fide creditors in like manner as a natural person, and the fact that such preference may inure to the benefit of directors or officers of the corporation does not make it invalid. *Levering v. Bimel*, 146 Ind. 545, 45 N. E. 775; *Henderson v. Indiana Trust Co.*, 143 Ind. 561, 40 N. E. 516; *Clapp v. Allen* (Ind. Sup.) 50 N. E. 589; *Smith v. Manufacturing Co.*, 148 Ind. 333, 46 N. E. 1000; *Nathan v. Lee*, 152 Ind. 232, 52 N. E. 987, 43 L. R. A. 820. But these cases are not authority for the statement that the directors of an insolvent corporation may prefer themselves, or that they may prefer a debt upon which a majority or all of the directors are indorsers. In *Henderson v. Trust Co.*, supra, it does not appear from the opinion that the five directors who indorsed the paper were all or a majority of the directors, and in the opinion it is said: "Whether an insolvent corporation may prefer a creditor who is a director or stockholder, we need not and do not decide." The scope of the decision is thus stated on page 561, 143 Ind., page 519, 40 N. E.: "It should be remembered that the debt to appellant was a bona fide one; that he was not a stockholder or director, but a stranger to the corporation; that when the accounts were delivered to

and accepted by appellant the corporation was a going concern; that he had no notice or knowledge that the corporation was insolvent, or that the accounts were transferred and assigned to him for the purpose of protecting the indorsees, or with the fraudulent intent to cheat, hinder, and delay the other creditors of the corporation, if there was any such intent." In *Levering v. Bimel*, supra, the court says: "Neither of the appellants in this appeal were stockholders or officers of the corporation, but strangers thereto; hence the question of a preference by an insolvent corporation to its own officers for debts held by them against such concern is not directly involved, and consequently the reasoning and holding herein must be limited to the fact in this respect that the directors in question were but sureties upon the claims preferred. It is also insisted by the appellees that the fact that the preferences in the case at bar were authorized by the votes of the two directors who were sureties upon the notes of the preferred creditors rendered the mortgage illegal. But the execution of the mortgages, as it appears, was authorized by the unanimous vote of the five directors; being the entire directory. Consequently, a majority of the directors, constituting a quorum, by their votes authorized the preference, independent of the votes of the two who were the sureties; therefore the principle asserted in the case of *Buell v. Buckingham & Co.* [16 Iowa, 284, 85 Am. Dec. 516] would apply. It was held in that case that a preference made by an insolvent corporation to its president by a vote of its directors, sufficient without counting the vote of the former, was valid." In neither *Smith v. Manufacturing Co.*, supra, nor *Nathan v. Lee*, supra, was the question of the right of an insolvent corporation to prefer a creditor who was a director or officer of the company, or its right to prefer a debt upon which directors were sureties, considered.

In the above cases the question here presented was either not considered or expressly not decided. But since the above cases were decided it has been held in *Nappanee Canning Co. v. Reid, Murdock and Co.*, 159 Ind. 614, 46 N. E. 870, that directors of an insolvent corporation may prefer themselves, although all of them are director creditors. When it is said that an insolvent corporation may prefer its creditors as an individual may, and that a majority of a board of directors not interested may prefer one or a minority of the directors indirectly as surety or sureties for the corporate debt, it seems that the doctrine is carried to its utmost limit. Any holding beyond this we believe to be opposed to the better reasoning, and contrary to the great weight of modern authority.

It is conceded that this state has not adopted the so-called "trust-fund" theory respecting the assets of insolvent corporations. *First National Bank v. Dovetail, etc., Co.*, 143 Ind. 550, 42 N. E. 924; *Nathan v. Lee*, 152 Ind. 232, 52 N. E. 987, 43 L. R. A. 820;

Henderson v. Trust Co., 143 Ind. 561, 40 N. E. 516; Levering v. Bimel, 146 Ind. 545, 45 N. E. 775. See, also, Sanford, etc., Co. v. Howe, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713; Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Purifier Co. v. McGroarty, 136 U. S. 237, 10 Sup. Ct. 1017, 34 L. Ed. 346; Fogg v. Blair, 133 U. S. 534, 11 Sup. Ct. 476, 33 L. Ed. 721; Washburn v. Green, 133 U. S. 80, 10 Sup. Ct. 280, 33 L. Ed. 516; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; Brown v. Furniture Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817; Conover v. Hull (Wash.) 45 Am. St. Rep. 826, note. But it cannot be said that the denial of the right of the directors of an insolvent corporation to prefer themselves would be to adopt the trust-fund doctrine. Nor can it be said that the theory that the directors hold the corporate property as trustees obtains only in courts that adhere to that doctrine. And when it is said that the trust-fund doctrine has been repudiated by most of the states of the Union it must not be understood that upon repudiating the doctrine the courts of those states have permitted directors to prefer themselves along with other creditors. In a very large majority of the states where that doctrine has been repudiated it is only to the extent of recognizing the right of insolvent corporations to prefer their common, unofficial creditors in the same manner and to the same extent that an insolvent individual may; but these states quite as generally hold that director creditors may not be preferred, for the reason that their position as managing agents gives them an unfair and unequal advantage over other creditors, and that a court of chancery cannot permit them to profit by their superior knowledge, thus gained, in a race of diligence among creditors. So that while a few states still adhere to the trust-fund theory, and deny the right to make any preference at all, a very large majority of the states have repudiated the doctrine only to the extent stated, and a very small minority of the states have repudiated the doctrine in toto, and permit the directors to prefer themselves to the exclusion of all other creditors. But it is immaterial by what name we designate the position occupied by the directors of a corporation, the fact remains that it is one of trust. They are bound to devote its property, while in their hands, to the objects for which the corporation was created. If they misappropriate its property, the only persons to whom they are answerable are the stockholders or the creditors. They hold and administer the corporate assets, in the first instance, for the stockholders; and it is to these assets alone, in the absence of statute, that the creditor can have recourse when the corporation ceases to prosecute its business or becomes insolvent, and it is to this property he must look as the only security for the fulfillment of its obligation. "The directors are the agents and trustees of the corpo-

ration and its stockholders," said the court in Nappanee Canning Co. v. Reid, Murdock and Co., 159 Ind. 614, 625, 46 N. E. 870. It is quite true that a corporation is an entity and existence separate from its officers and stockholders. But an act of insolvency like that in the case at bar leaves this separate entity without authority or value for any purpose. That the directors of a private corporation are simply and solely the representatives of the stockholders and of the corporation must be held to apply to a solvent, going concern, but such a statement applied to an insolvent corporation is, in effect, to say that the directors are the representatives of the stockholders and of themselves, because, if it is denied that the directors of an insolvent corporation owe any duty to the creditors, and the rights and duties of the stockholders and directors are taken out of the corporation, there is nothing left for any one to represent. It is not possible for the insolvent corporation, as a legal entity, to enforce any rights or to perform any duties aside from the rights and duties of its stockholders and directors. The acquiescence of the corporation and the stockholders in an action taken by the directors after insolvency can mean nothing more than the acquiescence of the stockholders in such action.

It is quite true that while the corporation is a going concern the directors are the trustees primarily of the stockholders, who are the real parties in interest. But when the corporation becomes insolvent, the relation of these trustees towards the assets has not changed. They no longer hold the assets in trust for the stockholders, as the stockholders have parted with all beneficial interest in the assets, because the same by force of law is transferred to the creditors. But because of the insolvency nothing has taken place that has changed the relation of the directors to the remaining assets. These remaining assets must go to the creditors. The directors must preserve the assets for this express purpose, and are powerless to make any other disposition of them. These assets must go to creditors, and to no one else, although, under the doctrine of preference, not necessarily to all creditors, or classes of creditors, alike. As the relation of the directors to the assets has not been changed by the insolvency, they necessarily hold the assets, not for themselves, but in trust for the creditors, who now have the exclusive interest; so that it must not be understood that there is no trust relation between the directors and the creditors. They hold these assets in trust for the payment of the debts, either pro rata or preferentially, and they can apply the assets to no other purpose. And when it is said that the trust-fund theory has been repudiated, nothing more can be meant than that the assets of an insolvent corporation are not held by the directors in trust for creditors pro rata.

Let it be conceded that a corporation may

prefer its creditors as an individual may, it certainly should not be declared that a corporation may do more in this regard than an individual may. But this is what is done when directors are permitted to prefer themselves. When the three or five directors are the sole stockholders, and apply its assets, when insolvent, to the payment of themselves as creditors, they are, in effect, exercising a power which is denied to an insolvent individual. So long as the directors of an insolvent corporation retain dominion over the assets, they should have the power to dispose of the assets and prefer creditors to the same extent that a partnership or an individual can. But with their authority as the corporation's only representatives in its dealings with the public, with their exclusive knowledge of its affairs by reason of their exclusive right of management, with their authority to determine when the corporation is insolvent and when it becomes necessary to abandon the object for which it was created, with the duty imposed upon them to devote the property placed in their control to particular uses, with the public as well as creditors wholly relying upon their fidelity and integrity, it would seem to violate the very spirit of equity to permit these managing agents and trustees, when the corporation becomes insolvent, to act as grantors for the corporation in distributing to themselves, as grantees, the remaining assets of the corporation upon their own unsecured antecedent claims to the exclusion of other unsecured creditors. A court would not hesitate to repudiate any action of a director of a solvent, going corporation whereby he sought to use his official position to advance his personal interests beyond those of others of equal merit. This is true because of the fiduciary relation of a director towards all persons lawfully entitled to the assets of the corporation. The creditors of an insolvent corporation are not the less lawfully entitled to the remaining assets of the corporation than are the stockholders lawfully entitled to the assets of a solvent corporation. The duty of the directors, when the corporation becomes insolvent, is no less imperative to preserve the remaining assets and apply them to the payment of debts than it is when the corporation is solvent to account to the stockholders. And when the director of an insolvent corporation undertakes to use his official position to advance his personal interests beyond those of others of equal merit the condemnation by a court of equity of such an act should be as prompt and effective as it would be in cases where the corporation is solvent. Until it can be said that some person or class of persons other than creditors has or may have some claim upon the remaining assets of an insolvent corporation, the statement that there is no trust relation between the directors of the insolvent corporation and the creditors must stand unsupported by sufficient reason.

It is argued that appellant, a creditor, cannot complain of the acts of the directors in giving preferences to themselves, but that the stockholders alone can do so; and it is held that, "if the corporation and the stockholders acquiesce in the action of the director creditors, outside creditors, who are strangers to the corporation, and have no lien or claim upon its property, cannot impeach the transaction." This necessarily is based upon the proposition that, if the act of the directors was a fraud, it was a fraud upon the stockholders alone. But how could the act be a fraud upon the stockholders, who, under no circumstances, can receive any of the remaining assets of the corporation after it becomes hopelessly insolvent? Upon insolvency all the beneficial interest the stockholders had in the assets is transferred to the creditors, who must look to the property of the corporation as the only fulfillment of its obligations. The only recourse the creditors have when the corporation becomes insolvent is the property in the hands of its managing officers. As they are the only persons injured under such circumstances, as all the remaining assets must go to creditors, and to no one else, we think it necessarily follows that they are the proper parties to complain of fraudulent acts of the directors in disposing of the remaining assets. Could creditors not be heard to complain if the directors were giving away the remaining assets or disposing of them at a sacrifice in the interest of others, even with the consent of the stockholders? It must be admitted that it is as much the duty of the directors after the corporation becomes insolvent to preserve its assets for the benefit of creditors as it was their duty before insolvency to preserve the assets for the stockholders. See *Morawetz on Corp.* (1st Ed.) 579; *Thompson on Corp.* § 6530; *Crown v. Brainerd*, 57 Vt. 625; *Atlanta, etc., Co. v. Atlanta Nat. Bank*, 75 Ga. 41; *Sweeney v. Sugar Refining Co.*, 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88. Moreover, where the directors and stockholders are the same persons, as when the corporation has but three or five directors, and they are its sole stockholders, it could hardly be expected that the stockholders would sue themselves as directors to set aside as fraudulent a transaction in which they themselves had been engaged. A court of equity will certainly protect the right of creditors of an insolvent corporation to have the remaining assets applied in payment of their claims.

Some of the states, among them Ohio, Tennessee, Texas, Washington, and South Dakota, adhere to the trust fund doctrine, and upon the insolvency of the corporation no preferences can be made, which necessarily means that director creditors cannot be preferred. The great weight of authority is against permitting the directors or officers of an insolvent corporation to be preferred as creditors, or to prefer themselves, and in support of the view we have taken of the question, we cite the following: *Bonney v. Tilley*, 109 Cal. 346, 42

Pac. 439; Sacramento Bank v. Pacific Bank, 124 Cal. 147, 56 Pac. 787, 45 L. R. A. 863, 71 Am. St. Rep. 36; Merced Bank v. Ivett, 127 Cal. 136, 59 Pac. 393; Fishel v. Goddard (Colo. Sup.) 69 Pac. 607; Lowry Banking Co. v. Empire Co., 91 Ga. 624, 17 S. E. 968; Milledgeville, etc., Co. v. McIntyre, etc., 98 Ga. 503, 25 S. E. 567; Atlas Tack Co. v. Macon Hardware Co., 101 Ga. 391, 29 S. E. 27; Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176; Atlas Tack Co. v. Exchange Bank, 111 Ga. 703, 36 S. E. 939; Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; Roseboom v. Whittaker, 132 Ill. 81, 28 N. E. 339; Atwater v. American Exchange Bank, 152 Ill. 605, 38 N. E. 1017; Gottlieb v. Miller, 154 Ill. 44, 39 N. E. 992; Rockford Grocery Co. v. Grocery Co., 175 Ill. 89, 51 N. E. 642, 67 Am. St. Rep. 205; Mayr v. Hodge, etc., Co., 78 Ill. App. 556; Rokker v. J. W. Butler Paper Co., 88 Ill. App. 278; Ryan v. L. O., etc., Ry. Co., 21 Kan. 305; Chicago, etc., Ry. Co. v. Fowler, 55 Kan. 17, 39 Pac. 727; Hays v. Citizens' Bank, 51 Kan. 535, 33 Pac. 318; Grand, etc., Co. v. Rude Bros. Mfg. Co., 60 Kan. 145, 55 Pac. 848; Cahill v. People's Slaughter House, 47 La. Ann. 1483, 17 South. 784; James Clark Co. v. Cotton, 91 Md. 195, 46 Atl. 383, 49 L. R. A. 698; Symonds v. Lewis, 94 Me. 501, 48 Atl. 121; Clay v. Towle, 78 Me. 86, 2 Atl. 852; European, etc., R. Co. v. Poor, 59 Me. 277; Taylor v. Mitchell, 80 Minn. 492, 88 N. W. 418; Janney v. Minneapolis, etc., 79 Minn. 488, 82 N. W. 984, 50 L. R. A. 273; Taylor v. Fanning (Minn.) 91 N. W. 269; Love Mfg. Co. v. Queen City Mfg. Co., 74 Miss. 290, 20 South. 146; Millsaps v. Chapman, 76 Miss. 942, 26 South. 369, 71 Am. St. Rep. 547; King v. Woolridge, 78 Miss. 179, 28 South. 824; Robins v. Emry, 1 Smedes & M. Ch. 207, 262, et seq.; Lamb v. Russell (Miss.) 32 South. 916; Tillson v. Downing, 45 Neb. 549, 63 N. W. 836; Ingwersen v. Edgecombe, 42 Neb. 740, 60 N. W. 1032; Stough v. Ponca Mill Co., 54 Neb. 500, 74 N. W. 868; Seeds Dry Plate Co. v. Heyn, etc., Co., 57 Neb. 214, 77 N. W. 660; Reynolds v. Smith, 60 Neb. 197, 82 N. W. 627; National Wall Paper Co. v. Columbia, etc., Bank (Neb.) 88 N. W. 481, 56 L. R. A. 121; Merchants' National Bank v. McDonald (Neb.) 88 N. W. 492; Williams v. Turner (Neb.) 88 N. W. 668; Smith v. Putman, 61 N. H. 632; Richards v. New Hampshire Ins. Co., 43 N. H. 263; Taylor v. Gray, 59 N. J. Eq. 621, 44 Atl. 668; Savage v. Miller, 56 N. J. Eq. 432, 36 Atl. 576, 39 Atl. 665; Mallory v. Kirkpatrick, 54 N. J. Eq. 50, 33 Atl. 205; Montgomery v. Phillips, 53 N. J. Eq. 203, 31 Atl. 622; Tennant v. Appleby (N. J. Ch.) 41 Atl. 110; First National Bank v. Elliott, 42 Hun, 121, affirmed in 114 N. Y. 622, 21 N. E. 416; Hill v. Pioneer Lumber Co., 113 N. C. 173, 18 S. E. 107, 21 L. R. A. 560, 37 Am. St. Rep. 621; Graham v. Carr, 130 N. C. 271, 41 S. E. 379; Rouse v. Merchants' National Bank, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 373, 15 Am. St. Rep. 644; Finch Mfg. Co. v. The Sterling Co., 187 Pa.

596, 41 Atl. 294; Mueller v. Clay Co., 183 Pa. 450, 38 Atl. 1009; Kersteter's Appeal, 149 Pa. 148, 24 Atl. 163; Pangburn v. American, etc., Co. (Pa.) 54 Atl. 504; Olney v. Conanicut Land Co., 16 R. I. 597, 18 Atl. 181, 5 L. R. A. 361, 27 Am. St. Rep. 767; Adams, etc., Co. v. Dryette, 8 S. D. 119, 65 N. W. 471, 31 L. R. A. 497, 59 Am. St. Rep. 751; Portland, etc., Co. v. Rossiter (S. D.) 94 N. W. 702; Memphis, etc., Co. v. Ward, 99 Tenn. 172, 42 S. W. 13, 63 Am. St. Rep. 825; New Memphis Gas Light Cases, 105 Tenn. 268 (292) 60 S. W. 206; Marr v. Bank, 4 Cold. 471; Swepson v. Bank, 9 Lea, 713; Lyons-Thomas, etc., Co. v. Perry Stove, etc., Co., 86 Tex. 143, 24 S. W. 16, 22 L. R. A. 802; Lyons-Thomas, etc., Co. v. Stove Co., 88 Tex. 468, 27 S. W. 100; Noble Mer. Co. v. Mt. Pleasant, etc., Inst., 12 Utah, 213, 42 Pac. 869; Burnham v. McCormick, 18 Utah, 42, 55 Pac. 77; State ex rel. v. Superior Court, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177; Cook v. Moody, 18 Wash. 114, 50 Pac. 1020, 63 Am. St. Rep. 872; Conover v. Hull, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810; Hulings v. Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620; Lamb v. Laughlin, 25 W. Va. 300; Lamb v. Pannel's Adm'rs, 28 W. Va. 663; Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184; First Nat. Bank v. Knowles, 67 Wis. 373, 28 N. W. 225; Rowe v. Leuthold, 101 Wis. 242, 77 N. W. 153; Slack v. Northwestern Bank, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841; Durlacker v. Frazer, 8 Wyo. 58, 55 Pac. 306, 80 Am. St. Rep. 918; Bradley v. Farwell, 1 Holmes, 433, 440, Fed. Cas. No. 1,779; Bradley v. Converse, 4 Cliff. 375, 379, Fed. Cas. No. 1,776; Corbett v. Woodward, 5 Sawy. 403, 417, Fed. Cas. No. 3,223; Coons v. Tome (C. C.) 9 Fed. 532, 534; Lippincott v. Shaw Carriage Co. (C. C.) 23 Fed. 577, 586; Adams v. Kehlor Milling Co. (C. C.) 35 Fed. 433, 435; Adams v. Kehlor Milling Co. (C. C.) 36 Fed. 212, 213; Consolidated Tank Line Co. v. Kansas City Varnish Co. (C. C.) 43 Fed. 204; Howe v. Sanford Fork & Tool Co. (C. C.) 44 Fed. 231; Consolidated, etc., Co. v. Kansas City, etc., Co. (C. C.) 45 Fed. 7, 13; Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496, 502, 11 C. C. A. 320; Bosworth v. Jacksonville Nat. Bank, 64 Fed. 615, 619, 12 C. C. A. 341; Northwestern, etc., Ins. Co. v. Cotton Exchange, etc., Co. (C. C.) 70 Fed. 155, 160; Kittel v. Augusta, etc., R. R. Co. (C. C.) 78 Fed. 855, 856; Richards v. Halliday (C. C.) 92 Fed. 798; Hart v. Globe Ins. Co. (C. C.) 113 Fed. 307, 342; Harding v. Hart, 113 Fed. 304, 51 C. O. A. 264; Koehler v. Black River, etc., Co., 2 Black, 715, 17 L. Ed. 339; Drury v. Railroad Co., 7 Wall. 299, 19 L. Ed. 40; Curran v. State of Arkansas, 15 How. 304, 14 L. Ed. 705; Graham v. Railroad Co., 102 U. S. 148, 26 L. Ed. 106; Hollins v. Brierfield, etc., Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Gas Light Imp. Co. v. Terrell, L. R. 10 Eq. 168; Aberdeen R. Co. v. Blakie, 1 MacQueen, 461; 1 Beach, Pri. Corp. § 241b; 2 Cook, Corp. (4th Ed.) 692; Clark

on Corp. § 244; 3 Clark & M. Priv. Corp. p. 2414; Elliott, Corp. (3d Ed.) § 189; Field, Corp. §§ 172-174; 2 Mor. Pri. Corp. (4th Ed.) § 787; 2 Spelling, Pri. Cor. § 713; Taylor, Pri. Corp. (4th Ed.) § 759; 5 Thompson, Corp. § 6503; 7 Thompson, Corp. § 8496; Walt, Insolvent Corp. § 162; 2 Beach, Modern Law of Con. § 1071; Reese, Ultra Vires, § 155; 23 Am. Law Rev. 1009; 27 Am. Law Rev. 846; note to Tennant v. Appleby (N. J. Ch.) 9 Am. & Eng. Corp. Cas. N. S. 209-212 (s. c. 41 Atl. 110); note to Atlas Tack Co. v. Exchange Bank (Ga.) 13 Am. & Eng. Corp. Cas. 252, 25 (s. c. 30 S. E. 939); note to Graham v. Carr (N. C.) 16 Am. & Eng. Corp. Cas. N. S. 483 (s. c. 41 S. E. 879); note to Sidell v. Missouri Pac. R. Co., 24 C. C. A. 221-231; note to Lyons, etc., Co. v. Perry Stove Co., 22 L. R. A. 802, 807; note to Buck v. Ross, 57 Am. St. Rep. 63 (82); note to Conover v. Hull, 45 Am. St. Rep. 826-835; note to Brown v. Grand Rapids, etc., Co., 22 L. R. A. 817; note to Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496, 11 C. C. A. 320; note to Hill v. Pioneer Lumber Co. (N. C.) 9 Am. R. R. & Corp. Rep. 61 (s. c. 18 S. E. 107, 21 L. R. A. 560, 37 Am. St. Rep. 621).

As bearing upon the proposition that directors may not prefer themselves, see, also, Washburn v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516; Wisconsin, etc., Co. v. Lehigh, etc., Co. (C. C.) 64 Fed. 497; Sidell v. Missouri Pac. Ry. Co., 78 Fed. 724, 24 C. C. A. 216; Standard, etc., Co. v. Excelsior, etc., Co., 108 La. 74, 32 South. 221; Krause v. Malaga Glass Co. (N. J. Ch.) 18 Atl. 367; Merchants' Bank v. Newton, etc., Mills, 115 N. C. 507, 20 S. E. 765; Mary Lee, etc., Co. v. Knox & Co., 110 Ala. 632, 19 South. 67; Corey v. Wadsworth, 99 Ala. 68, 11 South. 850, 23 L. R. A. 618, 42 Am. St. Rep. 29; Curran v. State, 15 How. 301, 14 L. Ed. 705; King v. Union Iron Co., 58 Hun. 601, 11 N. Y. Supp. 603; Standard, etc., Co. v. Excelsior Co. (La.) 32 South. 221; Hurd v. New York, etc., Co., 167 N. Y. 89, 60 N. E. 327; Standard Nat. Bank v. National, etc., Co. (Sup.) 63 N. Y. Supp. 312.

Without unduly extending this opinion, we can quote but briefly from a few of the above decisions. Bonney v. Tilley, supra: "It seems to be well settled that directors of an insolvent corporation, who are creditors of the company, cannot secure to themselves any preference or advantage over other creditors in the payment of their claims." Monroe Mercantile Co. v. Arnold, supra: "In the management, therefore, of the property, after the failure of the corporation, the governing body of officers thereof are charged with the duty of conducting its affairs strictly in the interest of its existing creditors; and it would be a breach of such trust for them to undertake to give any one of its members any advantage over any other creditor in securing the payment of his debts in preference to all others." Atwater v. American, etc., Bank, supra: "If the directors are

themselves creditors, they cannot receive any advantage or preference in the payment of their claims at the expense of other creditors." Rockford, etc., Co. v. Standard, etc., Co., supra: "The law is, however, that an insolvent corporation cannot prefer a creditor who at the time is a director therein." Rokker v. Paper Company, supra: "The purpose and spirit of the rule is to prevent officers who are creditors of an insolvent corporation from taking advantage of their position as such officers to secure a preference over other creditors." Hays v. Citizens' Bank, supra: "The directors of a corporation occupy a fiduciary character toward the stockholders and creditors. * * * The decisions are well-nigh unanimous that the directors of such corporation cannot, while they continue in control of the remaining assets of the corporation, take any advantage of their position to secure preferences or advantage for themselves over other creditors." Cahill v. People's, etc., Co., supra: "The director who is the trustee of the creditor, who has it in his power to stop expenses and prevent losses to the creditors, is not a third person who can acquire rights superior to him." James Clark Co. v. Cotton, supra: "Officers of a corporation, who are also its creditors, cannot lawfully pay their own claims in preference to other creditors when the corporation is insolvent." Taylor v. Mitchell, supra: "But, when the corporation is insolvent its directors who are its creditors cannot secure to themselves any advantage or preference over other creditors. They cannot take advantage then of their fiduciary relation, and deal directly with themselves, to the injury of others in equal right. If they do, equity will set aside the transaction at the suit of creditors of the corporation or their representatives, without reference to the question of any actual fraudulent intent on the part of the directors, for the right of the creditors does not depend upon fraud in fact, but upon the violation of the fiduciary relation of the directors." Love Mfg. Co. v. Queen City Mfg. Co., supra: "To permit it [directors to prefer themselves] would be to allow those intrusted with the governing power of a corporation to prefer themselves by their own determination and action—a proposition monstrous in the extreme, shocking to the moral sense, and wholly indefensible. * * * These directors, by their own will and act, preferred themselves; a thing quite natural, but which the law cannot sanction. By their act they practically dissolved the corporation, and put an end to its going, and appropriated its property to themselves, thereby destroying forever all chance of realization, by other creditors, from the continued operation of the corporation." Symonds v. Lewis, supra: "At common law a debtor may prefer a creditor to the exclusion of others, but a different rule prevails when the creditor is a director of an insolvent corporation debtor. The di-

rectors, in such case, are not strictly trustees for the general creditors, though sometimes so called, but they owe them a duty which is inconsistent with the taking of a security for prior indebtedness, to their detriment." *Williams v. Turner*, supra: "The proposition that an insolvent corporation cannot prefer a debt on which its officers and directors are bound as sureties is now thoroughly established in this state." *Smith v. Putnam*, supra: "While directors of corporations are not trustees in a technical sense, there is yet no doubt but that they occupy a fiduciary position towards stockholders and creditors of the corporation, and that they come within the designation of persons filling a fiduciary relationship. In fact, they hold a position of the highest trust, and will therefore be required to execute it with the utmost fidelity. This being so, it is plain that the defendants could not use their official position to advance their individual interests." *Graham v. Carr*, supra: "The law will not allow the stockholders and officers of the corporation to take advantage of their knowledge of the insolvent condition of the concern, and their power to use and control the assets, to pay their own debts, or to relieve them from special liabilities to the injury of the other creditors." *Mueller v. Clay Co.*, supra: "It is the settled law of this commonwealth that an insolvent debtor, whether corporation or individual, may prefer bona fide creditors; but, if the creditor benefited be a director or other officer possessed of corporate power and corporate knowledge of the insolvency of the corporation, then he has an advantage over other creditors whose claims may be of equal merit. He has knowledge that his debt is in peril, and has the power to prefer himself. As he is in a sense trustee for all the stockholders and creditors, equity forbids that he should act solely for himself, regardless of the interests of those for whom he is trustee." *Olney v. Conanicut Land Co.*, supra: "It is generally agreed that directors are trustees for stockholders. This being established, we think it follows naturally that, when the corporation becomes insolvent, and the stockholders have no longer a substantial interest in the property of the corporation, directors should be regarded as trustees of the creditors to whom the property of the corporation must go. * * * If, then, the director be a trustee, or one who holds a fiduciary relation to the creditors, in case of insolvency he cannot take advantage of his position for his own benefit to their loss. The right of the creditor does not depend upon fraud or no fraud, but upon the fiduciary relation." *Rowe v. Leuthold*, supra: "While it is true that the mere fact of the insolvency of a corporation does not convert its property into a trust fund for the benefit of all its creditors, so as to prevent one of them, without fraud, from obtaining a preference by ordinary adversary

proceedings, yet the officers and directors of an insolvent corporation cannot lawfully prefer themselves over its general creditors." *Corbett v. Woodward*, supra: "A director of an insolvent corporation is a trustee of its property and assets, for its stockholders and creditors, and it is contrary to the first principles of equity that he should deal with such property for his own advantage and to their injury." *Adams v. Kehlor Milling Co.*, supra: "It may be conceded that a corporation, though insolvent, has the power to prefer creditors, but the relation which directors bear to the corporation as trustees of its assets is such that they cannot lawfully exercise the power in question for their personal advantage." *Consolidated, etc., Co. v. Kansas City, etc., Co.*, supra: "When a corporation, in its business affairs, is thus in articulo mortis, whatever may yet be maintained on divided opinions as to its right to dispose of its property so as to give a preference to some general creditor, the law is too well settled, at least in this jurisdiction, to admit of extended discussion, that its directors cannot make a disposition of the assets so as to secure to themselves, directly or indirectly, a preference over general creditors. * * * It is not too much to say that it is the established doctrine of the federal courts." *Tennant v. Appleby*, supra: "Independent of any statute relating to preference of creditors by an insolvent corporation, the directors of a corporation upon its insolvency become trustees for its creditors, and cannot use their own position of trust to obtain for their own debts an inordinate share of the assets." See, also, the dissenting opinion and cases cited by *Hadley, J.*, in *Nappanee, etc., Co. v. Reid, Murdock & Co.*, 159 Ind. 614, 64 N. E. 870, 59 L. R. A. 199.

In support of the doctrine that a corporation in embarrassed or failing circumstances may prefer debts due to the directors, or indirectly as sureties, the following cases are cited: *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Central R. R. Co. v. Claghorn*, 1 Speers' Eq. 545; *Sanford, etc., Co. v. Howe, etc., Co.*, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713; *Farmers' Bank v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 398; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697, 29 N. W. 395, 59 Am. Rep. 461; *Warfield, etc., Co. v. Marshall, etc., Co.*, 72 Iowa, 666, 34 N. W. 467, 2 Am. St. Rep. 263; *Sergeant v. Webster*, 13 Metc. 497, 46 Am. Dec. 743; *Butler v. Land & Mining Co.*, 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464; *Bank of Montreal v. Potts, etc., Co.*, 90 Mich. 345, 51 N. W. 512; *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; *Planters' Bank v. Whittle*, 78 Va. 737; *Worthern v. Griffith*, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50; *Catlin v. Eagle*, 6 Conn. 233. In *Reichwald v. Commercial Hotel Co.*, supra, it is held that the fact that a creditor is a stockholder does not debar him from obtaining security for debts due to him-

self to the exclusion of other creditors. But in the same state, in *Beach v. Miller*, 130 Ill. 182, 22 N. E. 464, 17 Am. St. Rep. 291, it is held that, if directors are creditors, they cannot secure any advantage or preference in the payment of their claims at the expense of other creditors; and in *Rockford, etc., Co. v. Standard, etc., Co.*, 175 Ill. 89, 51 N. E. 642, 67 Am. St. Rep. 205, the court said, "The law is, however, that an insolvent corporation cannot prefer a creditor who at the time is a director therein." In *Central R. Co. v. Claghorn*, 1 Speers' Eq. 545, the court did not find that the corporation was insolvent when the mortgages were given, but states in the opinion that it cannot be said that the company was actually insolvent when the mortgages were given, or that they were given as a means of winding up. The case depended mainly on a statute of that state. In *Sanford, etc., Co. v. Howe, etc., Co.*, supra, the court rests its ruling upon the facts that when the mortgage was executed the corporation was not insolvent; that it was believed by all the parties at the time to be solvent, and was in fact solvent, if the assets were worth as much as they cost; that it was a going concern, intended to continue in business, and did in fact continue for some months in the ordinary way, and paid \$30,000 indebtedness, other than that secured, in the usual course of business. The court expressly holds that the rule that directors may not take advantage of their position and power to secure personal advantage to themselves has no application to the facts of that case. It is true that the case was reversed upon appeal from the Circuit Court (44 Fed. 231), the Circuit Court having found that the corporation was "deeply insolvent," its debts far in excess of its assets. In *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. 496, 11 C. C. A. 320, in answer to the contention that, in the absence of statute an insolvent corporation, though not intending to continue its business, might make preferences among its creditors, whoever they may be or whatever their relation to the corporation, Harlan, Circuit Justice, said: "If this be a sound rule, it would follow that directors, being also creditors, of an insolvent corporation, which has abandoned the objects of its creation, and ceased an active existence, may distribute among themselves its entire assets, if the reasonable value thereof does not exceed their aggregate demand. We cannot accept this view." In *Richardson's Ex'rs v. Green*, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516, it is said: "While the relations of a party towards a corporation as a director and officer, or as its principal stockholder, do not preclude him from entering into contracts with it, from making loans to it, and from taking its bonds as collateral security, a court of equity will refuse to lend its aid to their enforcement unless satisfied that the transaction was entered into in good faith with a view to the benefit of the company as

well as all its creditors, and not solely with a view to his own benefit." See, also, United States Supreme Court cases cited above. *Farmers' Bank v. Wasson*, supra, *Garrett v. Burlington Plow Co.*, supra, and *Warfield, etc., Co. v. Marshall, etc., Co.*, supra, follow the case of *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516, which holds that a director creditor may be preferred, although Judge Cole states there was no evidence that the company was insolvent; but the correctness of the rule seems to be doubted in *In re Assignment of Woolen Mills*, 101 Iowa, 181, 70 N. W. 115. See, also, *Singer Piano Company v. Walker*, 113 Iowa, 664, 83 N. W. 725. In *Sargeant v. Webster*, supra, it is held that a corporation may prefer creditors, but in that case Sargeant was not an officer or director, but simply a stockholder. Massachusetts now has a statute restricting the right of insolvents to prefer themselves. In *Butler v. Land & Mining Co.*, supra, it was held that the three directors of an insolvent corporation, who were the sole stockholders, might prefer themselves to the exclusion of all other creditors. In a later case—*State ex rel. v. Rubber Mfg. Co.*, 149 Mo. 181, 209, 50 S. W. 321—the court, speaking of the *Butler* and other cases said: "But in these and in all other cases that have come before this court bringing into question the powers and duties of directors, they have been treated as trustees, of whom the utmost good faith was demanded, and nothing has been said in any of its decisions that would justify a director in preferring himself to the detriment of the best interest of the corporation or its stockholders." That court formerly held that directors could not prefer themselves. *Roan v. Winn*, 93 Mo. 503, 4 S. W. 738; *Lagrange, etc., Co. v. National Bank*, 122 Mo. 154, 26 S. W. 710, 43 Am. St. Rep. 558; *Suddarth v. Gallagher*, 126 Mo. 393, 28 S. W. 880. And the Court of Appeals of that state follows the trust-fund theory, and denies the right to make such preferences. *Williams v. Jones*, 23 Mo. App. 132; *Kankakee, etc., Co. v. Kampe*, 38 Mo. App. 229; *State ex rel. v. Brockman*, 39 Mo. App. 131. In *Peters v. Bain*, supra, the court accepted the construction given a state statute against fraudulent conveyances by the Supreme Court of Appeals of Virginia as controlling. The right of a corporate officer to prefer himself to the exclusion of other creditors was not presented. *Worthen v. Griffith*, supra, follows the Iowa cases, but Arkansas now by statute forbids preferences by insolvent corporations. *Catlin v. Eagle*, supra, simply decides that preferences may be made. No question was made as to the right of directors to prefer themselves.

If the sole managing agents of a corporation may, even after they know it is approaching insolvency, invite public confidence by continuing the business as a going concern, determine for themselves how long they shall continue the losing business, determine

how far the assets shall be depleted before they declare the corporation insolvent, these same managing agents, having reached the point where insolvency must be declared, still acting for the corporation, should not be permitted to appropriate the remnant of the assets to the payment of their individual unsecured claims to the exclusion of all other creditors. If the right to collect a debt is "a race of diligence," open alike to all creditors—and this is admitted in some of the above cases; *Buell v. Buckingham*, among others—it is difficult to find any sufficient reasoning that will support the conclusion that the outside creditor has an equal opportunity with the director creditor. It is not enough simply to say "that he has an advantage, it is true, but it is one which results from his position, and which is known to every person who deals with and extends credit to the corporation." The common, unofficial creditor, does not know, when he extends credit to the corporation, that its officers, with their superior advantages, may, upon insolvency, appropriate all its remaining property in payment of their own claims, unless a court has previously so declared. What greater advantage could the director creditor ask than to control the corporate affairs, determine when the corporation is insolvent, keep the public and all creditors in ignorance of this fact, and then be permitted, with this exclusive information, to declare himself successful in a contest with another party, who did not even know that a contest was to take place? In two or three of the cases it is said that the act of director creditors preferring themselves may constitute a good legislative reason for giving priority to outside creditors, but the Legislature must furnish the remedy. But in such a case it would seem that a court of equity should not wait for the Legislature to declare the proper rule of action.

As we are not able to agree with the conclusion that director creditors of an insolvent corporation may prefer themselves, and believing that the ruling in the case of *Nap-panee, etc., Co. v. Reid, Murdock & Co.*, 159 Ind. 614, 64 N. E. 870, 1115, is erroneous, this case is transferred to the Supreme Court under the provisions of 1837J, Burns' Rev. St. 1901.

BLACK, J., concurs. HENLEY, C. J., dissents.

(184 Mass. 481)

HEATH v. NEW BEDFORD SAFE DEPOSIT & TRUST CO.

(Supreme Judicial Court of Massachusetts, Suffolk. Jan. 6, 1904.)

BANKS—DEPOSIT—WHAT CONSTITUTES—RELATION TO DEPOSITORS—LIABILITY FOR UNAUTHORIZED PAYMENTS—PAYMENTS TO AGENT—AUTHORITY—QUESTION OF FACT.

1. Where, at the time money was handed by plaintiff's correspondent to the cashier of a bank, the latter was informed that the deposit was made for plaintiff's benefit, and was re-

quested to telegraph plaintiff accordingly, which was done, the relation between plaintiff and the bank became that of depositor and banker; the bank becoming plaintiff's debtor for the amount of the deposit, its liability to be discharged only by payment.

2. That one is an agent for the purpose of depositing his principal's money in bank does not give him authority to check the deposit out.

3. The acts of an agent not within the scope of his authority do not bind his principal.

4. That a bank became dissatisfied by the delay of a depositor in returning a signature card, and by the fact that the deposit was to be immediately withdrawn, could not change the nature of its contract with the depositor, or discharge it from liability for returning the deposit to a person unauthorized to receive the same.

5. A bank, in paying money to a depositor's correspondent, who deposited the same, does so at its peril, and takes the chance of the correspondent's authority to sign the withdrawal check on the depositor's behalf.

6. It is a question of fact whether an agent was authorized by a bank depositor to make a settlement with a correspondent, and whether that settlement included the amount of a deposit drawn by such correspondent.

Exceptions from Superior Court, Suffolk County; Edward P. Peirce, Judge.

Action by one Heath against the New Bedford Safe Deposit & Trust Company. There was verdict for plaintiff, and defendant excepts. Exceptions overruled.

Contract to recover \$190 alleged to have been deposited to plaintiff's credit in defendant's bank by one Macomber, plaintiff's correspondent in New Bedford. At the trial in the superior court, before Edward P. Peirce, Judge, it appeared that, instructed by plaintiff, Macomber deposited the money to the credit of the plaintiff, and was given a signature card by the bank. After the deposit was made, the defendant's cashier sent a telegram to the plaintiff to the effect that the deposit had been made to his credit. Before Macomber had returned the signature card, the plaintiff drew a check on the deposit, which the bank refused to pay. The bank then sent for Macomber, and returned the money to him. Subsequently Macomber paid the money to one Rice, an agent of the plaintiff, but whom the plaintiff claimed was a special agent, not authorized to receive the money, and that it was never paid to the plaintiff. The verdict was for the plaintiff, and defendant excepted.

Joseph Cavanagh, for plaintiff. Mayhew R. Hitch and Fred L. Norton, for defendant.

BRALEY, J. The contention of the defendant that the money was received from Macomber on the condition that he was to obtain the plaintiff's signature on the card furnished him, and return it to the company, and because he failed to comply with this request the money was not accepted, and it was returned to him, becomes untenable, because at the time the money was handed

¶ 3. See *Principal and Agent*, vol. 40, Cent. Dig. § 557.

to the cashier of the defendant he was informed that the deposit was to be made for the benefit of the plaintiff, and he was requested to send a telegram to him that it had been made and placed to his credit. A telegram was sent accordingly, informing the plaintiff that \$190 had been placed to his credit by Macomber. The defendant was not obliged to take the money or send the telegram, but, if it choose to do both, it must stand by the contract thereby made. Under the completed transaction, the relation between the parties was that of banker and depositor, and the defendant became the debtor to the plaintiff for the amount of the general deposit placed to his credit. And its liability could be discharged only by payment of the debt. Ordinarily this could have been done in either of two ways: The plaintiff might have gone in person and demanded and received over the counter the money, or he could have drawn his check on the defendant for a part or the whole of the sum; and if the company paid to him, or to a person lawfully presenting a check signed by him, its indebtedness would be discharged. *Carr v. National Security Bank*, 107 Mass. 45, 9 Am. Rep. 6. But while Macomber, in making the deposit, obeyed the instructions given him by the plaintiff, the fact that he was his agent for that purpose would not of itself be sufficient to clothe him with authority to check it out. And the rule is clear that the acts of an agent not within the scope of his authority do not bind his principal.

The defendant apparently became dissatisfied by reason of the delay in not receiving the card containing the signature of the plaintiff, as well as by the fact that the deposit was to be immediately withdrawn. But its dissatisfaction could not operate to change the nature of the contract or discharge it from liability. And when it paid over the money to Macomber it did so at its peril, and took the chance that he was authorized to sign the check by which it was withdrawn in the name and behalf of the plaintiff. In justification of its action, and under an allegation of payment in the answer, it now relies on a subsequent ratification by the plaintiff of this act of Macomber, arising out of a settlement of the accounts between them, and in which the amount of the deposit was included, and credited to the plaintiff. But it was a question of fact whether Rice, who purported to be an agent of the plaintiff for that purpose, was authorized by him to make such a settlement, and, if so, whether it included the amount of the deposit. And the case was submitted to the jury under instructions which fully stated the legal rights of the parties. By their verdict they have found that the defendant has shown no sufficient legal reason to justify it in refusing to pay the demand of the plaintiff.

Exceptions overruled.

(184 Mass. 484)

COMMONWEALTH v. FIELDING.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 6, 1904.)

CRIMINAL LAW—BURNING BUILDINGS—EVIDENCE—PHOTOGRAPHS.

1. In a prosecution for burning a building with intent to defraud the insurer, photographs of such building, properly verified, were admissible in evidence, though they also included a dwelling house owned and occupied by defendant, which had been partly destroyed by a previous fire, and showed two dwelling houses adjoining the premises, from which witnesses testified they observed acts of the defendant at or about the time of the fire; the court having properly instructed the jury that no inferences were to be drawn from the burning of any other building than that charged in the indictment.

Exceptions from Superior Court, Middlesex County; John A. Aiken, Judge.

One Fielding was convicted of burning a building to defraud the insurer, and he brings exceptions. Overruled.

Hugh Bancroft, Asst. Dist. Atty., for the Commonwealth. H. N. Allen, for defendant.

BRALEY, J. This was an indictment under Rev. Laws, c. 208, § 10, charging the defendant with burning a building, which at the time was insured against loss or damage by fire, with intent to injure and defraud the insurer. At the trial, photographs representing the building that was burned, after having been properly verified, were put in evidence by the commonwealth. Two of them also included a dwelling house owned and occupied by the defendant, that had been partially destroyed by fire some time previous to the burning of the building which was the subject of the indictment. They also showed two dwelling houses adjoining the premises, from which witnesses at the trial testified that they had observed certain acts of the defendant at or about the time of the fire. The location of these houses in reference to the burnt building became important, as showing the opportunity for observation of the witnesses who had described the movements and conduct of the defendant, and the photographs would materially aid the jury in understanding the case. If evidence had been introduced tending to prove the commission of another like crime by the defendant, there would be ground for the position now taken by him that the introduction of the photographs tended to prejudice his case at the trial. But there was no testimony disclosing the circumstances under which the dwelling house was burned, or whether the fire which partially destroyed it was of malicious or accidental origin. The appearance of the house as partially burned, in the photographs, was as harmless as that of fences, trees, flowers, streets, or other natural or artificial objects which may, and often do, enter into, and form a part of, the surroundings of the main object represented in the picture.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 893; Evidence, vol. 20, Cent. Dig. § 1511.

"A plan or picture * * * is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. * * * Whether it is sufficiently verified is a preliminary question of fact to be decided by the judge presiding at the trial, and not open to exception." *Blair v. Pelham*, 118 Mass. 420; *De Forge v. New York, New Haven & Hartford R. Co.*, 178 Mass. 59, 62, 63, 59 N. E. 671, 86 Am. St. Rep. 464. As the photographs were sufficiently verified, they were admitted properly as evidence in the case. Besides, the presiding judge instructed the jury "that no inferences were to be drawn from the burning of any other building than that charged in the indictment."

Exceptions overruled.

(184 Mass. 499)

FRAZER et al. v. FULLER et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 6, 1904.)

**TRESPASS—TITLE—GREAT PONDS—ADJOINING
LAND—INSTRUCTIONS—EXCEPTIONS—
FAILURE TO ARGUE—WAIVER.**

1. In an action for trespass on land, which plaintiffs claimed under a lease, by the erection of an ice run, defendants denied plaintiffs' title on the ground that a part of the land was included within a great pond, and defendants claimed title by disseisin as far as the edge of the pond. *Heid*, that an instruction that if the line of the pond, as it originally existed, met the line to which the defendants' title by prescription existed, so that under the runway there was no intervening land between the two lines covered by plaintiffs' lease, defendant was entitled to a verdict, was proper.

2. An exception not argued in the Supreme Court will be deemed waived.

Exceptions from Superior Court, Worcester County; Chas. U. Bell, Judge.

Action by one Frazer and others against one Fuller and others for breaking and entering plaintiff's close and carrying away a quantity of ice. Plaintiffs contended that defendants committed a trespass by the erection and maintenance of a runway over plaintiffs' land. A verdict was returned in favor of defendants, and plaintiffs bring exceptions. Overruled.

Herbert Parker and Jonathan Smith, for plaintiffs. Chas. G. Bancroft, A. G. Buttrick, and O. L. Stone, for defendants.

HAMMOND, J. The principal question is whether any part of the ice run was upon or over land of the plaintiffs. The plaintiffs had a lease which, in terms, described land over which the run was built; but the answer of the defendants was that in fact the plaintiffs had no title to the land, because a part of it was included within a great pond, and as to the rest the defendants had a title by disseisin. In other words, the defendants claimed title by disseisin as far as the edge of the pond, and denied that the plaintiffs had any title under the lease

to the land forming part of the pond. The evidence as to whether there was any title by disseisin to any part of the land described in the plaintiffs' lease and as to the original boundaries of the pond was conflicting. The rules of law applicable to these questions were explained to the jury, and at the close they were instructed, in substance, that if the line of the pond, as it originally existed, met the line to which the defendants' title by prescription extended, so that under the runway there was no intervening land between the two lines, then their verdict should be for the defendants. It is now strenuously argued by the plaintiffs that there was no evidence which would justify the jury in finding that the two lines did thus meet. Without rehearsing the evidence in detail, it is sufficient to say that after a careful perusal of it we are of opinion that it is sufficient to justify the verdict. The case was properly submitted to the jury under instructions which were full, apt, and clear, and we see no error in the manner in which the court dealt with the plaintiffs' requests for instructions upon this branch of the case.

The exceptions with reference to the relation of William A. Fuller were not argued before us, and they are therefore deemed to be waived.

Exceptions overruled.

(184 Mass. 470)

SPAULDING v. QUINCY & B. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1904.)

CARRIERS—INJURIES TO PASSENGERS—ALIGHTING FROM CARS—NEGLIGENCE—EVIDENCE.

1. Where a passenger on a street car made no effort to alight when the car reached the terminus of a branch track at a station, at which point other passengers alighted, and after the conductor carried the trolley around to the other end of the car, and as the car was about to start, plaintiff attempted to alight, and was injured by the car starting while he was doing so, but neither the conductor nor the motorman had any reason to suppose plaintiff desired to get off at that time, defendant was not guilty of negligence warranting a recovery.

Exceptions from Superior Court, Suffolk County; Edgar J. Sherman, Judge.

Action by one Spaulding against the Quincy & Boston Street Railway Company for injuries sustained by plaintiff while alighting from one of defendant's cars. A verdict was rendered in favor of defendant, and plaintiff brings exceptions. Overruled.

James E. Cotter and Thomas F. McNarney, for plaintiff. Henry F. Hurlburt and Damon E. Hall, for defendant.

KNOWLTON, C. J. On October 16, 1897, the plaintiff was travelling from Taunton to Boston by the street cars, on his way to Man-

¶ 1. See *Carriers*, vol. 9, Cent. Dig. § 1223.

chester, N. H., for which place he intended to take a train that would leave Boston at half past 7 o'clock in the evening. Soon after he had passed Holbrook he inquired of the conductor whether the electric car would reach Boston in time to enable him to take that train, and was told that probably it would not, and that, to reach the train, it would be well for him to leave the electric car and take a steam car either at Braintree or Quincy. As the defendant's electric railway passes the station of the steam railroad in Braintree, there is a branch track leading from the main line, a distance of about 210 yards, to the station; and the car on which the plaintiff was riding left the main line and ran down this track to where the track terminated, and then ran back on the same track to the main line, and thence on to Quincy. After the car reached the terminus of the branch track at the station, some of the passengers alighted; the conductor carried the trolley around to the other end of the car, shutting off the lights in the car for a moment, and then put them on; other passengers got on the car; the car remained a sufficient time to enable any passengers who wished to alight or to get upon the car to do so easily; and the car then started back towards the main line. The plaintiff was sitting near the rear end of the car as it approached the station, and the forward end as it was about to go back. After seeing some of the passengers alight, and the conductor carry the trolley around from the rear of the car to the front, and after becoming aware that the car was about to go back, he started out through the door to the front platform where the motorman then was, and stepped off the car. It was nearly 8 o'clock, but not very dark, although there were lights in the car and near it outside. He testified that the car started suddenly just as he stepped upon the ground, and he fell, and his foot was crushed by the wheel of the car.

It is a grave question whether there was any evidence that he was in the exercise of due care. He had said nothing to the conductor or the motorman from the time when he made the inquiry in Holbrook. According to his testimony, he paid little attention to anything that was going on around him. He did nothing to obtain information in regard to the place where he was, or what were his surroundings; he gave no notice to any one of his desire or intention to alight; he was unable to give a clear account of how he stepped off; and he did not know whether there was a step on the car between the platform and the ground. It is not necessary to consider particularly the subject of the plaintiff's care, for we are of opinion that there was no evidence of negligence on the part of the defendant's servants. Although the plaintiff testified that the car started suddenly, there is nothing to indicate that the manner of starting it was unusual or dangerous. It is hardly possible to start a heavy electric car so quickly as to cause a jerk at the instant of its first move-

ment, and, if it is possible, there is no evidence that it was done in this case. The plaintiff's fall seems to have been caused by his stepping to the ground while the car was moving, and not by its starting in any unusual way. Nor is there evidence that there was negligence in starting the car at that time. Neither the conductor nor the motorman had any reason to suppose that the plaintiff desired to get off. If the conductor saw him pass out of the door to the front platform, where the motorman was, that did not show that he was intending then to leave the car; and the motorman, so far as appears, knew nothing of his movement. The time had come for the car to start back towards the main line on its way to Quincy, and it was proper for those in charge of it to start it. In the absence of evidence that they knew or saw or ought to have seen anything that should have prevented them from starting the car at that time, the jury would not have been warranted in finding that they were negligent.

Exceptions overruled.

(184 Mass. 466)

CONNORS v. MERCHANTS' MFG. CO.

(Supreme Judicial Court of Massachusetts.
Bristol, Jan. 6, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—DANGEROUS PLACE—USE—INVITATION BY MASTER—WARNINGS—STATUTES—EVIDENCE.

1. Where plaintiff, who was injured by the opening of automatic doors over an elevator well as she was crossing the doors while the elevator was down, knew that the elevator descended no further than the floor below, and opened the doors automatically by going up, and that there was no warning of the starting of the elevator but the movement of the elevator ropes, she was guilty of contributory negligence as a matter of law in attempting to cross the elevator doors when the ropes showed that the elevator was below and quiet, a different safe route being available.

2. In an action for injuries to a servant while attempting to pass over automatic elevator doors, in the absence of evidence that defendant had knowledge that the doors were used by its employés as a passageway, a finding that defendant had invited such use was not justified.

3. In the absence of proof that plaintiff, who was injured by the raising of automatic elevator doors, had some reason to suppose that a device had been put on the elevator, as required by St. 1901, p. 378, c. 439, requiring freight elevators to be equipped with a warning device, which went into effect two days before the accident, or that plaintiff had knowledge of the statute, and she testified that the only thing she saw in the way of warning was the moving of the elevator ropes, a question asked as to whether, when she went on the elevator doors, she expected and relied on some warning being given if the elevator was about to start was properly excluded.

Exception from Superior Court, Bristol County; Frederick Lawton, Judge.

Action by one Connors against the Merchants' Manufacturing Company. From a

1. See Master and Servant, vol. 24, Cent. Dig. §§ 702, 706.

judgment in favor of defendant, plaintiff brings exceptions. Overruled.

J. W. Cummings and E. Higginson, for plaintiff. Jennings, Morton & Brayton, for defendants.

LORING, J. 1. We are of opinion that the judge was right in ordering a verdict for the defendant. The plaintiff was employed in the weaving room of the defendant's cotton mill. She was injured while walking over a pair of wooden trapdoors level with the floor, which covered the opening of a freight elevator well. These doors opened upward automatically when the elevator went up or down. The plaintiff was injured by the elevator's starting up and throwing up and back the trapdoor on which she stepped. She was taken off her feet, flung on one side, and squeezed against the wall. The plaintiff went to work in mills when 14 years of age, and continued working there until she was 20 years old, when she was married. She began again when she was 31 years old, about a year before the accident, and she had been employed in the room in question for six weeks. One of the looms tended by her was not eight feet from the trapdoors. The jury were warranted in finding that she was passing over the elevator well on her way to get filling for use in her looms, and that she chose this way because the alleyway was temporarily blocked which led directly to the filling box in the southeast corner, some 60 feet away; that she had to get the filling to pursue her work, and that she chose this way of going because it would have taken 10 minutes longer to go through the alleyways which were then open to her. The plaintiff testified that she knew it was safer to go around the elevator than to go over it, for the reason that the doors might open up when the elevator was going up or down. She also testified that she looked twice at the elevator ropes before stepping on the trapdoors; that they were quiet, and so she stepped on them; that they immediately flew up, causing the injury already described. One of the plaintiff's witnesses testified that there was "no bell to indicate whether the elevator was going up or down, this condition being the same at the time of the accident as it had been while witness worked there, a period of three months." We are of opinion that where an elevator, which goes no farther down than the floor below, opens a trapdoor automatically by going up, and there is no warning of the starting of the elevator but the elevator ropes beginning to move, it is negligence as matter of law for a plaintiff, who could have gone by another route, to undertake to walk across the trapdoor when the ropes show that the elevator is below, and are quiet. The plaintiff testified that she did not know that the trapdoors

would fly up without warning. But she proved by one of her own witnesses that there was no device to warn persons of the starting of the elevator, and the danger was so apparent to a person who knew the conditions as the plaintiff on her own testimony knew them that it was negligent to undertake to cross without ascertaining that there was a device which would give sufficient warning to admit of a person crossing in safety. The use of the trapdoor testified to by the plaintiff's witnesses did not warrant a finding that there had been an invitation by the defendant to use it as a passageway, within *Hanlon v. Thompson*, 167 Mass. 190, 45 N. E. 88. There was no testimony that the defendant knew of the use of it as a passageway, and no evidence from which knowledge on the part of the defendant could be inferred. The testimony of the second hand in that room "that he told persons whom he saw passing the elevator trap that they ought to be more careful about going across that door, but did not tell them why," and "that of all the men and boys whom he had seen passing over the elevator he spoke to some, and to a good many he never spoke at all," is not evidence warranting such a finding.

2. The other exception is to the exclusion of evidence. The plaintiff was asked on direct examination: "Whether or not, when you went upon the elevator, you expected and relied upon some sort of warning or signal being given if the elevator was about to start." The question was accompanied by offer of proof that the plaintiff had such expectation and reliance." The plaintiff's argument in support of the competency of this question is based upon the fact that St. 1901, p. 378, c. 439, went into effect upon January 1st, two days before the accident, and that the statute required freight elevators to be equipped with a warning device. In the absence that she had some reason to suppose that some device had been put upon the elevator, we think that the evidence could be properly excluded. In the case at bar there was no evidence that the plaintiff knew of the statute, and she had already testified that the only thing she saw or heard in the way of a warning that the elevator was coming up was the ropes moving. The fact that one cannot plead ignorance of the law in justification for a violation of it does not mean that he in fact knows the law and what the provisions of it are. As we have said, it was negligence to make the attempt without finding out that there was a device which would give sufficient warning. In other words, it was, as matter of law, negligent to rely on a warning without some reason to suppose that there was a device to give warning.

Exceptions overruled.

(184 Mass. 486)

ALLEN et al. v. MAYERS et al.(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 6, 1904.)**GARNISHMENT—DEBTS—ASSIGNMENT—RECORD
—FUTURE EARNINGS.**

1. Where defendant contracted to build a stable for F., who was summoned as trustee in an action against defendant, and, at the time of an assignment of the balance due on the contract, defendant had fully completed the work, with the exception of putting the fastenings on six windows, the reasonable value of which would have been not more than 25 cents, and the setting of a sill cock, which had not been previously set by reason of the owner's failure to designate its position, and, notwithstanding defendant's failure to complete the building in such respects, the owner accepted, used, and enjoyed the same, the contract was substantially performed; and hence the balance due at the time of the assignment was not "future earnings," within Rev. Laws, c. 189, § 34, requiring an assignment of such earnings to be recorded in order to be valid as against attachment by trustee process.

Report from Superior Court, Bristol County; Lloyd E. White, Judge.

Action by F. L. Allen and others against J. Mayers and Edwin L. Fisher, trustee. On report from superior court. Judgment for plaintiffs.

J. M. Swift, for plaintiffs. Frank A. Pease, for claimants.

BRALEY, J. This is an action of contract brought by trustee process October 25, 1898. Edwin L. Fisher, summoned as trustee, disclosed by his answer that he had made a contract with the defendants to build a stable for him, to cost \$1,473, of which sum an unpaid balance remained due from him at the date of the writ of \$654. This balance was claimed by William H. Simmons under an assignment made and delivered to him September 9, 1898, but not recorded. The superior court having found for the plaintiff, the case is here on report, and the question raised is whether the plaintiff or the claimant is entitled to the money in the possession of the trustee.

If we assume that the agreement to build the stable was a contract for "future earnings," within the meaning of St. 1865, p. 466, c. 43 § 2, re-enacted in Rev. Laws, c. 189, § 34, then an assignment of such earnings would be invalid, as against attachment by trustee process, if not recorded as therein required. *Somers v. Kellher*, 115 Mass. 165-167. In order to avoid this result the claimant now contends that the contract was either fully or substantially performed, and the stable accepted by the owner, and therefore the assignment operated on a sum then due and payable. It is apparent from the report of the case that at the date of the assignment all the work had been done, with the exception of putting in a "sill cock * * * and the fastenings for six

windows," and that the reasonable cost of this work, including materials, if done separately from the contract would not exceed for the sill cock the sum of \$16, and for the fastenings 25 cents. The testimony of Mr. Samuel W. Ashton, admitted under the objection and exception of the plaintiff, was inadmissible, because it tended to contradict the answer of the trustee. *Phillips v. Meagher*, 166 Mass. 152, 44 N. E. 136. But otherwise the uncontradicted evidence, to which there was no objection, tended to show that the defendants agreed to complete the contract by August 20, 1898, but, as a matter of fact, did not do so until August 29th of that year, and that the sill cock was not put in because the specifications, among other things, provided "there will be one sill cock at some point in the front sill indicated by the owner," and up to the time when the defendants, with these exceptions, had completed the work, no place had been designated by the owner where it was to be put. It further appeared that at this time Fisher had the keys to the stable, and was using it; and it may fairly be inferred from his answers, as trustee, to the interrogatories propounded to him, and the evidence in the case, that he was not only in possession, but also treated the contract as having been substantially performed in good faith by the defendants. The sill cock had not been put in place because up to that time he had failed to indicate to them where he wanted it; and if it can be technically contended that the value of the window catches, and the necessary work to put them on, would be enough to justify a refusal by him to pay the balance due under the contract, he would, under the circumstances, be obliged to rely upon his claim for damages, if he had suffered any, by reason of the failure of the defendants to exactly and fully perform their contract, and he could not thereby successfully escape paying for what he had received. It would be manifestly unfair to allow the owner to take advantage of the condition precedent, and refuse to pay, when, knowing of the failure to perform the contract, he nevertheless accepts, uses, and enjoys what has been done, and, in all but trifling details, has the very thing that he bargained for. We know of no principle of law requiring such a result. *Hayward v. Leonard*, 7 Pick. 187, 19 Am. Dec. 269; *Wiley v. Athol*, 150 Mass. 426-435, 23 N. E. 811, 6 L. R. A. 342. It follows that at the date of the assignment the defendants had earned and were entitled to the balance due to them under the contract, less whatever sum that might be necessary to supply and affix the sill cock and window catches to the stable.

In accordance with the terms of the report, the order will be: "Trustee charged upon his answer if within fifteen days the plaintiff shall pay to the claimant the sum of \$500, and interest thereon at 1½ per cent. a month

¶ 1. See Garnishment, vol. 24, Cent. Dig. § 101.

from October 9, 1898, to the date of such payment, and his costs to be taxed by the clerk; otherwise trustee discharged." So ordered.

(177 N. Y. 63)

WERNER v. HEARST.

(Court of Appeals of New York. Dec. 18, 1903.)

NEGLIGENCE OF SERVANT—LIABILITY OF MASTER—EVIDENCE.

1. Plaintiff sued to recover for injuries received by the alleged negligence of the driver of a wagon employed by defendant. The main issue was whether the wagon was owned by the defendant, or by a certain newspaper corporation of which defendant was a stockholder and officer. *Held*, that allowing plaintiff to introduce evidence that the newspaper corporation had failed to file annual reports to the county clerk and State Comptroller, and instructing the jury to consider such failure in determining whether the corporation was conducted in good faith, and whether the articles of association were mere forms under which defendant exercised control, was reversible error.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Melle S. T. Werner against William R. Hearst. From a judgment of the Appellate Division (78 N. Y. Supp. 788) affirming a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

David B. Hill and Clarence J. Shearn, for appellant. Roger M. Sherman, for respondent.

GRAY, J. The judgment appealed from must be reversed and a new trial must be had of this action, because of errors committed upon the trial, which cannot be overlooked as unimportant, or as without possible influence upon the minds of the jurors. The plaintiff sued the defendant to recover damages for personal injuries sustained by her, which are alleged to have been occasioned by the negligent conduct of the driver of a newspaper delivery wagon employed by the defendant. She was at the time riding a bicycle, and she alleged that the driver of the wagon carelessly drove into her and threw her down. An issue was raised, by the defendant's answer, as to his ownership of the wagon. The jury rendered a verdict in favor of the plaintiff for \$25,000, and the judgment thereupon was affirmed, unanimously, by the Appellate Division in the Second Department.

The injuries received by the plaintiff were of sufficient gravity, if her evidence is believed by the jurors, to justify the amount of the verdict; but this court is not concerned with questions of the amount of damages, or of the defendant's responsibility as the employer of the driver. The unanimous affirmation of the judgment on the verdict by the Appellate Division is conclusive upon us as to such questions, and we are without juris-

diction to review the evidence upon the trial. All that we may do upon this appeal, which the court below has allowed to be taken to this court, is to review the exceptions taken to the rulings of the trial court upon the offers of evidence, and to the instructions to the jury upon the law.

The main controversy was over the question of the defendant's relation to the driver of the wagon. The plaintiff sought by her proofs to show that he owned the wagon and employed the driver, independently of his relations to certain newspaper corporations, for whose business the wagon was used; while the defendant's proofs tended to show that he was but a stockholder and officer of a corporation to which the wagon belonged. The plaintiff was permitted, over the objection and exception of the defendant, to introduce evidence showing that the newspaper corporations had failed to file annual reports with the county clerk and with the State Comptroller. At the request of the plaintiff, the jurors were instructed that they might consider the fact of a failure to file the reports, in deciding whether such corporations were conducted in good faith, and whether their articles of association were mere forms under which defendant had and exercised control. To these instructions the defendant excepted, and I think that the errors in that respect, and in admitting the evidence above referred to, were important, in view of the closeness of the question of ownership, and that they were substantial, as diverting the minds of the jurors to a collateral and a false issue. The validity of the creation of the corporations and their right to exist as such, in consequence of a failure to comply with statutory conditions and requirements, as questions, had no place in such an action as this, and they had no bearing upon the dispute as to the defendant's ownership and liability. We must assume that the evidence had a purpose, and that it had an influence upon the jurors; for its introduction must have been with the object of invalidating the corporate status, and the jurors may have been led to believe that, by reason of the failure to observe corporate obligations imposed by statute, incorporation was a sham and a device, adopted by the defendant to shield himself from liability. The plaintiff was thus permitted to interject an irrelevant issue as to the character and valid existence of the corporations, and it is reasonable, and, indeed, upon the record, fairly conceivable, that the jurors may have reached their verdict upon the supposition that, if the newspaper corporations were invalid, or defunct, corporate entities, the defendant was necessarily liable. But that is not so. They were corporations, in fact; however open to inquiry as to their right to continue as such, at the instance of the proper authorities. It was not the province of the jury to determine whether they were incorporated in good faith, or whether incorporation was a mere

form and an evasive device on the defendant's part to escape an individual responsibility for the conduct of the business. *Demarest v. Flack*, 128 N. Y. 205, 213, 28 N. E. 645, 13 L. R. A. 854. The issue was whether the defendant was the employer of the negligent driver, or whether the newspaper corporation was. All evidence establishing, or tending to establish, the fact in either way was competent; but it was not competent proof upon the subject to show that the corporation had defaulted in its obligations and duties under the law which gave it corporate rights and regulated its existence.

Other errors were committed in the rulings upon evidence, and in the instructions given to the jurors, at the request of the plaintiff, bearing upon the defendant's relation to the corporations and upon their conduct, to which I think reference unnecessary; as, upon a new trial, they may not be repeated, in view of this opinion.

For these reasons, briefly stated, I think that the judgment appealed from should be reversed, and that a new trial should be ordered, with costs to abide the event.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. HAIGHT, J., absent.

Judgment reversed, etc.

(177 N. Y. 73)

NORTHAM v. DUTCHESS COUNTY MUT. INS. CO. OF POUGHKEEPSIE.

(Court of Appeals of New York. Dec. 18, 1903.)

INSURANCE—ACTION ON POLICY—PLEADING—ISSUES.

1. An assignee for the benefit of creditors sued on an insurance policy issued to his assignor, and not for damages for a breach of an oral agreement. Evidence was admitted of a verbal agreement between the assignee and the agent of the insurance company, whereby the agent agreed to insure the assignee's interest in the property covered by the policy by an indorsement thereof, if it could be obtained, or, if not, by issuing a binding slip which would keep the insurance all right and insure him from that time. *Held* error, where no amendment to conform the pleadings to the proof was asked for.

2. In an action by the assignee of an insurance policy, it was error to submit the case to the jury on the theory that plaintiff could recover if the company had agreed to insure the assignee's interest in the property, where no such agreement was pleaded.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Lewis N. Northam, assignee of Wallace G. Northam, against the Dutchess County Mutual Insurance Company of Poughkeepsie. From a judgment of the Appellate Division (80 N. Y. Supp. 1144) affirming a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Horace McGuire, for appellant. N. F. Breen, for respondent.

MARTIN, J. The complaint was plainly upon the policy issued by the defendant, and not for damages for the breach of a verbal contract between the parties. There was evidence to show that, in consideration of the plaintiff's promise to pay the unpaid premium, the defendant agreed to insure the plaintiff's interest in the property mentioned in the policy issued to his assignor, by a proper indorsement upon such policy, if it could be obtained, or, if not, by issuing a slip or paper to him which "would keep the insurance all right and insure him from that time." If the action had been based upon that contract, the proof was sufficient to have justified the jury in finding for the plaintiff. *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Ruggles v. Am. Cent. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674; *Manchester v. Guardian Assur. Co.*, 151 N. Y. 88, 45 N. E. 381, 56 Am. St. Rep. 600; *Squier v. Hanover F. Ins. Co.*, 162 N. Y. 552, 57 N. E. 93, 76 Am. St. Rep. 349; *Hicks v. British Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Northam v. International Ins. Co.*, 45 App. Div. 177, 61 N. Y. Supp. 45, affirmed on opinion below in 165 N. Y. 666, 59 N. E. 1127. But the action was based upon the policy alone, and it is obvious that the proof was insufficient to establish a valid transfer or continuance of the policy in accordance with its requirements and provisions. This does not fall within the class of cases where, although the complaint is insufficient, the proof is sufficient to authorize a recovery, and is admitted without objection, and where the pleadings may be amended to conform to the proof. In this case the plaintiff failed to prove the cause of action alleged, and the evidence tending to establish a different cause of action was objected to upon the ground that it was inadmissible under the pleadings, and no amendment was asked for. In such a case, if the plaintiff fails to prove the cause of action set up in his complaint, and proper objections are made upon the trial, and no amendment of the pleading is asked for or ordered, a judgment in the plaintiff's favor upon a cause of action not alleged cannot be sustained on appeal, nor after trial can the pleadings be conformed to the proof. *Southwick v. First Nat. Bank of Memphis*, 84 N. Y. 420; *Truesdell v. Sarles*, 104 N. Y. 164, 167, 10 N. E. 139; *Pope v. Terre Haute Car & Mfg. Co.*, 107 N. Y. 61, 13 N. E. 592; *Freeman v. Grant*, 132 N. Y. 22, 28, 30 N. E. 247; *Reed v. McConnell*, 133 N. Y. 425, 434, 31 N. E. 22; *Bradt v. Krank*, 164 N. Y. 515, 519, 53 N. E. 657, 79 Am. St. Rep. 662. Therefore it is manifest that the learned trial court erred in admitting, under the defendant's objection and

exception, evidence of the verbal agreement between the parties, and also in submitting the case to the jury upon the theory that the plaintiff might recover if the jury should find that such an agreement was made. The defendant's exceptions to the admission of that evidence and to the charge of the court in that respect were well taken, and require a reversal of the judgment.

The judgment should be reversed, and new trial granted, with costs to abide the event.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, CULLEN, and WERNER, JJ., concur.

Judgment reversed, etc.

(177 N. Y. 71)

QUACKENBOSS v. GLOBE & RUTGERS FIRE INS. CO.

(Court of Appeals of New York. Dec. 18, 1903.)

CORPORATIONS—ACTION ON CONTRACT—EVIDENCE.

1. Where, in an action on a contract of a corporation, defendant showed that it was signed by the president and the secretary of the corporation, with the seal of the corporation attached thereto, it was error to exclude the contract; the seal being prima facie proof that it was attached by the proper authority, and the burden being on the party objecting to the execution to show that it was affixed improperly, or that the officers of the corporation exceeded their power.

O'Brien, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by George W. Quackenboss against the Globe & Rutgers Fire Insurance Company. From a judgment of the Appellate Division (78 N. Y. Supp. 1019) affirming a judgment in favor of defendant, plaintiff appeals. Reversed.

This action was brought to recover damages for the breach of an alleged contract between the plaintiff and the Rutgers Fire Insurance Company, which company was subsequently consolidated with the Globe Insurance Company, and the obligations of the former assumed by the defendant.

Frederick Seymour and Frederick B. Maerke, for appellant. W. P. Prentice, for respondent.

MARTIN, J. On the trial the plaintiff, after proving that the contract upon which the action was based was signed by the president and secretary of the Rutgers Insurance Company, for whose debts and obligations the defendant was liable, and that the corporate seal of the company was affixed thereto, offered it in evidence. It was rejected, and the plaintiff excepted. We think the

exception was well taken, and constituted error which requires a reversal.

It is an ancient and well-established rule of law that where the seal of a corporation is affixed to a contract or written instrument, to which such corporation is a party, and it is signed by the president and secretary or other proper officers, it will be presumed that such officers did not exceed their powers, as the seal is prima facie proof that it was attached by proper authority, and it lies with the party objecting to its execution to show that it was affixed surreptitiously or improperly. *Whitney v. Union Trust Co. of New York*, 65 N. Y. 576; *Trustees of Canandaigua Academy v. McKechnie*, 90 N. Y. 618; *Jourdan v. Long Island R. Co.*, 115 N. Y. 380, 384, 22 N. E. 153; *Lovett v. Steam Sawmill Ass'n*, 6 Paige, 54, 60. It is manifest that there was no sufficient proof overcoming the presumption arising from the execution of the contract in question to justify the court in excluding it. Whatever proof was given as to the regularity of the contract bore, not upon its admissibility, but upon its effect when received. The court could not improperly exclude the plaintiff's most material and important evidence—indeed, that which was the very basis of his action—and then, because he had not made sufficient proof to sustain his complaint, hold that the erroneous ruling should be disregarded. Such a claim finds no justification in law. When the plaintiff was refused his legal right to have the contract admitted, he was not required, nor would he be expected, to introduce other proof to establish his cause of action.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PARKER, C. J., and GRAY, BARTLETT, and CULLEN, JJ., concur. O'BRIEN, J., dissents. HAIGHT, J., absent.

Judgment reversed, etc.

(177 N. Y. 59)

BRIGGS v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York. Dec. 18, 1903.)

EXPERT EVIDENCE—PERSONAL INJURIES—SPECULATIVE DAMAGES.

1. In an action for personal injuries, where the extent of plaintiff's injuries is largely dependent on the testimony of medical experts, it is error to allow such experts to testify as to what "might" result in consequence of the injury, consequences which are contingent or speculative not being properly considered in estimating the damages.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Florence Briggs, by Louisa Briggs, her guardian ad litem, against the

¶ 1. See *Corporations*, vol. 12, Cent. Dig. §§ 1729, 1730.

¶ 1. See *Damages*, vol. 15, Cent. Dig. §§ 65, 236; *Evidence*, vol. 20, Cent. Dig. § 2337.

New York Central & Hudson River Railroad Company. From a judgment of the Appellate Division (82 N. Y. Supp. 1095) affirming a judgment for plaintiff, defendant appeals. Reversed.

Maurice C. Spratt, for appellant. Eugene M. Bartlett, for respondent.

O'BRIEN, J. On February 2, 1902, the plaintiff was injured in a collision on the defendant's belt line in Buffalo. It was a cold, stormy night, and a great deal of snow had fallen and drifted. Objects could not be seen very far through the snow, and it continued to storm after the plaintiff left the train. The car in which the plaintiff was seated had the seats arranged so that for a third of the length from either end of the car they were continuous along each side, and in the middle third of the car the seats were crosswise. The plaintiff and her aunt sat in the seats crosswise of the car, and after the train had stopped at one of the regular stopping places, and had just got started forward, an engine following in the rear collided with the train by running into the rear end of it. As soon as the headlight was seen approaching, the plaintiff and her aunt got up out of their seats and went forward to the head end of their car. The plaintiff stood there, without supporting herself, until the collision occurred, which caused her to sit down involuntarily upon one of the iron arm rests, or divisions, between the individual seats along the side of the car. The collision appears to have been a slight one; nothing was broken about the car except the glass in the front door, and the train started up again and ran on to the next stop in the usual way. The plaintiff and her aunt having reached their destination, got out and walked for some 10 minutes through the storm and snow to the home of the aunt. It was Sunday evening, and plaintiff stayed there that night and the next day and night, and on Tuesday went home. The plaintiff then went with her mother to a physician at his office. The testimony tended to show that she went there every day for a week, and then every other day for two weeks, and then less frequently. It was claimed that the tip end of the spine was injured, resulting in serious consequences. The physician stated that when he first examined her he found a discoloration, not very much discolored, about two inches above the tip of the spine. He did not remember giving any local treatment, but gave her nerve sedatives. The jury rendered a verdict for the plaintiff of \$6,000, which has been unanimously affirmed.

The extent of the injury and the damages were sought to be established by the plaintiff largely upon the testimony of medical experts. These experts were conducted by the learned counsel for the plaintiff, in his examination, through a very wide field of speculative inquiry. Much of this testimony ap-

pears in the record without exception, though it was constantly objected to by defendant's counsel. The testimony was not at all confined to the condition of the plaintiff at the time of the trial, which took place about eight months after the accident, but the experts were permitted to speculate upon the consequences of the alleged injury which might affect the plaintiff in the future. It was suggested that the injury might affect the bladder, the kidneys, and other organs of the body, and in the end become permanent. The following is a specimen of the testimony given by one of the plaintiff's experts, who had seen the plaintiff but once, and then long after the accident: "The bladder is a very bad master and a very good servant. If you humor it, or it gets into bad habits, it is almost impossible to correct them. I make this statement more than ordinarily positive, because I have seen a great many of them. Because of this, irritability in this child is either from her general nervousness, or if it is from some central trouble—the result of the blow and the shock she has received—the outcome of it is, in my judgment, permanent. * * * The effects on this child, of this bladder, are of a general effect and local. The general effect of frequent urinating is harassing, inasmuch as it interferes with a person's going about. It is a pitiable thing sometimes. * * * The coats become thickened, just as much as a blacksmith's arm becomes larger, the bladder grows so that by and by it don't hold as much water, so that even if it was not sensitive the person could not retain it and would have to empty it, because it wouldn't retain it any longer. After it has lasted, it subjects the person to a long train of evils. A bladder which is enlarged and irritable is liable to have infection and inflammation set in, and when you add inflammation to irritability you have a condition of affairs that is most serious." The counsel for the defendant here interposed and said: "I object to this kind of testimony. It is of the most general character possible. I have objected to the question, and I want to object now to its being allowed to continue." The plaintiff's counsel thereupon replied: "If there is any part of the evidence that is not responsive, the counsel can move to strike it out, of course." The court thereupon stated, "I will let it stand," and thereupon the defendant's counsel excepted. In response to another question the witness, continuing, stated: "If the condition of the bladder— When that condition of the bladder sets in which I have described, it is only a step further for it to ascend to the kidneys. That always does not take place; but, as long as the lower urinary organs are in that state, there is no question about the jeopardy of the upper urinary organs."

It is undoubtedly true that in an action to recover damages for personal injuries the evidence of experts as to the future consequences which are expected to follow the injury are

competent; but to authorize such evidence, however, the apprehended consequences must be such as, in the ordinary course of nature, are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible are not proper to be considered in estimating damages, and may not be proved. *Strohm v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 306; *Tozer v. N. Y. C. & H. R. R. Co.*, 105 N. Y. 617, 11 N. E. 369; *Jewell v. N. Y. C. & H. R. R. Co.*, 27 App. Div. 500, 50 N. Y. Supp. 848; *Kleiner v. Third Ave. R. R. Co.*, 162 N. Y. 193, 58 N. E. 407; *Smith v. N. Y. C. & H. R. R. Co.*, 164 N. Y. 491, 58 N. E. 655. We think this rule of evidence was violated in this case, since the learned trial judge permitted to stand, for the consideration of the jury, evidence which was speculative and conjectural. Indeed, the medical experts in the case, upon the examination of the plaintiff's counsel, were permitted to state numerous things which might result as a consequence of this injury. This is apparent from the extracts which we have referred to, and much more evidence of like character which is to be found in the record; therefore the learned trial judge, in permitting the examination, and in allowing the testimony to go into the record to be considered by the jury, gave the sanction of the court to testimony which was highly speculative and conjectural, and so far prejudicial to the defendant as to require a new trial. The objections made and exception taken were sufficient to direct the attention of the court to the point.

The judgment should therefore be reversed, and a new trial granted, costs to abide the event.

PARKER, C. J., and MARTIN, CULLEN, and WERNER, JJ., concur. GRAY, J., not sitting. HAIGHT, J., not voting.

Judgment reversed, etc.

(177 N. Y. 75)

BROWN v. QUINTARD et al.

(Court of Appeals of New York. Dec. 18, 1903.)

WILL—CONSTRUCTION—DEVISE BY IMPLICATION—TRUST—VALIDITY—SUSPENSION OF ALIENATION.

1. Testator left four children surviving and a son of a deceased child, and devised his residuary estate in trust for certain purposes, and provided for its division into four parts at the expiration of the trust. The part which was to be given to one son was to be reduced to meet advancements to such son, but there were no directions as to the other three-fourths of the residuary estate. *Held* insufficient to create a devise by implication of such three-fourths to the remaining three children.

2. Extraneous and parol evidence is admissible only to explain a latent ambiguity, but a former will cannot be introduced to modify, contradict, or enlarge the written words of the will subsequently executed.

3. Testator gave his residuary estate in trust to his executors to pay annuities to seven specified persons during their lives, or until the division of the residuary estate, which was fixed at 26 years from his death. The trustees had power to sell the real estate, if necessary, but the will failed to make any disposition of the residuary estate. *Held*, that the trust was void, as measured by more than two lives in being.

4. A direction to hold certain property in trust for 26 years renders the trust void, as being measured by years, and not by lives.

5. Where testator created a trust for the preservation of his residuary estate, and the payment of the income therefrom to certain named beneficiaries, but made no disposition of three-fourths of the residuary estate, it renders the whole trust and residuary scheme invalid.

O'Brien, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Alfred S. Brown against John A. Quintard and others, executors of Paul S. Brown and others, and Herbert J. Carrington and others. From a judgment of the Appellate Division (81 N. Y. Supp. 918) affirming a judgment of the Special Term, plaintiff and Herbert J. Carrington and others appeal. Modified.

Francis A. McCloskey, for appellant Alfred S. Brown. Joseph Fettretch and Richard B. Kelly, for appellant Carrington. Louis J. Altkrug, for appellant Augusta A. Brown. Hugo Hirsh, for respondents John A. Quintard and others. Albert C. Wheeler, for respondent Margaret Brown. Max E. Lehman, for respondent Le Annah Brown.

WERNER, J. The purpose of this action is to obtain a judicial construction of the will of Paul Sandstrom Brown, who died, at the age of 90 years, on August 30, 1901, seised of both real and personal property. In addition to his widow, he left, him surviving, as his only heirs at law and next of kin, four sons, Mortimer, Edward, Alfred, and Oscar, and a grandson, Herbert J. Carrington, the child of his deceased daughter. The will is dated June 21, 1900, supplemented by a codicil dated August 15, 1901. At the time of the testator's death he owned two pieces of real estate, one situated on Third avenue, in the borough of Manhattan, and the other on Tompkins Place, in the borough of Brooklyn, city of New York. He was also the owner of a leasehold estate in property situated on Third avenue adjoining the premises owned by him in fee. The material parts of the will are as follows: The first clause directs the payment of debts and funeral expenses. The second disposes of all but \$425 of the proceeds of a \$2,000 life insurance policy by applying \$1,000 of it on a mortgage, and giving specific portions of the remainder to various persons named. The third deals with household effects and personal property. The fourth gives to the executors in trust the residue of the estate, to collect and receive the rents, issues, and profits, to apply the net income to the payment of annuities to each of the sons except the incompetent

¶ 4. See *Perpetuities*, vol. 29, Cent. Dig. § 50.

son, Oscar, whose wife receives \$50 a month, and other annuities in specified sums to the wives of the sons Alfred and Mortimer and the grandson Carrington. These annuities are directed to be paid " * * * until the death of the said parties, or until my estate shall be divided among my heirs as hereinafter provided, when all said payments shall cease and determine, except as hereinafter provided." The fifth paragraph provides for a ratable decrease in the annuities in the event of a diminution of income, and the sixth provides that, if the income from the estate should increase, \$2,000 thereof should be first applied each year to the reduction of mortgages on the real estate, and then there should be a proportionate increase of the annuities above mentioned. The eighth paragraph gives to the executors power to renew mortgages on real estate, and to rebuild in case of fire. The ninth paragraph gives to the executors full power "to sell at any time, in their discretion, any and all" of the testator's real estate, and then continues as follows: "But I advise that my real estate in the borough of Manhattan, city of New York, shall not be sold until twenty-six years from the date hereof, or until the termination by expiration of term or otherwise of a certain lease to Clarence S. Brown, now existing upon the premises No. 33 Third avenue, in said borough and city, which said lease by its terms now runs to May 1st, 1905, with privilege to the lessee to renew the same for a period of twenty-one years at an increased rental to be agreed upon by the respective parties. Upon the expiration of said period of twenty-six years, or upon the termination of said lease at an earlier period, or at any time theretofore, if, in the judgment of my said executors, their successor or successors, it shall be deemed for the interest of my estate that said real estate shall be sold, it shall thereupon be sold and the proceeds divided in four equal parts. From one of said four parts my said executors, their successor or successors, shall deduct the sum of \$3,000.00, and the said part so reduced shall be the part or share of my son Edward S. Brown; being so reduced in justice to my other children because of the money I have advanced to him. * * * And I direct my said executors, or their successor or successors, to pay to my son Edward S. Brown his share so reduced at the convenience of said executors; or in case of his death to invest the same for the benefit of his children." In the same paragraph the \$3,000 which was deducted from the share of Edward was bequeathed to the testator's two grandsons, Herbert J. Carrington and Clarence Brown; \$2,000 to the former, and \$1,000 to the latter. The codicil reduced the amount to be deducted from the share of Edward to \$1,000, and this was bequeathed to the two grandsons in the same proportions as the \$3,000 mentioned in the ninth paragraph of the original will. In the tenth para-

graph the executors were given power to sell the Tompkins Place real estate at any time, in their discretion, at either public or private sale, and "to invest the balance coming from said sale in such manner as, in their judgment, will be most secure and give the largest attainable income," but there was no direction as to the disposition of the proceeds of such sale. The eleventh clause again gives to the executors the power to sell the real estate at public or private sale, but, in the latter event, only with the approval of a majority of the testator's adult heirs then living as to the amount for which such sale shall be made.

The fundamental difficulty with this will lies in the failure of the testator to make any direct or explicit disposition of three-fourths of his residuary estate. It will be noted that in the ninth paragraph he directs the division of his estate into four parts. One of these parts, less \$3,000, he gives to his son Edward. The other three parts are not disposed of unless, by implication, we can import into the will language that gives the other three parts to the testator's sons Mortimer, Oscar, and Alfred. Such an implication will save from collapse the essential features of this testamentary scheme. Without such implication there is no testamentary disposition of the residuum of the estate, unless the trust set forth in paragraph 4 and the alleged trust in paragraph 9 are valid. The trust in paragraph 4 is to pay the annuities therein specified to the several annuitants named during their respective lives, or until the estate shall be divided "among my heirs as hereinafter provided." If there is no complete and valid disposition of the estate "as hereinafter provided," it follows that the trust must stand, if at all, upon the provision to pay the annuities during the lives of the respective annuitants; and this is clearly invalid, because it suspends the power of alienation of property or its proceeds for more than two lives in being. Under paragraph 4 no less than seven lives intervene between the death of the testator and the ultimate disposition of the estate, unless subsequent parts of the will validly provide for an earlier division. As to the alleged trust, which is predicated upon the provisions of paragraph 9, as read in connection with paragraph 4, it is enough to say that, if the direction not to sell the Third avenue real estate until after the expiration of 26 years is anything more than mere advice, it is void, because it attempts to create a trust measured by years, and not by lives.

Thus we come to the real question in the case: Can the ninth clause be so read as to dispose of the whole of the residue of the estate? The learned trial court and counsel for the executors evidently thought that it could not be so read, or at least entertained doubts upon the subject, as is shown by the use of a former will of the testator as evidence to disclose the latter's testamentary

intent in making his last will. We think it was error to receive the revoked will in evidence for that purpose. Extraneous and parol evidence is admissible to explain a will when there is a latent ambiguity arising dehors the instrument, but never to supply, contradict, enlarge, or vary the written words. *Mann v. Mann*, 1 Johns. Ch. 231, and cases there cited. The reason for this rule is obvious. The courts cannot be permitted to construct wills from the materials which testators have discarded. A will is never revoked unless the testator changes his mind respecting the disposition of his estate. When a will is revoked, it no longer expresses the testamentary intention of its maker. To the extent that the provisions of two wills of the same testator are identical, there is, of course, no necessity for explanation. But when they are different the last must speak for itself. If this were not so, a testator could never safely change or revoke his will. In the case at bar the former will was received to show that it contained provisions which were inadvertently omitted from the last will. If the two wills could be read together, the conclusion would be obvious. But the testator's last will must be read and construed by itself in the effort to ascertain his intent. When thus read and construed, no court can say that the omissions in the last will were inadvertent. Non constat that may have been the very purpose of revoking the former will and making another. The introduction of the former will was properly objected to, and there was an exception to the ruling receiving it. The error is not one which we can disregard, for we cannot say that it did not prejudice the substantial rights of the appellants, and it follows that there must be a reversal of the judgment. It is necessary, however, to go a step further in the discussion. The construction and effect of paragraph 9 must be determined. This is a feature of the case that cannot be changed by any number of new trials, and we therefore dispose of it now.

In so far as the testator has given expression to his plan or scheme of testamentary disposition, it is plain. The executors were vested with the legal title to the residue of the estate to pay the annuities during the lives of the respective annuitants, or until there should be a division as provided. The only division directed to be made is that there shall be four parts, of which the son Edward shall receive one, less the deduction specified in the codicil. The other three parts are not disposed of. It is true that the testator had four sons, and that the direction to divide the residue into four parts is coupled with the statement that the deduction from Edward's share is made "in justice to my other children." These circumstances give rise to surmise, conjecture, and argument, but they prove nothing except the fact that, if the testator intended to give three-fourths of the residue to his sons Mortimer, Alfred,

and Oscar, he utterly failed to do so. If we were dealing with this case alone, and not with the law relating to wills, we might, in the interests of justice, permit probabilities to outweigh proofs; but the law must be upheld. There has been no direct and explicit disposition of three-fourths of the residue, and the language of the will is not such as to support a disposition by implication. A few extracts from the reported decisions will serve to illustrate the inflexibility of the rule by which this case must be governed. "To uphold a legacy by implication, the inference from the will of the testator's intention must be such as to leave no hesitation in the mind of the court, and permit of no other reasonable inference." *Bradhurst v. Field*, 135 N. Y. 564, 32 N. E. 113. "To devise an estate by implication there must be so strong a probability of such an intention that the contrary cannot be supposed." *Post v. Hover*, 33 N. Y. 594. "Especially is this true when the implication sought to be drawn will result in the disinherison of an heir." *Scott v. Guernsey*, 48 N. Y. 106. "The rule is peremptory that the heirs shall not be disinherited unless by plain and cogent inference arising from the will." *Quinn v. Hardenbrook*, 54 N. Y. 83; *Lynes v. Townsend*, 33 N. Y. 558. The conclusion that the testator failed to dispose of three-fourths of his residuary estate necessarily leads to the result that he must be held to have died intestate as to the whole of the residue. In the failure of the residuary disposition to the extent of three-fourths, the real substance of the whole residuary scheme failed. The trust or trusts were created for the purpose of paying the annuities and then making division as directed, which was only as to one-fourth. Without a valid disposition of the other three-fourths, and without a valid trust, the whole residuary plan is destroyed, and there would be neither logic nor justice in holding that, despite this result, the son Edward may yet take under the will, and then share with his brothers under the statute of distributions. "A portion of a will should not be upheld when the result will work injustice to those interested." *Benedict v. Webb*, 98 N. Y. 460. "Where a trust is a part of a single scheme, the principal object of which cannot be carried out, the whole scheme fails, and no effect can be given to any part of it." *Holmes v. Mead*, 52 N. Y. 332; *Benedict v. Webb*, 98 N. Y. 460; *Rice v. Barrett*, 102 N. Y. 161, 6 N. E. 898; *Matter of Butterfield*, 133 N. Y. 473, 31 N. E. 515. Those provisions of the will that are not a part of the residuary scheme are not affected by this decision. They are distinct and separable. Those that form an integral and essential part of the residuary plan must fall together.

The judgment of the court below must be modified as above indicated, and, as thus modified, affirmed, with costs to all the appellants and to the executors, respondents, payable out of the fund.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, and CULLEN, JJ., concur. O'BRIEN, J., dissents.

Judgment accordingly.

(177 N. Y. 68)

CROOKS v. PEOPLE'S NAT. BANK OF MALONE.

(Court of Appeals of New York. Dec. 18, 1903.)

APPEAL—AFFIRMANCE—DISMISSAL.

1. Where a judgment on the facts as well as the law is reversed by the Appellate Division, if on appeal the evidence raises a question of fact, the order of reversal will be affirmed, unless peculiar circumstances require dismissal of the appeal to prevent injustice.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by George W. Crooka, trustee in bankruptcy of Howard E. King and others, against the People's National Bank of Malone. From an order of the Appellate Division (76 N. Y. Supp. 92) reversing in part a judgment in favor of defendant entered on dismissal of the complaint, and granting a new trial, defendant appeals. Affirmed.

This action was brought to set aside certain transfers of personal property made by Howard E. King to the defendant, or for its benefit, on the ground that such transfers created unlawful preferences under the bankrupt law.

John P. Kellas and Martin E. McClary, for appellant. John P. Badger, for respondent.

PER CURIAM. The Appellate Division reversed that part of the judgment rendered by the Special Term which related to the first cause of action alleged in the complaint, but affirmed as to the part relating to the second cause of action. This appeal was taken from so much of the order as reversed the judgment dismissing the complaint as to the first cause of action.

As the reversal by the Appellate Division was based upon the facts as well as the law, our first duty was to examine the record, and see whether there was a material question of fact upon which a reversal as to the facts could be founded. *Otten v. Manhattan Railway Co.*, 150 N. Y. 395, 44 N. E. 1033. After reading the record for that purpose, we have reached the conclusion that the circumstances surrounding the actors at the time of the transaction warrant the inference that a preference was intended by the debtor, and that the creditor had reasonable cause to believe that the debtor intended to give the preference. There was evidence on both sides of these propositions, which were among the vital questions in the case. Although the witnesses may not contradict each other, admitted circumstances may contradict the witnesses and authorize a conclusion opposed to their testimony, as is frequently the case in trying

questions of fraud. The story told by a witness may be truthful upon its face, yet scattered through it there may be circumstances which show that it is false, and that the reverse is true. The controverted questions of fact were decided in favor of the defendant by the Special Term, and in favor of the plaintiff by the Appellate Division. In civil cases we are restricted to the review of questions of law, and, after deciding that the Appellate Division had jurisdiction to reverse because there was a material question of fact, we can proceed no further, but must either affirm the judgment or dismiss the appeal. *Chapman v. Comstock*, 184 N. Y. 509, 31 N. E. 876; *Williams v. D., L. & W. R. Co.*, 127 N. Y. 643, 27 N. E. 404. While we have generally dismissed the appeal under such circumstances, we have sometimes affirmed the judgment, and we have given repeated warnings that we should do so uniformly if attorneys persisted in wasting time by futile appeals to this court when the reversal was founded on a question of fact. We have jurisdiction to affirm, because we are required to decide the question of law whether the evidence raised a question of fact. Constant disregard of our admonitions makes it necessary to affirm as a rule, and dismiss only in rare instances, where peculiar circumstances require that course in order to prevent injustice. We apply the rule thus announced to the case in hand, by affirming the order of reversal, and rendering judgment against the defendant, in accordance with its stipulation, upon the first cause of action set forth in the complaint, with costs in all courts.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

Order affirmed, etc.

(69 Ohio St. 236)

STATE ex rel. ATTORNEY GENERAL v. CRAIG.

(Supreme Court of Ohio. Nov. 17, 1903.)

OFFICERS—ILLEGAL APPOINTMENT—OUSTER—MUNICIPAL CORPORATIONS—HEALTH OFFICER.

1. Where the appointment to an office is a nullity, for the reason that the appointee is by statute ineligible to such office, a legal appointment to such office may be made without first ousting such first appointee by proceedings in quo warranto.

2. A health officer is not an employé, as that word is used in section 189 of the new municipal code.

3. A board of health, having appointed a new health officer, thereby indicated its pleasure that it no longer desired the services of the previous health officer.

(Syllabus by the Court.)

Quo warranto by the state, on the relation of the Attorney General, against J. Harvey Craig. Judgment of ouster.

¶ 1. See *Officers*, vol. 37, Cent. Dig. §§ 18, 47.

On the 4th day of May, 1903, the mayor of the city of Mansfield appointed a board of health, consisting of five qualified electors of said city, which appointment was duly confirmed by the council of said city, and they entered upon the discharge of their duties as such board; and thereafter, on the 15th day of May, said board of health duly appointed one A. H. McCullough health officer of said city, and he accepted the appointment and duly qualified. On the 13th day of June, 1903, after said acceptance and qualification, said A. H. McCullough demanded of J. Harvey Craig, respondent, the books and other property appertaining to said office, but said respondent refused to deliver the same; and refused to surrender said office, claiming to be such health officer of said city himself, and entitled to the emoluments thereof, and to discharge the duties of the same. Thereupon the Attorney General instituted proceedings in quo warranto in this court, requiring said J. Harvey Craig to show by what warrant he holds said office. By his answer the respondent claims that he was appointed health officer of the city of Mansfield by the board of health of said city on the 12th day of January, 1894; that his tenure of office was during the pleasure of the board; and that he has not been removed by the board or any other authority, and therefore still continues in office. He further claims that he is entitled to hold said office under the provisions of section 189 of the municipal code, which provides that "all employees now serving in the health department shall continue to hold their said positions and shall not be removed from office or reduced in rank or pay, except for cause assigned, and after a hearing has been afforded them before the board." He further claims that the board of health of said city in office before the 4th day of May, 1903, continue since that date to be the legal board, and that the mayor had no lawful right to appoint a new board of health on that day, and that such appointment was and is void. The old board and new board each claims to be the legal board, and each refuses to yield to the other. And so, also, each health officer claims to be the legal officer, and each refuses to yield to the other, so that the city is burdened with two boards of health and two health officers, and the auditor of the county refuses to recognize either of said health officers. There is an agreed statement of facts, from which it appears that the members of the board of health in office up to the time the new municipal code took effect, May 4, 1903, were each elected by the council of said city while they were members of said council, and were present and voting at the meeting at which they were so elected as members of the board of health. It further appears that on January 12, 1894, said J. Harvey Craig was appointed health officer by the council of said city to fill a vacancy caused by the

resignation of Dr. Reid; that on May 12, 1897, he was elected by said board of health for one year; that on May 10, 1898, he was again elected for one year, and again on May 24, 1899, for one year, and again on May 8, 1900; that, on May 10, 1901, there was an effort by the board to elect a health officer, but there was no election, the vote being a tie; and that on June 13, 1902, he was again elected for one year.

Smith W. Bennett, Special Counsel of the Attorney General's office. C. E. McBride and William McE. Weldon, for plaintiff. Bowers & Black, for respondent.

BURKET, O. J. (after stating the facts). It is conceded that the members of the old board of health in office when the new municipal code took effect, on May 4, 1903, were each, when appointed by council, members of the council that appointed them, and were present and voting when such appointments were made. Section 1717, Rev. St. 1890, then in force, and part of title 12, contains the following: "No member of council shall be eligible to any other office, or to a position on any board provided for in this title, or created by law, or ordinance of council, except as provided in the seventh division of this title." Members of boards of health are provided for in said title 12, and are not embraced within the exception as to the seventh division of the same title. The members of council were therefore not eligible to the office of members of the board of health, and their appointment to that office by council was a nullity. *State ex rel. v. Kearns*, 47 Ohio St. 566, 25 N. E. 1027. The fifth subdivision of the syllabus is as follows: "The appointment by a city council of a member thereof to an office which the statute makes a member of council ineligible to fill, and his acceptance thereof, does not work an abandonment of his office as councilman. The appointment to the second office is absolutely void."

It is contended by the state in this case that, the appointment of these members of council to be members of the board of health being a nullity and absolutely void, the appointment by such board of health of Dr. Craig as health officer was also void; and on part of Dr. Craig it is contended that such board of health became and was a de facto board, and that its appointment of a health officer constituted him a de-jure officer. It is not necessary to determine in this case which, if either, of these contentions is right, as the case turns upon another principle.

The appointment of members of council to positions on the board of health being a nullity and void, no proceeding in quo warranto was necessary to oust them from such nullity, but the council, under the old statute, or the mayor, under the new municipal code, might treat the office as vacant, and make a valid appointment to fill such vacancy, as was done by the

mayor in this case. True, the members of the old board might have been ousted by proceedings in quo warranto, as intruding themselves into a public office without warrant of law; but, while that might have been done, it was not necessary to do so before appointing a new board, because their appointment was a nullity, and they had no color of title to the office, and could not invoke a nullity to keep duly appointed officers out of the office. When there is some color of title, resort must first be had to quo warranto; but where there is no such color, but a mere nullity, a legal appointment may be made to fill the office, and then, if the party in the wrong still persists in holding onto the office, he may be ousted by proceedings for that purpose. It is therefore clear that the board of health appointed by the mayor May 4, 1903, and confirmed by council, is the only lawful board of health of the city of Mansfield, and was such lawful board of health on the 15th day of May, 1903, when it appointed A. H. McCullough health officer of said city. By the official act of appointing Dr. McCullough health officer, the board of health expressed its pleasure that Dr. Craig should no longer serve as health officer, and he then ceased to be such officer. The pleasure of the board may be as effectually indicated by official acts as by words or resolutions. It was not necessary to expressly remove Dr. Craig to get rid of him, because the appointment of Dr. McCullough expressed the pleasure of the board, and, in legal effect, terminated and ended the term of service of Dr. Craig.

It is further urged by counsel for Dr. Craig that when the new municipal code took effect, May 4, 1903, he was an employé serving in the health department, and that therefore he would continue to hold his position, as provided in the latter part of section 189 of the new code. That is not tenable. The part of the section relied upon is as follows: "All employés now serving in the health department shall continue to hold their said positions and shall not be removed from office or reduced in rank or pay, except for cause assigned, and after a hearing has been afforded them before the board." Is the health officer an "employé," as that word is used in the statutes? We think not. He is known as a "health officer" throughout the statute, and in section 2115 is spoken of as an "appointee," but nowhere as an "employé." It is urged that the General Assembly, in the use of the word "employé" meant "appointee"; but as there may be both employés and appointees in the health department, and as the General Assembly has legislated as to each, it must be held that when it used the word "employé" it meant what it said, and did not mean "appointee" or "health officer." And even if the word "employé" means and includes a health officer, then such employé, as such health officer, will, under section 2115, Rev. St. 1890, serve in said office only during the pleasure of the board of health; and in this case the board indicated its pleasure, by the appoint-

ment of Dr. McCullough May 15, 1903, that Dr. Craig should no longer serve as such health officer. It being clear, under section 2115, that a health officer can serve only during the pleasure of the board, his term of service cannot be extended by the doubtful word "employé," found in section 189 of the new code.

It is therefore clear, from every point of view, that Dr. Craig ceased to be health officer when Dr. McCullough was appointed to that office and qualified, and that Dr. McCullough, by his appointment and qualification, became and is the legal health officer of the said city of Mansfield. Judgment of ouster will be rendered against Dr. Craig, and an order of induction awarded in favor of Dr. McCullough.

Judgment of ouster and order of induction.

SPEAR, DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(206 ILL. 423)

VILLAGE OF LEE v. HARRIS.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS — STREETS — ENCROACHMENTS — EJECTMENT — ABSENCE OF FEE TITLE — DEDICATION — SUFFICIENCY OF PLAT — VACATION — ADVERSE POSSESSION — EXTENSION OF STREET — SUFFICIENCY OF EVIDENCE — REVIEW — PARTIAL AFFIRMANCE OF JUDGMENT.

1. A village, being vested by 1 Starr & C. Ann. St. 1896, p. 689, c. 24, art. 5, par. 63, § 1, subd. 7, with power to extend its streets, may do so by an actual prolongation of the street by travel and use by the public, and an acceptance of the public way thus created.

2. A village, being vested by 1 Starr & C. Ann. St. 1896, p. 689, c. 24, art. 5, par. 63, § 1, subd. 7, with the right to the exclusive possession, use, and control of a street extension, may maintain ejectment to recover possession thereof from one encroaching thereon, though its right is merely an easement and it does not possess the fee title.

3. Unless a contrary intention is shown, the acceptance by a village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys.

4. Where the plat of a village shows certain strips bearing names as streets, and spaces are marked between lots in the blocks, there is a sufficient manifestation of an intent to dedicate to public use such strips and spaces as streets and alleys.

5. Under the express provisions of 3 Starr & C. Ann. St. 1896, p. 2964, c. 109, par. 6, the plat of a village cannot be vacated if lots therein have been sold, except by the consent of all the lot owners.

6. The fact that a number of streets and alleys in a village have never been improved, and have been for some years within the inclosure of private persons, does not prevent their recovery by the village.

7. Evidence, in ejectment by a village to recover possession of a portion of its streets, held to support a finding that an easement of passage and use as a street over certain lots had been established, thus effecting the extension of a certain street, which the village had accepted by user as a part of the street.

8. Where a village sues to recover possession of parts of different streets and alleys, and re-

¶ 2. See Dedication, vol. 15, Cent. Dig. § 76.

covers but a portion of the parcels sued for, though entitled to them all, the judgment on a writ of error may be affirmed in so far as proper, and the case sent back for new trial as to the other parcels.

Error to Circuit Court, De Kalb County; Chas. A. Bishop, Judge.

Action by the village of Lee against Michael P. Harris. Judgment for plaintiff, granting insufficient relief, and it brings error. Modified.

Jones & Rogers, for plaintiff in error. Carnes, Dunton & Faissler, for defendant in error.

BOGGS, J. The plaintiff in error village brought an action of ejectment against defendant in error to recover premises as follows: That part of East street lying between blocks 3 and 4, and the south 15 feet of East street and the alley lying adjacent to and south of blocks 3 and 4, all in Hinckley & Boyles' First Addition to the village of Lee; also that part of First street lying between blocks 12 and 14, and between block 13 and lot A, in the original town of Lee; also that portion of D street lying between lot A and outlot F, in the original town of Lee, being the south end of D street; also that part of B street lying adjacent to and west of blocks 12 and 14, in the original town of Lee; also was possessed of the part of Third street lying between C street and the railroad across block 5, in the original village of Lee, and also of the alley between lots 1 and 2, in block 13, in the original village of Lee. A jury was waived, and the cause was heard by the court. The defendant in error was found guilty of unlawfully withholding the premises last and next last above described, and found not guilty as to all other parcels. The village sued out this writ of error, and both parties have assigned errors.

The grounds of defense were, first, that neither the plat of the original town nor the plat of the addition thereto was acknowledged in compliance with the statute in force at the times of their execution, respectively, and for that reason the village did not become invested with the fee to the streets and alleys; second, that, even if the plats were sufficient to show a common-law dedication, the village did not accept the dedication of the particular parts of the streets and alleys here involved, and consequently possessed no interest or right whatever in them; third, that it does not appear from the plat that Third street, as platted by the proprietors, extended from C street across block 5 to the railroad, and that the only right or interest claimed or proven (if any) in that area is a mere easement in the public arising from the alleged use of the same as a passageway or road for 30 years, and that the action of ejectment will not lie to recover a mere easement.

The right of a city or village which possesses the fee to the streets and alleys to

maintain an action of ejectment against one who has intruded upon or occupies any portion of a street or alley seems never to have been doubted, but where the fee remained in the proprietor of the abutting property that fact was thought to present a technical objection to the successful prosecution of the action. The right to the possession, use, and control of all highways, including streets and alleys, rests primarily in the state in its sovereign capacity, and the state having, by the express grants set forth in various subdivisions of section 1, art. 5, c. 24, entitled "Cities," etc. (1 Starr & C. Ann. St. 1893, p. 689, par. 63), vested in the cities and villages of the state the possession, use, and control of their respective streets and alleys, the right of possession, use, and control is regarded by the courts as a legal and not a mere equitable right, and in that view no cause or reason exists why the action of ejectment may not be maintained, though the city or village has not the legal title to the street or alley. *City of Chicago v. Wright*, 60 Ill. 318; 10 Am. & Eng. Ency. of Law (2d Ed.) 475; *Methodist Episcopal Church v. Hoboken*, 33 N. J. Law, 13; *Klinkener v. McKeesport*, 11 Pa. 444. A city or village may therefore resort to the action of ejectment to regain possession of any part of a street or alley which may be unlawfully withheld from it.

The plaintiff in error village claimed that for more than 30 years the public had continuously, and with the knowledge and acquiescence of the owner of the fee, and with the claim of right, traveled over and used, as a part of Third street, the lots or parts of lots in block 5, in the original village, situate between the west line of the intersection of Third and C streets and the railroad, and that by prescription said Third street as a public highway had been extended and continuously used for said period of time by the public as a street, and that the same had been in the possession, use, and control of the said village as a street for said period of time, and that the defendant in error had erected a platform, scales, and other obstructions upon the area of the street so extended. The court held this contention to be sustained by the proof to the extent such area was shown to have been actually used, and awarded judgment accordingly that defendant in error was guilty of unlawfully withholding that portion occupied by his platform, scales, etc. Defendant in error insists that this recovery is for a mere easement—an incorporeal hereditament—and cites authorities to support his further contention that the action of ejectment cannot be maintained for an easement.

An easement, which is but a mere intangible right or license appurtenant to land, and does not include the right to the possession of the land, cannot be the subject-matter of an action of ejectment, for the reason there is nothing tangible on which the writ of restitu-

tion could operate—nothing which the sheriff can take under such a writ and deliver to the plaintiff in the action. But the locus in quo here is an extension of Third street. The village, by virtue of the seventh subdivision of section 1 of said article 5, c. 24, entitled "Cities," possessed the power to extend its streets, and became vested, by virtue of the various grants of power enumerated in said section 1, with the right to the exclusive possession, use, and control of any street so extended. We see no reason why the extension of a street may not be effected by the actual prolongation of the street by travel and use of the same by the public for the requisite period, and the acceptance by the village of the public way thus created as an extension of the street.

But it is contended that the right remains but an easement, and that ejectment cannot be maintained for that reason. It is a public easement, and the possession thereof is exclusive of any interference by the owner of the fee for its improvement, regulation, or enjoyment as one of the streets of the village. Such right of possession is in the village by force of the statute. It is not a mere intangible right or license, but is a legal right to the actual and exclusive possession of the locus in quo, and the action of ejectment furnishes an appropriate remedy, it seems to us, for the recovery of such possession. In *Hoboken Land Co. v. Hoboken*, 36 N. J. Law, 544, it was said: "Where the public easement is such that possession, exclusive of any interference by the owner of the fee, is essential for its improvement, regulation, and enjoyment, the only appropriate action to obtain the possession is ejectment."

It is contended by the defendant in error that neither the acknowledgment of the plat of the original village of Lee, nor the acknowledgment of the plat of the addition thereto in which the streets and premises here involved are located, was in conformity with the statutes in force at the time of the execution and acknowledgment of such plats, and that there was, therefore, but a common-law dedication of the streets and alleys, and that proof was lacking of the acceptance by the village of those parts of the streets and alleys here involved. The further contention in the same behalf is that, in the absence of an acceptance, the plats are but a mere offer of dedication, and that the village has no legal right of possession or other legal interest in the streets or alleys, or parts thereof, which have not been accepted.

It was abundantly proven, and, as we understand it, was not disputed, that the village accepted a number of the streets and alleys in both the original village and the addition thereto, and opened the same up to public use, and maintained the same, for the use of the public, as streets and alleys of the village. But it is insisted that an acceptance of some of the streets and alleys

of a plat does not constitute an acceptance of the whole, and that proof of the acceptance of a part is not sufficient to vest the village with right to the use, possession, and control of all the streets and alleys shown on a plat. We do not so understand the law, but, on the contrary, hold the true rule and doctrine to be that an acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing, unless the intention to limit the acceptance is shown. In *Village of Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 378, we said (page 246, 197 Ill., page 379, 64 N. E.): "It is true that a street may be accepted in part and the remainder rejected, if it is proved that such was the intention of the public authorities. An acceptance of some of the streets named in a plat will not constitute an acceptance of the whole, if it is shown that there was an intention to limit the acceptance." There is no proof in this record that the village declined to accept any portion of either plat, and, that being true, the acceptance of a part was an acceptance of the whole plat. The immediate opening and use by the public of all the streets in ground laid out and platted into lots for their entire length, or an immediate formal acceptance by some competent public authority, is not necessary to give effect to the dedication of land to the public use, for a street, by the making of a town plat and the selling of lots with reference to the plat. The public authorities must be allowed a reasonable time for opening and improving public streets, as their resources and the public necessity may allow and require. *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269; *Elliott on Roads and Streets* (2d Ed.) § 118, p. 138, and cases there cited.

There is no force in the contention that the plats are insufficient to show an intention on the part of the proprietors thereof to dedicate to the public use the spaces claimed to be streets and alleys. The strips shown upon the plats and claimed as streets are given names, as such, on the plats. The spaces claimed as alleys appear upon the plats as strips between the lots in the different blocks, and, we think, sufficiently manifest the intention of the proprietors of the plats. In *Clark v. McCormick*, 174 Ill. 164, 51 N. E. 215, we said (page 170, 174 Ill., page 218, 51 N. E.): "It was not necessary that a declaration, either oral or written, should be established, in order to show it was the intention of the proprietor to dedicate the strips to such uses. Such intention may be established in any conceivable way by which it may be made manifest. A survey and plat alone are sufficient to establish a dedication, if it is evident from the face of the plat it was the intention of the proprietor to set apart certain grounds for public use."

There was some proof produced relative to an attempt made by the defendant in er-

ror and one Bridget Kennedy, on the 15th day of April, 1885, to procure a vacation, under the statute, of a portion of the plats, including some of the premises here involved. Counsel for defendant in error, in their brief, however, say that they do not contend that the attempted vacation was in compliance with any law. Before this attempted vacation lots shown on said plats had been sold, and the owners of all the lots in each of the plats did not join in the attempted vacation. Such attempted vacation did not, therefore, become effective. 3 Starr & C. Ann. St. 1896, p. 2964, c. 109, par. 6.

The fact that a number of the streets and alleys had never been improved by the village, and had been for some years within the inclosure of private persons, had no potency to defeat the action of the village. Whether the interests of the public require that a street or alley shall be improved, or that repairs thereon are necessary, is committed to the judgment and discretion of the governing board of the city or village. Mere adverse possession by a lot owner of a portion of a public street, however long continued, does not, by virtue of the statute of limitations, bar the right of the public to be restored to possession of the street to its full width. *City of Dekalb v. Luney*, 193 Ill. 185, 61 N. E. 1036. Mere nonuser of a street or alley, no matter how long continued, does not deprive the city or village, as the representative of the public, of the right to take possession thereof and improve the same. The doctrine of equity that a city or village may be deemed estopped, under some circumstances, to assert a right to the possession of a portion of a street or alley which has been permitted to remain in the possession of a private person, has application only when such private person, acting on the faith of the belief that the street or alley has been permanently abandoned by the municipality, has, with the acquiescence of those representing the municipality (as was said in *City of Dekalb v. Luney*, supra), "erected structures on the street, or made improvements thereon of such lasting and valuable character that to permit the public to assert the right to repossess itself of the premises would entail such great pecuniary loss and sacrifice upon the private property holder that justice and right would demand that the public be estopped." No such state of case appeared with reference to any of the premises here under consideration. The finding of the court was that an easement of passage and use as a street or highway situate over the lots in block 5 of the original town, between the intersection of O and Third streets and the railroad, had been established by the evidence; that an extension or prolongation of Third street had been thus effected, and that the village had accepted the same, by user, as part of Third street; and that defendant in error had pla-

ced and was maintaining in the traveled way of the street, as so extended, a platform and scales, and that he was guilty of withholding that portion of the extension of Third street occupied by said platform and scales; and the court also found that the defendant in error had erected a shed, the east end whereof extended $4\frac{1}{10}$ feet into the alley between lots 1 and 2, in block 13, of the original town.

Much testimony bearing upon the facts involved in each of these findings was produced, but there is but little conflict in the proof. Prior to 1871, before the original plat of the village was executed, two buildings stood, one on either side, in the space now declared to constitute the prolongation of Third street. The public passed between these buildings to and from the depot of the railroad, using the same as a public road. After the making of the plat the public traveled over the passageway as before, and it came into use as a prolongation of Third street, and constitutes one of the principal parts of that street. It reached the railroad tracks where a plank crossing had been put in to accommodate the passage of teams, vehicles, and pedestrians, and the railroad company maintained a sign there, warning travelers to "look out for the cars." A sidewalk ran along the south side of the extended street when the defendant in error placed his platform and scales in the traveled way. The defendant in error petitioned the village to construct this sidewalk, and assisted in building it, and the village board, at his request, at other times made repairs, filled holes, etc., therein. The evidence shows the traveled way became, in fact, an extension of Third street from C street to the railroad tracks, and had been used as such for more than 20 years after the organization of the village. Counsel for defendant in error insist it was, however, a mere permissive use or license from the owners of the soil. The trial court was justified in holding to the contrary. The use by the public was with the acquiescence and knowledge of the owners. It was exclusive and uninterrupted, and the proof indicated an intention on the part of the owners to dedicate the premises to the use of the public as a prolongation of Third street. We also find the holding of the trial court that the shed protruded in the alley between lots 1 and 2, in block 13, supported by the proof.

It appears, from the rulings made in passing upon the propositions of law, that the court held the view that while user by the village authorities of a street or alley evidenced an acceptance of the dedication, still the acceptance was limited to the extent of the user. Influenced by this conclusion, the court denied to the plaintiff in error village the right to recover the different parts of the streets and alleys to which the user had not extended and as to which the verdict for the defendant in error was entered. As we have seen, the acceptance of some of the

streets and alleys shown on a plat, or parts of such streets and alleys, is an acceptance of the entire system of streets and alleys appearing on the plat, unless an affirmative official declaration of the remaining streets and alleys is shown. There was no proof that the village elected to limit its acceptance, and the court was in error in holding that the dedication of any part of any street or alley shown on either of the plats, the original or the plat showing the addition to the village, had not been accepted. The action was for the recovery of distinct parcels of land—parts of different streets and alleys. The recoveries sought were independent each of the other. The judgment may therefore be affirmed in so far as it is correct, and reversed and remanded for a new trial as to the other matters involved. 3 Cyc. 447, 448.

The judgment adjudging the defendant in error guilty of unlawfully withholding that part of Third street, as extended across block 5 in the plaintiff in error village, which is occupied by the defendant in error by a platform, scales, etc., and also guilty of withholding that part of the alley between lots 1 and 2, in block 13, in the original village, which is occupied by the projection of a shed to the distance of 4.6 feet on the south side of said alley, is affirmed. In all other respects the judgment is reversed, and the cause will be remanded for such other and further proceedings as to law and justice shall appertain. The costs will be taxed to the defendant in error.

Affirmed in part, and remanded.

(206 Ill. 387)

WETMORE v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ORDINANCE—UNCERTAINTY.

1. 4 Jones & Addington's Supp. to Starr & O. Ann. St. 1902, p. 151, § 7, provides that in proceedings for constructing drains no resolutions, public hearing, or preliminary proceedings shall be necessary, but that the board may submit to the city council an ordinance, together with the recommendation and the estimated cost of the improvement as made by the engineer, etc. The engineer's estimate of the cost of laying certain drains contemplated the laying of drains from each of a number of lots to the main sewer, and the recommendation of the board of local improvements was in accordance with the estimate. The ordinance authorizing the improvement made the engineer's estimate and the board's recommendation each a part thereof; but while one section described the proposed drains as to be laid from each of certain described lots to the public main sewer, another section provided that the drains should terminate at a point 4 feet within the sidewalk space, which would be 10 or 12 feet from the lot line. *Held*, that the ordinance was fatally defective for failure to show with sufficient certainty how long the drains were to be.

Appeal from Cook County Court; R. A. Russell, Judge.

Proceedings by the city of Chicago for confirmation of a special assessment for lo-

cal improvements in which Earnest O. Wetmore filed objections. From an order confirming the assessment, objector appeals. Reversed.

Marston & Tuttle, for appellant. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

MAGRUDER, J. This is an appeal from an order of the county court of Cook county confirming a special assessment for the cost of six-inch drains in South Forty-First avenue from West Twenty-Seventh street to West Thirty-First street in the city of Chicago. The appellant filed objections to the confirmation of the assessment, among which was the objection that the description and location of the proposed improvement contained in the ordinance and petition were indefinite and uncertain, and that the ordinance did not definitely prescribe the nature, extent, locality, and description of the improvement. The objections of the appellant were overruled.

What the exact width of South Forty-First avenue was between the cross-streets above named is not clearly shown by the evidence introduced. It would appear, however, from the statements of counsel and from the character of the questions propounded by them to the witnesses, that the roadway of the street was either 80 feet wide or 66 feet wide. If the street is 80 feet wide, what is called the "sidewalk space"—that is, the space between the curb line and the lot line—would be 16 feet wide. But if South Forty-First avenue is 66 feet wide, such sidewalk space would be 14 feet wide. The city introduced in evidence the general sidewalk ordinance, being section 1814 of the Revised Municipal Code of Chicago of 1897, which is set forth and commented upon in *Topliff v. City of Chicago*, 196 Ill. 215, 63 N. E. 692. The roadway of the street, as was stated in *Topliff v. City of Chicago*, supra, is that portion of the street intended for the use of horsemen and vehicles; and the other portions of the street are known as the sidewalks—that is, the spaces reserved for pedestrians to walk upon on either side of the roadway. The "curb line" of a street is the dividing line between the roadway and that portion reserved on each side of the roadway for the use of pedestrians. The evidence in this case shows that the "sidewalk space," which is the space between the curb line and the lot lines of the property owners owning lots abutting upon the street, is not always actually used or improved, so as to be used for sidewalk purposes. In other words, the portion of the sidewalk space actually used for the purposes of a sidewalk, and which to that end may be paved with wood or cement or stone, may be, and often is, narrower than the space between the curb line and the lot line.

In the case at bar the engineer of the board of local improvements made an esti-

mate of the cost of laying a drain of six inches internal diameter of the best quality of vitrified tile pipe, three-fourths of an inch in thickness, from each of the lots, blocks, tracts, or parcels of land abutting on South Forty-First avenue from West Twenty-Seventh street to West Thirty-First street, to connect with the public main sewer in South Forty-First avenue between said points, including labor, materials, and all other expenses attending the same, as provided by law, namely, 90 drains, costing \$12 each, making a total of \$1,080, and in such estimate the engineer certified that in his opinion the above estimate did not exceed the probable cost of the above proposed improvement. On the same day, to wit, April 9, 1903, the board of local improvements made a written recommendation to the mayor and aldermen of the city, and therewith submitted an ordinance for six-inch drains in South Forty-First avenue from West Twenty-Seventh street to West Thirty-First street, together with said estimate of the cost of said improvement contemplated therein.

It will be observed that in the engineer's estimate of the cost the drains were to be laid from each of the lots, blocks, tracts, or parcels of land abutting on South Forty-First avenue to the public main sewer in the middle of the street. If the sidewalk space on South Forty-First avenue—that is, the space between the curb line and the lot lines—was 14 feet wide, then the length of each drain to be laid would be 14 feet, added to the width of half the street. If the sidewalk space was 16 feet wide, then the length of each drain would be 16 feet, added to half the width of the street.

By section 2 of the ordinance for the improvement here in question it was provided that a drain of six inches internal diameter of the best quality of vitrified tile pipe, three-fourths of an inch in thickness, should be and was thereby ordered laid from each of the lots, etc., of land thereafter described, abutting on South Forty-First avenue, to connect with the public main sewer in South Forty-First avenue. But, after describing the lots of the property owners abutting upon the street, the ordinance also provides as follows: "Each of said drains shall rise from its connection with said main sewer at the rate of one-fourth of an inch to one foot lineal to its terminus at a point four feet within the sidewalk space as established." The engineer of the board was placed upon the stand as a witness, and testified as to the construction of the drains under the terms of the ordinance, as follows: "An excavation would first be made to permit the laying of the drain, the drainage to be conducted from a point four feet within the curb line, or within the sidewalk space, to the main sewer, to the point where the connection is to be made. Then the drain pipe is laid in such a manner that the elevation of the grade would rise from the first pipe in the sewer, at the rate of a

quarter of an inch for every foot, and terminate four feet inside the curb line. * * * It is built from the center of the street up to the curb line and four feet further. * * * If the sidewalk space was sixteen feet, the end of the drain would be twelve feet from the lot line. * * * The curb line is the division between the sidewalk space and the roadway proper. On a sixty-six foot street the sidewalk space is fourteen feet. * * * It would be ten feet from the lot line."

It thus appears that in one part of the ordinance lying at the basis of the present improvement the drains were to extend from the lot lines to the sewer pipe in the center of the street, and that by another part of the ordinance in question the drains were only to extend from a point four feet within the sidewalk space to the sewer in the center of the street. If the sidewalk space is fourteen feet wide, then the drain, which extends from a point four feet within the curb line to the sewer pipe in the center of the street, would be ten feet shorter than a drain extending from the lot line to the sewer in the middle of the street. If the sidewalk space is sixteen feet wide, then the drain, extending from a point four feet within the curb line, or within the sidewalk space, to the main sewer, would be twelve feet less in length than a drain extending from the lot line to the main sewer in the street.

It is thus left uncertain by the terms of this ordinance whether the contractor laying these drains should make them long enough to extend from the lot lines to the main sewer, or whether he should only extend them from four feet inside of the curb line to the main sewer. A drain extending from a point four feet inside the curb line, and being either ten or twelve feet shorter than a drain extending from the lot line, would, of course, cost less than a drain extending from the lot line. It is to be supposed that the contractor making the improvement would put in the shorter drain instead of a longer one, as it would be more for his interest to do so, the expense being less in the one case than in the other. The defect in the ordinance is that it leaves it uncertain how long these drains are to be, and also leaves it to the discretion of the contractor constructing the drains whether he shall extend them from the lot lines to the main sewer, or from a point ten or twelve feet away from the lot lines to the main sewer.

In his estimate of the cost of the improvement the engineer estimates the cost of drains to run from the lot lines to the main sewer. He makes no estimate of the cost of drains to run from a point four feet within the sidewalk space to the main sewer. The drains running from the lot lines to the main sewer were to cost \$12 apiece, and the whole cost was to be \$1,080. The amount assessed against the property owners was

\$1,080, the cost of constructing all the drains from the lot lines to the main sewer. But inasmuch as, under the terms of this ordinance, the contractor could construct drains 10 or 12 feet less in length than those whose cost was estimated in the estimate of the engineer, the property owners could be assessed for more than the actual cost of the drains. In other words, under this ordinance they could be compelled to pay for long drains when only short drains were constructed. The law will not tolerate any such imposition as this upon property owners.

Section 7 of the act in regard to local improvements provides "that in proceedings only for laying, building, constructing or renewing of any sidewalk, water service pipe or house drain, no resolution, public hearing or preliminary proceedings leading up to the same shall be necessary. In such proceedings the board may submit to the city council or board of trustees, as the case may be, an ordinance, together with its recommendation, and the estimated cost of the improvement, as made by the engineer as herein provided, and such proceedings shall have the same force and effect as though a public hearing had been had thereon." 4 Jones & Addington's Supp. to Starr & O. Ann. St. 1902, p. 151.

It thus appears that in this proceeding for the laying of house drains the property owner is not entitled to any public hearing, and has therefore no opportunity to call attention to the difference between the character of the improvement in the estimate of the engineer and the character of the improvement specified in the ordinance.

When the ordinance is presented to the city council by the board of local improvements the statute requires that it shall be accompanied by the estimate of the engineer and the recommendation of the board of local improvements. In the present case, by section 3 of the ordinance, the recommendation of the board of local improvements, together with the estimate of the cost of the improvement made by the engineer, are approved by the common council, and the ordinance recites that both the recommendation and the estimate of the cost are attached to the ordinance. The estimate of the engineer is therefore a part of the ordinance itself. The cost of the improvement to be assessed against the property owners is the cost fixed in the estimate of the engineer, and the improvement provided for in the ordinance must be the improvement recommended by the board of local improvements. Here there was no such improvement as the construction of drains from a point four feet within the sidewalk space to the main sewer provided for or recommended by the board of

local improvements, or whose cost was estimated by the engineer of the board.

We have held that, in view of the extraordinary powers conferred upon the board of local improvements, the requirements as to the preliminary steps to be taken before the passage of an ordinance for the improvement should be strictly enforced, and that the prima facie case made by the recommendation of the board is overcome by proof showing a substantial variance from the preliminary requirements of the law. We have also held that these requirements are for the benefit and protection of the owners of property to be assessed, and that the proceedings prior to the adoption of the ordinance required by the statute are jurisdictional, and that without them no valid ordinance can be passed and no valid assessment can be made. *Clarke v. City of Chicago*, 185 Ill. 354, 57 N. E. 15; *Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 161.

Here there is a substantial variance between the estimate of the engineer and the recommendation of the board of local improvements on the one side, and the ordinance passed by the common council on the other. This is so because the drains mentioned in the engineer's estimate and in the recommendation of the board are to extend from the lot lines to the main sewer in the middle of the street, while by the terms of the ordinance they may extend either from the lot lines, or from points four feet within the sidewalk space to the main sewer in the middle of the street. It is thus clear that the ordinance is uncertain and indefinite in its description of the improvement, and does not comply with the provision of the statute which requires the ordinance to prescribe the nature, character, locality, and description of the improvement. In *Sanger v. City of Chicago*, 169 Ill. 286, 48 N. E. 309, an ordinance was condemned where the description and locality of the improvement were uncertain. In *County of De Witt v. City of Clinton*, 194 Ill. 521, 62 N. E. 780, an ordinance which provided for paving and curbing the public square, and left uncertain the question whether it was intended to pave the streets surrounding the square or the area embraced within the square, was condemned, as being "altogether too indefinite to meet the requirements of the statute."

For the reasons above stated we are of the opinion that the county court erred in not sustaining the objections to the confirmation of the assessment as the same are herein stated. Consequently the judgment of the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(206 Ill. 378.)

GRAHAM et al. v. DEUTERMAN et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

WILLS—TESTAMENTARY CAPACITY—EVIDENCE—SUFFICIENCY—UNEQUAL DISTRIBUTION OF PROPERTY—ATTORNEY'S FEES.

1. In a will contest, an unequal division of property among children of testator may be considered by the jury in determining the issue of mental capacity.

2. The allowance of a solicitor's fee to executors defending a will contest is within the discretion of the trial court.

3. On a will contest, evidence considered, and held insufficient to support a jury finding that testator was without testamentary capacity.

Appeal from Circuit Court, McLean County; C. D. Myers, Judge.

Bill by Alice Deuterman and others against Charles S. Graham and another, as executors of William A. Graham, deceased, to contest the will. From a decree for complainants, the executors appeal. Reversed.

Blinn & Harris and Welty & Sterling, for appellants. Livingston & Bach and F. L. Capps, for appellees.

WILKIN, J. This is a bill in chancery brought by Alice Deuterman and her two sisters and four brothers, appellees, to contest the will of their father, William A. Graham, deceased. On the 6th day of July, 1901, William A. Graham executed his last will and testament, by which he gave all of his personal property to his widow, Mary A. Graham, and also all of his real property for life; charging her with the duty of supporting and educating his minor son, Arthur E. Graham. The remainder in the real estate, after the death of the widow, was devised to his sons Charles S. Graham and Arthur E. Graham, subject to the payment of \$25 to each of his four remaining sons and three daughters. On the 14th day of August, 1901, said William A. Graham died, owning 160 acres of land and a small amount of personal property, being indebted in the sum of about \$3,000. The will was admitted to probate in the county court of McLean county, and Charles S. Graham and Mary A. Graham were duly appointed executors thereof. On November 3, 1902, the seven appellees, who had been bequeathed, by the will, \$25 each, filed in the circuit court of McLean county this bill to contest said will on the ground that the testator, William A. Graham, was not, at the time of the execution of the same, of sound mind and memory, and that he was induced to make it by the undue influence of Charles S. Graham and Mary A. Graham. Upon the trial before a jury, the testator, William A. Graham, was found not to have been of sound mind and memory at the time of the execution of his said will; the court instructing the jury to find for appellants on the issue of undue influence. A motion was made by the proponents for a new trial, which was overruled by the court, and a decree entered setting aside the will. To reverse that decree, this appeal is prosecuted.

Objection is made to a single instruction given by the trial court on behalf of the contestants, to the effect that an unequal division of property among children by a testator could be taken into consideration by the jury in determining the mental capacity of the testator. We see no objection to this instruction. It is in conformity with our decision in the case of *Pooler v. Christman*, 145 Ill. 413, 34 N. E. 57.

Objection is also made to the refusal of the trial court to allow a reasonable solicitor's fee paid by the executors in defending the will. There is no reversible error in that refusal, the matter being one committed to the sound discretion of the trial court.

The most serious and substantial error assigned by the appellants is that the verdict of the jury is against the preponderance of the evidence, and should therefore have been set aside by the trial court.

It appears from the evidence that the testator was about 72 years of age at the time of the execution of his will. He had been afflicted with defective eyesight from the time he was a small boy, to such an extent that he could see only a part of the letters of a word at the same time, on account of which affliction he had not learned to read or write. He was therefore compelled to receive assistance from members of his family in the transaction of his business. On the 12th day of February 1900, he went to a justice of the peace in McLean county and procured him to draw a will, which he duly executed in conformity with the provisions of the statute. After that instrument was executed, he placed it in the custody of his bankers, where it remained until shortly prior to his death. For some reason, he became doubtful whether it had been legally executed, and sent an attorney to get it from the bank and examine it. Upon such examination his attorney decided to rewrite it, and on July 6, 1901, did so, and it was re-executed by the testator; being substantially, if not literally, a copy of the one previously executed. At the time of its execution the testator was asked why he gave so little to some of his children and so much to the others, to which inquiry he replied, in substance, that those to whom but little was given had received their portion; that he had given them money, and had paid accounts and notes for them, but that his son Charlie had never received a dollar.

The evidence as to the mental capacity of the testator at the time of the execution of the will is somewhat conflicting, but, when fairly and impartially considered, we think, clearly preponderates in favor of his soundness of mind and memory, within the requirements of the law as to testamentary capacity. The following will be found a fair synopsis of the testimony of the several witnesses introduced by the respective parties:

R. F. Qulsenberry testified on behalf of the proponents that he was bookkeeper for the People's Bank; that he had known William A. Graham for 12 years; that he signed the

will as a witness; that Graham asked him to sign it; that the will was read to Graham, paragraph by paragraph; that, after the reading was completed, Mr. Harris (the attorney who wrote the will), asked the testator why it was he gave so little to some of his heirs, and all to the rest, and that he replied that they had received their portions in money, accounts, and notes paid, and that Charlie had never received a dollar; that, in his opinion, the testator was capable of transacting ordinary business; that he did not notice any difference in his mental condition at that time from what it had been during the time he had known him; that the testator could not read or write.

J. E. Arnold testified that he had known the testator all his life; that he had not seen much of him during the past 3 or 4 years, for the reason that he had had an ankle broken, and did not go to town very much; that he had transacted business with him; that he signed the will as a witness at the testator's request, and that, in his judgment, he was capable of transacting ordinary business; that he at that time named his children, and explained why he was not making their shares equal.

Dr. J. T. Webster testified that he had known the testator 9 or 10 years; that he saw him two days before his death; that, in his judgment, he was a man of as sound mind and memory as the ordinary run of men, but that at the time he last saw him he was in a dying condition.

Jason T. Place testified that he had known the testator 30 years; that he saw him in March before he died; that he transacted business with him—loaned him money; that he had poor eyesight, but that he was of sound mind and memory; that, though physically weak, he was capable of transacting ordinary business.

Rev. J. W. Derr testified that he had known the testator for about 4 weeks before his death; that he had talked to him with reference to his spiritual condition; that, so far as he had had conversations with him, he thought he was a man of sound mind.

Rev. Mary Moreland testified that she had met the testator a few days before his death; that she talked to him about a half hour with regard to religion, and, in her judgment, he was a man of sound mind.

Howard McFarland testified that he had known the testator all his life; that he had sold goods to him on several occasions; that he was at his house on July 28, 1901, and talked with him for 10 or 15 minutes at that time; that, in his judgment, he was of sound mind, and he did not discover any difference in his mind and memory or mental faculties from what they had been.

John L. Bevan testified that he was a practicing lawyer; that he had been personally acquainted with the testator 20 or 25 years; that he had transacted business for him, but had not seen him much during the

past 2 or 3 years; that he saw him last in June, 1901, and acknowledged a deed for him, and thought that he was capable of transacting ordinary business at that time, and did not discover in his mental faculties or memory any difference from what they had always been.

George Church testified that he drew the will executed by the testator in December of 1900; that he read its provisions to the testator; and that the testator took the will away with him.

Stacy B. Kinzie testified that he had known the testator since 1880; that he was a witness to the will executed by him in the office of Church, justice of the peace, in December, 1900; that he saw the testator sign it; that he did not have much talk with him, but that he did not notice any difference in his mind from what it had always been since he had known him; and that at that time he was capable of transacting ordinary business.

H. C. Haas testified that he had known the testator 40 years; that he had transacted business with him—sold him goods; that he was in his store in Atlanta the winter before he died; that, while he was physically weak, yet he was capable of transacting ordinary business.

George I. Vanness testified that he was a justice of the peace; that he took the census of 1900, and that he got all the facts with reference to the farm and family of the testator from the testator himself; that he seemed to have a pretty good recollection, and would say at that time he was capable of transacting ordinary business.

Edward Stubblefield testified that he had known the testator for 25 years; that he traded with him in 1890 and 1891; that he talked with him a year or two before his death, and that he talked like a man who was capable of transacting business; that he did not notice any difference in him at that time from what he had been for years before.

D. M. Longworth testified that he knew the testator for 20 years; that he had conversations with him, but never transacted any business with him; that he saw him within a year before his death, and at that time he was as capable of transacting business as he was at any time; that he noticed no change in his mental condition.

Charles H. Turner testified that he was cashier of the People's Bank at Atlanta, Ill., and had done business with the testator for 12 or 13 years—the last time about four months before his death; that he at that time got money on a check; that he had borrowed money from the bank, had given notes, had paid notes, and had made deposits; that he thought he was capable of transacting ordinary business; that transacting business with him was a pleasure, and not a trouble.

L. F. Gifford testified that he had known

the testator 12 years; that he had transacted business with him from two to six times a year for 10 years; that he had sold him stoves and hardware, the last time within 5 or 6 months before his death; that, in his judgment, he was capable of transacting ordinary business, and he did not see any difference in him from what he had always been, so far as his mind was concerned.

On behalf of appellees, Abel Larrison testified that he had known the testator for 40 years; that he had not seen him much in the last 5 years; that he never considered him of sound mind; that he never transacted any business with him, but always did his business with some member of the family.

Samuel Iddings testified that he had known the testator 12 or 14 years; that he saw him three times just before his death; that he hardly thought he was of sound mind; that he never transacted any business with him, but always with some member of the family; that he did not seem to trust himself; that a few months before his death he transferred to him three acres of land, and, at the time the deed was given, witness did not think him competent to transact business.

A. C. Arnold testified that he had known the testator since 1874; that he did not see him much from 1874 to 1901; that he saw him in May, 1901; that he did not think he was of sound mind; that his conversation was disconnected; that he was very weak.

Henry C. Montgomery testified that he had known the testator 40 years; that he saw him many times; that he could talk pretty well, but as to his business faculties he was deficient; that he saw him three or four times just before he died; that he was in bed, and bad off; that he tried to buy land of the testator at one time, but failed; that he did not think him capable, in law, of making a deed.

James Foot testified that he knew the testator 12 years; that he never had any dealings with him; that he had a conversation with him 9 years before his death; that he never thought him of sound mind or memory, but did not know the condition of his mind in 1901; that he had not seen the testator, to speak to him, for 9 years.

Mrs. Hattie Nicholson testified that she knew the testator 12 years; that she visited him at his home for the past 8 years, nearly every week; that she saw him and talked with him two or three times a week for the last 6 months; that she was there 2 days before he died; that his mind was weak, and he would drop off to sleep while he was talking; that he was not of sound mind; that he had not been capable of transacting ordinary business for 8 or 9 years.

Mrs. Mollie Summers testified that she had known the testator since 1871; that his father had married her mother; that she did not think him capable of transacting ordi-

nary business; that she had not seen him much since 1874.

Alice Deuterma, one of the complainants, testified that she had a conversation with John L. Bevan after the death of her father, in which he told her that the testator was a man of unsound mind and incapable of making a will. Curtis Graham, a son, testified to the same thing. Bevan testified that he had no recollection of making such a statement.

Pendleton Howard testified that he had known the testator since 1867; that he had not had much talk with him for 10 or 12 years before he died; that he saw him just before his death; that he did not notice any difference in his mental capacity from what it used to be, only once in a while he got a little bit off; that he was so weak he could not talk; that he did not think he was of sound mind, but he could not just say that he was not.

William Cook testified that he had known the testator 40 years; that he talked with him and did business with him; that he saw him a few days before his death, and did not think he was of sound mind; that he was fickle-minded; that he was of unsound mind because he went back on his contract.

Mrs. J. B. Voight testified that she had known the testator 18 or 20 years; that her half-brother married his daughter; that she saw him last on July 5, 1901; that he did not know her; that he was very weak; that he was then of unsound mind.

Mrs. Caroline Zimmerman testified that she was the mother of Mrs. Charles Voight; that she had been at the testator's house in July, 1901; that she had known the testator for 40 years; that he could not carry on a connected conversation when she saw him; that he was in bad shape.

This is all of the evidence pro and con bearing on the question of mental capacity.

Counsel for appellees have called our attention to misstatements, contradictions, etc., in the testimony of some of appellants' witnesses. They are not of controlling importance. Evidence was offered by both parties of little or no value. That produced in favor of the validity of the will is not only by a greater number of witnesses, but their testimony is much more positive and convincing than that of those produced by the complainants. The evidence shows that during the last years of his life the testator was bodily very weak, and, as before said, his eyesight was exceedingly deficient, and for that reason, in part, at least, he required the assistance of others in the transaction of his affairs. We cannot escape the conviction that many of the witnesses testifying to his want of mental capacity were influenced in their opinions by that physical infirmity. In any view of the evidence, we are unable to see how it can be fairly said that he was of unsound mind and memory. The fact that there is inequality in the distribution of his property cannot, of itself, have the effect of

invalidating his will. Moreover, he assigned a substantial and sufficient reason for such inequality, and that reason must be accepted as true, there being no evidence in the record tending to disprove it. We are not unmindful of the weight due to the verdict of the jury and decree of the chancellor, they having seen all the witnesses and heard them testify; and, if we could say that that finding and decree were fairly sustained by the evidence, we would unhesitatingly affirm the same. This we cannot do, but regard the verdict of the jury as manifestly against the clear weight of the evidence. The trial court should have set it aside, and dismissed the complainants' bill of complaint.

The decree of the circuit court must therefore be reversed, and the cause will be remanded for another trial. Reversed and remanded.

(206 Ill. 80)

REXROTH v. SCHEIN.

(Supreme Court of Illinois. Dec. 16, 1903.)

ELECTIONS—ELECTION DISTRICTS—PRECINCTS —VOTERS—PLACE OF VOTING—BALLOTS —DISTINGUISHING MARKS.

1. Under Rev. St. U. S. § 2172 [U. S. Comp. St. 1901, p. 1334], where a child was born in Germany, and his father brought him to the United States when a minor, and the father was naturalized, the status of the child became that of his father.

2. Inasmuch as on an election contest a charge that certain persons who voted were not entitled to do so involved a charge that they had committed a criminal offense, and, moreover, involved the imputation that the election officers had been derelict in their official duty, it was incumbent on the party seeking to justify the rejection of the ballots of such voters to overcome the presumptions of innocence and of regularity.

3. As the burden was that of proving a negative, complete proof to rebut the presumptions was not required, but it must be sufficient to render the existence of a negative probable.

4. On an issue on an election contest as to whether certain persons who had cast ballots had been citizens, one of them testified that he had been naturalized, but that his certificate had been lost or destroyed, and the others testified that, while they had been born abroad, their fathers had been naturalized, but it was shown that strict search of the records of the county and circuit courts showed no record of naturalization as claimed. Proof was made that no record had been entered of the issuance of certificates of naturalization in a great number of cases. The persons who it was claimed had been naturalized had exercised the franchise for many years under claim of lawful right to do so. *Held*, that the court was warranted in holding that it was most probable that certificates had been issued, and that the evidence was not sufficient to overcome the presumption that the votes were legally cast.

5. The statute provides that no person shall vote in a precinct other than that of his residence. *Held*, that where, on an election contest, it appeared that a person was employed as a bartender in M. Precinct, but that he resided at the home of a certain person in R. Precinct, he was a legal voter in R. Precinct.

6. On an election contest it appeared that a voter who cast his ballot in R. Precinct had lived there for three years, and that he had paid his poll tax there, and been assessed for labor on the highways; that his father lived in

Missouri; and that on one occasion he had spoken of "going home" to see his parents. *Held*, that a finding that he was a resident of R. Precinct was warranted.

7. Where, on an election contest, it appeared that a voter who cast his ballot in R. Precinct had lived in such precinct for seven years, and never voted anywhere else, and that he had been absent from there temporarily in order to get employment, but had left his belongings in the precinct, a finding that he was a resident of R. Precinct was warranted.

8. Under the express provisions of the statute providing that no person shall be permitted to vote at an election except in the district in which he resides, on an election contest it was proper to reject a ballot cast by a voter in a district other than that of his residence.

9. Hurd's Rev. St. 1899, p. 741, c. 46, § 29, entitled "Elections," provides that in counties not under township organization election precincts shall remain as established until changed by the board of county commissioners, but that said county board may from time to time change the boundaries of election precincts and establish new ones. Section 30, as amended by Act April 24, 1899 (Laws 1899, p. 209), and by Act 1901 (Laws 1901, pp. 166, 167, 170), provides that the county board in each county shall, at its regular or at a special meeting in the month of July, divide its election precincts which contain more than 450 voters into election districts so that each shall contain as near as practicable 400 voters, and that, so often as it shall appear from the facts at a November election that a division is to be had, the county board at its meeting in July after November shall make the division, and that it may be made at a meeting in the month of August next thereafter. Starr & C. Ann. St. 1896, p. 3835, c. 131, par. 1, cl. 7, provides that the words "county board" in sections 29 and 30 refer to the governing body of all counties, whether composed of supervisors or county commissioners. *Held*, that it was the legislative intent that division should be made at some of the times specially specified, and, in any event, not later than the month of August, and hence a division authorized at a special meeting of the county commissioners in the month of September preceding the election was invalid.

10. On an election contest it appeared that one of the voters who had cast his ballot in P. Precinct had not lived with his father, who resided in another precinct, for five or six years, nor had any settled place of abode; that in 1900 he had voted in the precinct where his father lived, but in 1901 and in 1902 he had voted in P. Precinct. *Held*, that his act in voting in P. Precinct in 1901 and 1902, together with the presumption of legality of voting, warranted a finding that his ballot was legally cast.

11. On an election contest it appeared that a voter who cast his ballot in P. Precinct was 23 years of age, and that when he arrived at age he lived with his father in another precinct, but that since then he had not lived in any other place as a permanent home, and there was no proof to show that he acquired any other residence; that at the time of the election he was staying with a person residing in P. Precinct, and that his vote was the first one cast by him. *Held*, that a finding that he was not a resident of P. Precinct, so as to entitle him to vote therein, was warranted.

12. Where, on an election contest, it appears that the vote of an elector was illegally cast, and there is no evidence as to whom he voted for, evidence of his political affiliation was sufficient to authorize the deduction of his vote from those cast for the candidate of the party with which he was shown to be affiliated.

13. On an election contest for the office of county treasurer it appeared that one F. was nominated for the office of justice of the peace,

but that for some reason his name was not printed on the official ballots; that on the morning of the election the judges consulted by telephone with reference to the omission; and determined that the name of F. should be written by one of the judges of election on each of the official ballots. *Held*, that such action, while without authority of law, was at most a mere irregularity, and furnished no ground for the rejection of the ballots cast.

14. Where a ballot bore the printed words "For Constable," and below them a printed dotted line, with a square opposite the dotted line, so that voters desiring to vote for such office could have written in the name of the candidate on the line and placed a cross in the square, the fact that the name of a person was written below the dotted line, though on the margin of the ticket, did not render the ballot subject to rejection as bearing a distinguishing mark.

15. The fact that a ballot bore in pencil on a dotted line under the printed words "For Constable" the capital letters "H. A.," did not render the ballot subject to rejection as bearing a distinguishing mark.

16. The fact that the name of a candidate written on a proper dotted line on a ballot extends beyond that line does not render the ballot subject to rejection as bearing a distinguishing mark.

17. In the square opposite the name of a candidate on a ballot there was a distinct cross, and near the square opposite the name of another candidate for another office in which there was a cross appeared a mark made with a pencil after the square. *Held*, that there was no distinguishing mark fatal to the ballot.

18. A cross placed after and beyond the square on a ballot in which the cross should be placed renders the ballot illegal.

19. The placing of a cross in the space between the square on a ballot and the name of the candidate, in order to vote for whom a cross should be placed in the square, renders the ballot illegal.

20. The fact that marks constituting crosses, or nearly completed crosses, in the circle at the head of the column on a ballot had been erased by the voters, the column of opposing candidates bearing a proper mark in the circle at the head, did not make the ballots illegal as bearing distinguishing marks.

21. A voter placed a cross in the square opposite the name of a candidate for each office, and there was an erasure in the square opposite the name of one candidate, and the proper cross in the square opposite the name of the opposing candidate. *Held*, that the erasure did not constitute a distinguishing mark.

22. The fact that a circle at the head of a column of candidates on a ballot contains a circle or flourish as well as a distinct and clear cross did not render the ballot illegal.

23. The fact that the circle at the head of a column of candidates on a ballot bore a cross below and in the greater part outside the circle, and also a cross in the circle, did not render the ballot invalid.

24. Where a ballot has a cross in the circle at the head of a column of candidates, and also some other pencil marks in the circle, the additional marks do not constitute a distinguishing mark.

25. Where the cross in the circle at the head of a column of candidates on a ballot has an additional pencil mark from one arm of the cross to the lower right-hand circumference line of the circle, it is nevertheless a legal ballot.

26. A ballot having an unusually heavy pencil cross in the Democratic circle is not thereby rendered invalid.

27. The fact that crosses made in different squares on a ballot were blurred as if the pen-

cil has been moistened and the hand rubbed over the marks did not render the ballot illegal.

28. Where a ballot had no mark upon it except in the circle at the head of the Democratic column, which marks were indistinct, and visible as scratches on the paper, rather than as pencil marks, but a cross in each of the circles, though faint, could be distinguished, the ballots were properly counted for the Democratic candidates.

29. The use by a voter of a pencil other than that provided in the election booth by the election officer does not render his ballot illegal, where no improper motive appears.

30. Where ballots bore dotted lines, above which were the printed words "For Justice of the Peace," but they were voted in precincts where no justice of the peace was to be elected, the fact that names were written on such lines did not render the ballots subject to rejection as bearing distinguishing marks.

31. The fact that a ballot shows an accidental blotting does not render it illegal.

32. Where, on an election contest, it appeared that certain ballots had not been indorsed by the initials of either of the election judges, and testimony was introduced to show that the initials were omitted by mistake, but the evidence shows no more than a possibility that the initials were omitted by mistake, the ballots should have been rejected as illegal.

33. The fact that a ballot bore on the back thereof the figures "125" did not render it illegal, it appearing from the testimony of one of the judges of election that he wrote the figure on the ballot for the purpose of keeping tally of the number of ballots, and that it was not numbered with the intention that any particular voter should receive it, and that he did not know who did receive it.

Appeal from Monroe County Court; J. B. Vaughn, Judge.

Contest between Adolph C. Rexroth and David Schein of the result of an election for the office of county treasurer of Monroe county. From a judgment in favor of contestant, Schein, the contestee appeals. Affirmed.

Bollinger, Horner & Slate, for appellant. Rickert & Morrison, for appellee.

BOGGS, J. At the general election held in the county of Monroe on the 4th day of November, 1902, the appellant and the appellee were opposing candidates for the office of county treasurer of said county; the appellant being the nominee of the Republican Party, and the appellee the nominee of the Democratic Party. The votes cast at said election were canvassed by the county clerk and two justices of the peace of the said county, and the appellant was declared to have been elected to the said office by a majority of nine votes, and a certificate of election was issued to him. The appellee filed in the county court of said county a petition to contest the election of the appellant. The hearing of the issues made under the petition was had, and an order was entered finding that the appellee had received a majority of two of the legal votes cast at said election for said office, and declaring that he had been legally elected county treasurer for the county. This is an appeal to bring in review in this court such order and judgment of the county court.

A statement of the mode and manner adopt-

¶ 12. See Elections, vol. 13, Cent. Dig. §§ 151, 154.
69 N.E.—16

ed by the court and the parties in counting the ballots and in the determination of the objections is necessary to a clear understanding of our conclusions.

The appellee objected to the counting of any of the ballots that had been cast in Moredock Precinct. Among the ballots cast in the other precincts in the county 44 were found to which one or the other of the parties objected for reasons appearing upon the face of the ballots. The parties then agreed that the ballots cast in the county, other than those cast in Moredock Precinct and the 44 ballots above referred to, should be counted by the court, the right being reserved to each litigant to show that any of said ballots should finally be rejected from the count for the reason they had been cast by persons not entitled to vote. The ballots cast at the election, excluding those voted in Moredock Precinct and the 44 ballots objected to, were then counted. Their number was 2,918, and it was found that each candidate had received an equal number of them, namely, 1,459 each. The parties, respectively, contended that certain of the ballots included in the 2,918 ballots had been cast by persons not entitled to vote. The evidence produced by the parties was heard, and the various contentions passed upon by the court. The court held the votes cast in Moredock Precinct should be counted, and ruled upon the many other questions hereinafter stated. Assignments as for error and cross-error have been filed. We find it will conduce to the more convenient and orderly consideration of the case to consider assignments of error and of cross-error without regard to their order as such.

Joseph Strodt, Charles Schallum, and John Fahey, all foreign-born, deposited ballots at said election, which were counted by the county court for the appellee. The appellant insists they were not legal voters. Joseph Strodt was born in Germany in 1834. His father came to the United States in 1842, and brought Joseph, then a minor of eight years of age, with him. Joseph was never naturalized, but had been informed that his father had been naturalized, and believed he had, through the naturalization of his father, the legal right to vote, and on the faith of that belief had voted at the elections in Monroe county for more than 40 years. If his father became a citizen by naturalization, the status of Joseph would be that of his father by the express provisions of the federal statutes. Rev. St. U. S. § 2172 [U. S. Comp. St. 1901, p. 1334]; *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 42 L. R. A. 809, 69 Am. St. Rep. 228. John Fahey testified that he received his certificate of naturalization in Monroe county, and had voted in that county for many years, and that his certificate had been lost or destroyed. Charles Schallum was born in Germany, and came to the United States with his father and mother while a minor. He testified that his father resided in Monroe county, and was naturalized by order of

court in that county while he (Charles) was still a minor, and that his father voted at elections held in Monroe county as a naturalized citizen, and that he had voted in that county for many years. Schallum, the father, died some 27 years before the time of the hearing, and, though thorough search had been made for the alleged certificate of his naturalization, it could not be found.

As the charge that Strodt, Fahey, and Schallum cast illegal votes involved the charge that they had committed a criminal offense, the law raises the presumption of innocence in their behalf, and casts upon the appellant the burden of proving that they were not qualified to vote. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 28 N. E. 704; *Dorsey v. Brigham*, supra. The charge also involves the imputation that the election officers had been derelict in official duty in receiving the ballots of these voters. The presumption of law is that the election officers discharged their duties properly and legally, and acted correctly in receiving and counting the ballots of these voters. *Dorsey v. Brigham*, supra. It became incumbent upon the appellant, in order to justify the court in rejecting the ballots of these voters, to overcome by proof this presumption of innocence on the part of the voters and the presumption of the regularity and correctness of the official action of the election officers. As the law cast upon the appellant the burden of proving a negative, full and complete proof in rebuttal of these presumptions is not required, but, in order to remove the presumptions, it is necessary proof should be produced sufficient to render the existence of the negative probable. *City of Beardstown v. City of Virginia*, 76 Ill. 34; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 28 N. E. 704. In order to overcome these presumptions, the appellant produced testimony to the effect that strict and careful search had been made of the records of the county and circuit courts held in and for the county of Monroe, and that no record could be found of the naturalization of the father of said Joseph Strodt, or of said John Fahey, or of the father of said Charles Schallum. Proof was, however, produced on behalf of the appellee to the effect that prior to the year 1873 no record had been entered in the county court of Monroe county of orders for the issuance of certificates of naturalization in a great number of cases in which such orders had been made by the court. Judge Paul C. Brey testified that he was elected county clerk in 1873, and that he found the papers in as many as 75 or 100 cases of applications for naturalization in which no entries of record appeared, and that the county judge then presiding ordered him to record such papers, and that he placed all that he found on the records. It was also proved that a certificate of the naturalization of Ed. Kipping, duly authenticated by the county clerk, and bearing the seal of the court, issued out of

the said county court of said county on the 29th day of October, 1872; and that in 1860 a certificate of the naturalization of one William Bode, also in due form and properly authenticated, issued out of the same county court of said county; and that there appeared upon the records of the said county court no record whatever of any order for the naturalization of the said Ed. Kipping or the said William Bode. All of these voters had been exercising the elective franchise in Monroe county for many years under claim of lawful right to do so. In this state of the proof we think the court, upon the hearing of this cause, was fully warranted in holding that it was most probable that certificates of naturalization issued out of the said county court of Monroe county to the said John Fahey and to the father of said Charles Schallum and to the father of said Joseph Strodt, and that the presumption that the said voters, Strodt, Fahey, and Schallum, were innocent of the offense of illegal voting, and the presumption of the correctness and regularity of the action of the election officers, were not overcome.

One George Dehn voted for the appellant in Prairie du Long Precinct, but the court decided his vote should not be counted because the said Dehn was not legally entitled to vote in said precinct of Prairie du Long. The statute expressly provides no person shall be permitted to vote in another precinct than that in which he resides. Dehn was an unmarried man. His father lived in New Design Precinct. His brother-in-law, Stephen Reinecke, lived in Prairie du Long Precinct. George had been for the past six or seven years working away from the home of his father. During that time he had worked at different times for his brother-in-law, sometimes for Valentine Braun, and sometimes for Peter Braun, who also lived in Prairie du Long Precinct, and for about two years had worked at Red Bud, in Randolph county, and for a short time in St. Louis, Mo. From St. Louis he returned to the house of Valentine Braun, and was there when he cast his vote in Prairie du Long Precinct, being the precinct in which said Braun resided. He testified that he considered that he had his home with his brother-in-law or with the Brauns, but he admitted that after he had been away from his father's home for three or four years, during which time he had worked for and lived with his brother-in-law and said Brauns, he voted at the presidential election in 1900 in the precinct of New Design, being the precinct in which his father lived, and he stated that he voted in New Design because he considered that his home was with his father. He further testified he had voted at five, six, or seven different elections; that he had voted twice in Red Bud, in Randolph county, and at all other times in New Design Precinct, and had never voted in Prairie du Long except at the election under consid-

eration. At the September term, 1892, of the board of county commissioners of Monroe county, on the 17th day of that month, an order was entered ordering that a portion of the territory of New Design Precinct be detached therefrom and attached to Prairie du Long Precinct. The elder Dehn, father of George, lived in the territory so proposed to be attached to and become a part of Prairie du Long Precinct. That order, if legal, would have operated to constitute the elder Dehn a legal elector in the precinct of Prairie du Long, and if the said George Dehn regarded his home as being that of his father, as the testimony tends most strongly to indicate, he may have been induced to cast his ballot at the polls in Prairie du Long Precinct because of the said order of the board of county commissioners, which purported to fix the voting place of the father in Prairie du Long. But, as we shall hereafter see, the order of the board of county commissioners was unauthorized, and of no legal effect. It is a necessary constitutional qualification that an elector shall have resided in the election district for the period of 30 days (Const. 1870, art. 7, § 1), and section 30, of chapter 46, entitled "Elections," Hurd's Rev. St. 1899, p. 741, expressly provides that no person shall be allowed to vote except in the district in which he resides. The county court held Dehn was not a legal voter in Prairie du Long Precinct, and that conclusion seems to have been properly deduced from the proofs bearing upon the question.

The court, over the objections of the appellant, held Louis Teichgraeber, John Ballard, and Henry Althoff to be legal voters in the precinct of Renault, where they cast ballots for the appellee. The appellant insists these voters were not residents of Renault Precinct. We have carefully read the testimony as to the qualifications of these electors, and are of the opinion they were legal voters in the precinct of Renault. Teichgraeber was employed as a bartender in Mayeston, in Mitchie Precinct, but the evidence shows he resided at the home of Joe Christ, at Ivy, in Renault Precinct. John Ballard resided in Borton, Renault Precinct, and had lived there for three years. It was shown he had been assessed to labor on the highways in that precinct, and that he had paid his poll tax there in the year 1902. His stepfather lived in Missouri, and there was some proof that he spoke on one occasion of going "home" to see his parents; but this expression is not at all inconsistent with his testimony that he was a resident of Renault Precinct. Henry Althoff was 26 years old. His father resided in Mitchie Precinct, but he testified that he had had his home and claimed his residence in Renault Precinct, where he had lived for seven years, and that he had never voted anywhere than in Renault. He had been absent from Renault temporarily in order to get employment, but left

his belongings at his home with Mr. McOlanahan, in Renault Precinct.

It is insisted no distinction can be drawn between the status of Althoff and that of said George Dehn, who, as we have herein held, voted in a precinct in which he did not reside. But there are two points of difference that stand out prominently. Althoff testified that he had never claimed to reside with his father for seven years, but had during all that time claimed and had his home in Renault Precinct, and had always voted in Renault, and never at any other polling place. Dehn was by no means so explicit as to his intentions, but testified that at the election held in the year 1900, and some four years after it was contended that he ought to be regarded as a voter in Prairie du Long, he considered his place of residence was that of his father, and for that reason he voted in New Design Precinct, and that he had never voted in Prairie du Long Precinct until the election in question, which was after the county board had adopted the order purporting to transfer the territory of New Design Precinct, within which territory his father lived, to the precinct of Prairie du Long. His father regarded himself as a legal voter in the precinct of Prairie du Long because of the order of the board, and voted there, and the action of George Dehn is consistent with the view that he voted in Prairie du Long in 1892 for the same reason he voted in New Design in 1900, namely, that his place of residence was at his father's home.

Ben Busch resided and was a legal voter in Election District No. 1 in Waterloo Precinct. He cast his ballot for the appellee in Election District No. 2 in said precinct. The county court refused to count his vote for the appellee. The statute expressly provides that no person shall be permitted to vote at any election except in the district in which he resides. His ballot was properly rejected.

At a meeting of the board of county commissioners of Monroe county held in the month of September next preceding the election here under consideration an order was entered purporting to transfer a portion of the territory of New Design Precinct to the precinct of Prairie du Long, and a number of voters who reside in the territory so purported to be transferred voted in the precinct of Prairie du Long. It is insisted the county board was wholly wanting in power to enter such board at said September meeting, that such order was void, and that voters residing in the territory purported to be transferred were not legal voters in Prairie du Long Precinct. We will not consider that contention.

The county of Monroe is not under township organization. Section 29 of chapter 46, entitled "Elections" (Hurd's Rev. St. 1899, p. 741), is as follows: "In counties not under township organization, the election precincts shall remain as now established until changed by the board of county commissioners,

but said county board may, from time to time, change the boundaries of election precincts and establish new ones. In counties under township organization, each town shall constitute an election precinct." The phrase in said section 29, "but said county board may, from time to time, change the boundaries of election precincts and establish new ones," does not, however, invest county boards with unlimited and unrestricted power to make such changes at any and all times, at the pleasure of the board, for the reason that the succeeding section in said chapter 46, viz., section 30, Hurd's Rev. St. 1899, p. 741, is expressly devoted to the declaration of the legislative will as to the time or times at which such changes may be made. The two sections must be construed together, and, so interpreted, it will be found that the purpose of the phrase quoted from section 29 is to express that the power of the county boards to make such changes shall not be deemed to be exhausted by the exercise thereof at any particular time or single instance, but that the power is continuing, and may be exercised from time to time. Section 30, however, controls the time and manner of the exercise of the power. The words "county board," in sections 29 and 30, and in all acts amendatory of section 30 (hereinafter referred to), refer to the governing body of all counties of the state, whether such bodies are composed of supervisors or of county commissioners. Clause 7, par. 1, c. 131 (3 Starr & C. Ann. St. 1896, p. 3835), entitled "An act to revise the law in relation to the construction of the statutes," provides that the words "county boards" shall apply to boards of county commissioners in counties not under township organization, to boards of supervisors in counties under township organization, and to the county commissioners of Cook county.

Said section 30 of said chapter 46, as amended by the act approved April 24, 1899 (Laws 1899, p. 209), in part reads as follows: "The county board in each county shall, at its regular (or at a special) meeting in the month of July, 1895, respectively divide its election precincts which contain more than four hundred and fifty voters, into election districts, so that each district shall contain, as near as may be practicable, four hundred voters, and not more in any case than four hundred and fifty. Said district shall be composed of contiguous territory, and in as compact a form as can be for the convenience of the electors voting therein. The several county boards, in establishing said districts, shall describe them by metes and bounds and number them. And so often thereafter as it shall appear by the number of votes cast at the general election, held in November of any year, that any election district, or undivided election precinct, contains more than four hundred and fifty, the county board of the county in which such district or precinct may be shall, at its regular (or at a special)

meeting in the month of July next after such November election, re-divide or re-adjust the election district, or divide such election precincts, so that no district or undivided election precinct shall contain more than the number of voters above specified. If said division or readjustment is not made at such July meeting, it may be made at an adjourned or special meeting of said county board, to be held in the month of August next thereafter. * * * Provided, that the county board may, if it deem it to be for the best interest of the voters of any town or precinct divide any election precinct which contains more than three hundred legal voters into two election precincts, same precincts to contain as near two hundred voters as is possible." The omitted portions of the section have no relation to the power of county boards to divide or readjust election districts, and are not set forth for mere purposes of brevity.

At the session of the General Assembly in 1901 three enactments, each purporting to amend said section 30, were approved on the same day, namely, May 10, 1901. Laws 1901, pp. 166, 167, 170. These three enactments are, or may be thought to be, in some respects repugnant. Neither refers to or purports to expressly repeal the other, or to repeal section 30 as amended by the act of 1899. Whether these amendatory acts of 1901 must all fall for uncertainty or repugnancy, and section 30, as amended by the act of 1899, be held to be unaffected by them, and be in full force, or whether one or more of said amendatory acts of 1901 shall be held to declare the legislative will, are questions by no means free from difficulty. Interests in which neither of the parties hereto are concerned may be affected by the decision of such questions, and therefore the decision thereof is not here imperative.

The provisions of section 30 as amended by the act of 1899, and as purported to be amended by the three acts approved May 10, 1901, so far as such provisions relate to the power and authority of the county board to redivide or readjust existing election precincts or districts during the month of September of any year, are not inharmonious. The repugnancy or uncertainty, if any there be, is in respect of other provisions of the acts. Section 30, as amended by the act of 1899, or by either of the acts of 1901, after providing that election precincts which contain more than 450 voters shall be so divided into election districts that each district shall contain, as near as may be practicable, 400 voters, and not more, in any case, than 450, and that as often as it shall appear by the number of votes cast at the general election held in November of any year that any election district or precinct contains more than 450 voters the same shall be redivided or readjusted so that no district or precinct shall contain more than 450 voters, provides that the county board may, at the regular or spe-

cial meeting to be held in certain specified months—the month of August being the latest of the months so specified—make such division or readjustment. As to the latest period of time when the power invested in the board may be exercised the various enactments are in harmony, an adjourned or special meeting to be held in the month of August being fixed in each of the various enactments as the latest period at which such action may be taken by the board. And we think this is not merely directory, but mandatory. The language employed in all of the enactments is that the county board, if it acts at all, "shall" make the division or readjustment at the earlier meeting of the board specified in the acts, and that, if said division and readjustment is not then made, it "may" be made at any "adjourned or special meeting of said county board to be held in the month of August next thereafter." The exercise of the right of the elective franchise is involved in the action to be taken by the board. If the board should be held to possess unrestricted power to change the boundaries of election districts or precincts at any time, the power might be exercised at such time immediately preceding an election as to practically disfranchise electors by placing them in new districts or in other precincts less than 30 days before the day of election.

It is also manifest that in conferring power on county boards to make such changes, the effect whereof is to require some voters to repair to other voting places than those at which they have been accustomed to vote, it could not escape legislative consideration that it was important that the change should be made in ample time to enable those to be affected to become advised that they could not vote at their accustomed polling place, but must go elsewhere to vote. None of the various enactments we have been considering require or provide for giving the voters notice, by way of publication or otherwise, that a change had been ordered. It was clearly the legislative intent that the board should act at some of the times specified, and not, in any event, later than the month of August, in order that changes should not be made at a time which would place voters in a district or precinct less than the time required for them to be residents of such district in order to be entitled to vote therein, and also that a reasonable period should elapse between the adoption of the order making the change and the date fixed for the election, to enable voters to become apprised of the changes. The enactments read that, if county boards desire to make changes they "shall" act at specified meetings, or, if they do not take action at such specified meetings, action "may" be taken at some adjourned or special meeting to be held in the month of August. The section does not purport to give the county boards power to act at any later period than at

some meeting in the month of August. Those boards are creatures of the statute, and may exercise such power only as may be conferred upon them by the Legislature. The provision that such boards, if they do not act at earlier meetings, "may" act at a meeting to be held in August, under a proper construction of the section must be held to imply a denial of the power to act at any later time than the month of August. No contrary doctrine is held in *People ex rel. v. Board of Supervisors of Adams County*, 185 Ill. 288, 56 N. E. 1044. In that case it became the duty of the county board of Adams county, at its July meeting in the year 1899, or at some adjourned or special meeting in the month of August next thereafter, to redivide or readjust the election districts of the town of Riverside, in that county, for the reason that at the preceding general election held in November, 1898, more than 450 votes had been cast at one of the election precincts in said town. As in discharge of that duty, the county board, at the July meeting, 1899, adopted a resolution redividing and readjusting the election districts in said town, but did not properly discharge such legal duty, in that some or all of the election districts as readjusted contained more than 450 voters. An original petition was filed in this court on the 6th day of December, 1899, praying that a writ of mandamus issue commanding the board of supervisors of said Adams county to revise their action taken at said July term, and properly discharge the legal duty which then devolved upon them; and at the April term of this court in the year 1900 we decided the cause and granted the writ, commanding said board of supervisors to revise the action taken by them at their July meeting in the year 1899, and properly and legally discharge their duty with reference thereto. The power of the board to act originally at any other meetings than those held in the months of July and August was not involved in that case. Counsel for the board of supervisors construed the statute, as we have here construed it, to deny to the board of supervisors power to redistrict or readjust election districts except at a meeting of the board in July or August, and in support of that contention suggested that, unless the statute received that construction, election districts might be changed within less than 30 days preceding the day fixed for holding the election, and voters thereby deprived of the right to vote in either the old or the new district; and also suggested that it was the legislative intent that the boundaries of election districts should be permanently fixed and known a sufficient time in advance of the day of the election to enable voters to be advised of the changes, and argued that, as the board did not possess such power at later periods than in August, it was not in the power of this court to coerce the board by mandamus to act at any time after the

month of August. We considered this argument of counsel, and in reference thereto said (page 293, 185 Ill., page 1046, 56 N. E.): "If it were asked to coerce a board, by the writ of mandamus, to take action at a period intervening between the month of August and the date of the election to be held in November, these arguments and considerations advanced by counsel would no doubt be worthy of consideration, for courts, in granting or refusing writs of mandamus, exercise judicial discretion, and are governed by what seems necessary and proper to be done in the particular instance for the attainment of justice." The action of the board of county commissioners of Monroe county, taken on the 17th day of September, 1902, was without authority of law. The board did not possess power to change the boundaries of precincts or districts at its September meeting.

Thomas Havey, August Simpson, Peter Dehn, and Owen J. Fahey, who, among other voters, resided in that portion of New Design Precinct which the board of county commissioners so illegally ordered should be attached to and become a part of the precinct of Prairie du Long, were permitted to and did cast ballots in the precinct of Prairie du Long. They were not residents of the precinct of Prairie du Long, and the county court erred in counting their ballots. The three first named voted for the appellant and Fahey voted for the appellee.

Louis Dehn and Henry Dehn voted for the appellant in Prairie du Long Precinct. They were sons of Peter Dehn, who, as before said, lived in the territory that the order of the county court directed should be transferred from New Design to Prairie du Long Precinct. Whether either of them had any settled place of residence is left in doubt by the proof. Neither appeared as a witness. Louis was of about the age of 25 or 26 years at the time of the election. He had not lived with his father for five or six years, or had any settled place of abode. In 1900 he voted in New Design Precinct, and in 1901 he voted in Prairie du Long, and again voted in Prairie du Long in 1902 at the election in question. These acts of his in voting in Prairie du Long in 1901 and 1902, and the presumption that he voted legally, inclines us to the view his ballot was properly allowed to remain in the counted ballots. Henry Dehn was of the age of 23 years. When he arrived at age he lived with his father, Peter Dehn, in New Design Precinct. Since then he had not lived at any other place as a permanent home. There is a lack of proof to show that he acquired any other residence. At the time of the election in question he was at one Braun's, a relative who lived in Prairie du Long Precinct; but how long he had been there, and whether he was merely a visitor there, does not appear. His stay there was but temporary. He then went to Randolph county, where he was at the time of the trial. The vote deposited by him

in Prairie du Long Precinct was the first cast by him. His home, when he arrived at age, was that of his father. We find nothing in the evidence to indicate that he changed it, or that he thought he had, or intended to do so. The more consistent view is that his home was at his father's, in New Design Precinct, and that he voted in Prairie du Long because he regarded his home as at his father's home, and he supposed, as did his father, that the order of the county board had transferred that portion of New Design Precinct wherein his father lived to Prairie du Long Precinct, and that for that reason he had the legal right to vote in Prairie du Long. The order of the county board, as we have seen, was ineffectual to change the residence of the father, and neither the father nor the son was rendered a legal voter of Prairie du Long Precinct by that order.

It was not shown for whom Henry Dehn voted. It was proven that he was a member of the same political party of which the appellant was the nominee, and it is urged that such proof is sufficient to authorize the deduction of his vote from those cast for the appellant in that precinct. Circumstantial evidence may be resorted to in order to purge the ballot of illegal votes. The party affiliations of the voter have been uniformly held sufficient to raise the presumption that he cast his ballot for the nominees of the political party of which he was a member, and this proposition, in the absence of any countervailing proof or circumstances, is, it seems, to be accepted as determining for whom the voter cast his ballot. *Sorenson v. Sorenson*, 189 Ill. 179, 59 N. E. 555; *People ex rel. v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *People ex rel. v. Teague*, 106 N. C. 576, 11 S. E. 665. The ballot cast by Henry Dehn should therefore be deducted from those counted by the trial court for the appellant.

We think that the votes cast in Moredock Precinct for the appellant and for the appellee were properly counted for them, respectively. One F. J. Fischer was nominated at the precinct convention of a political party in Moredock Precinct for the office of justice of the peace, but for some reason, not material to be known, his name was not printed upon the official ballots. The official ballots for that precinct were prepared and printed by the county clerk, and by that official were furnished to the precinct judges of election. On the morning of the election the judges of the election consulted, by means of a telephone, with the county clerk with reference to the fact that the official ballots did not contain the name of said Fischer as a candidate for justice of the peace. Afterward the judges of the election determined the name of Fischer should be written by one of the judges of the election on each of the official ballots so furnished by the county clerk, in a space left on each ballot for the name of the candidate for justice of the peace of that precinct. This action of the officials of the election was without

authority of law, but, however it might be regarded in a contest between candidates for the office of justice of the peace of that precinct, should such a contest arise, it is, we think, clear, to be deemed but an irregularity, affecting in no way the rights or interests of either of the parties litigant in this cause. It is a general rule that the votes of innocent electors are not to be rendered invalid by mere irregularities on the part of election officials which do not affect or change the result of the election, unless the statute expressly declares such irregularities fatal. This doctrine may be deduced from the expressions of this court in *Hodge v. Linn*, 100 Ill. 397; *Blankinship v. Israel*, 132 Ill. 514, 24 N. E. 615; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704; *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; and *Schuler v. Hogan*, 168 Ill. 369, 48 N. E. 196. And, also, see 10 Am. & Eng. Ency. of Law (2d Ed.) pp. 670, 722, 766, and also *McCrary on Elections*, 227, 231. In Moredock Precinct 76 votes were cast for the appellant and 73 votes for the appellee, and were properly so counted by the county court.

Objections were preferred by the one or the other of the parties to 44 ballots. The original ballots so cast and objected to have been certified to this court as part of the record herein. They are numbered consecutively from No. 1 to No. 44, inclusive. The objections urged by the appellant to ballots Nos. 4, 5, 6, 11, and 37, and by the appellee to ballots Nos. 1, 2, 7, 8, 9, and 10, are the same in character, and will be considered together.

Ballot No. 1 bears the name "H. Riebling" written with a pencil in the space or margin of the ticket below the column of Republican candidates, and in the same space on ballot No. 2 appear written with a pencil "H. Riebling" and "Plutoski, Jr." These two ballots were cast in Columbia Precinct, and were marked for appellant for county treasurer. The record shows there were vacancies in the office of justice of the peace and in two offices of constable in that precinct, and that Henry Riebling and Andrew Plutoski qualified as constables and that Louis Wehl qualified as justice of the peace as the result of the election in that precinct. The county court refused to count these ballots, regarding the words written thereon as distinguishing marks. Appellant insists that the penciled words on the tickets clearly indicated an attempt to vote for Riebling and Plutoski for constables. Below each group of candidates whose names were printed on the printed ballots were the printed words, "For Justice of the Peace," below which was a printed dotted line with a square at the left of the line, and also the printed words, "For Constable," and below these words was also a printed dotted line with a printed square opposite such dotted line. Voters desiring to cast votes for either of those offices could have lawfully written in the name of the candidate or candidates of their choice on the

dotted line or lines and placed a cross in the square at the left and in front of such line or lines. The names H. Riebling and Plutoski, Jr., were written below the dotted line, under the words "For Constable," though on the margin of the ticket. Writing the name of a person, though that person be a candidate, on the sheet of paper on which the official ballot is printed, but on some other part of the paper than that whereon the name of a candidate should appear, it cannot be denied distinguishes that ticket from other official ballots which have been prepared by the voters in accordance with the requirements of the statute. In *Pierce v. People*, 197 Ill. 432, 64 N. E. 372, we said (page 436, 197 Ill., page 374, 64 N. E.): "The distinguishing mark prohibited by the statute is such a mark as will separate and distinguish the particular ballot from the other ballots cast at the election. It is some sort of mark put upon the ballot to indicate who cast it, and to furnish the means of evading the law as to secrecy." Therefore not every mark made by a voter on his ballot which may separate and distinguish the particular ballot from other ballots cast at the election will necessarily result in the declaration that the ballot is invalid. If it appears from the face of the ballot that such marks or writings were placed thereon as the result of an honest effort on the part of the voter to indicate his choice of candidates among those to be voted for at the election, and that the voter did not thereby intend or attempt to indicate who voted the ballot, the ballot should not be rejected as to candidates for whom there is thereon a choice expressed in compliance with the requirements of the statute. The name of Riebling on ballot No. 1 and the names of Riebling and Plutoski, Jr., on ballot No. 2 were, beyond any doubt, written there by the voters in an honest effort to indicate the choice of the voters for the office of constable. That they, or the initials "H. A." on ballot No. 37, hereinafter considered, were intended to serve as distinguishing marks for the purpose of indicating who cast the ballots is a conjecture too remote and too highly improbable to be entertained and be allowed to operate to deprive electors of the right to vote. These two votes should have been counted for the appellant.

Ballot No. 37 bears a cross in the circle at the head of the Democratic column. At the foot of the column there was printed a square and a dotted line following it, and the words "For Constable" above the dotted line. On the dotted line were written in pencil the capital letters "H. A." This ticket was also rejected by the court from the count on the ground these initials were to be regarded as distinguishing marks. The square and the dotted line and the words "For Constable" above it invited the voter to write in the name of some one as his choice for the office of constable. The manner in which the letters are placed on the

ballot by the voter indicates to us that he wrote the letters as the initials of some one for whom he wished to vote, and by an oversight did not complete the name, or that he changed his mind, and concluded not to vote for any one for that position. There was no constable to be elected in that precinct, and this may have occurred to the voter, and he may for that reason have failed to complete the name. This ballot should have been counted for the appellee.

Ballots Nos. 4, 5, 6, and 11 were cast in Columbia Precinct, where, as stated before, there were candidates to be elected for justice of the peace and constable. On each of these tickets the voter wrote the name of some one of the candidates for constable. On ballots 4 and 5 the names were written on the appropriate printed dotted line. On ballots 6 and 11 the first name of the candidate is on the proper printed dotted line, but the surname extends, in both instances, beyond that line. The ballots were counted for the appellee. Ballots numbered 7, 8, 9, and 10 were also cast in the Columbia Precinct, and were counted for the appellant. The names of candidates for constable appear also written in pencil on each of these tickets, but practically upon the appropriate lines. To hold the names written on these tickets shall be regarded as distinguishing marks would be wholly unjustifiable, and would raise a rule so technical as to practically defeat the right of the voter to write on his ticket the name of the candidate of his choice, though blank or dotted lines are on the ticket for the name of such candidate.

Ballot No. 8 shows some very peculiar markings in the circle, but was counted for the appellant, and that action of the court is not assigned as for cross-error.

In the square opposite the name of the appellant on ballot No. 12 there is a distinct cross. Near the square opposite the name of another candidate for another office in which there is a cross appears a mark made with the pencil without the square. It may have been made from a slipping of the pencil or through inadvertence. It was properly held not a distinguishing mark fatal to the ballot. The ballot was correctly held a good vote for the appellant.

On ballots numbered 13 and 18 each voter made a cross in the circle at the head of the column of Republican candidates, the appellant being a candidate of that party, and between the square and the name of the appellee, in the column of Democratic candidates, the voters had made a cross on each of said ballots. The county court refused to count these ballots for either of the candidates. It is urged with much force the intention of these voters cannot be a matter of doubt; that each intended to cast a ballot for each candidate in the column of Republican candidates except the appellant, and that each intended to cast a ballot for the appellee for county treasurer. Such

would have been the effect given to the tickets had the crosses been placed in, or substantially in, the square opposite the name of the appellee. But the crosses are entirely without and beyond the square, and, conceding that the intention of the voters to vote for the appellee is very strongly indicated, still the voter did not in a legal manner indicate his intention in marking his ballot—that is, did not make a cross in, or substantially in, the square in front of the appellee's name, but put the cross entirely without and beyond the square—and for that reason the ballot cannot be counted for the appellee. *Parker v. Orr, supra*. Placing the cross in the space between the square and the name of the appellee indicates plainly that it was the intention of the voter not to vote for the appellant, though he desired to vote for all other candidates of the Republican Party. We think the court properly refused to count these ballots for either candidate.

In ballots Nos. 14, 23, 28, and 38 crosses appear in the circle at the head of the column of Democratic candidates. These ballots were cast in different precincts. In two of such ballots an attempt was made to make a cross in the circle at the head of the column of Republican candidates, and in each of the other two a cross in the same circle had been practically completed by the voter, but in all of these tickets the marks in the circle at the head of the Republican column had been erased by the voters. These erasures were regarded by the county court as the result of an effort on the part of the voters to correct mistakes made in endeavoring to mark their ballots, and were held by the county court not to constitute distinguishing marks, and that holding was correct.

In ballot No. 31 the voter attempted to indicate his choice of candidates for every office by placing a cross in the square opposite the name of each of such candidates. An erasure in the square opposite appellee's name indicates he first made a cross in that square either by mistake, or that he afterward changed his intention. He placed a cross in the square opposite the name of appellant, and voted the ticket thus marked. The distinct cross in the square opposite the name of the appellant must be held to show the intention of the voter. The county court correctly ruled the erasure did not constitute a distinguishing mark, and counted the ballot for the appellant. This ruling manifestly gives effect to the voter's intention.

In the circle at the head of the group of Democratic candidates in ballots Nos. 15 and 35 the voter in each ballot first made a circle or flourish and then made a distinct and clear cross in the circle, and in ballot No. 17 a cross appears below and in the greater part outside the circle at the head of the Republican group of candidates, and also a cross in the circle. These ballots were held to be valid. Nos. 15 and 35 were counted for the

appellee and No. 17 for the appellant. The circular marks or flourishes were no doubt the result of the habit frequently noticed of making movements of that nature before beginning to write. The cross outside the circle was plainly an inadvertence, which the voter discovered and corrected. The court ruled correctly as to these ballots.

Ballot No. 27 has a cross in the circle at the head of the Republican column and also some other pencil marks in the circle. Appellee concedes these additional marks were apparently caused by nervousness in the voter, or unskillfulness, and that it ought not to be regarded as a distinguishing mark. The county court properly counted the ballot for the appellant.

The cross in the circle at the head of the Democratic column in ballot No. 34 has an additional pencil mark from one arm of the cross to the lower right-hand circumference line of the circle, most probably caused by an involuntary twitching of the muscles or nerves. It was correctly counted for the appellee, and the appellant so concedes.

Ballot No. 16 has an unusually heavy pencilled cross in the Democratic circle, but there is nothing to indicate it was so made for any other purpose than that of plainness and certainty, and appellant so concedes. It was properly counted for the appellee.

Ballot No. 28 was counted for appellant, and appellee concedes the irregularity therein is not fatal.

Ballot No. 19 was counted for appellant. This voter indicated his choice by putting crosses in the squares. A number of the crosses made in different squares were blurred, as if the pencil had been moistened and the hand rubbed over the marks. Appellee, in his brief, concedes it is a good ballot.

Ballots Nos. 20 and 21 have no marks upon either of them except in the circle at the head of the Democratic column. These marks are indistinct, and are visible as scratches on the paper, rather than as pencil marks. They were doubtless made with the wood of a pencil that needed sharpening to expose the lead. Both were cast in Renault Precinct, and no doubt the same pencil was used by both voters. A cross in each of the circles, though faint, can be discerned. The ballots were plainly cast with the intention to vote for the appellee, and were properly so counted.

Ballot No. 22 has a blue-pencilled cross in the circle at the top of the Democratic column. The voter did not use the pencil placed in the booth by the election officers, which made a bluish-purple mark. This ballot was cast at the polls in Renault Precinct. It was in this precinct that ballots Nos. 20 and 21 were cast, in both of which the cross was found to be indistinct, and but faintly discernible, as though made with a broken or dull pencil. The voter who cast ballot No. 22 at the same polls probably decided to use a pencil of his own. The use, without im-

proper motive, of another pencil than that supplied by the election officers, will not destroy a ballot.

Ballots Nos. 24, 25, 30, 32, 33, 39, 43, and 44 contained in each column two dotted lines, above one of which were printed the words "For Justice of the Peace," and above the other the words "For Constable," and also a square opposite each of said lines. These ballots were voted in precincts where neither a justice of the peace nor a constable was to be elected. On each of them a name or names of persons were written on the dotted lines. Ballots Nos. 24, 25, 30, and 43 were counted for the appellant, and ballots 32, 33, 44, and 39 for the appellee. The names so written, it is thought, should be regarded as distinguishing marks. The dotted lines, with the printed words above them, on the ballots, would be understood by many voters at least to indicate those offices were to be filled at the election, and regarded as an invitation to write in the name of the person of their choice. We are inclined to think these names were put upon the ballots for that reason, and not as distinguishing marks, and agree with the trial court that they should not be regarded as distinguishing marks.

Ballot No. 29 was counted for the appellee. The intention to vote for the appellee is unquestioned, and in appellant's summary in his brief it is conceded this ballot should be counted for appellee. The irregularity in the ballot indicates only uncertainty or change of purpose in the mind of the voter.

Ballot No. 38, though objected to below by the appellee, is conceded in the brief to be a good ballot for the appellant. We so regard it. The ticket shows accidental blotting, and nothing more.

Ballots Nos. 40 and 41 were cast for the appellee in New Design Precinct, on neither of which were indorsed the initials of either of the election judges. The court permitted the introduction of testimony for the purpose of proving that the ballots were genuine official ballots, and that the initials of one of the judges were omitted by mistake of the election officers. Without committing the court to the view that it is or is not competent to produce evidence for such purpose, we dispose of the question, so far as this case is concerned, by the observation that it is the opinion of a majority of the court the evidence shows no more than that it is possible that the initials were not indorsed on these tickets by the mistake or oversight of the judges. Accordingly, it is held these ballots should not have been counted for appellee.

Ballot No. 42, cast in Columbia Precinct, was counted for the appellant. On the back thereof appear the figures "125." The court permitted proof to be produced to explain the presence of these figures on the ballot. Mr. Weinel, one of the judges at that polling place, testified that he wrote the figures on

the ballot; that he counted the official ballots out of the envelopes as put up by the county clerk, and put these figures on this ticket for the purpose of keeping tally of the number so taken out; that it was not numbered with the intention that any particular voter should receive it, and that he did not know to whom it was handed, or by whom it was voted. In *Perkins v. Bertrand*, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315, the judges of the election, as hereinbefore referred to, placed numbers corresponding with the number of the voter on the back of the ballots under a mistaken view that the law required ballots to be so numbered, and without the knowledge of the voter, and we held the ballots were not invalidated, but should be counted. The object of our ballot law is to secure the sanctity of the right of suffrage, and secure the free, honest, and secret exercise thereof. The law was not intended to destroy the right of qualified electors, and should not be given that effect when the voter has not been guilty of any omission or wrongful act, and the failure to observe a statutory requirement by an election official appears to have been an honest mistake, which in no way affects the secrecy of the ballot. This ticket was properly counted for the appellant.

In accordance with our investigation and conclusions the count of the votes cast at the last election for each of said candidates may be stated as follows:

Rexroth, appellant..	1459	Schein, appellee....	1459
Votes cast for him in Moredock precinct	76	Votes cast for him in Moredock precinct	76
Ballots Nos. 1, 2, 3, 7, 8, 9, 10, 12, 17, 19, 24, 25, 26, 27, 30, 31, 36, 42 and 43.....	19	Ballots Nos. 4, 5, 6, 11, 14, 15, 16, 20, 21, 22, 23, 28, 29, 32, 33, 34, 35, 37, 38, 39 and 44.....	21
	1554		1553
Deduct the ballots cast by George Dehn, Thomas Havey, August Simpson, Peter Dehn and Henry Dehn.....	5	Deduct the ballots cast by Ben Busch and Owen J. Fahey	2
Total legal votes.	1549	Total legal votes.	1551

It thus appears the appellee received a majority of two of the legal votes cast at the election in question for the office of treasurer of the county of Monroe.

The judgment of the county court is therefore affirmed. Judgment affirmed.

(162 Ind. 353)

HAMMOND v. CROXTON et al.*

(Supreme Court of Indiana. Dec. 16, 1903.)

WILLS — CONSTRUCTION — LIFE ESTATE WITH POWER TO SELL AND CONVEY—REMAINDER IN FEE TO SURVIVING DEVISEE.

1. A will provided that testator's wife should have "full power to bargain, sell and convey any or all of my property, real or personal, by deed or otherwise, as she may see fit, in as full and ample manner as I could do were I living; and after her death, and not until then, the heir, if living, is to have all that part of the

*Rehearing denied, 70 N. E. 368.

property real and personal, that may be left after my wife's death. * * * But if my wife survive the heir (by that I mean H.), she is to dispose of the whole estate real and personal as she sees fit." Held to devise to the widow an estate for her own life, with power to sell and convey the reversion, and to H. an estate in remainder in fee in case he survived the widow, of which he could not be divested by devise of the widow.

Appeal from Circuit Court, Steuben County; P. V. Hoffman, Special Judge.

Action by Edith May Hammond against William G. Croxton and others. From a judgment for Croxton, plaintiff appeals. Transferred from Appellate Court under clause 2, § 10, of the act of March 12, 1901 (Burns' Rev. St. 1901, § 1337j). Affirmed.

See 61 N. E. 596.

S. A. Wood, E. D. Salisbury, and S. A. Harper, for appellant. F. M. Powers, Brown & Carlin, and McBride & Denny, for appellees.

DOWLING, J. Edward T. Hammond was the owner of certain lands in Steuben county, in this state. He died February 26, 1875, testate, leaving his widow, Frances Hammond, and an adopted son, Arthur K. Hammond, as his sole heirs at law. By his will, which was duly admitted to probate, he disposed of his estate as follows:

"First. I direct that my body be decently interred, and the funeral expenses, together with all my other outstanding debts, be first paid; and as to such worldly estate as it has pleased God to entrust me with, I direct as follows, to wit:

"I direct that my beloved wife be made my executor and administrator, and that she have full power to bargain, sell and convey any or all of my property, real or personal, by deed or otherwise, as she may see fit, in as full and ample manner as I could do were I living; and after her death, and not until then, the heir, if living, is to have all that part of the property real and personal, that may be left after my wife's death, and her funeral expenses be paid. Her funeral and mine both to be conducted in a manner corresponding with our manner of life and estate. But if my wife survive the heir (by that I mean Arthur K. Hammond), she is to dispose of the whole estate real and personal as she sees proper."

At the death of Edward T. Hammond, his widow, Frances, took possession of all the property, real and personal, left by her husband, paid his funeral expenses and debts, appropriated the personal property to her own use, and occupied and enjoyed the real estate as long as she lived. None of the land was sold or conveyed by her. She did not qualify as executrix, and the estate of her husband was settled out of court. August 27, 1888, the said Frances Hammond, widow of Edward T., died testate; and by her will she devised all of her estate to Nancy J. Hammond, the wife of the said Arthur K.

Hammond, and to Clyde E., Schuyler O., and Edith May Hammond, the children of Arthur K. and Nancy J. Hammond. On the death of the said Frances Hammond, Arthur K. Hammond took possession of the lands left by Edward T. Hammond, and on October 21, 1895, he executed a mortgage, in which his wife joined, to the appellee Croxton, to secure the payment of a debt of \$2,600. November 12, 1895, Arthur K. Hammond and wife executed a second mortgage on the same lands to his son Clyde E. Hammond, to secure the payment of a debt of \$1,387.19. After the debt to the appellee Croxton became due, he brought suit in the Steuben circuit court to recover the same, and to foreclose his said mortgage; making Arthur K. Hammond and wife, Clyde E. Hammond, and certain other persons claiming liens, defendants. Arthur K. Hammond and wife made default. Clyde E. Hammond filed a cross-complaint to foreclose his mortgage. Judgments were rendered in favor of Croxton and Clyde E. Hammond for the amounts due to them, respectively, for the foreclosure of the mortgages, and the distribution of the proceeds of the sale of the mortgaged premises. The lands were sold under the decree of foreclosure, and the appellee Croxton became the purchaser. No redemption having taken place, at the expiration of one year from the date of the sale the sheriff executed a deed for said lands to Croxton, and by virtue of this deed he claims to be the owner in fee of the real estate so sold. After this sale to the appellee Croxton, the appellant, Edith M. Hammond, claiming to be the owner in fee of the undivided one-fourth of the said real estate, as one of the devisees under the will of the said Frances Hammond, brought this suit for partition and to quiet her title to said part of said lands. Nancy J. Hammond, Schuyler O. Hammond, and Clyde E. Hammond, who were the wife and other children of the said Arthur K. Hammond, were made defendants, and were alleged to be the owners, each, of an undivided one-fourth of said lands under the will of the said Frances Hammond. William G. Croxton, the appellee herein, was also made a party because he asserted title to said real estate. The finding and judgment of the circuit court were in favor of Croxton, and the case comes here upon the evidence concerning which there is no dispute.

The proper decision of this controversy depends upon the construction to be put upon the will of Edward T. Hammond, deceased. It is contended by the appellant, Edith May Hammond, that this will gave to the widow, Frances Hammond, an estate in fee simple, and that Arthur K. Hammond took nothing by its provisions. On behalf of the appellee Croxton it is insisted that Frances Hammond took an estate for life, only, under the will of her husband, and that Arthur K. Hammond held the remainder in fee. It is to be observed that the will of Edward T. Hammond

makes no express devise to his widow. Whatever estate is given to her, she takes by implication only. Neither is the property devised to the widow as executrix. The words of the will, "I direct that my beloved wife be made my executor and administrator," refer simply to that appointment, and may be read as an independent clause of the will, wholly disconnected from the succeeding sentences, which authorize the widow to bargain, sell, and convey the property left by the testator, and which provide for the succession to the estate. While in terms expressly devising nothing to the widow, the will does give her power to bargain, sell, and convey the property, real and personal, by deed or otherwise. What was the intention of the testator? Did he design to give his widow a fee, or a life estate, with power to dispose of the reversion? If, either expressly or by implication, the will shows a purpose to give the property to the widow in fee simple, then that purpose must prevail, although the formal expression of such intention is inapt and ambiguous. The rule in such cases is very distinctly stated in *Mulvane v. Rude*, 146 Ind. 476, 482, 483, 45 N. E. 659, 661, in these words: "When real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established law that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and any limitation over is void for repugnancy. [Citing many authorities.] The only exception to this rule is where the testator gives to the first taker an estate for life, only, by certain and express terms, and annexes to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition." Citing authorities. The provisions of the will in *McMillan v. Deering*, 139 Ind. 70, 38 N. E. 393, were very similar to those of the will in this case, but there the controversy was upon a deed executed by the widow pursuant to the power. The court held that the widow took an interest in the land, without saying what interest, and that the will authorized her to convey the land in fee. It is a general rule of construction that an inheritance in fee passes where incidents of *jus disponendi* are annexed to the gift, as to A. "to give and sell," "to be at his discretion," "to give away at his death to whom he pleases," "to do what he will with it," and the like. *Schouler on Wills*, § 549; 2 *Jarman on Wills*, 274, 275; *Jennings v. Convoy*, 73 N. Y. 230; *Purcell v. Wilson*, 4 Grat. 16; *Lakeman v. Butler*, 17 Pick. (Mass.) 436, 28 Am. Dec. 311. It is said in 4 *Kent's Com.* 535, 536, that "it does not require the word 'heirs' to convey a fee; but other words denoting an intention to pass the whole interest of the testator, as a devise of all my estate, * * * and many other ex-

pressions of the like import, will carry an estate of inheritance, if there be nothing in the other parts of the will to limit or control the operation of the words. So, if an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life, only, and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee." By the will in this case a power to sell and convey was given to the widow. But no estate was given to her absolutely, nor generally or indefinitely, with the power of disposition. The will in this case, therefore, does not fall within the rule stated in *Mulvane v. Rude*, supra. There is in the will an express limitation for life, and this, in our opinion, is sufficient to control the operation of the power and prevent it from enlarging the estate to a fee. *Fenstermaker v. Holman*, 158 Ind. 71, 62 N. E. 699. The will does devise an estate in fee, in remainder, to Arthur K. Hammond, the adopted son of the testator. It declares that after the death of the widow, and not until then, the heir, if living, is to have all the part of the property, real and personal, that may be left after the death of the widow. A subsequent clause provides for a second contingent remainder in fee to the widow, in these words: "But if my wife survives the heir (by that I mean Arthur K. Hammond), she is to dispose of the whole estate as she sees fit." These two provisions, and especially the latter, seem inconsistent with an intention of the testator to give to his widow an estate in fee by the previous clause of the will. If a fee was given to the widow, it could not, as we have seen, be cut down by other provisions of the will. But to arrive at the intention of the testator, all the provisions of the will must be read together, and harmonized, if possible, so as to give effect to each, unless some positive rule of law prevents such construction. This will was inartificial and extremely indefinite. All its important provisions are contained in a single item. The several connected and interrelated clauses must be read together, and the intention of the testator extracted from the whole of them, if possible. The limitation of an estate given to a tenant for life need not necessarily be placed in the first clause, which makes him a beneficiary under the will. As we have before stated, there is in this will no direct or express devise of any estate whatever to the widow, either for life or in fee. To determine the intention of the testator, it is absolutely essential that the whole will be considered, and that from its several parts the court must determine whether the widow took any, and, if so, what, interest in the property left by the testator. It is said in *Schouler on Wills*, § 561, that "a devise, whether absolutely or for life, will be raised by implication under a will, where the context requires it, and the

devise is not in express terms. Thus the gift of the rest and residue of one's estate to his children after the death of the wife creates a life estate in the wife by implication." *Macy v. Sawyer*, 66 How. Prac. 381; *Sisson v. Seabury*, 1 Sumn. 235, Fed. Cas. No. 12,918; *Hill v. Thomas*, 11 S. O. 346; 1 *Jarman on Wills*, 533.

Applying these rules to the will before us, we are of the opinion that it should be so construed as to dispose of the estate of the testator as follows: First, to the widow, an estate for her own life, with power to sell and convey the reversion; second, to the adopted son, Arthur K. Hammond, an estate in remainder, in fee, in case he survived the widow; third, to the widow, an estate in remainder, in fee, in the event of the death of the adopted son during her life.

Finding no error in the record, the judgment is affirmed.

The death of the appellee William G. Croxton after the submission of this cause having been suggested, it is ordered that judgment be rendered as at the term at which the submission was made.

(161 Ind. 585)

BARROWS v. STATE.

(Supreme Court of Indiana. Dec. 18, 1903.)

CRIMINAL LAW—APPEAL—OVERRULING MOTION FOR NEW TRIAL—FAILURE TO SAVE EXCEPTION.

1. Where, on a criminal appeal, the only error assigned is overruling a motion for a new trial, and no exception appears to have been reserved to the court's action, no error is presented for review.

Appeal from Criminal Court, Marion County; Fremont Alford, Judge.

Raymond Barrows was convicted of embezzlement, and appeals. Affirmed.

Herod & Herod and H. D. Merrifield, for appellant. C. W. Miller, Atty. Gen., and W. C. Geake, C. C. Hadley, and L. G. Rothschild, for the State.

JORDAN, J. Appellant was charged by indictment, tried by a jury, and convicted of the crime of embezzlement, and over his motion for a new trial was sentenced by the court to pay a fine of \$1, and to be imprisoned in the Indiana State Prison not less than 2 nor more than 14 years, disfranchised, and rendered incapable of holding any office of trust or profit for a period of one year. From this judgment he appeals, and the only error assigned is that the lower court erred in overruling his motion for a new trial.

At the very threshold of the consideration of the case we are met with the contention of the Attorney General that the questions which appellant seeks to present under the ruling of the lower court upon his motion for a new trial cannot be considered, for

the reason that the record does not disclose that he reserved any exception to the action of the court in denying the motion for a new trial. An examination of the record verifies the statement of the Attorney General. The rule is well affirmed that in order to be available on appeal to this court it must appear by the record that an exception was reserved by the aggrieved party to the rulings of the court which he seeks to have reviewed under his motion for a new trial, and it must further appear that he reserved an exception to the overruling of the motion for a new trial. *Ewbank's Manual*, p. 81. In *Henley v. McNoun*, 76 Ind. 380, the court said: "The only error assigned upon this record is the overruling of the motion of appellants for a new trial. The record does not show that the appellants excepted to the ruling. There is therefore no question before us. *Buskirk's Prac.* pp. 144, 289, and cases cited." In *Fletcher v. Waring*, 137 Ind. 159, 36 N. E. 896, this court again affirmed the rule that in an appeal in which the only error assigned is the overruling of the motion for a new trial, and it is not shown by the record that an exception was taken to such ruling, no question is before the court for decision. See, also, *Copenhaver v. The State* (Ind. Sup.) 67 N. E. 453.

There being no error presented for review, for the reasons stated the judgment is therefore affirmed.

(161 Ind. 512)

CHICAGO, I. & L. RY. CO. v. LEACHMAN.

(Supreme Court of Indiana. Dec. 15, 1903.)

HIGHWAYS—DUTIES OF TRAVELER—DANGEROUS PLACE—OBSERVANCE OF CARE—RAILROADS—HIGHWAY CROSSINGS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—TRIAL—GENERAL VERDICT—SPECIAL FINDINGS—APPEAL—DISTURBANCE OF VERDICT.

1. While it is the duty of a traveler on a highway to avoid all threatening situations by going another way when he may reasonably do so, he is nevertheless entitled to travel the highway, and, where he has no alternative, is not bound to forego an effort to pass, provided the highway is not so defective as to make it obvious to a person of ordinary understanding that the danger cannot be encountered without injury.

2. A traveler on a highway must observe due care according to the degree of peril confronting him, and, if the place is not impassable, or known to be so defective as to render injury probable, he will be justified in proceeding if he observes that degree of care which a person of ordinary prudence in like place would deem sufficient to guard against the threatening danger.

3. Since, by virtue of Burns' Rev. St. 1901, § 5153, a railway is imperatively enjoined on intersecting an established highway to restore the highway to its former state, or in a sufficient manner not to necessarily impair its usefulness, a railway, and not a traveler on the highway, assumes the risk to travel resulting from the former's failure to observe such stat-

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2638.

¶ 1. See Highways, vol. 35, Cent. Dig. §§ 601, 602.

utory duty, and the traveler is answerable only for his conduct in dealing with the defective conditions as he finds them.

4. A general verdict will prevail against special findings of fact in answer to interrogatories, unless it clearly appears that the general verdict is so incompatible and contradictory on some material point that both cannot possibly be true.

5. One driving across a railway, the approaches to which were defectively constructed, was not negligent as a matter of law in attempting to cross, though he knew it to be unsafe for one to ride in the wagon loaded as his was, and knew that the only way in which he could safely go over the crossing was to leave the wagon and walk on the ground, where he had encountered such crossing frequently before, and by the observance of certain precautions had always safely avoided danger by riding and driving in his wagon, and, on the occasion in question, lightened his load by causing his family to get out, set the brakes, and locked the wheels of his wagon, and stood up the better to manage and guide his team down the embankment.

6. Where the jury has found in a general verdict, from all the evidence, that plaintiff acted as an ordinarily prudent person would have acted under the circumstances, an appellate court cannot disturb the verdict where the evidence does not disclose as a matter of law that plaintiff's conduct amounted to negligence.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action by Jerome B. Leachman against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. C. Field and H. R. Kurrie, for appellant. M. M. Bachelder, for appellee.

HADLEY, J. Appellee recovered against appellant a judgment for personal injuries alleged to have been caused by the negligence of appellant in the construction and maintenance of certain approaches to a highway crossing of its railroad. Divers answers to interrogatories were returned with the general verdict, and the correctness of the court's ruling that said answers did not entitle appellant to judgment notwithstanding the general verdict is the only question presented. The complaint avers that appellant, in constructing its railroad, intersected an established highway in Montgomery county known as the "Haw Creek Road" with a fill 20 feet higher than the surface of the highway; that prior to said intersection the Haw Creek Road was at that place level and smooth, making travel thereover easy and safe to life and property; that under pretense of restoring said highway to the condition it found it, the defendant constructed the approaches of said highway to the top of its railroad embankment, and constructed, and has ever since maintained, the said highway approaches in a negligent manner, in this: that said approaches are so steep, rough, narrow, and unguarded as to make it unsafe and dangerous to travel over the same with animals and vehicles; that the plaintiff, with his family, was traveling along said highway with his team hitched

to a wagon, and was compelled to pass over said railroad on said unsafe approaches, because there was no other place or way provided, or whereby he could pass over the defendant's said railroad; that in attempting to pass over the same, and while in the exercise of great care, his wagon and team, by reason of said negligent construction and maintenance, fell down the west approach, whereby the plaintiff was precipitated from his wagon to the ground, and thereby injured.

The facts found in answer to interrogatories are, in substance, as follows: The plaintiff was injured while driving west on the Haw Creek Road at a point where the defendant's railroad intersects said highway with a grade above that of the highway. At the point of intersection the highway runs east and west, and the railroad north and south. The defendant's track was higher than the traveled highway, and to enable travelers to get over the railroad the defendant had constructed approaches, but these approaches were not, any part of them, suitable for travel, and were unsafe for an ordinary farm wagon drawn by two horses to be driven over them. When injured the plaintiff was driving two animals hitched to a farm wagon loaded with farm implements, and with a corn planter tied and trailing behind. The team plaintiff was driving was gentle, and easily managed, and had often been safely driven by the plaintiff over that crossing. The condition of the crossing was such as to cause the plaintiff's wagon, when it left the center of the railroad track and started down the west side, to run against the team and force it over the embankment. The corn planter tied on behind and the implements in the wagon in part caused the wagon to run down against the team when it started down the west side. The plaintiff stopped his wagon at the foot of the east approach, and caused his wife and children, who were riding with him, to leave the wagon. The plaintiff was familiar with the crossing and its condition, and knew it was unsafe for one to ride in a wagon, loaded as his was, over the crossing, and down the west approach, but did not believe his wagon, loaded as it was, would force his team over the embankment, or cause any other injury. The plaintiff knew that the only safe way to go over the crossing was to leave the wagon and walk on the ground. While descending the grade he stood up, and had the breaks set, and the wheels of his wagon locked.

It is the law that one is not always bound to abandon travel on a highway because he knows it to be defective and dangerous. See cases collected in *Gosport v. Evans*, 112 Ind., at page 138, 13 N. E. 258, 2 Am. St. Rep. 164; *Board v. Mutchler*, 137 Ind. 140, 148, 36 N. E. 534; *Board v. Brown*, 89 Ind. 48. It is doubtless the duty of the traveler to avoid all threatening situations by going an-

other way when he may reasonably do so, but he is entitled to travel the highway, and when he has no alternative, as in this case, he is not bound to forego an effort to pass, provided the highway is not so defective as to make it obvious to a person of ordinary understanding that it cannot be encountered without injury. *City of Ft. Wayne v. Breese*, 123 Ind. 581, 23 N. E. 1038. A traveler must, however, in all cases observe due, or ordinary care; that is, his care must be great or slight, in the particular case, according to the degree of peril that confronts him, and in no case less than he might, under the circumstances, reasonably and honestly believe sufficient to avoid injury. And if the place is not impassable, or known to be so defective as to make injury probable by entering into it at all, he will be justified in proceeding if he observes that degree of care and caution which a person of ordinary prudence, in like place, would deem sufficient to successfully guard against the threatening danger. *City of Huntingburgh v. First*, 15 Ind. App. 552, 555, 43 N. E. 17; *Gosport v. Evans*, 112 Ind. 133, 138, 13 N. E. 256, 2 Am. St. Rep. 164. In the last case cited it is said by Mitchell, J., that "the doctrine to be extracted from the cases is that, although a sidewalk or highway may be in an apparently defective or dangerous condition, yet a person with knowledge of the defect or danger is not on that account obliged to abandon travel upon the highway, if, by the exercise of care proportioned to the known danger, he may reasonably expect to shun or avoid the defect." There is no question of assumed risk in this case, however well appellee knew of the defective condition of the crossing. Appellant, in the construction of its railroad, having intersected an established highway, it became its imperative statutory duty "to restore the * * * highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness, and in such manner as to afford security for life and property." Section 5153, cl. 5, Burns' Rev. St. 1901; *Railroad Co. v. State*, 158 Ind. 189, 191, 63 N. E. 224, and cases cited. Whatever danger or risk, obvious or otherwise, resulted from the failure of appellant to perform its specific statutory duty to keep the crossing safe and in good condition for travel, was assumed by appellant, who wrongfully created it, and not by appellee. The appellee is answerable only for his conduct in dealing with the defective conditions as he found them. As relates to him, the question is: (1) Was it negligence to undertake at all to drive his team and load over the crossing in its known condition, and, (2) if he might reasonably undertake it, in his effort to do so did he neglect the observance of any care or precaution required by ordinary prudence under the circumstances? If he might rightfully undertake to cross, and he used such care as an ordinarily careful and cautious

person would observe in driving a like team and load over the crossing, he cannot be adjudged guilty of fault. *Davis Coal Co. v. Pollard*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; *Monteith v. Enameling Co.*, 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944. What do the answers to the interrogatories show? It has been so often decided by this court as to make it appear supererogation to cite the cases that a general verdict will prevail against special findings of fact in answer to interrogatories, unless it clearly appears that the general verdict, after being re-enforced by the assumed proof of all favorable facts provable under the issues, and all natural inferences arising from such facts, in its relation to such special findings, is so incompatible and contradictory on some material point that both cannot possibly be true. The rule is rooted in the theory that the general verdict is the jury's deduction from all the facts proved in the case, and in its support it will be presumed that isolated adverse facts specially found were overcome by other proved facts, if such other facts might have been properly proved under the issues. It is shown by the findings that appellee was familiar with the condition of the crossing; that his team was gentle, and he had often safely driven it over; and we must assume, in support of the verdict, because not shown to the contrary, that in his previous successful efforts his team had drawn like or heavier loads. It is also found that he believed at the time of the accident that he could safely drive over, and, if he had safely driven the same team, with an equal load, over the crossing, frequently before, the jury had the right to consider this circumstance in adjudging the quality of his conduct.

Stress is laid upon the following questions and answers: "(26) Did the plaintiff know that it was a dangerous crossing? Ans. Yes. (27) Did the plaintiff know that it was then unsafe for one to ride in the wagon, loaded as his was, * * * over said crossing, and down the west embankment? Ans. Yes. (30) Did the plaintiff know that the only way in which he could safely go over said crossing at the time was to leave the wagon, and walk on the ground? Ans. Yes." The term "safe," as here employed, is used in a relative sense. One almost daily encounters something that is not entirely safe. We say that riding behind a nervous horse or walking on an icy pavement is dangerous, but ordinarily neither is accounted negligence per se, nor negligence at all, if one exercises care commensurate with the danger. Here the appellee knew the crossing was in some degree (not shown), dangerous, and that riding over it in the wagon would be in some degree unsafe; but he had encountered it frequently before, and by the observance of certain precautions had always safely avoided the danger by riding and driving in his wagon. On this occasion he lightened his load by

causing his family to get out, set the brakes, and locked the wheels of his wagon, and stood up the better to manage and guide his team down the embankment. We cannot say, from what is disclosed, as a matter of law, that his conduct amounts to negligence; and the jury having found in their general verdict, from all the evidence, that he acted as an ordinarily prudent person would have acted under the circumstances, we are not permitted to disturb their verdict.

Judgment affirmed.

(161 Ind. 583)

STUDEBAKER v. BOARD OF COM'RS OF WELLS COUNTY et al.

(Supreme Court of Indiana. Dec. 18, 1903.)

PUBLIC DITCHES—ESTABLISHMENT—PROCEEDINGS—ENGINEER'S REPORT—EXCEPTIONS—ORDERS—APPEAL.

1. Where, after exceptions had been filed to the report of an engineer appointed to examine the construction of a public ditch, the board of county commissioners, after examining and considering the report and the exceptions, filed an order overruling the exceptions and accepting and approving the report, such order was not a final order or judgment from which the exceptant was entitled to appeal.

Appeal from Circuit Court, Wells County. E. C. Vaughn, Judge.

Proceedings by the board of commissioners of Wells county and others for the establishment of a public ditch. From an order overruling exceptions filed by Della M. Studebaker to the report of an engineer appointed to examine the ditch, and accepting such report, she appeals. Affirmed.

Mock & Sons, for appellant. Wm. H. Eichhorn and Dailey, Simmons & Dailey, for appellees.

DOWLING, J. An application for the construction of a public ditch in Wells county, under the act of March 7, 1891 (Acts 1891, p. 455; Burns' Rev. St. 1901, § 5690 et seq.), was filed with the board of commissioners of that county in 1892. All necessary steps were taken in the proceedings, and a ditch was excavated on the route proposed. August 6, 1901, the appellant, whose lands were subject to assessment for the construction of the said ditch, filed her petition with the board, charging that the improvement was not made in conformity to the plans and specifications adopted, and that it had not been completed, approved, or accepted by the board. She asked that an order requiring a report of the condition of the ditch to be made by the superintending engineer be set aside; that said engineer be removed, and another appointed in his stead; that such new engineer be required to examine the said work, and report its condition, and whether it had been completed according to the said specifications; that a commissioner be appointed to complete the said ditch; and that he be ordered to let the

contract for such work. The board thereupon entered an order directing the superintending engineer to report the condition of the said improvement, and whether the same had been completed according to the plans and specifications. September 3, 1901, the engineer filed his report, showing that the main ditch, with its laterals, from 0 to stake No. 448, had been inspected and accepted by a former engineer and superintendent; that the original specifications were amended by the board from stake No. 448 to stake No. 501, and that this part of the ditch had been completed according to the amended specifications, inspected, and accepted by said former engineer; and that from stake No. 501 to its terminus the ditch had been completed according to the original specifications. The appellant filed exceptions to this report, most of which were in denial of its statements. After hearing the evidence, the board overruled the exceptions and made the following order: "And the board upon examination and consideration of the foregoing report, and the exceptions filed thereto, and after hearing the testimony of witnesses, and being fully advised in the premises, order, that the exceptions filed to the report of John H. Trostel, engineer, be, and the same are hereby, overruled, and the said report of John H. Trostel, engineer, is hereby accepted and approved." From this order, an appeal was taken by Mrs. Studebaker to the Wells circuit court; the board, Trostel, the engineer making the report, and William A. Kunkle, the former engineer, being named as the defendants in the proceeding. On motion of the defendants, the appeal was dismissed by the Wells circuit court.

Assuming, without deciding, that the appellees, or some one or more of them, were proper parties defendant in the appeal to the circuit court, the action of that court in dismissing the appeal was right. The order appealed from was in no respect a final order or judgment from which an appeal could be taken under the act in question. We find nothing in the statutes authorizing an appeal from an order of this kind, and none has been pointed out by counsel for the appellant. *State ex rel. Work v. Brown*, 44 Ind. 329; *Thiebaud v. Dufour*, 57 Ind. 598; *Thompson v. Board, etc.*, 148 Ind. 136, 45 N. E. 519; *Ewbanks' Manual*, § 82; *Black on Judgments*, § 115.

We find no error. Judgment affirmed.

(161 Ind. 519)

NESBITT v. STEVENS.

(Supreme Court of Indiana. Dec. 15, 1903.)

TRUSTS—EXPRESS TRUSTS—WRITING—SUFFICIENCY—ENFORCEMENT—EVIDENCE—APPEAL—ERRORS REVIEWABLE.

1. To create a trust it is not necessary that the deed conveying the property affected thereby shall contain the declaration of trust upon which the same is held, but it is sufficient, under Burns' Rev. St. 1901, § 3391 (Rev. St. 1881, § 2969; Horner's Rev. St. 1901, § 2969), pro-

viding that express trusts can be created only by writing signed by the party creating the same, if the trust has been manifested or can be proved by any writing under the hand of the party to be charged, provided the fiduciary relations, terms, and conditions are set forth with sufficient certainty.

2. A complaint alleged that plaintiff was the owner of certain mortgaged lands, and was indebted in certain sums, and conveyed the lands to defendant to sell the same, and, after paying the debts and incumbrances, and retaining a reasonable compensation, to pay the balance to plaintiff. Attached to and made a part of the complaint was a letter from defendant to plaintiff, in which the former proposed that plaintiff should convey the property to him, and he would pay the debts and mortgage, and, if he could sell the property, and there was anything left over, plaintiff should have it. *Held*, that the complaint and letter, taken together, were sufficient to show a trust in favor of plaintiff.

3. In a suit to enforce a trust, incompletely expressed in a letter written by defendant to plaintiff, in which the former offered to take a conveyance of plaintiff's property and pay his debts and the incumbrances thereon, and, if possible, sell the property, and pay any balance to plaintiff, it was error to exclude evidence showing the position and circumstances of the parties, that the deed and letter might be construed in the light thereof.

4. A ruling of the court not assigned as a cause for a new trial is not before the Supreme Court for review.

Appeal from Circuit Court, Grant County.
H. J. Paulus, Judge.

Suit by Harvey F. Stevens against Cyrus Nesbitt. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under the act of 1901 (Acts 1901, p. 500, c. 259) being section 1337u, Burns' Rev. St. 1901. Reversed.

Henry & Elliott, for appellant. Carroll & Dean, for appellee.

MONKS, J. Appellee brought this suit against appellant to enforce an alleged express trust. A demurrer for want of facts was overruled to the additional paragraph of complaint. A trial of said cause upon said paragraph of complaint resulted in a finding, and, over a motion for a new trial, a judgment, in favor of appellee. The errors assigned call in question said rulings of the court.

Appellant insists that the court erred in overruling the demurrer to the additional paragraph of complaint. It appears from the additional paragraph of complaint that on and prior to December 1, 1893, appellee, a son-in-law of appellant, was the owner of 80 acres of land in Grant county, Ind., described therein; that there were mortgages and ditch liens on said real estate amounting to \$1,869, and that he was otherwise indebted in the sum of \$400; that he also owned a note, then due, for \$205.43; that said note was assigned to appellant, and that said real estate was conveyed by appellee and his wife to appellant in trust that he would pay said liens on the land and said \$400 indebted-

ness of appellee, sell said land, collect said note for \$205.43, and, after reimbursing himself for the said sums paid out for appellee and retaining a reasonable compensation for his services, to pay the remainder of the amounts received for said land and collected on said note to appellee; that appellant has paid said liens and other indebtedness of appellee as he promised to do, but has failed, neglected, and refused to sell said real estate or otherwise execute said trust, and has cut timber on said land and sold the same for \$500, and converted the same to his own use; that said real estate was worth \$3,000 when conveyed to appellant and is now worth \$4,000. Prayer that appellant be required to sell said land, render an account of the proceeds, and, after payment of all amounts paid out by him and for debts, expenses, and trouble, that he be directed to pay balance remaining to appellee, and on his failure to do so that a commissioner be appointed to carry the decree into effect. The writing signed by appellant upon which said pleading rests, and which was made a part thereof, was a letter written by appellant to appellee, and reads as follows:

"Dec. 14th 1893. Well, Harve, I received a letter from you last night and your chances are slim to get the money to renew. I have been down with the sore throat for a week or two, but I studied over the matter and have come to the conclusion to make you an offer, and it is this:

"I will pay off the mortgage which is \$1704.00 and that note of Miller's of \$400.00, which will make \$2104.00 and you to send me Bob's note and I will try and get enough out of that to pay the ditch assessment on the Middle Fork, you to send Miller the interest on the note for one year and if I can make anything out of it after paying me for my trouble and expense you will get it. But I aint going to promise any more till I get out of debt. I will have to borrow the money and if the place will pay the taxes and interest it will do well. I went out this morning to see if I could raise the money and made the arrangement if it was all right with you, and went to see Bob. He is off at you but he said that he would let me have 150 bushels of corn, and he had ten pigs which would weigh about 60 to 80 pounds and he said that he would let them go on the note when fat, about February.

"It might be I could get enough out of Bob to pay the ditch taxes. That would leave only a small amount for you to meet, \$50.00 to the lodge, \$100.00 to Green, and it will be a hard summer on me next summer for I will have so much ditch tax to pay. Now Harve, if it suits you make me a deed subject to mortgage and I will send you the Miller note as soon as interest is paid.

"It has taken all the surplus money I could get to build the house at Herbst and I aint fixed to buy and wouldn't if you could get through. But it has got to go for the

¶ 4. See Appeal and Error, vol. 3, Cent. Dig. § 1650.
69 N.E.—17

mortgage if you depend on Bob. Now, Harve, do as you think best and if you take me up at my offer don't depend on anything from the place and if I can sell it after while you will get what is right if I am living, but life is uncertain, but I don't think any of them would wrong Anna or Roy out a cent. Bob said there was two dollars (\$2.00) more due him for some wire and express on that wheat. Now let me know right off and if you don't want to take that all right. Tell Anna and Roy I wish them a merry Christmas. Aunt Kate Williams is at my house, is going to stay some time. Sold my hogs today at 5c, got all the wheat on the road stored there was about 2400 bushels.

"C. Nesbitt to H. F. Stevens.

"Harve there is nothing against the place but that mortgage. If there is write me and let me know.

"I doubt if Bob leaves the farm this spring. But I will do the best I can with him. Farming is very bad but you treated me all right. If you decide to take me up write to the agent at Indianapolis and tell him I want to settle it off at Marion. There is an agent at Marion for the same firm I think.

"C. Nesbitt."

It is settled that, to create a trust, it is not necessary that the deed conveying the property to be affected by the trust shall contain the declaration of the trust upon which the same is held. The statute (section 3391, Burns' Rev. St. 1901; section 2969, Rev. St. 1881; and section 2969, Horner's Rev. St. 1901) is satisfied if the trust has been manifested or can be proved by any writing under the hand of the party to be charged, or of the party who is enabled to declare the same, provided the fiduciary relations, terms, and conditions of the trust are set forth with sufficient certainty. Letters, receipts, or other writings signed by the trustee may be sufficient to establish a trust. *Ransdel v. Moore*, 153 Ind. 393, 400, 401, 53 N. E. 767, 53 L. R. A. 753, and authorities cited. While said letter, as appellant contends, may be indefinite, ambiguous, and of doubtful construction as to some of its terms, yet, when considered in connection with the averments of said paragraph of complaint of which it is a part, we think no error was committed by the court in overruling the demurrer for want of facts.

During the progress of the trial the court, on objection of appellee, excluded evidence properly offered by appellant to prove the position, situation, circumstances, and surroundings of the parties to said deed and letter, in order that the same might be read and construed in the light thereof. The letter upon which the case depends was not so complete, definite, and certain as to justify the exclusion of such evidence. *Greenleaf's Ev.* §§ 286-288, 295a; *Beach on Contracts*, § 581; *Ransdel v. Moore*, 153 Ind. 393, 401, 53 N. E. 767, 53 L. R. A. 753.

The court also excluded evidence as to the

conduct of the parties in reference to said land subsequent to the execution of said deed and the writing of said letter. Appellant claims that such evidence was admissible on the ground that the parties had thereby given a practical interpretation to said deed and letter showing that the title conveyed to appellant was absolute, and not in trust. This ruling of the court was not assigned as a cause for a new trial, and is not, therefore, before us for decision. See, however, on this subject, *Gaylord v. City of Lafayette*, 115 Ind. 423, 430, 431, 17 N. E. 899, and cases cited; *Reissner v. Oxley*, 80 Ind. 580, 584, and cases cited; *Roush v. Roush*, 154 Ind. 562, 569, 570, 55 N. E. 1017, and cases cited; *Bever v. Bever*, 144 Ind. 157, 164, 41 N. E. 944. It is clear that the court should have admitted evidence as to the situation, circumstances, and surroundings of the parties to said contract when executed.

Judgment reversed, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

(161 Ind. 524)

IRVIN v. RUSHVILLE CO-OPERATIVE TELEPHONE CO.

(Supreme Court of Indiana. Dec. 16, 1903.)

TELEPHONES—CO-OPERATIVE COMPANIES—PAYMENT OF TOLLS—RULES—REASONABLENESS—ENFORCEMENT—DISCRIMINATION—STATUTES—PENALTIES—SET-OFF—DISCONTINUANCE OF SERVICE—DUE PROCESS OF LAW—COMPLAINT—APPEAL—ERRORS—FAILURE TO ARGUE.

1. Where, in an action against a telephone company for refusing to furnish plaintiff with switch-board connections, the complaint did not allege that there had been any discrimination against plaintiff's "business," it did not state a cause of action within Burns' Rev. St. 1901, § 5529, providing that no telephone company shall discriminate against any individual or company engaged in any lawful business.

2. A rule of a co-operative telephone company that all moneys due from its patrons for toll-line connections are payable on or before the 5th day of the month succeeding the maturity of the indebtedness, and, if not paid, the service of the delinquent patron shall be disconnected until the indebtedness is paid, is a reasonable regulation, which the company is entitled to enforce.

3. Where a telephone company had promulgated a rule that claims for service must be paid on a particular day on pain of having the patron's service refused, and the patron was charged with notice of the rule, and with the fact that he had violated it, the telephone company was justified in refusing service without informing him at the time of its refusal as to its reason therefor.

4. Where a telephone company had established and promulgated a rule requiring payment of previous tolls on a particular day on pain of having the service discontinued, the mere fact that the company had not enforced such rule against third persons before cutting off plaintiff's service for noncompliance therewith did not of itself deprive the company of its right to enforce the rule against plaintiff.

5. Where a public telephone company had promulgated a rule requiring payment of past tolls by subscribers on a particular day on pain of discontinuance of service, it was entitled to enforce payment of such dues and tolls

by denying service, regardless of the fact that the subscriber claimed that the company was indebted to him to an amount exceeding the tolls due.

6. In an action against a telephone company to recover a statutory penalty provided by Burns' Rev. St. 1901, §§ 5512, 5529, for refusing to furnish service to a subscriber alleged to be indebted to the company, the subscriber was not entitled to put in issue an alleged claim of set-off of an indebtedness by the telephone company to him greater than the telephone company's claim for unpaid charges.

7. Where, in an action to recover a statutory penalty against a telephone company for cutting off plaintiff's service for its failure to comply with a rule requiring payment of past tolls on a particular day, the complaint alleged that the rule had not been enforced as against 35 other patrons of the company who "were in like situation with the plaintiff," but did not allege that such other patrons were in default, or had refused to pay, it was insufficient to show a discrimination against plaintiff in the enforcement of the rule prohibited by Burns' Rev. St. § 5529.

8. Plaintiff owned stock in a co-operative telephone company, together with his telephone instrument and his line of wire to the exchange. Plaintiff was entitled to exchange connections on payment of certain tolls, and was subject to a rule providing that the company might discontinue connections for failure to pay past tolls on a specified date. Plaintiff, claiming that the company was indebted to him in excess of tolls claimed, refused to pay the tolls, and his service was discontinued. *Held*, that such discontinuance did not deprive plaintiff of his property without due process of law.

9. While the failure of appellee to brief a cause of action is tantamount to a confession of error, appellee's failure to argue a point will not lead to a reversal unless its neglect has been so flagrant as to demand a reversal for the protection of the appellate court.

Appeal from Circuit Court, Rush County; Douglas Morris, Judge.

Action by Arthur B. Irvin against the Rushville Co-operative Telephone Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

S. L. Innis, G. W. Morgan, Conner & Conner, and A. B. Irvin, for appellant. Ben L. Smith, Claude Cambern, and Donald L. Smith, for appellee.

GILLETT, C. J. Action by appellant in 10 paragraphs to recover 10 penalties of \$100 each, under the provisions of sections 2, 3, Acts 1885, p. 151 (sections 5529, 5512, Burns' Rev. St. 1901). A demurrer was sustained to each of said paragraphs, and there was a final judgment that appellant take nothing by his action, and for costs.

The eleventh paragraph of complaint is of a representative character, and an exhibit of that will therefore sufficiently show what is alleged. Said paragraph, omitting the prayer, is as follows: "That the defendant is an incorporated telephone company, duly incorporated under the laws of the state of Indiana authorizing the incorporation of telephone companies, and that it is now, and has been for more than eight years past, engaged in carrying on a general telephone business in the city of Rushville, Indiana. That said company, at the time of its organization, adopted

the plan of allowing patrons who desired telephone service to become stockholders in the company, to purchase and own their own telephones, and to purchase and own their own wires leading from the location of their said telephones over the pole lines of the defendant to its exchange, and to pay a rental at the end of each month of a sum sufficient to pay the operating expenses of said company. That under this arrangement the plaintiff purchased and paid for one share of stock in said company, purchased a first-class telephone, and also paid for a line of wire leading from said telephone, which was and is located in plaintiff's dwelling on North Main street, in said city of Rushville, and within the local limits of said telephone business, to the switch board of the defendant in said city. That on the 20th day of July, 1898, he had said telephone and line in good working order and connected as aforesaid. That he had always complied with the reasonable regulations of said company, and that on said 20th day of July, 1898, he called up the exchange of the defendant, and demanded that he be connected with No. 29, which was the line leading from said defendant's switch board to plaintiff's said telephone, which said defendant unlawfully and wrongfully refused to do. That more than two years before the happening of the grievances hereinafter complained of the defendant, by its board of directors, had adopted a rule or by-law which reads as follows, to wit: '13. All moneys due this company or its toll-line connections shall be payable at the office of the secretary on or before the fifth day of the month succeeding the maturity of such indebtedness, and if not paid on or before said date, the service of such delinquent shall be discontinued until such indebtedness is fully paid.' That said rule or by-law was never enforced by the defendant. That the patrons of said company did not pay the tolls, dues and demands that the several patrons of said company owed said company at the office of the secretary of said company in compliance with the provisions of said rule, but, on the contrary, said company allowed said rule to remain unenforced, and at no time has said company enforced the same. That on said 20th day of July, 1898, the defendant was justly indebted to the plaintiff in the sum of \$1.50, and he owed said company on account of rent and tolls the sum of \$1.05, leaving defendant owing him, after deducting said rent and tolls, the sum of \$.45. That long after said telephone service had been refused the plaintiff, as hereinbefore stated, the defendant gave as a reason for refusing said telephone service that the plaintiff had not paid the rent and tolls he owed said company, but at the time said telephone service was refused the defendant gave no reason for refusing said telephone service. That at the time he was refused telephone service, as hereinbefore stated, thirty-five other patrons of the de-

fendant, who were in like situation with the plaintiff, except that the defendant did not owe them, or any of them, any amount, were delinquent and in arrears in the payment of rent and tolls that each of said thirty-five patrons then owed the defendant, and had been in arrears in the payment of said tolls and rents from and beyond the time of the maturing of the indebtedness of \$1.05 from the plaintiff to the defendant hereinbefore mentioned. That the defendant did not refuse said thirty-five patrons, or any of them, who were in arrears in the payment of their respective rents and tolls, as hereinbefore stated, telephone service, but, on the contrary, continued to render each of said thirty-five delinquent patrons telephone service, though each of said thirty-five patrons remained delinquent and failed to pay what they each owed said company for more than twenty days after the plaintiff had been refused telephone service as aforesaid, though demands had been made upon them for the payment of said dues; but plaintiff expressly avers that the defendant unlawfully and wrongfully discriminated against the plaintiff, and refused to render him telephone service, as hereinbefore stated."

On a former appeal of this case, where there had been a recovery on each of the first 10 paragraphs of complaint, which were afterwards dismissed, it was held by the Appellate Court that said by-law or rule No. 13 was valid, and that appellee was not obliged to yield such provision or incur the statutory penalty in case it could be proved that appellant had a set-off greater than the amount of the delinquent rental. *Rushville Co-operative Telephone Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327. Much of the effort of appellant's counsel on this appeal has been to show that the cause of action has been so changed that the decision of the Appellate Court above referred to is not the law of the case. It is claimed that the present complaint is based on an unlawful discrimination. It is further claimed that the question as to the reasonableness of said by-law or rule was not presented to the Appellate Court, and that therefore appellant is not bound by its decision upon that point. In the latter insistence counsel impliedly forget the announced theory of their complaint, but we prefer to put our decision on a broader basis. Section 5529, *supra*, is as follows: "Every telephone company with wires wholly or partly within this state, and engaged in a general telephone business, shall within the local limits of such telephone companies' [sic] business supply all applicants for telephone connections and facilities with such connections and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such

companies discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise for any lawful purpose." The claim is made on behalf of appellant that his complaint states a cause of action within the following words of said statute, "nor shall such companies discriminate against any individual or company engaged in any lawful business." It is not shown by allegation that there has been any discrimination against the business of appellant, and therefore he has not brought himself within the clause of the statute last quoted. Whether he complains of the failure to furnish him connections or facilities, or of the imposing of a condition or restriction upon him that is not imposed impartially upon all persons in like situation, it is evident that, to recover, he must either successfully assail the reasonableness or operation of the by-law or rule, or show that it was not impartially implied to all similarly situated. The statute travels on the assumption that telephone companies may make reasonable rules. Appellant does not allege that the by-law or rule in question was not promulgated, or that he did not know of it, and we incline to the opinion that the complaint states such facts relative to the mutual character of the corporation that it may be said that the provision was in the nature of a legislative act, passed by the corporation for the government of its members, that appellant was bound to take notice of. *Mason v. Mason*, 160 Ind. 191, 65 N. E. 685, and cases there cited; *Thompson, Com. Law Corp.* § 939. It is further to be noted that the complaint is so drawn that it is open to inference that appellee had warned appellant before the service was denied him that it would enforce the by-law or rule against him as a consequence of his refusal of payment, and it may also be inferred that he was denied service for the reason that he had not complied with the regulation mentioned. The allegation of the complaint that at no time has the company enforced the rule was evidently inserted by the pleader by way of antithesis to the preceding charge that the rule had not been enforced against other patrons who were in default. This view is borne out by the following statement of counsel for appellant in their brief: "The thing we complain of in this case is that the rule was unreasonably applied against the appellant; that under it the appellee refused appellant telephone service when he did not owe it a cent under the rule." If a corporation authorized to establish and promulgate a rule as a condition to furnishing service has done so, and a patron is charged with notice of the rule, and also of the fact that he has violated it, the corporation may refuse him service for such reason without informing him at the precise time of its refusal as to its reason there

for; but the corporation would not, of course, be permitted to bring its rule forward as a mere afterthought. When it is shown that the corporation in a case of this kind has acted under a rule, thereby suggesting a colorable defense, it is required that the plaintiff should allege facts avoiding the operation of the rule. See *Morgan v. Lake Shore, etc., Ry. Co.*, 130 Ind. 101, 23 N. E. 548. The mere fact that appellee had not enforced its by-law or rule against third persons before that time does not alone furnish a reason why it should not be revived as against appellant. As before observed, for aught that appears in the complaint, he may have been fully apprised in advance of the consequence of his refusal to pay. We are not at present dealing with the subject of discrimination. We shall consider that point hereafter.

The cases cited by appellant's counsel to the effect that corporations engaged in the performance of a quasi public function, as in the furnishing of light, water, or gas, cannot, by the enforcement of their rules, preclude the courts from an examination into the facts, are not in point. In this case no question is involved growing out of the relation of the parties as telephone company and patron. The appellee, it may be inferred, had rendered perfect service, and had in all respects complied with its agreement with appellant as its patron, and it is admitted that appellant's indebtedness to it had matured. What appellant asserts is that he has an independent claim against appellee sufficient to extinguish the latter's claim, and that the company must continue to furnish him service, and go into a court as a suitor if it desires to collect its bill, or at its peril defend suits for penalties which might be accumulated ad infinitum. It will be observed that it is not alleged that the company is insolvent, and that it does not appear that the company is not in good faith disputing the validity of appellant's claim to a set-off. Considering the quasi public functions of corporations like the one at bar—corporations whose first duty is to the public whom they serve—we think that their revenues should not be depleted by the furnishing of service to individuals who refuse to pay because they are asserting collateral demands against it. In the course of the opinion by the Appellate Court on the former appeal of this cause it was said: "It cannot be denied that a rule of the company requiring these monthly payments to be made in advance would have been a reasonable rule, and that upon refusal so to pay service could be denied. The company must protect its plant, and keep up its efficiency, and may enforce a rule that insures a reasonable revenue and its prompt receipt. It can maintain an efficient service only through prompt payment of its dues and tolls, and because of that fact it may use the summary remedy of denying service for nonpayment. It cannot be said it may be denied the benefit of this rule because a

patron claims the company is indebted to him. It cannot be required to stop and adjudicate claims held against it. The law compels it to furnish service. A patron may take service or not, as he chooses. It must furnish efficient service to all alike who are alike situated, and must not discriminate in favor of or against any one. For failure the extraordinary remedies of mandamus and injunction may be successfully invoked. It may be said that the courts are open to the company to collect its claim, but as to this the company and the patrons are on an equal footing. The fact that the patron is solvent aids nothing in determining a rule which must apply to solvent and insolvent patrons alike. Keeping in view the nature of the company's duties, and the services it may be compelled to render, it must be held that the company may enforce the payment of its current dues and tolls by the summary remedy of denying service regardless of the fact that the subscriber claims the company is indebted to him." The right of set-off as to independent demands having in them no element on which to base a claim of equitable intervention is statutory (*Boil v. Simms*, 60 Ind. 162, 168; *Pomeroy's Code Remedies*, § 729; 25 *Amer. & Eng. Ency. Law*, 489; *Waterman on Set-Off*, §§ 9, 12, 13, 16. See *Wills v. Browning*, 96 Ind. 149, 151), and, whatever may be the effect of a set-off when allowed by the court, we deem it clear that in an action for the enforcement of a penalty the plaintiff will not be allowed to draw in issue a claim of set-off on his part. In the circumstances of this case it appears that, if neither party will yield, a resort to the law is practically the only remedy, and we think that appellant should be content with the opportunity to assert his independent demand in a purely civil action.

As to the claim of discrimination, the statement of the complaint that 35 other patrons of the company "were in like situation with the plaintiff" is a mere conclusion. So far as averment goes, they are only shown to be in default. It is not shown that they refuse to pay.

It is contended that the action of appellee deprives appellant of property without due process of law. He has not been deprived of his tangible property or of his stock, and, as to the deprivation of telephone service, that has been brought about by his violation of a rule which we hold valid. He may regain his right by paying the rental up to the time service was denied him, and complying with such lawful conditions as the company has established. As to his own demand, he was at liberty to resort to the courts. This case differs essentially from the case of *Indiana, etc., Co. v. State ex rel. Ball*, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761, where it was claimed that a public corporation had unlawfully discriminated against an individual, and thereby denied to him the equal protection of the laws.

While this court asserts, and has exercised, the right of treating the failure upon the part of an appellee to brief a cause as tantamount to a confession of error, yet it does not follow that the mere refusal of appellee's counsel to argue a point that they apparently believe to be without merit must lead to a reversal. On the contrary, where the neglect of appellee's counsel has not been so flagrant as to demand a reversal as a measure of protection to the court on appeal, the rule is not to reverse except for actual error. See *Martin v. Martin*, 74 Ind. 207; *Big Creek Stone Co. v. Seward*, 144 Ind. 205, 42 N. E. 464, 43 N. E. 5; *Travelers' Ins. Co. v. Prairie School Tp.*, 151 Ind. 36, 49 N. E. 1, 51 N. E. 100; *Wilson v. State*, 156 Ind. 631, 59 N. E. 880, 60 N. E. 1086.

Judgment affirmed.

(32 Ind. App. 227)

HART v. SIGMAN et al.*

(Appellate Court of Indiana, Division No. 1.
Dec. 15, 1903.)

SURFACE WATERS—DRAINS—NATURAL FLOW—OBSTRUCTION—HIGHWAYS—REPAIR.

1. Where there was a depression in a highway dividing land owned by plaintiff and defendant on the line of a covered public tile drain, so that surface water not carried off by the drain flowed from plaintiff's land over the highway onto the adjoining land, the act of the road supervisor in raising the surface of the highway at that point for about five inches was a proper repair thereof, and not actionable, though it turned back surface water onto plaintiff's land.

2. Where an existing public tile drain was insufficient to carry off surface water from the land of adjoining proprietors, the owner of the higher land could not compel the lower proprietor to cease his efforts to protect his land from being overflowed by water descending from the higher.

Appeal from Circuit Court, Jasper County; V. S. Reiter, Special Judge.

Action by Ben Hart against Joseph Sigman and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Foltz, Spittler & Kurrie, for appellant.
E. P. Honan and C. W. Hanley, for appellees.

BLACK, J. The complaint of the appellant showed, in substance, that he was the owner and in possession of a tract of 40 acres of land in Jasper county, and one of the appellees (John Kellner) owned lands adjoining on the west and on the south. A public highway, running north and south divided the land of the appellant from that of Kellner lying to the west thereof. This road was intersected by another public highway, which divided the appellant's land from that of Kellner lying south thereof. All these lands were low and swampy. A certain public ditch, which, by the terms of its description in the proceedings by which it was established, was to be for the first 1,950 feet a "covered ditch," commenced at the east side of

the north and south highway, and on the west side of the appellant's land, 30 feet east and 580 feet north of its southwest corner, and ran thence westwardly across the north and south road, and over the land of Kellner lying west thereof. All these lands were assessed for the construction of this ditch, as was also Jasper county for the benefit to the public highways. This ditch was constructed and finally accepted in 1898. It began with a tile drain on the east side of the north and south road, at the place above mentioned, at the west side of appellant's land, crossed the north and south public highway, and ran across the land of Kellner to the public highway which ran east and west, and thence into another public ditch described, previously made, for the construction of which all the lands above mentioned had been assessed. There was, it was alleged, a swale or slough running through the middle of appellant's land from west to east, and, near the center of the tract, curving toward the south, and extending to and across the highway which ran east and west, and thence, in a southerly direction, across the land of Kellner which lay south of that highway. Before the construction of any of the public ditches mentioned, the water from Kellner's land south of that of the appellant, and from other lands in that locality, and from the line of the east and west highway, ran therefrom down and through this swale across the appellant's land and thence across the north and south highway, at the place where the tile ditch was made, and thence followed the line of that ditch down to the ditch with which the tile ditch communicated. It had so run for 25 years before the construction of the tile ditch, and still so ran, other than the portion which passed through the tile drain, except as prevented by a grade and barrier as hereafter described. It was further alleged that when appellant purchased his land there was an open ditch along said depression on his tract, and thence across the north and south highway, and southwestward across the land of Kellner on the west; and where this ditch crossed that highway the township and the officers thereof had constructed a wooden bridge across the ditch, and this bridge remained there until this open ditch was changed into the public tile ditch. When the public tile ditch was made, under the ditch proceeding by which it was established, the bridge was moved, and the tile were placed in the ditch. After this public tile ditch had been constructed under the court-proceeding authorizing it, the appellant continued the tiling over and across his tract of land. In the spring of 1900 the tile proved to be insufficient in size to carry all the water coming from the east and west highway and the lands south thereof, and by reason thereof the water passed over the north and south highway, and over the line of the tile down to the outlet thereof. It was then alleged that in 1900 the defendants, who were

*Rehearing denied January 13, 1904.

Kellner and the township trustee and the road supervisor, who are appellees, wrongfully and unlawfully constructed a grade of 2 or 3 feet in height, and 8 or 10 feet in width, along the center of the north and south highway where the ditch crossed it, and 10 or 15 rods in length, and dug out large ditches on either side of the highway, and thereby made a dam along the highway, for the purpose of holding the water back on the appellant's land, "which naturally fell on his tract of land, and from the lands of" Kellner, and other lands on the south; and they erected the grade and dam without providing any means of escape for the water coming down the swale above mentioned, and across appellant's land. Thereby the water was caused to be and remain on his land, and to back up, and it was prevented from escaping as it had previously done; the tile being insufficient to carry off "the surface water as caused to be accumulated on the land of the plaintiff by reason of the construction of said grade." It was then further alleged that the appellees wrongfully and unlawfully constructed an open ditch in 1900 across the east and west highway opposite the low depression and swale on appellant's land, where it continued south across Kellner's land; that by reason of the construction of this ditch, and a bridge over it, and by digging ditches along either side of this highway, they caused the water from the highway and the lands south thereof, including Kellner's tract, to be gathered together in accumulated quantities, and not as they naturally came, and cast the same upon and over the appellant's land in large quantities, to such an extent that the tile was insufficient to carry the same, and by reason of the premises the water was held on his land until it killed and drowned out all his crops described, to his damage in the sum of \$300; that they constructed the grade and ditches and placed the culvert over appellant's objections; and he has demanded of the appellees to take out the grade and place a bridge across the same, and to fill up and change the ditches and culvert on the south side of his land so as to prevent the water from coming down over his land, all of which the appellees have refused to do; and he made a written demand upon the appellees to make the proper repairs on each of the highways, which demand was refused, and the appellees were threatening to maintain and were maintaining the grade, and had refused to place a bridge therein to carry off the water, and have threatened to maintain said ditches and culvert, all to his damage, to date, in the sum of \$300. After allegations concerning future continuing injury, the appellant prayed for an injunction and for damages. Each of the appellees answered in denial.

The court overruled the appellant's motion for a new trial. That ruling is assigned as error, and counsel have discussed the ques-

tions whether the finding was sustained by sufficient evidence, and whether it was contrary to law. We have found it necessary to look into the voluminous evidence in the record, and we find it sufficient to sustain a conclusion that there was no injury to the appellant from water cast upon his land, as alleged in the complaint, from the east and west road, or from the land of Kellner lying south of that road; that while there was at one time a tile drain, constructed by Kellner under an agreement with the appellant, extending from that road and Kellner's land northward across appellant's land, and connecting with a tile drain which the appellant had made from the central portion of his land westward to the public tile drain which crossed the north and south road, the tile drain so constructed by Kellner had been taken up by him, and he had constructed a tile drain wholly on his land south of that road, and running toward the west, pursuant to a later agreement between the parties, and the appellant had made an embankment on his land which kept out the waters at the place where the tile drain so made by Kellner had previously brought in water from the southward; and it appeared in evidence that Kellner's land on the south of the road was lower than the land of the appellant on the north side thereof, and there was sufficient evidence to support a finding that the water which injured the appellant's crops in rainy seasons was surface water which accumulated in the low places on his land by natural drainage from other portions of his land and lands of neighboring proprietors, against which he was entitled to protect his land by barriers, which he attempted to do by the making of embankments which were not wholly sufficient to effect the purpose of their construction. The open ditch in which the public tile drain which ran across the north and south road was made does not appear, from the complaint, to have been a public ditch. It, however, was spoken of as a public ditch by the appellant testifying as a witness. Whether it was a public or private ditch, it appears that by regular legal proceedings it was at the time here in question a public, covered tile ditch. Its head was 30 feet east of the center of the north and south road, which it crossed at the place where the old open ditch had crossed, and where there was an old wooden culvert. The appellant testified that he himself, some three years before the occurrence of the injury complained of, had taken up this culvert under an agreement between him and a road officer by which the appellant was to have an allowance on his tax for such service. There remained here a depression in the road on the line of the covered tile drain, and the substantial matter in dispute is the claim of the appellant, as against the proprietor on the west side of the road and the highway officers, to be allowed to have the surface water which accumulated on his land

to flow over the highway above the covering of the tile drain, and thence upon and over the land of Kellner; it appearing in evidence that Kellner, in working the road for the road supervisor, placed on the surface of the highway earth dug by him from ditches at the sides thereof, thereby raising the surface of the way so that it was nearly five inches higher than the adjoining land of the appellant. This we regard as a reasonable repairing of the highway, so far as the highway officers were concerned, and no actionable fault can be imputed to Kellner for thus protecting his own land from the surface waters so accumulated on the appellant's adjoining lands. So far as they were too abundant to be carried by the public tile drain, they were mere surface waters, which Kellner had a right to ward out; and there could be no ground of complaint on the part of the appellant if Kellner, in so protecting his land, merely improved and rendered more passable the public highway which divided their tracts. If the existing means for draining the appellant's land are inadequate, his remedy is not by a proceeding to compel the lower proprietor to cease his efforts to protect his land from being overflowed by surface waters descending thereon from other land.

Judgment affirmed.

(38 Ind. App. 309)

**UNION CENTRAL LIFE INS. CO. v.
LOUGHMILLER.¹**

(Appellate Court of Indiana, Division No. 2.
Dec. 18, 1903.)

**LIFE INSURANCE—BURDEN OF PROOF—NEW
TRIAL—CUMULATIVE EVIDENCE
—DILIGENCE.**

1. Plaintiff in an action on a life policy, counting on a condition of the policy continuing the insurance in force for a certain time, notwithstanding nonpayment of premiums after the third, and, to bring herself within the condition, averring that the first three premiums were paid, has the burden of proof, and the resulting right to open and close.

2. Where plaintiff's witness testified to making a payment to L. at a certain time and place, and L. testified that no such payment was made at any time or place, newly discovered evidence that the place did not exist at the alleged time of payment is not cumulative, within the rule as to new trial.

3. The issue was whether a payment was made to defendant. On interrogatories before trial, plaintiff disclosed her claim that the payment was made on or about January 11, 1896, at the city of I., and that M. and L. were present, and that the payment was made to L., a general agent of defendant. M., who testified to making the payment, on cross-examination testified that he did not know about the V. Block, where he said the payment was made, being nearly torn down and unoccupied at that time; that it was his impression that he paid it in the V. Block; that he paid it to L. in what he claimed to be his office; and that it was not in the D. Hotel. L., who was a witness, failed to testify to the whereabouts of himself or his office on that day. The excuse therefor on motion for a new trial on newly discovered evidence that on that day his office was in the

D. Hotel, in I., and that he was in another city, was that he was taken by surprise by the testimony of M., and was only prepared to testify that he was not paid, and that on a subsequent examination of his papers he discovered these facts. Held, that diligence warranting a new trial was not shown.

Appeal from Circuit Court, Floyd County; E. G. Henry, Judge pro tem.

Action by Emma B. Loughmiller against the Union Central Life Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Charles E. Barrett, Maxwell & Ramsey, and O. L. & H. E. Jewett, for appellant. Stotsenburg & Weathers and C. D. Kelso, for appellee.

ROBY, J. On January 20, 1893, the appellant insurance company issued a policy upon the life of Thomas B. Loughmiller for \$1,000, upon the 20-payment life plan, in consideration of the payment of the annual premium of \$34.22 during said 20 years; appellee, wife of the insured, being named as beneficiary therein. The policy contained provisions as follows:

"In consideration of the statements made in the application for this policy, which application is hereby made a part of this contract, and of the annual payment of the sum of \$34.22 Dollars, at the Home office of the company, on or before the 15th day of January at noon in every year during the term of twenty years from date hereof and of the payment when due of any and all notes given for premiums or parts of same."

"After three years premiums shall have been paid, except in case of failure to pay at maturity a note given for premium, the company will, upon legal surrender of this contract while in force, issue a paid-up, non-participating Life Policy for the amount named in table 'A' on the following page; and if not surrendered, in such case, then this policy shall, Without Surrender, become a Paid-Up, Term Policy, without change of conditions and agreements, except as to the payment of premiums, and continue in force for such time as named in table 'C' on the following page, at the end of which time the contract shall cease. In case the insured dies while the said Term Policy is in force the amount of foreborne premiums, with annual interest at six per cent. shall be deducted from the sum insured.

"Conditions and Agreements."

"Second. The failure to pay any of the first three annual premiums or notes, or interest upon notes given to the company for any of said premiums, on or before the days upon which they become due, at the office of the company in the city of Cincinnati or to the authorized agent on producing a receipt therefor signed by the President, Vice President or Secretary (and in case of the payment of a note upon the surrender of said note), shall avoid and nullify this policy,

¹Rehearing denied. Transfer to Supreme Court denied.

without action on the part of the Company, or notice to the insured or beneficiary, and all payments made upon said policy shall be deemed earned as premiums during its currency.

"Third. Any and all notes which may be given for premiums on this Policy, with their conditions, are hereby made a part of this contract of insurance."

The first and second premiums were paid when due. When the third premium became due, the assured executed his note therefor, payable nine months after date, which was accepted by appellant. When this note became due, he paid \$14.22, and gave a new note for \$20, due three months after date. The last of said notes was of the following tenor:

"20.00. Interest 40.

"New Albany, Indiana, Oct. 15, 1895.

"Three months after date for value received, I promise to pay to the order of the Union Central Life Insurance Co. at Second National Bank at New Albany, Ind., the sum of \$20., with interest at eight per cent. per annum, payable annually (being the premium on policy No. 101,050 in said company bearing date Jan. 15, 1893), and with attorney's fees. If this note or any installment of interest be not paid at maturity, said policy, with all conditions—herein for the surrender or continuance as a paid-up term policy, shall, without notice to any interested party, be null and void, and said premium and accrued interest shall, without rebate or discount, and without reviving said policy, or any of its provisions, be collectible without relief from valuation or appraisement laws.

"Thos. R. Loughmiller."

The fourth and subsequent premiums were not paid, and appellee's complaint proceeds upon the theory that the provision relative to the extension of the policy, after the third payment of premium, without surrender, operated to continue the same in force for five years and seven months, as stipulated by Table C, within which time the assured departed life. She avers in the complaint "that said Thos. Loughmiller paid upon the policy the first three premiums." Appellant, answering, set up the execution and terms of the last note, and averred that it was not paid when due, and has never been paid, by reason of which said policy became null and void. The appellee replied in general denial and by a plea of payment.

The appellant filed no denial to the complaint, and claimed that it had the burden of the issue, and the resulting right to open and close both the evidence and the argument. The court held otherwise. The correctness of its holding is the first question for decision. That the nonpayment of the second note at maturity avoids the policy is established by *Forbes v. Union Central Life Ins. Co.*, 151 Ind. 89, 51 N. E. 84; the provisions of the policy before the court in that case

being substantially identical with the one sued upon. In suit on an insurance policy, it is ordinarily sufficient to aver the issuance of the policy and the death of the assured; nonpayment of premium or other default relied upon being matter of defense. *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110; *Phoenix Ins. v. Stark*, 120 Ind. 448, 22 N. E. 413. Appellee, however, counted upon a condition of the policy continuing the insurance in force for a definite period, notwithstanding nonpayment of the regular premium. In order to bring herself within the terms of the condition and contract, she has averred that the three first premiums were paid. The contract, by its own clear stipulation, becomes a paid-up term policy for the time stipulated in Table C after, and only after, the payment of the three-years premiums, and of all notes given therefor. The payment of the three first premiums, or an agreement for credit, is therefore a condition precedent to the policy becoming a paid-up term policy. 19 Am. & Eng. Encyc. of Law (2d Ed.) p. 81; *Klinne v. Insurance Company*, 92 Wis. 335, 66 N. W. 859; *Moses v. Insurance Co.*, 50 Ga. 196; *Wells v. Insurance Co.*, 28 Ind. App. 620, 62 N. E. 501, 63 N. E. 578, 88 Am. St. Rep. 208; *Meyer v. Insurance Co.*, 144 Ind. 439, 43 N. E. 448. It appears that it was not the intention that the notes given should be considered payment of the premium, changing the policy to a paid-up term policy without regard to their payment. *Pitt v. Birkshire*, 100 Mass. 500; *Curtis v. Hubbard*, 9 Metc. (Mass.) 822. If the transaction was shown to have amounted to a loan, to evidence which notes were given, the rule would be different. *Insurance Co. v. Little*, 53 Ind. 504; *Insurance Co. v. Dutcher*, 95 U. S. 269, 24 L. Ed. 410; *Insurance Co. v. Wallace*, 98 Ind. 17; *Kline v. Association*, 111 Ind. 466, 11 N. E. 620, 60 Am. Rep. 703. Appellee's right was dependent upon proof that the condition had been performed. She assumed the burden of making such proof, and was therefore entitled to open and close the case. *Burns' Rev. St.* 1901, §§ 542, 545.

A further reason for a new trial is on account of newly discovered evidence. Affidavits accompanying the motion set out the evidence. It is to the effect that a building in Indianapolis formerly known as the "Vance Block" was undergoing repairs and being remodeled, and that on July 1, 1894, John S. Lambert, appellant's agent, had vacated his office in said building, and did not return to it until November 1, 1897; that on January 11, 1896, said Lambert was at Liberty, Ind., where he resided, and not in Indianapolis at all; that he purchased a draft at the bank in Liberty on that day, wrote a letter from said town, and received a letter from his clerk at Indianapolis; that his office was at that time in room 260 of the Denison Hotel. The affidavits as to such facts are made by disinterested persons, and appear conclusive as to their existence. The

controversy at the trial was narrowed down to the single question of whether the \$20 note last given had been paid. Appellee produced a witness who testified that he received the money from Loughmiller, carried it to Indianapolis, and paid it to Lambert, to whom said note had been indorsed for collection; that Lambert told him the note was at Liberty, and that he would mail it to him. No receipt was given, and the note was not surrendered. Lambert, as a witness, denied that payment had been made to him by any one. Appellee's witness testified that payment was made at Lambert's office, in the Vance Block, on January 11, 1896. The relevancy of the newly discovered evidence is apparent. Two objections are made to a new trial being granted on account of it: First, that it is cumulative; second, that diligence is not shown. "Cumulative evidence is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admissions of a party, evidence of another verbal admission to the same effect is cumulative." 1 Greenl. Ev. § 2; *Hines v. Driver*, 100 Ind. 315, 327. The witness McCay testified to making payment of the note to Lambert at the time and place stated. Lambert testified that no such payment was made at any time or place. The evidence exhibited by the affidavits tended to the same conclusion as did the testimony of Lambert, but it is not of the same class. It tends to prove the same fact as did evidence introduced, but no evidence was introduced tending to show that payment could not have been so made by reason of the nonexistence of the place at which it was said to have been made. The offered evidence is not, therefore, regarded as cumulative in the sense that prevents a new trial on account of its discovery. It tends to prove the same facts, but in a materially different way. *Hines v. Driver*, 100 Ind. 315-328; *Rains v. Ballow*, 54 Ind. 79; *Humphreys v. Klick*, 49 Ind. 189; *Humphries v. Marshall's Adm'rs*, 12 Ind. 609; *Kochel v. Bartlett*, 88 Ind. 237; *Cooper v. Ellis*, 3 Ind. App. 142, 29 N. E. 444; *Blackburn v. Crowder*, 110 Ind. 127, 10 N. E. 933. The witness Lambert was the general agent of the appellant company in Indiana. Notice to him was notice to appellant. He was a witness, and failed to testify relative to the whereabouts of his office or himself on the day named. The excuse given therefor is that he was taken by surprise by the testimony of McCay, and was not prepared to testify, other than that he had not been paid the amount of said note; that after returning home he consulted his papers and memorandum, with the result stated. Appellee's attorneys declined to advise appellant's attorneys prior to the trial as to the details of the payment claimed, other than that it had been made to a duly authorized agent of the company. Thereafter interrogatories were submitted to appellee, the answers to which disclosed the

plaintiff's claim to be that said note was paid on or about January 11, 1896, at Indianapolis, Ind.; that McCay and Lambert were present; and that the payment was made to the latter. On cross-examination, McCay was asked the following questions: "Q. In 1896, in January, don't you know that the Vance Block was almost torn down; there was nobody occupying it; the tenants were all out of the building? A. I don't know about that. Q. They were putting four or five floors upon it? A. In 1896 I paid it in Mr. Lambert's office, wherever it was. I paid it to Mr. Lambert in person. Q. You said you paid it in the Vance Block? A. That was my impression, because I used to go to his office in the Vance Block. Q. Did you pay it in the Denison House? A. No, sir. Q. Are you certain of that? A. Yes, sir. Q. If Mr. Lambert's office was in the Denison House, No. 283, in 1896, then you did not pay it to Mr. Lambert? A. I don't say that. I paid it to Mr. Lambert in cash. I paid it to him in person, in what he claimed to be his office." In view of these facts, we are constrained to hold that due diligence has not been shown, and that for such reason there was no error in overruling the motion on account of the newly discovered evidence. This leads to an affirmance of the judgment. There is evidence supporting the verdict, evidently credited by the jury.

Judgment affirmed.

(32 Ind. App. 104)

CHRISTIAN v. HIGHLANDS.

(Appellate Court of Indiana, Division No. 1.
Dec. 18, 1903.)

DEEDS—EXPRESS TRUSTS—CREATION—STATUTE OF FRAUDS—MODIFICATION OF AGREEMENT BY PAROL—SURETYSHIP—RIGHTS OF SURETY—CLAIMS AGAINST ESTATES—STATEMENT.

1. Under Burns' Rev. St. 1901, § 3391, providing that no trust concerning lands except such as may arise by implication of law shall be created unless in writing signed by the party creating the same, a deed conveying certain real estate to plaintiff "in trust," but failing either by reference or otherwise to indicate the purpose of the trust or any beneficiary, was insufficient to create an express trust.

2. Where a widow conveyed certain land to plaintiff in trust to pay the debts of her husband, etc., by a deed which was insufficient to create an express trust, but in an action thereon by the grantee against the widow's personal representative after her death, to which her heirs were not parties, he admitted his trusteeship, and pleaded of record the trust for which the conveyance was made, such trust was enforceable against him.

3. Where a widow conveyed certain of her husband's property to plaintiff in trust to pay the husband's debts, after fulfillment of such trust the conveyance could not be changed by parol into a mortgage of lands remaining unsold to indemnify plaintiff as surety for the widow's debts.

4. While a surety on a note assumes liability to the payee from the time of executing the note, he has no cause of action against his

¶ 4. See *Principal and Surety*, vol. 40, Cent. Dig. § 510.

principal until he has been compelled to pay the debt, or has sustained some loss by reason of his suretyship.

5. Where a complaint in an action against a decedent's estate alleged that plaintiff was compelled to pay and did pay on certain dates certain sums of money for intestate as her surety on certain notes specified, the complaint contained sufficient allegations to bar another action for the same demand, and was therefore a sufficient statement of a claim against decedent's estate.

Appeal from Circuit Court, Huntington County; R. K. Erwin, Special Judge.

Action by Daniel Christian against James Highlands, as administrator of the estate of Judith Glick, deceased. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Samuel M. Saylor, for appellant. Fred H. Bowers, for appellee.

BLÁCK, J. The court below sustained the demurrer for want of sufficient facts of the appellee, administrator of the estate of Judith Glick, deceased, to each of the two paragraphs of the appellant's statement of claim against that estate. In the second paragraph it was in substance alleged that the intestate, widow of Emanuel Glick, deceased, and certain others named, his children, by their quitclaim deed, October 18, 1881, conveyed certain described real estate in Huntington county to the appellant, in trust to pay the debts of said Emanuel Glick, deceased, Judith Glick agreeing that as much of her share of the real estate as might be necessary therefor should be used to pay such debts; that the appellant proceeded to sell and did sell all of the real estate, except a portion thereof described, being 12.81 acres, which tract was less than a one-third share of the real estate so conveyed to him; that Judith Glick, widow, consented to such sales, and that the proceeds thereof should be applied on the debts of Emanuel Glick, her deceased husband, and the proceeds were so applied, and his debts were paid; that after the debts had been paid the appellant, in the spring of 1882, his wife joining, executed a deed for such remaining real estate to Judith Glick, and tendered it to her in full settlement of his said trust; that when he tendered it to her she was indebted to one John Colclesser on two notes—one for \$150, to become due June 1, 1882, and one for \$50, to become due July 31, 1883; that instead of accepting the deed she and the appellant made a new agreement, by which they mutually agreed that the first deed above mentioned should be considered to be and should be a mortgage to secure the appellant against any loss or costs which he might incur if he should secure the renewal of these two notes when they should become due respectively, and they then agreed that the appellant should secure the renewal of the notes by signing the renewed notes dated June 1, 1882, and July 31, 1883, and they arranged and agreed with the payee of the notes to renew them; and the

appellant and Judith Glick then further agreed that, in consideration of the title of the real estate remaining in the appellant, and being by them considered to be a mortgage in his favor, he would act as surety for her on such loans of money as she in the future might need to borrow. It was alleged that pursuant to this agreement the appellant entered himself as surety on the renewed notes by signing them; that when it was so agreed to consider the deed to be a mortgage Judith Glick was the surety of one Jacob W. Glick on a note dated in 1873, payable to one Martha Dinus, and when the agreement aforesaid was made Jacob W. Glick was solvent, and the note payable to Martha Dinus was collectible from him; that about the year 1882 Judith Glick gave Martha Dinus verbal notice to sue upon the note so belonging to the latter; that at the time of the making of the agreement between Judith Glick and the appellant Martha Dinus had knowledge that the legal title to the real estate was in the appellant by the above-mentioned deed of trust, and afterward at divers times Judith Glick told Martha Dinus that the appellant held the land to indemnify himself against any loss on account of securing the loans which Judith Glick made; that afterward, in 1891, Martha Dinus obtained a judgment in the court below against Judith Glick on her said note, and the appellant was not a party to the suit; that Martha Dinus for many years, from 1891 until the death of Judith Glick, never attempted to collect the judgment by execution; that March 13, 1890, Judith Glick, by her promissory note, promised to pay one Amos D. Young \$250, one year after date; that the appellant, pursuant to his agreement aforesaid, entered himself as surety on this note, relying on the agreement and the deed as his indemnifying security; that August 10, 1893, Judith Glick, with the knowledge and consent of the appellant, her surety, made a payment of \$5 on the note payable to Young, but never afterward made any further payment; that she died in Huntington county February 4, 1901, having no property, real or personal, except the real estate above mentioned; that from June 1, 1899, until her death she had no other property, real or personal; that the judgment of Martha Dinus has been filed as a claim against the estate of Judith Glick, deceased, in the clerk's office of that county; that there are no creditors of her estate besides the appellant except Martha Dinus and Amos D. Young and one Emanuel Glick; that the last-named creditor, for many years before her death, knew of the details of the agreement between her and the appellant, and that the latter was, by said agreement, to be considered to be her mortgagee, and was to be indemnified out of the real estate for any payment that he might make as surety for her, and consented to such arrangement and agreement; that Amos D. Young knew of said agreement, and, relying on the same, loaned said sum of \$250 to Judith Glick; that, she

being insolvent, except as she owned said real estate, and having no other property, the appellant, November 13, 1899, was compelled to pay and did pay for her, as her surety, to the estate of John Colclessor, deceased, on the note dated June 1, 1882, \$62.84, and on the note dated July 31, 1883, \$74.75; that appellant was liable for the payment of the note made to Young dated March 13, 1890, in the sum of \$500, and that the amount for which he was liable and which he had been compelled to pay was \$637.79; that Judith Glick, in all her dealings with all her creditors, openly proclaimed and declared to them that the appellant held all of said real estate in the trust deed of October 18, 1881, which remained unsold, as and for an indemnity against any loss that might accrue to him by reason of his said suretyship on said notes. Prayer that the appellant's claim be allowed as a preferred claim against the estate in the class of mortgages, and of priority as of date of June 1, 1882, in the sum of \$700, and that the appellee be ordered to pay the same as of such priority, and for all other proper relief. The deed of conveyance and the several promissory notes executed by the appellant were filed as exhibits. The first paragraph was like the second, except that the amount of the note to Martha Dinius was mentioned therein, being \$75, and in other respects the facts were stated more fully in the second paragraph. By the terms of the deed the grantors conveyed and quitclaimed to the appellant "in trust," no consideration being stated, and the purpose of the creation of a trust not being more fully expressed.

The appellant, the grantee "in trust," in his statement of claim, admits and sets forth the character and object of the trust, which do not appear to have been expressed otherwise than orally, being that the grantee should pay the debts of the deceased husband of one of the grantors and father of the others, using for such purpose so much of the widow's one-third share of the land as might be necessary, no other consideration being alleged; it being admitted also that he had accomplished the purpose of the conveyance in trust, and that a certain definitely described portion of the real estate, less than the widow's share, remained undisposed of, which he recognized as the property of the widow; it being alleged that, instead of conveying to her, as he proposed to do, the legal title thereof, it was agreed orally between the widow and the appellant that the deed so executed in trust for a certain purpose, the payment of the debts of Emanuel Glick, deceased, should be by the widow and the appellant treated in the future as a mortgage to secure and indemnify the appellant as surety for the widow upon the promissory notes thereafter to be executed.

Our statute provides that no trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully au-

thorized in writing. Section 3391, Burns' Rev. St. 1901. It is not enough for the deed of conveyance by which it is proposed to create a trust that it shall merely indicate an intention of the parties thereto to create some sort of trust. The trust must be expressed in the instrument, or by a reference therein to some other writing, so that the court which is called upon to enforce it as an express trust may ascertain, without resort to parol evidence, the character of the trust. To this end a beneficiary should be named or indicated. In the deed here shown no purpose of the trust is stated. There is no provision requiring the trustee to hold the property for any designated use or purpose, or for any designated person. It cannot be ascertained from the writing that the trustee was to devote the land or its proceeds to any particular purpose, and to hold and recover the remainder thereof not so used to the grantors, or any of them. It may be claimed plausibly that there is indication in the writing that the grantee was not to hold absolutely for his own benefit alone, for in such case the words "in trust" would be wholly superfluous; yet there cannot be said to have been more than the ineffectual expression of a desire to create a trust, inasmuch as the writing by which an express trust is created must contain a proper and sufficient declaration of the trust, and not stop short with the designation of a trustee. See *Dillaye v. Greenough*, 45 N. Y. 438. It is plain that by the deed in question an express trust was not created. The case before us is not one brought by the assumed cestui que trust seeking the enforcement of the alleged parol trust under the terms of the deed of conveyance, supplemented by a parol agreement, but the grantee himself has instituted the suit, asserting in his complaint his trusteeship, and the character thereof, and naming the beneficiary for whom he was to hold the portion of the land remaining after the accomplishment of his active duty as trustee. He has admitted by matter of record the facts which, if set forth in the deed, would have made it fully expressive of an enforceable trust. The court is not called upon to accept parol evidence as against the grantee for the purpose of charging him as a trustee. The facts thus, for the purposes of the case established, are such that it would be a fraud upon the widow who joined in the conveyance to deny her beneficial ownership of the real estate in question; and the alleged trustee does not interpose the statute or resist the proof of the trust by parol evidence, but asserts the widow's equitable ownership of the property and his bare legal title. There could be no occasion here for the enforcement of the statute to prevent fraud, the purpose for which it was enacted. The appellant could have no reason to complain if in the suit brought by him against the personal representative of the deceased widow, in which her heirs at law were not parties, the

court to which he applied took the view of the transaction presented by him.

Assuming, then, that for the purposes of the case the appellant, when he had paid the debts of the deceased husband and father, held the unused portion of the real estate in trust, the equitable title thereto being in the widow, could this relation be changed by parol so as to convert the deed of conveyance, under which the appellant so held the legal title, into a mortgage to secure or indemnify the appellant upon his contracts of suretyship for the widow, to be entered into in the future? This, we think, must be answered in the negative. The agreement that the deed of conveyance, admitted to be a conveyance in trust for a certain purpose—that of paying the debts of the deceased husband and father—should stand as a mortgage indemnifying the grantee against loss by reason of his future suretyship for one of the grantors, was within the statute of frauds, and not enforceable, because not in writing, signed as required by the statute. *Irwin v. Hubbard*, 49 Ind. 350, 19 Am. Rep. 679. Among the cases there cited are *Ourles' Heirs v. Eddy*, 24 Mo. 117, 66 Am. Dec. 699, and cases there cited; *Wood v. Wood*, 124 Ind. 545, 24 N. E. 751, 9 L. R. A. 173; *Slack v. Collins*, 145 Ind. 569, 42 N. E. 910. A contract, which, being within the statute of frauds, has been made in compliance therewith, cannot be orally modified. *Carpenter v. Galloway*, 73 Ind. 418. While, therefore, the appellant's effort to have the quitclaim deed treated as a mortgage to secure any indebtedness of the intestate, *Judith Glick*, to him, growing out of his suretyship for her, it does not necessarily follow that he had no claim for the recovery of money from her estate; and the complaint needs further consideration to ascertain whether or not it shows facts on which to base such a recovery. While a surety upon a promissory note assumes liability thereon to the payee from the time of executing the note, yet until he has been compelled to pay the debt, or has sustained some loss by reason of his suretyship, he has no cause of action against his principal merely on the ground that he is bound as surety, and liable as such to pay the debt, even though the principal be insolvent, and wholly unable to discharge the debt, or any part of it. His right of action against his principal is not founded upon the note, but grows out of the implied obligation of the principal to indemnify the surety for his loss as such, to which his recovery must be limited. *Gieseke v. Johnson*, 115 Ind. 308, 17 N. E. 573; *Barnes v. Sammons*, 123 Ind. 596, 27 N. E. 747; *Goodwin v. Davis*, 15 Ind. App. 120, 43 N. E. 881. This sufficiently disposes of what is averred in the complaint concerning the note made by the intestate and the appellant as her surety to *Amos D. Young*.

It is alleged in the complaint that the appellant was compelled to pay and did pay

November 13, 1899, for the intestate, as her surety, a specified amount on a note dated June 1, 1882, and another certain amount on a note dated July 31, 1883. The claim was filed March 5, 1902, the intestate having died February 4, 1901. We cannot look to the notes filed as exhibits, and can know concerning them only what is alleged in the complaint. It is well established that the statement of a claim against a decedent's estate, like a complaint originating before a justice of the peace, is to be regarded as sufficient if it apprises the defendant of the nature of the claim and the amount demanded, and contains enough substantial matter to bar another action for the same demand. Applying this rule to the complaint before us, and having reference to our decisions wherein the rule has been affirmed, we are required to hold that each paragraph was a sufficient statement of claim. *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Knight v. Knight*, 6 Ind. App. 268, 33 N. E. 456; *Hopwell v. Kerr*, 9 Ind. App. 11, 36 N. E. 48; *McCulloch v. Smith*, 24 Ind. App. 536, 57 N. E. 143, 79 Am. St. Rep. 281; *Harker v. Glidewell*, 23 Ind. 219; *Gerber v. Sharp*, 72 Ind. 553.

Judgment reversed.

(33 Ind. App. 488)

CHRIST v. STATE.¹

(Appellate Court of Indiana, Division No. 1.
Dec. 15, 1903.)

GAMING—STATUTES—INDICTMENT.

1. Burns' Rev. St. 1901, § 2173, provides that "whoever keeps a building or room * * * to be used or occupied for gaming, or knowingly permits the same to be used or occupied for gaming, or whoever, being the owner of any building or room, * * * rents the same to be used or occupied for gaming, shall be fined," etc. Held, that an indictment charging that defendant, being then and there the keeper of a building and room within the county and state, did then and there permit said building and room to be used and occupied for gaming by certain persons, and did permit them to play faro and other games of chance therein for money, sufficiently stated an offense described by the first clause of such section.

Appeal from Circuit Court, Blackford County; Edwin C. Vaughn, Judge.

William F. Christ was convicted of keeping a building or room to be used or occupied for gaming, and he appeals. Affirmed.

Hindman & Powell, for appellant. John Burns, Pros. Atty., C. W. Miller, Atty. Gen., C. C. Hadley, W. C. Geake, and L. G. Rothchild, for the State.

ROBINSON, J. The indictment charges that at a time and place named appellant, "being then and there the keeper of a building and room in said county and state, did then and there permit said building and room to be used and occupied for gaming by certain persons, to wit, * * * and did permit such persons in and about such build-

¹Rehearing denied. Transfer to Supreme Court denied.

ing and room to play faro, poker, and other games of chance for money." The sufficiency of this indictment against a motion to quash is the only question presented. The statute (section 2173, Burns' Rev. St. 1901) provides that "whoever keeps a building, room, * * * to be used or occupied for gaming; or knowingly permits the same to be used or occupied for gaming; or whoever, being the owner of any building, room, * * * rents the same to be used or occupied for gaming, shall be fined not more than five hundred dollars nor less than ten dollars." The above section of the statute defines three separate offenses: (1) Keeping a building or room to be used or occupied for gaming; (2) keeping a building or room, and knowingly permitting the same to be used or occupied for gaming; (3) being the owner of the building or room, and renting it to be used or occupied for gaming. The indictment does not charge the offense defined in either the second or third clauses. It is not charged that appellant kept a building and knowingly permitted it to be used for gaming, or that he owned a building and rented it to be used for gaming. But considering the indictment as a whole, it does charge the offense defined in the first clause; that is, that appellant kept a building and room that was being used and occupied for gaming. It does not simply charge that appellant was the keeper of a building which he permitted to be used for gaming, but it particularizes by naming certain persons whom appellant permitted to play certain games in the building, thus sufficiently informing appellant that he was charged with keeping a room that was being used and occupied for gaming. The Supreme Court has said the general rule is that, if the facts well pleaded supply grounds for the necessary legal conclusion, it will be made by the court, and the failure of the pleader to state it will not, under our Criminal Code, however it may have been at common law, vitiate the indictment. *Henning v. The State*, 106 Ind. 386, 6 N. E. 803. 7 N. E. 4, 55 Am. Rep. 756. In considering an indictment under this statute claimed to be bad for duplicity, the court in *Davis v. The State*, 100 Ind. 154, said: "If a person keeps a house to be used for gaming, he violates the statute, and may be convicted. If a person knowingly permits his house to be occupied or used for gaming, he that far makes it a gambling house, violates the statute, and may be convicted. In this sense the offenses are separate, and may be separately prosecuted. And yet in another sense the offenses constitute the one offense of violating the statute against gambling houses. And in this sense, as was said in the case of *Sowle v. State*, 11 Ind. 492, the offense of permitting the gambling is merged in the offense of keeping a gambling house." With whether the evidence showed that appellant kept a building or room that was being used and

occupied for gaming we have nothing to do, as no attempt has been made to bring the evidence into the record.

Judgment affirmed.

(33 Ind. App. 95)

CHICAGO & E. I. R. CO. v. STEPHENSON.*

(Appellate Court of Indiana, Division No. 2
Dec. 15, 1903.)

RAILROAD FIREMAN—INJURY BY SERVANTS OF OTHER COMPANY—CONTRIBUTORY NEGLIGENCE—PLEADING—PROXIMATE CAUSE OF INJURY—SPECIAL FINDINGS—GENERAL VERDICT—KNOWLEDGE OF FIREMAN'S POSITION—COLLISION OF CARS—SIGNALS—RULES OF COMPANY—DECEDENT'S NEGLIGENCE—JURY QUESTION—INSTRUCTIONS—EXCESSIVE RECOVERY.

1. Under the express provisions of Burns' Rev. St. 1901, § 359a, it is not necessary, in a complaint for negligently occasioning the death of plaintiff's intestate, to negative his contributory negligence.

2. A railroad fireman is not negligent, as a matter of law, in going under his engine and cleaning out the ash pan, in the performance of his duties, though while doing so cars are projected against the engine through the negligence of employes of another company, thereby causing his death.

3. In a personal injury case, the averment that defendant's negligence caused decedent's death is a sufficient allegation of proximate cause.

4. A railroad fireman went under his engine to clean out the ash pan. About a car's length away, certain cars were standing; and against these the employes of another company sent a locomotive and a number of cars, causing them to strike the fireman's engine, resulting in his death. *Held*, that the act of such employes was the proximate cause thereof.

5. The fact that railroad employes running a locomotive and cars against standing cars, which were thereby projected against another engine, whose fireman was underneath it, cleaning out the ash pan, were not aware of the fireman's position, does not conclusively negative the idea of their negligence.

6. In an action for the death of a fireman, killed, while beneath his engine in the discharge of his duties, by certain cars being projected against it by employes of another company, a finding that there is no evidence that decedent took any precaution to warn or notify the employes of his position is not equivalent to a finding that he did not take any such precaution; the burden of establishing contributory negligence being upon the master of such employes.

7. In an action for the death of a fireman killed while underneath his engine, cleaning out the ash pan, by certain standing cars being thrown against the engine as a result of the impact of a locomotive and cars in charge of the employes of another company, the jury found that decedent did not put out any warning signals, or station a switchman to notify such employes of his position; that there was no evidence that he took any precaution whatever to that end; that there was no evidence that such employes knew his position; that they could not see him; that decedent had been instructed by his engineer not to go under the engine, but was not subject to the engineer's orders; that he did not know the approaching danger, and did not fail to exercise ordinary care in doing as he did. *Held*, that such findings were not in irreconcilable conflict with a general verdict for plaintiff.

* 1. See *Negligence*, vol. 37, Cent. Dig. § 153.

*Rehearing denied. Transfer to Supreme Court denied.

8. The fact that a railroad company has the right to use a certain track in connection with another company would not justify its employees in driving a locomotive and cars against certain detached cars with such force as to throw them against an engine standing, with brakes set, about a car's length away; thereby driving it a distance of 20 feet, and killing a fireman underneath it at the time.

9. Rules of a railroad company requiring car inspectors to place signals when inspecting cars are not applicable to a fireman when underneath his engine, cleaning out the ash pan.

10. Evidence in an action for the death of a railroad fireman while underneath his engine, occasioned by its being struck by standing cars propelled by an impact with a locomotive and cars under the control of the employees of another company, considered, and held to render the question of decedent's negligence one for the jury.

11. In an action for negligently occasioning the death of plaintiff's intestate, the court instructed that "unless the defendant has proven, or it otherwise appears from all the evidence in the cause—the preponderance of all the evidence—that plaintiff's decedent was guilty of contributory negligence, your finding should be for plaintiff upon this issue; that is, that plaintiff's decedent was not guilty of contributory negligence." Held that, while inartistically drawn, a fair construction of the charge was that if, from all the evidence, it appeared that decedent was guilty of contributory negligence, there could be no recovery, and hence the instruction was not erroneous.

12. In determining the issue of contributory negligence, the jury are not limited to the consideration of defendant's evidence alone.

13. Decedent, a railroad fireman, had boarded with his mother, and paid her \$25 per month of his wages. At the time of his death she was 64 years old, with an expectancy of 14.74 years, and was largely dependent upon him. Held, that a verdict of \$1,600 was not excessive.

Appeal from Circuit Court, Clay County; S. D. Coffey, Special Judge.

Action by Malinda J. Stephenson, as administratrix of the estate of Frederick B. Stephenson, deceased, against the Chicago & Eastern Illinois Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

George A. Knight, for appellant. W. J. Beckett and Elliott, Elliott & Littleton, for appellee.

ROBY, J. The complaint was in one paragraph, to which appellant's demurrer for want of facts was overruled. The action was brought by appellee, as administratrix of the estate of Frederick B. Stephenson, to recover damages on account of the alleged negligence of appellant, causing the death of said Stephenson, and for the benefit of his next of kin, Trial by jury. Verdict, with answers to interrogatories. Motion for new trial overruled. Judgment on verdict for \$1,600. Error is assigned upon each adverse ruling of the court.

The complaint shows that appellant's line of railroad was intersected by the line of the Indiana, Decatur & Western Railroad Company at Hillsdale, Vermilion county, and that a Y track had been constructed at said place for the joint use of said companies;

that the decedent was a locomotive fireman in the employment of the Indiana, Decatur & Western Railroad Company; that the engine on which he was working was coupled to four cars, and was standing on the west part of the Y; that a cut of four other cars stood about a car's length east thereof; that one of the duties of decedent's employment was to clean out the ash box of the engine; that, in performing such duty, he was, at the time of his death, under the engine, and that he could not discharge such duty in any other way; that the brakes were set upon the locomotive and cars; that they were stationary, and could not be "removed" without some great force coming against them; that appellant had no duty to perform with regard to, and no right to move or strike, said locomotive and cars, as decedent knew; that it backed a locomotive and several cars in on said Y track from the east, and negligently struck the detached cars aforesaid with force and violence, causing them to strike, and to run the engine 20 feet west, and over decedent, engaged as aforesaid, thereby killing him. The objection made to the complaint is that it does not show appellant to have been guilty of any breach of duty to decedent which was the proximate cause of his death, and that it shows on its face that he was guilty of contributory negligence in going under the locomotive, and in failing to take precautions for his own safety. The averments of the pleading show decedent to have been at a place where he had a right to be in the line of his employment, and they show that his death was caused by the movement of the engine and cars, with respect to which appellant was negligent. It was not necessary to negative contributory negligence, although the complaint does contain averments to that effect. Section 359a, Burns' Rev. St. 1901. It is not averred that no precautions were taken by decedent to protect himself, nor does the pleading purport to declare the conditions bearing upon the question. Pittsburgh v. Martin, 157 Ind. 219, 61 N. E. 229; Southern Indiana R. Co. v. Peyton, 157 Ind. 690-694, 61 N. E. 722. The courts certainly cannot say, as a matter of law, that a railway employé is negligent per se in going under an engine to do work devolved upon him by his employment, which cannot be otherwise done. The engine of the Indiana, Decatur & Western Company is averred to have stood at one end of the union track. Appellant, having no right to move or strike it, and no duty to perform with regard to it, struck it with sufficient force to drive it westward, with set brakes, a distance of 20 feet. It owed the duty to those lawfully using the track of using ordinary and reasonable care to avoid injuring them. McMarshall v. Chicago, etc., R. R., 80 Iowa, 757, 45 N. W. 1067, 20 Am. St. Rep. 445; Cleveland, etc., R. Co. v. Gray, 148 Ind. 266, 46 N. E. 675. Had the Indiana, Decatur &

Western engine been damaged by the collision, and had suit been brought against the appellant to recover such damage by the other company, it could not well be insisted that it was not guilty of a breach of duty in causing such collision. A different injury was inflicted in the case at bar, but the breach of duty was not different. So far as the question of proximate cause is concerned, the averment that the negligence of the defendant caused the death of the decedent is, as a matter of pleading, sufficient. *Baltimore v. Peterson*, 156 Ind. 372, 59 N. E. 1044. The facts stated also show that the negligence charged was the proximate cause of the injury. *Cleveland R. Co. v. Gray*, supra. The complaint was not, therefore, subject to the objections made to it.

The answers to the interrogatories by the jury, in so far as they are material, are substantially as follows: The locomotive under which decedent was killed was standing on the track used and maintained jointly by appellant and the Indiana, Decatur & Western Company. Appellant had the right at the time of the accident to use the track. When decedent went under the locomotive to clean out the ash pan, he did not put out any warning or danger signal, or station a watchman near said locomotive to notify appellant's servants, while using said track, of his presence under the locomotive. There was no evidence that he took any precaution whatever to warn or notify the servants in charge of appellant's train that he was under the locomotive, cleaning out its ash pan. There was no evidence that appellant's servants knew that decedent was under the engine at the time he was killed. The servants of appellant at the time of the accident could not see him without looking under the engine. The appellant's servants at the time of the accident could not see him under his locomotive. The decedent, on the Saturday prior to the accident (the accident occurred on Monday), was instructed by the engineer of the Indiana, Decatur & Western Company engine not to go under it while standing on this track. He was not subject to the orders or under the control of the engineer. He did not know that appellant would back its train in on the Y track, and did not know that it had done so. He did not fail to exercise ordinary care in going under the engine as he did, and exercised such care under the circumstances as a person of ordinary prudence would. The finding that appellant's employes did not see decedent before he was killed is not decisive in its favor upon the question of its negligence. Negligence is not determined by the knowledge or lack of knowledge of the wrongdoer as to the details of the injury likely to be caused by his act. Under the complaint, the general verdict finds that appellant was negligent in striking the cars and engine of the Indiana, Decatur & Western Company as it did. It is not charged

to have been negligent after decedent's peril was or should have been known, nor is willful injury charged.

A motion for judgment on the answers to the interrogatories notwithstanding the general verdict is not well taken unless the antagonism between them and the general verdict is so great that it could not have been removed by any evidence that might have been admitted under the issues. *Indiana Co. v. Neusbaum*, 21 Ind. App. 361, 52 N. E. 471. There is nothing shown as to the rules and customs of the companies with regard to the use of the Y track, and nothing to show that decedent had reason to know or expect that appellant would strike or move his engine, while the absence of evidence that any precaution was taken is not equivalent to a finding that no precaution was taken; the burden of establishing contributory negligence being upon the defendant. The quality of his acts and omissions must be determined by reference to the following legal propositions: He was not negligent in entering upon the common track in the course of his employment. *Pittsburgh v. Martin*, supra. The rules requiring travelers at highway crossings to look and listen for approaching trains were not applicable to him. *Baltimore R. Co. v. Peterson*, supra. He had a right to rely to a reasonable extent upon the care and vigilance of appellant and its employes. *Shoner v. Pa. Ry. Co.*, 130 Ind. 177, 28 N. E. 616, 29 N. E. 775; *Pa. Ry. Co. v. O'Shaughnessy*, 122 Ind. 588, 23 N. E. 675. He had a right to presume that appellant would not be negligent in the operation of its engine and cars. *Baltimore v. Peterson*, supra; *C. I., St. L. & C. Ry. Co. v. Long*, 112 Ind. 172, 13 N. E. 659; *Hopkins v. Boyd*, 18 Ind. App. 63, 47 N. E. 480. Appellant's right to use the track at the time of the accident, as stated by the jury, was limited by law to such reasonable use as would not unnecessarily imperil the lives and property of others also entitled to use the same. The finding that it had the right to use the track is very far from a finding that it had the right to strike the cars and engine of the other company as it did. The interrogatories failed to show the existence of any present, imminent danger, making it negligent for decedent to perform the duty in which he was engaged at the time of his death. *Pittsburgh v. Martin*, supra. It follows that the facts stated are not in irreconcilable conflict with the general verdict, and that appellant's motion for judgment was correctly overruled.

Among the grounds stated for a new trial are that the verdict is contrary to the evidence, is not sustained by sufficient evidence, and is contrary to law.

It is claimed that there is an absence of evidence to establish that appellant had no right to touch or move the detached cars standing east of those coupled to the engine. The jury found, in answer to interrogatories, that such right did not exist; giving as a reason for

the finding that such cars were not, in fact, taken away by it. However that may be, there is room for inferring that appellant's employes had no right to strike cars attached to a "live" engine, with the brakes set, with sufficient force to drive them and the engine the distance named. Assuming that it had a right to move such detached cars and to take them off the Y track, it could only exercise such right in a reasonably careful manner. The usual and ordinary method of coupling cars cannot be invoked to justify the manner in which the Indiana, Decatur & Western engine was driven along the track and upon the decedent. The rule by which decedent's conduct must be measured is as follows: "To require an engineer to anticipate and provide against the possible or probable negligence of trainmen of other companies would be to deprive him from remedy for his injuries, or drive him from his occupation. He has the right to go about his business, obeying the ordinances and rules established for the safety of all, on the presumption that others will do likewise; and it is only when on the particular occasion he learns, or by the exercise of reasonable diligence, under the circumstances, might have learned, of the negligent conduct of others, then threatening, that he is required to exercise reasonable care to avoid injury." *Pittsburgh v. Martin*, supra. Whether decedent, in what he did, conformed to the requirements of the law, and used reasonable care under the circumstances, was a question for the jury. *Baltimore v. Peterson*, supra; *L. B. & W. v. Carr*, 35 Ind. 510.

To the extent that the verdict, finding for appellee, is supported by the evidence, it is conclusive. That decedent had no knowledge of actual impending danger is reasonably certain. There is evidence tending to show that the engine and the four cars attached to it were disconnected from any other cars on the track; that appellant had no duty to perform with respect to it, or with the cut of four cars next east; that it had no right to touch or move the engine or cars attached; that brakes were set. The track was up grade to the west, so that the east cars were not likely to move towards the engine. Decedent was engaged in cleaning out the ash pan of the engine in the only manner in which such work could be done. The rules of his employment required him to do this at the first opportunity. He was evidently absorbed in his work, and failed to discover the approaching train. *Railroad v. Long*, supra. There was evidence to the effect that he knew the appellant's train was in the vicinity of the Y track; that on a preceding day he had been told by the engineer that he should not clean out the ash pan on the Y, because of the danger caused by one of appellant's trains. Rules of the Indiana, Decatur & Western Company were introduced, by which the duty of car inspectors to display signals when inspecting cars was

prescribed. The rules were not applicable to the fireman, nor was notice of them brought home to him. *Railroad v. Bundy*, 152 Ind. 590, 53 N. E. 175; *Railroad v. Berkey*, 136 Ind. 181, 35 N. E. 3. If, as a matter of law, decedent was negligent in failing to set out a flag or to station a watchman, it must be because of special conditions existing at the time, of which he had notice. We do not think such conditions are shown by the evidence. The element in the case that makes his conduct open to question is that he was lying down under a "live" engine. This is the basis of a very vigorous argument on the part of appellant's counsel, but the standard of reasonable care applicable when the act was done by one not in the railway service does not apply to an employe who had no choice of methods. There never can be a time when it is not hazardous to assume such a position. That it possesses inherent hazard, irrespective of the surrounding circumstances, is no excuse for an employe refusing to do his duty. The question, then, was whether the circumstances existing at the time, not the circumstances that may have existed at some previous time, were such as to make the doing of the work by decedent negligent. The question was one for the jury. The facts involved were different from those in any case cited where contributory negligence has been held as a matter of law, in this: that there was no element of trespass in the decedent's presence on the track, and it did not require signals, watchman, or notice to charge appellant with the duty of using care for his protection. Appellant was guilty of negligence that the decedent was not called upon to anticipate, and it was bound to know that he might not be in position to guard himself therefrom.

Instruction No. 5 given by the court stated the proposition that decedent was not required to anticipate the negligence of the employes of the appellant company. The objection urged to it is that it is not applicable to the evidence. The objection is not well taken.

Instruction No. 6 was inartistically drawn. After stating that the burden of proving contributory negligence was on the defendant, the instruction proceeds: "And unless the defendant has proven or it otherwise appears from all the evidence in the cause—by a preponderance of all the evidence—that the plaintiff's decedent was guilty of contributory negligence, your finding should be for the plaintiff upon this issue; that is, that the plaintiff's decedent was not guilty of contributory negligence." The law, admittedly, is that if, from a consideration of all the evidence, it appears that decedent was guilty of contributory negligence, there can be no recovery. A fair construction of the language used in the instruction gives it this meaning. The jury were not limited to the consideration of defendant's evidence alone.

The objection to the seventh instruction is

that it was not applicable to the evidence. In argument it is said: "There was no proof that appellant was negligent in the manner of backing its train upon this track, or in coupling the cars thereon, outside the theory of a few discharged railway men, imported from Indianapolis as experts," etc. In this statement the right of the jury to draw an inference of negligence from the undisputed facts is omitted. The argument sufficiently shows, however, that there was evidence to which the instruction was applicable.

Instruction No. 8 correctly left the question of contributory negligence to the jury.

The fourth instruction requested by the appellant, and refused by the court, made the question of appellant's negligence depend upon the knowledge of its employes that decedent was under the engine. That phase of the case has already been discussed. Had they known decedent was under the engine, they would have been guilty, not of negligence, but of murder. The instruction was properly refused.

The fifth instruction asked by appellant took the question of contributory negligence from the jury, and was properly refused.

There was evidence to the effect that decedent boarded with his mother, and paid her \$25 per month of his wages. She was 64 years' old, with an expectancy of 14.74 years, and largely dependent upon him. The verdict is not regarded as excessive.

Judgment affirmed.

(177 N. Y. 106)

CRANE v. BENNETT.

(Court of Appeals of New York. Jan. 5, 1904.)

LIBEL—PROPRIETOR OF NEWSPAPER—ACTS OF MANAGER—LIABILITIES—PUNITIVE DAMAGES—EVIDENCE—MALICE.

1. Where the proprietor of a newspaper leaves the general manager in charge, and absents himself from the state in which the newspaper is published, he is responsible for the manner in which the business is performed by the manager; and when the latter publishes a libel, and refuses to retract when informed of the groundlessness of the charge, and republishes the libel, the proprietor is liable for punitive damages.

2. In construing the opinion of the court, it should be confined and limited by the facts of the case under consideration when the opinion was rendered, and not extended to cases where different facts exist.

3. Where, in an action for libel, plaintiff proves the falsity of the alleged publication, it is evidence of malice, raising a question for the jury whether the malice is of such a character as to call for punitive damages, which question is still for the jury if defendant gives evidence to show no actual malice.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Leroy B. Crane against James Gordon Bennett. From a judgment of the Appellate Division (79 N. Y. Supp. 66) modi-

fying and affirming a judgment for plaintiff, defendant appeals. Affirmed.

Charles F. Brown, William Jay, Flamen B. Candler, and Robert W. Candler, for appellant. Eugene Frayer, for respondent.

MARTIN, J. This action was for libel. It was based upon four articles published in the New York Herald, a newspaper owned by the defendant, who resides in France, but whose paper is published in the city of New York. Its management was confided solely to persons in his employ, who had practical control of the entire business. The plaintiff was a magistrate in the city of New York. The matter complained of was published in four issues of the defendant's newspaper, and related to alleged flagrant misconduct imputed to the plaintiff in the discharge of his official duties. The articles were published, respectively, on the 21st, 22d, 23d, and 24th days of August, 1899. The first and each succeeding article related to the same subject, and they were all libelous per se. After the publication of the first and of each succeeding one, the plaintiff wrote to the defendant's manager, stating that each of the articles was untrue and unjust, and asked that the defendant retract or apologize therefor. Instead of sending or publishing a retraction or apology, another article to the same general effect, and relating to the same subject, was published, including an editorial. After these repeated requests of the defendant's manager, and after writing to the defendant personally upon the subject, stating that the publication of such articles was creating a feeling of distrust, and tending to disgrace him in the eyes of the community, the plaintiff waited until the 13th of the following November, when this action was brought to recover the damages sustained by reason of such publications. That each of the articles published was proved to be false and was libelous per se is not denied, nor is it disputed that their publication was continued from day to day, and no retraction made by the defendant or those managing and conducting the publication of his newspaper and the business connected therewith. Obviously there was abundant evidence to justify the jury in finding that the publication of the libels complained of was recklessly and wantonly made and continued, with utter disregard of the rights or feelings of the plaintiff. This brief but general review of the situation is all the statement as to the facts we deem necessary to dispose of the questions of law which are presented upon this appeal.

The defendant contends that, as the acts complained of were performed in his absence by his manager and employes, he is not liable for punitive or exemplary damages, inasmuch as there was no proof of personal ill will or hatred upon his part sufficient to form a basis for the finding of actual malice

1. See Libel and Slander, vol. 22, Cent. Dig. §§ 174, 351.

That the proprietor of a newspaper is responsible for all that appears in its columns, although the publication may have been made in his absence and without his knowledge, is too well settled to require discussion. His liability is not upon the ground of his being the publisher, but because he is responsible for the acts of the actual publisher. Townshend on Slander & Libel, § 123; Newell on Defamation, Slander & Libel, p. 377; Odgers on Libel & Slander, p. 412; Huff v. Bennett, 4 Sandf. 120; *Andres v. Wells*, 7 Johns. 260, 5 Am. Dec. 267. In libel cases, the falsity of the libel being proof of malice sufficient to uphold exemplary damages (a question we shall presently discuss), the right to recover them, in the discretion of the jury, rests in the very act done in the publication of the false libel; and whoever is chargeable with that act is chargeable with the legal consequence, which is the right of the jury to redress the wrong by imposing reasonable damages beyond any injury actually shown. Dissenting opinion of Davis, P. J., in *Samuels v. Evening Mail Ass'n*, 9 Hun, 288, 294, affirmed in 75 N. Y. 604.

Although a mere servant or agent employed to perform some specific act for a principal may not render the latter absolutely liable for increased damages on account of his motives in performing it, yet, when a principal surrenders to his general manager and employes all his business affairs, or the general management of some particular business, absents himself from the jurisdiction where his paper is edited and published, leaving such manager in entire charge thereof, he is responsible for the manner in which his business is conducted. In other words, a principal surrendering his entire business to another, to be conducted for him, should be held to the same responsibility he would incur if he himself personally directed it, as to all matters coming within the line of the authority which he has conferred upon such manager or employes. Therefore, while, as was held by the trial court, the defendant might not have been liable for any personal ill will of his employes or servants against the plaintiff, if there was a willful departure from such business for their private or individual purposes, yet he is responsible for the manner in which the business so delegated was performed by his manager; and if the publication complained of was wanton, reckless, or heedless of the rights or feelings of the plaintiff, and, upon being apprised of the groundlessness of the charges, there was a continued refusal to make or publish any retraction thereof, the defendant was fully responsible for the acts of his general manager, and liable for such punitive damages as the jury, in its discretion, might award. In considering this question, we have not regarded it necessary to refer to the cases, relied upon by the learned counsel for the defendant, relating to the question of punitive damages in ordinary actions for negligence,

as it is manifest that the rule governing the question in such actions is totally unlike that which obtains in actions for tort or personal wrong.

Upon the trial the counsel for the defendant submitted to the court a great number of requests to charge, some of which were charged, others modified, and charged as modified, while others the court refused. To such rulings, exceptions were taken by the defendant. Although many of these exceptions were discussed by counsel upon the argument and in their briefs, still the exception to that portion of the charge by which the court instructed the jury "that the falsity of the libel is sufficient evidence of malice to uphold exemplary damages, but the plaintiff's right to recover exemplary damages is in the discretion of the jury," fully presents the only other question we deem it necessary to discuss or decide upon this appeal. Indeed, we should not have regarded it necessary to discuss that question at all, but for the fact that there seems to be a misapprehension among some of the members of the profession, and an existing uncertainty on the part of courts, as to the effect of the decisions of this court relating to the existing rule upon that subject. The situation seems to have chiefly arisen from our decision in *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317, or from considering what was said in the opinion in that case, without limiting it to the facts involved, rather than what was decided by the court. That was an action against several defendants for the publication of an article libelous per se. Each of the defendants testified he had no malice or ill will toward the plaintiff, when the latter, in order to show express malice, was permitted to prove against all the defendants that, several years before the publication, one of them, who knew nothing about the article until after it had been published, had made statements expressing ill will and contempt for the plaintiff, which were never heard by or communicated to the other defendants before the publication complained of; and this court held that a judgment recovered against all must be reversed, as the general malice proved neither caused nor prompted the publication, and that the admission of such evidence presumably affected the verdict. That case was properly decided. In the opinion, however, there are some expressions that may, perhaps, be regarded as not absolutely accurate, because not including certain exceptions or added principles which would be applicable to a case where the circumstances were essentially different. As was said by the learned writer of that opinion in *Colonial City Traction Co. v. Kingston City R. Co.*, 154 N. Y. 493, 495, 48 N. E. 900: "It was not our intention to decide any case but the one before us, * * * and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made, by way of argument or otherwise, than were essential to the decision of the questions

presented, they are the dicta of the writer of the opinion, and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance." *Stokes v. Stokes*, 155 N. Y. 581, 594, 50 N. E. 342; *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 551, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828. It cannot be reasonably expected that every word, phrase, or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context, and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. When this rule is followed, much of the misapprehension and uncertainty that often arises as to the effect of a decision will be practically avoided. Construing the *Krug Case* in accordance with the foregoing rule, and giving it only the effect suggested, it is manifest that it has in no way affected the doctrine that the proof of the falsity of a libel, of its character, and of the circumstances under which it was published, is sufficient to present a question for the jury, whether the malice was of such a character as to call for exemplary or punitive damages, and that that question rests with the jury alone.

For a quarter of a century the dissenting opinion in *Samuels v. Evening Mail Ass'n*, 9 Hun, 288, seems to have been regarded as containing a correct statement of the principle applicable to the question of punitive damages in actions for libel. In that case the General Term reversed the action of the trial court upon the ground that the evidence did not justify the jury in awarding punitive damages, and it set aside the verdict on that ground. *Davis, P. J.*, however, dissented; and upon appeal to this court (75 N. Y. 604) the judgment of the General Term was reversed, and that of the trial court affirmed, upon the dissenting opinion. The principle established by the decision of this court in that case, as stated in the opinion of *Davis, P. J.*, is that "the falsity of the libel was sufficient evidence of malice. * * * The libel being false, the malice imputable from the act of publication is a part of the res gestæ from which the action arises. * * * The plaintiff in an action of libel gives evidence of malice whenever he proves the falsity of the libel. It becomes, then, a question for the jury whether the malice is of such a character as to call for exemplary or punitive damages, and that question is not to be taken away from the jury because the defend-

ant gives evidence which tends to show that there was in fact no actual malice. When he gives no such evidence, it is the duty of the court to say to the jury that, upon proof of the falsity of the libel, the plaintiff is entitled to exemplary damages, in their discretion. *Tillotson v. Cheetham*, 3 Johns. 56; and see opinion of *Kent, C. J.*, in same case; *Taylor v. Church*, 8 N. Y. 452, where the rule of *Tillotson v. Cheetham* is approved; *Hunt v. Bennett*, 19 N. Y. 173. But where he gives evidence tending to prove the absence of actual malice, then it is the duty of the judge to submit to the jury the question, as one of fact, whether such malice existed in the publication." That case was cited with approval by this court in *Bergmann v. Jones*, 94 N. Y. 51, 62. It was there held that where a publication is libelous per se, and is proved to be false, this is sufficient evidence to require the submission of the question of malice to the jury, and to warrant the allowance of exemplary damages, although the defendant gives evidence tending to prove no actual malice. Such evidence is to be considered by the jury, and it is for them to determine, in view of all the evidence, whether punitive damages should be allowed or not. Again, in *Warner v. Press P. Co.*, 132 N. Y. 181, 184, 30 N. E. 393, the *Samuels Case* was followed, and it was there said: "The plaintiff gave evidence of malice when she proved the falsity of the libelous publication, and, in the absence of evidence on the part of the defendant tending to show that it had neither the desire nor the intention to wrong her, it would have been the duty of the court to instruct the jury that the plaintiff might be awarded exemplary damages in their discretion. But testimony was adduced on the part of the defendant tending to prove the absence of actual malice on its part towards the plaintiff, which, taken in connection with the evidence of malice which the law imputed when the falsity of the libel was established, presented a question of fact, whether malice existed in the publication. If found to exist, then, in their discretion, the jury could award exemplary damages." That case was also cited with approval and followed in *Marx v. Press P. Co.*, 134 N. Y. 561, 563, 31 N. E. 918; *Van Ingen v. Star Co.*, 1 App. Div. 429, 37 N. Y. Supp. 114, affirmed on opinion below in 157 N. Y. 695, 51 N. E. 1094; and *McFadden v. Morning Journal Ass'n*, 28 App. Div. 508, 517, 51 N. Y. Supp. 275. In *Gray v. Sampers*, 35 App. Div. 270, 55 N. Y. Supp. 3, the rule stated was that, in an action of libel, proof by the plaintiff tending to establish the falsity of the alleged libelous article is evidence of malice, and, where it is given, a question is presented for the jury, whether the malice is of such a character as to call for exemplary or punitive damages; and this question is not taken from the jury because the defendant gives evidence which tends to show that there was in fact no actual malice. That was the rule

which was also followed by the learned Appellate Division in the case at bar. 77 App. Div. 102, 79 N. Y. Supp. 66.

In *Smith v. Matthews*, 152 N. Y. 152, 46 N. E. 164, this court held that punitive damages for libel are not limited to cases of actual malice, but may be awarded for a libel recklessly or carelessly published, as well as one induced by personal ill will. The *Samuels Case* was again considered and cited with approval in *Holmes v. Jones*, 121 N. Y. 461, 467, 24 N. E. 701, and it was there said: "So far as the libel was not justified, it was for the jury to determine the amount of the damages to be awarded therefor. If they came to the conclusion, from the circumstances and the nature of the charge made, that the publication was malicious, in bad faith, or recklessly, carelessly, or wantonly made, they could go beyond compensation, and award punitive damages." In the same case (147 N. Y. 59, 67, 41 N. E. 409, 49 Am. St. Rep. 646) this court said: "But the amount of damages in an action for libel is peculiarly within the province of the jury. The jury may give nominal damages, or damages to a greater or less amount, as they shall determine. The jury may accord damages which are merely compensatory, or damages beyond mere compensation, called punitive or vindictive damages, by way of example or punishment, when, in their judgment, the defendant was incited by actual malice or acted wantonly or recklessly in making the defamatory charge." In *King v. Root*, 4 Wend. 139, 21 Am. Dec. 102, which was an action for libel, the court said: "The jury may not only give such damages as they think necessary to compensate the plaintiff for his actual injury, but they may also give damages by way of punishment to the defendants." See, also, *Cook v. Ellis*, 6 Hill, 466, 41 Am. Dec. 757, and *Tift v. Culver*, 3 Hill, 180. In *Burr v. Burr*, 7 Hill, 207, 218, in discussing this general question, it was said: "If a wanton and malicious outrage is committed upon the civil rights of an individual, it would oftentimes be monstrous injustice to confine the injured party, when seeking for redress, to the actual ascertainable damages he may have sustained. Such a rule would be a license to every species of private wrong, and, in most cases of trespass to the person, it would be impossible to apply it with any degree of accuracy."

This examination of the authorities bearing upon the question clearly discloses that the rule of law stated by the trial court was proper, and is justified by a long line of decisions in this state. The general rule is that, in an action for libel, proof by the plaintiff tending to establish the falsity of the alleged libelous publication is evidence of malice, and, if such evidence is introduced, a question for the jury is presented, whether the malice is of such a character as to call for punitive damages, and that question is not to be withdrawn from them because the de-

fendant gives evidence which tends to show that there was no actual malice. We think the foregoing rule is well established by the authorities of this state and elsewhere, and that it must be regarded as the true rule, notwithstanding any expressions found in other cases where the question was not necessarily involved, which may not be in consonance with it. The doctrine of any such cases will not be followed, but must be regarded as overruled so far as they may be in conflict with this decision.

Moreover, as we have already seen, the jury might well have found not only that the publications complained of were grossly false, were recklessly and wantonly made in bad faith, but also that, after the defendant and his manager were fully informed of their falsity and injustice, they were purposely and willfully continued, without apology or retraction of any kind. To paraphrase the language of Chief Judge Nelson in *Hotchkiss v. Orphant*, 2 Hill, 510, 516, the defendant might have inadvertently published the original article, and have been chargeable only with mistake or indifference to the truth; but, having been advised of his error, and having refused to correct it, the case rises to one of premeditated wrong—one of determined malignity towards the plaintiff—which should be dealt with accordingly, and there is no longer room for any indulgence towards the defendant's acts, but he becomes a fit subject for exemplary punishment, and the charities of the law give way to such a prostitution of the public press.

Other questions were discussed at the bar, but, as they were properly disposed of by the court below, and were of no general or great importance, we regard it as unnecessary to continue this opinion by any discussion of them, but will content ourselves by concurring in the disposition made of them by the court below.

The judgment of the Appellate Division should be affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, and CULLEN, JJ., concur. HAIGHT, J., absent.

Judgment affirmed.

(177 N. Y. 124)

VOLLKOMMER v. CODY et al. FLEER et al. v. SAME. BAIRD v. SAME.

(Court of Appeals of New York. Jan. 5, 1904.)

COURT OF APPEALS—JURISDICTION—QUESTIONS OF LAW—NEW TRIAL—DEPOSITIONS—ADMISSIONS—OBJECTIONS—EXCEPTIONS—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Where the Appellate Division grants a new trial on a question of fact, the Court of Appeals cannot review even rulings duly excepted to, if there was a question of fact involved, but, if granted solely on exceptions of law under Const. art. 6, § 9, that court may review such questions of law, and, if the ex-

ceptions were not well taken, reverse the order and reinstate the judgment.

2. In an action by judgment creditors, a deposition in supplementary proceedings, signed and sworn to by defendant, is properly received in evidence against him as an admission of record, and is not incompetent though plaintiff subsequently examine the defendant, who testifies to facts contradictory of the deposition, on the ground that it was an attempt by plaintiff to impeach his own witness.

3. Where no objection was made to a remark of the trial court, in giving reasons for deciding in plaintiff's favor, that there were many contradictions by defendant in his testimony of a deposition previously given by him, and no objection was made or exception taken, and the remark was not embodied in the formal decision, a reversal by the Appellate Division on the ground that the trial court did not consider the deposition as an admission, but as evidence to impeach plaintiff's witnesses, cannot be sustained, the error not having been raised by objection or exception.

4. A judgment setting aside an assignment by an insolvent as not made in good faith is not erroneous for want of a specific finding that defendant was insolvent at the date thereof, where his fraudulent intent is found as a fact.

Appeal from Supreme Court, Appellate Division, Second Department.

Actions by Joseph Vollkommer, by George Fleer and others, and by Andrew R. Baird against James A. Cody and others. From an order of the Appellate Division (82 N. Y. Supp. 869) reversing judgments in favor of plaintiffs, they appeal. Reversed.

J. Addison Young, Henry H. Sawyer, and William A. Moore, for appellants. Abram J. Rose and Alfred C. Petté, for respondents.

VANN, J. These actions, involving the same issues, were tried together and submitted on the same evidence. Each is a creditor's action, brought by a different plaintiff against the same defendants to set aside certain assignments of the moneys due and to grow due under a contract for public work, upon the ground that they were made to hinder, delay, and defraud creditors. The plaintiffs are judgment creditors of James A. Cody and others, composing the firm of Cody Bros., with executions returned unsatisfied. After the several debts of the plaintiffs were contracted, but before their judgments were recovered, the brothers composing said firm made the transfer in question to their sister, Theresa Cody, who, a few months later, assigned the same interest to her sister, Elizabeth L. Cody. The amount of money thus assigned, as subsequently admeasured by a judgment against the city of New York, was over \$13,000. The trial judge found that each of said assignments was without consideration, and was made and accepted with the intent to hinder, delay, and defraud the creditors of said judgment debtors, including the plaintiffs. Upon appeal to the Appellate Division each judgment was reversed, and a new trial granted upon questions of law on-

ly, the facts as found not having been disturbed. The plaintiffs gave the usual stipulation, and appealed to this court.

As the judgments were not reversed upon a question of fact, we are confined in our review to errors of law duly excepted to. *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; *National Harrow Co. v. Bement & Sons*, 163 N. Y. 505, 57 N. E. 764. Even if errors were committed by the trial judge, they would not justify a reversal by the Appellate Division upon a question of law only, or warrant us in sustaining their action, unless the question was duly raised by an exception. The jurisdiction of this court in all cases "except where the judgment is of death" is "limited to the review of questions of law." Const. art. 6, § 9. Where a new trial is granted by the Appellate Division upon a question of fact, we have no power to review even rulings duly excepted to, provided there was a question of fact; but if it is granted solely upon questions of law—that is, in the language of the Constitution, "on exceptions"—we may review the questions of law raised by exceptions, and, if we find that no exception was well taken, it is our duty to reverse the order and reinstate the judgment. Thus, as was said by the learned counsel for the respondents, "the only questions open for consideration are as to the errors in the reception or rejection of evidence, and as to whether the facts found support the judgment rendered."

Substantially all the oral evidence upon the trial was given by the principal defendants when called as witnesses for the plaintiffs. These defendants had been previously examined in proceedings supplementary to execution, and in each instance, as soon as the party was called and the deposition identified, it was offered in evidence against the defendant who had signed and sworn to it. One deposition was not objected to, the second was objected to as incompetent, and the third as immaterial. The objections were overruled, and the defendants excepted. Each deposition was offered and received only as against the person who made it, and, as it was an admission of a party to the record, it was properly received as against himself. *Lent v. Shear*, 160 N. Y. 462, 469, 55 N. E. 2; *Williams v. Sargeant*, 46 N. Y. 481, 483. The plaintiffs, however, in each instance after the deposition was received examined the deponent at length, proved some facts not covered by the deposition, and elaborated others not fully covered by it, and the answers of the witnesses were to some extent inconsistent with their depositions. None of this evidence was objected to, and the defendants were apparently willing that it should be received whether it was competent or not. At the close of the evidence, and after the case had been summed up by both sides, the trial judge, in orally giving his reasons for deciding in favor of the plain-

¶ 4. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 138, 144.

tiffs, said: "It is unfortunate in this case that there are many contradictions by the witness Elizabeth L. Cody and by her brothers in comparison with the deposition in supplementary proceedings." No exception was taken to this remark or to any remark made by the judge in announcing what his decision would be, and subsequently he signed formal findings, which were excepted to, but which did not embrace said remark, nor give any reasons for the conclusion reached. The Appellate Division, as indicated by its opinion, founded its order of reversal upon this observation, and held, in substance, that the trial court did not consider the depositions as admissions, but as evidence which was competent to impeach witnesses called by the plaintiffs. In other words, it was held, in effect, that evidence which was competent when received became incompetent through other evidence subsequently received without objection, and, although no motion to strike out was made, the judgments were reversed solely for this reason. The defendants were thus given the benefit of objections never made and of exceptions never taken.

In thus deciding we think the learned judges below inadvertently fell into error. As we have seen, the depositions were competent when received, and they never became incompetent. They were material admissions, made by parties to the action, tending to show that they had been guilty of the fraud charged, and they continued to be competent evidence to the close of the case. They were not offered to impeach or discredit, because when offered the witness had not testified upon the merits. How could the court or the plaintiffs know that the witnesses would contradict themselves? No motion was made or ruling requested which changed the status of the depositions as material and competent evidence. There was no effort to limit their effect, and no suggestion, even after the trial court made the remark above quoted, that they could not be used to discredit or impeach the witnesses guilty of swearing one way on the trial and another way in their examination before trial. "It is only evidence offered for the mere purpose of impeaching the credibility of the witness which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility." *Bullard v. Pearsall*, 53 N. Y. 230, 231; *People v. Kelly*, 113 N. Y. 647, 652, 21 N. E. 122. "All the cases concur in the right of a party to contradict his own witnesses to prove a fact, material to the issue, to be otherwise than as sworn to by him, even when the necessary effect is to impeach him." *Becker v. Koch*, 104 N. Y. 394, 403, 10 N. E. 701, 58 Am. Rep. 515. If an improper use was made of the depositions by the trial justice, the error was raised by no objection or exception, and hence is not be-

fore us to review, and was not before the judges below. They were clothed with a power which is almost discretionary to reverse on the facts, but they did not do so. In order to reverse on the law, however, an error of law is necessary, and there can be no error of law that we can consider without an exception to raise it. *Hecla Powder Co. v. Sigua Iron Co.*, 157 N. Y. 437, 441, 52 N. E. 650; *Wagner v. Grimm*, 169 N. Y. 421, 427, 62 N. E. 569. The action of the Appellate Division in reversing the judgments for the reasons stated in their opinion cannot be sustained.

The respondents, however, contend that the reversal was proper because the facts found do not support the conclusion of law, inasmuch as there was no specific finding that the assignors were insolvent at the date of the assignment. No such finding was necessary, because "it is only when one makes a voluntary conveyance in good faith, with no intent to defraud his creditors, that it will be upheld by proof showing that when he made it he retained an ample estate to pay all his debts." *Fox v. Moyer*, 54 N. Y. 125, 131. Fraudulent intent is made a question of fact by statute, and it was found as a fact in this case. It necessarily follows that the assignment was not made in good faith. Moreover, insolvency, while a fact, is but an evidential fact, which need not be alleged. *Kain v. Larkin*, 141 N. Y. 144, 151, 36 N. E. 9. Hence it is involved in the finding of fraud, provided it is necessary to support that finding and there is evidence to warrant it, as there was in this case.

We find no exception which authorized the Appellate Division to reverse the judgments for error of law, and its orders must therefore be reversed, and the judgments rendered by the Special Term affirmed, with costs in all courts.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, and WERNER, JJ., concur. HAIGHT, J., absent.

Orders reversed, etc.

(177 N. Y. 117)

WELCH v. POLLEY et al.

(Court of Appeals of New York. Jan. 5, 1904.)

TRUSTS — ACCOUNTING — ACTION BY BENEFICIARY — FOLLOWING TRUST FUND — BANKRUPTCY OF TRUSTEE.

1. An action will lie at the suit of the beneficiary under a trust fund against the trustee of such fund and his trustee in bankruptcy for an accounting as to the trust funds, and to recover from the funds held by the trustee in bankruptcy so much thereof as belong to, or were derived from, the trust fund.

2. Where part of the funds held by a trustee in bankruptcy were obtained from lands purchased with trust funds by the bankrupt, and conveyed by him on the compromise of a judgment recovered by the trustee in bankruptcy

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 228.

in an action to set aside a fraudulent conveyance of real estate, before the petition in bankruptcy, it does not preclude an action against the trustee to recover the trust funds.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Mary Frances Welch against Grahams Polley and another. From a judgment of the Appellate Division (83 N. Y. Supp. 819), affirming a judgment dismissing the complaint as to defendant O'Brien, plaintiff appeals. Reversed.

Raphael J. Moses, for appellant. Moses Weinman and Louis Marshall, for respondent.

BARTLETT, J. At the trial, after the opening of plaintiff's counsel, and before the introduction of any evidence, the counsel for the defendant the trustee in bankruptcy moved to dismiss the complaint, as to him, on the ground that it did not state facts sufficient to constitute a cause of action. The motion was granted, and judgment duly entered, which was affirmed by the Appellate Division.

This is a suit in equity brought by Mary Frances Welch, the plaintiff, against Grahams Polley, individually and as surviving trustee for her in a trust created by herself on the 31st day of October, 1879, for her own benefit, and such persons as she should appoint by her last will and testament, or, in failure of appointment, her next of kin; also against Miles M. O'Brien, as trustee in bankruptcy of Grahams Polley. On the 15th day of December, 1900, Grahams Polley was adjudicated a bankrupt, and the defendant Miles M. O'Brien was appointed sole trustee of the bankrupt's estate.

The following facts appear on the face of the complaint, and must be taken as admitted, for the purposes of this appeal: The principal sum under the trust referred to was about \$40,000, and was duly paid over to the trustees, one of whom died in 1896. That a certain portion of the trust fund, amounting to about \$7,000, was converted by the defendant Grahams Polley to his own use. That Grahams Polley is a man of dissolute life and habits, and has wasted the trust fund and estate belonging to the plaintiff, and is an unfit person to act as trustee. That Grahams Polley, with said trust fund belonging to the plaintiff, purchased and maintained certain real estate, a part of which he fraudulently conveyed to Lillian G. Cavanaugh. That the trustee in bankruptcy commenced an action in the New York Supreme Court against said Cavanaugh and Grahams Polley to set aside said transfer of real estate and certain personal property made by Polley to said Cavanaugh prior to the filing of the petition in bankruptcy, on the ground that they were fraudulently made, without consideration, and with intent to hinder, delay, and defraud the creditors of said Polley. That said action was tried, and resulted in a judg-

ment in favor of the trustee, which by leave of the court was compromised; the trustee receiving the sum of \$18,963.48. That, in addition to the foregoing sum received by the trustee in bankruptcy on the said compromise, there are other sums in his hands, the total amount of which is unknown to the plaintiff, except that the aggregate does not make up the amount of the trust fund to which she is entitled, and which was in the hands of the defendant Grahams Polley as plaintiff's trustee. That the plaintiff prays for an accounting as to the trust fund in the hands of Grahams Polley at the time he was adjudicated a bankrupt, and that such portion of the fund in the hands of the trustee as is made up of the trust fund should be paid over to her. There is also a prayer for the removal of Grahams Polley from his trust, and for an injunction running against both Polley and the trustee in bankruptcy, preventing any disposition of the fund until judgment in this action.

Section 70 of the present United States bankruptcy law (subdivision "e") reads as follows: "The trustee may avoid any transfer by the bankrupt of his property which any creditor or such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value." Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452]. The action brought by the trustee in bankruptcy pursuant to the powers vested in him by this section was not in hostility to the title or rights of the plaintiff, but in subordination to the same. The learned Appellate Division states in its opinion as follows as to the decision of the Special Term: "In the opinion the court * * * stated that as Polley used Mrs. Welch's trust fund in the purchase of real estate, which he presented to Cavanaugh, her title to the real estate was impressed with a trust in favor of Mrs. Welch; that O'Brien, as trustee in bankruptcy, became vested with all the rights of the bankrupt and of his creditors as such; that his release to Cavanaugh did not discharge the rights of Mrs. Welch against the real estate; and that she could not enforce any claim against the money in the hands of O'Brien as trustee. It is manifest that the money received by O'Brien was recovered under an adjudication that the real estate belonged to Polley, and not to Mrs. Welch; that it was his property, and not hers, which was transferred to Cavanaugh."

We are of opinion that the complaint was improperly dismissed as to the trustee in bankruptcy. It is true that the plaintiff was not, so far as this record discloses, an unsecured creditor of the bankrupt, but she did represent a claim against him that must be

treated as valid for the purposes of this appeal, growing out of the relations existing between them as beneficiary and trustee.

It is not necessary to determine in this action the effect of the compromise in bankruptcy upon the right of the plaintiff to pursue Cavanaugh as the holder of the legal title to this real estate, if it be still vested in her. It is quite possible that insuperable obstacles now prevent plaintiff from invoking this remedy.

In view of the facts disclosed by this record, it was proper for the plaintiff to institute a suit in equity, bringing in her defaulting trustee, the bankrupt, and his trustee, in bankruptcy, as parties defendant. In that suit the plaintiff was entitled to prove, if she could, that a certain portion of the trust fund held by Polley went into the purchase price of the real estate transferred to Cavanaugh; and assuming, as we must, that the sum received by the trustee in bankruptcy, in compromise of the judgment recovered by him, declaring the conveyance of the bankrupt to Cavanaugh fraudulent, stood in the place of the property, which might have been reconveyed to the trustee in bankruptcy, she would be entitled to have restored to the trust such portion of that fund as she was able to successfully follow into the purchase money paid by the bankrupt, or into the funds in the hands of the trustee in bankruptcy.

The cases cited in support of the decision below are not in point. In *Stephens v. Board of Education of Brooklyn*, 79 N. Y. 183, 35 Am. Rep. 511, one Gill, while a member of the board, converted to his own use moneys belonging to the board. He obtained money from Stephens on a forged mortgage, and deposited the same in his bank account, against which he drew a check, and paid the board. The court held that Stephens could not recover the money from the board, but that his cause of action was against Gill; that the board, having received the money in good faith and in the ordinary course of business, for a valuable consideration, was not liable. No such situation is presented in the case at bar. In *Patrick v. Metcalf*, 37 N. Y. 332, this court held that where two parties claim payment from the government for the same services, and the one is recognized and paid to the exclusion of the other, who was in fact the one entitled, the latter cannot maintain an action for money had and received against the former, he having received it under a claim of right. This case was followed in the other cases cited of *Butterworth v. Gould*, 41 N. Y. 450, and *Hathaway v. Town of Homer*, 54 N. Y. 655. The principle involved in all of these cases is inapplicable to the situation presented in the case before us, where, as already stated, the trustee is not acting in hostility to the plaintiff's claim or title, but in subordination to the same. The plaintiff must be permitted to follow, if she can, her trust moneys into

the hands of the trustee in bankruptcy; he having no greater right against her than the bankrupt, her trustee, possessed, had he remained solvent. The other creditors of the bankrupt have no claim upon any of the funds derived from plaintiff's trust which can be fully identified.

To the extent that plaintiff is able to follow the trust funds into the purchase price of the real estate, or into the bankrupt's estate generally, she points out moneys that are no part of the estate held by the bankrupt's trustee for general distribution among the creditors, and is entitled to have them restored to the trust for her benefit, which is to continue during her life.

The judgments and orders of the Special Term and Appellate Division should be reversed, and a new trial ordered, with costs to abide the event.

PARKER, C. J., and GRAY, O'BRIEN, MARTIN, CULLEN, and WERNER, JJ., concur.

Judgments and orders reversed, etc.

(177 N. Y. 100)

BEACH v. SUPREME TENT OF KNIGHTS OF MACCABEES OF THE WORLD.

(Court of Appeals of New York. Jan. 5, 1904.)

FRATERNAL ASSOCIATION—INJURY TO MEMBER—RIGHT TO BENEFITS—CHANGE OF BY-LAWS.

1. A fraternal association provided that a member who was unable to perform the business which he had always followed because of a disability arising after admission to endowment membership should be deemed entitled to disability benefits. *Held*, that a member who was a farmer and operated a sawmill, who had become permanently disabled by an accident so as to be unable to follow his usual occupation, was entitled to the benefit specified.

2. A certificate of membership in a benefit association provided that in case of disability, or on attaining 70 years of age, a member would be entitled to receive one-half of the endowment provided by the by-laws. *Held*, an absolute contract to pay one-half of the amount of the certificate on disability as provided in the by-laws of the order, which could not be impaired by a subsequent by-law providing that any member who shall become totally and permanently disabled shall be entitled to receive one-tenth part of the amount of his benefit certificate, though the society reserved the right in its constitution to amend the by-laws governing the endowment fund.

Haight, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Benjamin C. Beach against the Supreme Tent of the Knights of the Maccabees of the World. From a judgment of the Appellate Division (77 N. Y. Supp. 770), affirming a judgment for plaintiff, entered on a verdict directed by the court, and an order denying a new trial, defendant appeals. Affirmed.

¶ 2. See *Insurance*, vol. 22, Cent. Dig. § 1255.

James L. Quackenbush, for appellant.
George E. Spring, for respondent.

CULLEN, J. This is an action brought to recover on a certificate of membership issued by the defendant, a fraternal or mutual benefit organization. The certificate stated that the plaintiff would be entitled to receive one assessment on the members of the order not exceeding \$2,000 as a benefit to his wife upon satisfactory proof of his death. It contained this further provision: "In case of permanent or total disability, or upon attaining the age of seventy years, he will be entitled to receive one-half of said endowment, as provided in the laws of the order." When the plaintiff joined the order the endowment laws provided (section 13, art. 4): "A member who by reason of a disability incurred after admission to endowment membership becomes unable to direct or perform the kind of business or labor which he has always followed, and by which alone he can thereafter earn a livelihood shall be deemed entitled to disability benefits." In 1895 this provision was amended so as to read (section 188): "Any member holding a benefit certificate who shall become totally and permanently disabled from any cause, not the result of his own illegal act, to perform or direct any kind of labor or business * * * shall be entitled to receive from the disability fund, annually, one-tenth part of the sum for which his benefit certificate is issued." The plaintiff was a farmer, and a part of the time operated a portable sawmill. In 1895, after the adoption of the amendment referred to, his right arm was almost severed by a saw. As a result of this injury the arm became practically useless. The plaintiff testified that he was unable to do any work on the farm or at the sawmill. At the close of the evidence each party requested the direction of a verdict. The court granted the application of the plaintiff, and directed a verdict in his favor for \$1,000 and interest, half the amount payable under the certificate in case of death.

As the appellant did not request the cause to be submitted to the jury, he assented to the determination by the court of any question of fact that the evidence presented. The evidence warranted the finding that the plaintiff was permanently disabled within the terms of the by-laws as they stood at the time he joined the order. The language of the by-law is quite similar to that construed in the case of *Neill v. Order of United Friends*, 149 N. Y. 430, 44 N. E. 145, 52 Am. St. Rep. 738. In that case the endowment was payable if a member became disabled "from following his usual or some other occupation by reason of accident and disease." The plaintiff, a brakeman, had his foot crushed by an accident. It was contended for the defendant that, though the injury may have rendered him unable to act as brakeman, he was not disabled "from following some other occupation." It was held that "some other"

occupation was to be construed in connection with the previous provision of "usual," and did not mean "any other occupation." The opinion there delivered by Judge Haight covers the whole subject, and renders further discussion of the subject unnecessary. Therefore, if the plaintiff's rights were unaffected by the subsequent amendment of the by-laws, the decisions of the courts below were clearly right.

We have quite recently reiterated the doctrine that a general power reserved either by statute or by the constitution of a society to amend its by-laws does not authorize an amendment impairing the vested rights of the members. *Parish v. N. Y. Produce Exchange*, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; *Weber v. Supreme Tent K. of M.*, 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753. It is contended that the power of the defendant in this case was enlarged because the constitution of the order at the time the plaintiff joined reserved the right to amend the laws governing the endowment fund. It may be doubted whether this was intended to cover the case of existing members or was applicable solely to those who should join the order after the amendments. But, giving this provision the broadest construction, we are of opinion that it would not relieve the defendant from liability. The contract expressed in the certificate is absolute. It is to pay one-half of the certificate on disability "as provided in the laws of the order," not as may be provided in the laws of the order. A reference to the laws of the order informed the plaintiff at the time he joined the order of the character of the disability which entitled him to receive half the amount of the certificate, and there was no provision therein to the effect that the payment was not to be immediate, but in annual installments. As said by Judge Gray in *Langan v. Supreme Council American Legion of Honor*, 174 N. Y. 266, 66 N. E. 932: "It was beyond the power of the defendant to affect the obligation expressed in the certificate without the consent of its holder." The constitution and laws of the defendant constitute a book of over 90 pages, and the provision authorizing an amendment of the endowment laws is found not in the endowment laws, but in a brief section in the constitution. It has been held in the case of railroad bonds that, in case the bonds and trust deed contain inconsistent provisions, those contained in the bonds must prevail over those contained in the deed, for the reason that it is the provisions of the bonds that meet the eye of a purchaser and induce the purchase. *Rothschild v. Rio Grande Western Railway Co.*, 84 Hun, 103, 32 N. Y. Supp. 37, affirmed on opinion below, 164 N. Y. 594, 58 N. E. 1091. The same principle was applied by this court and the case last cited approved in *Imperial Shale Brick Company v. Jewett*, 169 N. Y. 143, 62 N. E. 167. In that case there was issued to the plaintiff a certificate insuring it "under and

subject to the conditions of Open Policy No. 4,007, issued by the Buffalo Fire and Marine Underwriters of Buffalo, N. Y." The policy proved to be one issued by individual writers, each one obligating himself only for his aliquot share of the loss. It was held that the terms of the certificate prevailed over those of the policy, and, as the certificate represented a single indemnity for the whole loss, the liability of the underwriters was joint despite the terms of the policy. Under the doctrine of these cases we think that the obligations assumed by the defendant in its certificate of membership should not be impaired by provisions of the constitution and laws of the order to which the attention of the member might never be called, or at least they should not be cut down under the reservation of the power to amend. It is quite easy for fraternal organizations, such as the defendant, if they deem the provisions for benefits to their members tentative only, and desire to have them subject to such modification as the business of the orders may require, to express that in the certificate. So, in the present case, if the certificate had provided that the payments therein specified should be subject to such modification as to amount, terms, and conditions of payment and contingencies in which the same were payable as the endowment laws of the order from time to time might provide, the amendments would be applicable to existing members. But I think that nothing less explicit than this appearing in the certificate itself should be effectual for such a purpose. Fairness to persons joining the order required such plain dealing.

The case of *Hutchinson v. Supreme Tent K. of M.*, 68 Hun, 355, 22 N. Y. Supp. 801, is not in point. There the learned court held that the plaintiff could not recover at all under the endowment laws as they existed at the time he joined the order. The claim was made to rest solely on the amended by-laws, and, of course, claiming under the amended by-laws, the plaintiff was subject to the provisions of the amendment which changed the payment of the benefit from a gross sum to annual installments.

The judgment appealed from should be affirmed, with costs.

PARKER, C. J., and BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. HAIGHT, J., dissents.

Judgment affirmed.

(177 N. Y. 86)

HERZOG v. TITLE GUARANTEE & TRUST CO. OF NEW YORK CITY et al.

(Court of Appeals of New York. Dec. 18, 1903.)

WILL—CONSTRUCTION—RESTRAINT OF ALIENATION—GIFT TO A CLASS.

1. Testator, by his will, gave to trustees the residue of his estate during the lives of those

two of his children who should be the youngest at the time of his death, and directed the trustees to pay the remainder of the income undisposed of to his four children equally, and provided that on the termination of the trust each child should be paid one-fourth of the residuary estate. He provided by a codicil that if a daughter, who was not one of his two youngest children, should marry a person named, she was to receive a specified annuity, and on her death a certain sum was to be divided between her children. *Held*, that the codicil simply changed, in the event of the daughter's marriage, the amount she was to receive from the income, and gave her children a definite sum, instead of the share which she or they would have received if she had not married, and as the trustees were required to retain the title to the trust property not only during the lives of the two youngest children, as provided in the original will, but also to retain the portion necessary to pay the income to the daughter for life in the event of her marriage, and on her death to pay the sum named to her children, there is a suspension of the power of alienation for a longer period than two lives in being, so as to render the codicil void.

2. Where testator provided that, when his two youngest children died, the residuary estate which had been held in trust should be divided among his four children equally, and by a codicil provided for a specific sum to be set aside to a daughter named if she contracted a certain marriage—such property to be held in trust—and the codicil was void, as suspending the power of alienation, it did not affect a gift to the other residuary legatees of such daughter's share in the residuary estate in case of her marriage, independent of the trust, and uncontrolled by its provisions.

3. A bequest is not a gift to a class where the number of donees is fixed at the time of making it, and the share which each is to receive is also certain, and not dependent on the members who shall survive.

4. Where it is apparent from a will and a codicil that testator intended that the provision for his daughter under the codicil should be inalienable during her life, the rule that annuities do not suspend the power of alienation is inapplicable.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Fanny McComb Herzog against the Title Guarantee & Trust Company of New York City and others. From a judgment of the Appellate Division (83 N. Y. Supp. 548) modifying and affirming a judgment of the Special Term construing the will of James Jennings McComb, plaintiff and Edward Rayne Herzog appeal. Reversed.

William W. MacFarland, Robert W. B. Elhott, and Robert L. Harrison, for appellant Fanny McComb Herzog. Edward M. Scudder, for appellant Edward Rayne Herzog. John Notman, for respondents Title Guarantee & Trust Company and others. Robert E. Deyo, for respondent Jennings Scott McComb.

MARTIN, J. This action was for the construction of the will of James Jennings McComb, who died on the 31st of March, 1901, leaving a last will and testament, to which there were three codicils. Without referring to or discussing the provisions of the will or codicils which have no necessary bearing up-

on the question before us, we shall only call attention to those relating to the question under consideration. The questions on this appeal involve the construction and effect of the fifteenth paragraph of the will, as changed or modified by the ninth provision of the third codicil thereto.

After making many other provisions for intended recipients of his bounty, he provided for his issue, immediate and remote, by the fifteenth clause of his will. He thereby gave, devised, and bequeathed all the rest, residue, and remainder of his estate to his executors and trustees, and their successors, to hold, invest, maintain, and manage during the lives of those two of his children who, surviving him, should be the youngest at the time of his death, in trust, however, and for the purpose, among others, of paying from the income of the residuary estate not otherwise disposed of the sum of \$6,000 per annum to each of his four children, Mary Alice, Fanny Rayne, Lillie, and Jennings Scott, and upon the termination of the trust to transfer and convey said residuary estate in equal parts, share and share alike, to his children above named, or to their respective heirs, legatees, devisees, next of kin, executors, administrators, or assigns. The ninth clause of the third codicil was as follows: "It is my will, and I hereby direct, that in case my daughter Fanny shall marry Mr. Louis Herzog, the provision which she shall enjoy from my estate shall be as follows: An annuity of fifteen (\$15,000) thousand dollars per year shall be paid to her, so long as she shall live, free and clear from any enjoyment or interference therewith on the part of her husband. Upon her death the sum of three hundred (\$300,000) thousand dollars shall be divided between her children, who may survive her, and the issue of any child of hers, who may have previously died, such issue to take the parent's share. The principal so to be divided upon her death shall be three hundred (\$300,000) thousand dollars." The plaintiff remained unmarried until about nine months subsequent to the death of the testator, when she was married to the Mr. Louis Herzog therein mentioned and referred to.

Upon the argument and in the briefs of counsel a number of very interesting and important questions were elaborately and exhaustively discussed in a manner evincing great industry, research, and ability upon the part of the learned counsel for the respective parties. Many of those questions, however, we shall not discuss or determine, but shall confine our examination to the question passed upon by the courts below which we think is decisive and controlling.

On the trial the learned Special Term held that the ninth clause of the third codicil, construed in connection with the fifteenth article of the will, was illegal, inoperative, and void. Upon appeal to the Appellate Division, that learned court held to the contrary, and reversed the judgment upon the ground that

that provision of the codicil was valid. We concur in the opinion of the learned Appellate Division so far as it states that "It was manifestly the intention of the testator to modify the third and fourth subdivisions of the fifteenth clause or article in the event that Fanny should marry Herzog, by providing that she should then receive fifteen thousand dollars per annum as a life annuity, instead of a share in the income of the residuary estate during the continuance of the trust, and in the principal thereof at the termination of the trust, and that upon her death her issue should receive three hundred thousand dollars." The will and codicil are to be taken and construed as parts of one and the same instrument, and the dispositions of the will are not to be disturbed further than are necessary to give effect to the codicil. *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177; *Goodwin v. Coddington*, 154 N. Y. 283, 48 N. E. 729. Therefore, in ascertaining the effect of the ninth clause of the codicil upon the interest of the plaintiff under the fifteenth clause of the will, both instruments must be read and interpreted as one. From them the intention of the testator must be ascertained. The intent to be discovered is not whether he intended to make a valid disposition of his estate, but what provisions he in fact intended to make. When that is found, it is for the court to determine whether such intended provisions are valid or otherwise. *Colton v. Fox*, 67 N. Y. 348, 351. The question of intent may relate to the mode of administration and the character of the gift, as well as to the amount or the person to whom it is made. The duty of the court is not to make a new will or codicil to carry out some supposed but undisclosed purpose, but to ascertain what the testator actually intended by the language employed by him, when properly interpreted, and then to determine whether such intended provisions are valid or otherwise. The duty of the court is to interpret, not to construct; to construe the will and codicil, not to make new ones. *Tilden v. Green*, 130 N. Y. 29, 51, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487.

All the valid provisions of the will for the benefit of the testator's issue, either immediate or remote, are contained in the fifteenth clause. Although, as to other gifts by his will he had adopted different methods for their administration, yet, when it came to the bulk of his estate, and to the provisions for his children and their issue, he plainly and purposely provided that such provisions should be administered through the instrumentality of a trust. Obviously his purpose was to suspend the power of alienation for the longest period permissible under the law. That intent he plainly and expressly states in the fifteenth clause of his will. Thus the dominant purpose of the testator, so far as gifts to his children and their issue were concerned, was to provide for the inalienability of their shares for the longest period possi-

ble. There is nothing in the ninth clause of the codicil indicating or expressing any other purpose as to the share given the plaintiff and her issue in case of her marriage to Herzog, but the provision that in that case she should receive \$15,000 a year, and \$300,000 should be divided between such of her children and their issue as should survive her, discloses that the same general intent of inalienability was to be continued as to the share provided for the plaintiff by such ninth clause.

A doubt may exist as to the sufficiency of the codicil to cut down the absolute gift to the plaintiff contained in the will, by reason of the indefiniteness and uncertainty of the language employed. The rule is that an absolute gift by a will cannot be cut down by a later provision unless the intention to do so is expressed in language as plain, definite, and certain as is used in making the original gift. *Banzer v. Banzer*, 156 N. Y. 429, 51 N. E. 291. We are, however, inclined to the opinion that the language of the codicil is sufficiently plain to show an intention on the part of the testator to modify his original gift to the plaintiff as to the amount of the income she should receive, between whom the remainder of the income should be divided, between whom the corpus of the fund should be ultimately divided, the proportion or amount thereof they should each receive, and the time when such division should be made as to the share going to the plaintiff and her children or their issue. Therefore, just so far as the codicil modifies or changes the provisions of the will, it should be held to be effective. *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177.

In considering the effect of the codicil upon the provisions of the will to which it relates, our attention must be directed to the provisions for the disposition of that portion of the estate, and the method in which it is to be administered or divided between its intended recipients. If the codicil, when construed in connection with the fifteenth clause of the will, is illegal and contrary to the law in either of those respects, it is void, and should not be given effect. After eliminating from the fifteenth clause of the will the invalid provisions therein, the testator, in effect, gave the remainder of the income from his residuary estate not specially dedicated to other purposes to his children equally, share and share alike; and upon the termination of the trust each child, or her issue, successors, or representatives, was to be paid one-fourth of such residuary estate. This provision was not revoked, nor was it even modified, by the codicil, unless a condition should arise which might be either precedent or subsequent; and upon the happening of that condition the only modification of the gift in the fifteenth clause was to change or reduce the amount the plaintiff should receive from the income, and to give her children \$300,000 instead of the share which she or

they would have received if such condition had not arisen. In other words, by the codicil, upon the happening of the event mentioned therein, the clear and obvious intent of the testator was that the fifteenth clause should be so modified as to divide the income and corpus of the residuary estate among his children and their issue, successors, and representatives, under the provisions of that clause, but in different proportions. No portion of the residuary estate was withdrawn from the operation of the trust, or dedicated to any purposes except those mentioned in the fifteenth clause of the will and the ninth clause of the third codicil. By such modification, upon the termination of the trust, the whole corpus of the residuary estate was still to be divided between his four children or their respective issue, if the condition mentioned did not arise. But if it arose, then the plaintiff was to have an annuity of \$15,000 a year so long as she lived, and upon her death \$300,000 was to be divided between her children who should survive her, including the issue of any child who should have previously died.

We think the plain and intended effect of the fifteenth clause, as modified by the ninth provision of the codicil, was to continue the trust as it stood in the will as to all of his children, unless the plaintiff should marry Herzog, in which event the amount or share of such children was to be changed so that the plaintiff and her children or grandchildren were to receive a reduced sum, and the income and body of the trust estate were to be divided in a different manner, but through the same instrumentality. The codicil contains no words of gift, provides no other method by which the \$15,000 of the income was to be paid to the plaintiff, and establishes no other fund or source from which either the income or principal was to be derived. Nor does it state by whom the \$300,000 is to be divided, or in whose hands it is to remain until the time of the plaintiff's death. The whole scheme and plan of the will, except as to the portion which she and her children were to receive, are left intact and unchanged. The only method of administration is provided by the will. The form of bequest in the fifteenth clause is by words of gift contained only in the direction to transfer and divide. The same form of bequest is contained in the ninth clause of the codicil. The effect of the codicil was not to revoke the residuary clause, interfere with the trust, or change the scheme or method provided for the administration of his estate, but simply to provide that, if the condition mentioned should arise, the amount should be changed as to the income, and \$300,000 of the principal, which otherwise would go to her or her children, was to be transferred to such of her children or their issue as should be living at the time of her death. Considering the situation of the testator at the time the codicil was made, his

full knowledge of the whole scheme and plan of his will as to the execution of its provisions for his children, with no designation of any person to carry out the provisions of the codicil, and the fact that the codicil was a mere modification of the provisions of the fifteenth clause, it seems obvious that he intended to employ the same agency to accomplish the administration of the fifteenth clause, as modified by the occurrence of the condition mentioned in the codicil, as though that condition had not arisen.

It is likewise to be observed that the testator's entire estate, except the residuum, has been disposed of, and by the residuary clause the title to the residue of his property after paying other independent legacies was absolutely vested in the trustees for the purposes stated in the third and fourth paragraphs of the fifteenth clause of the will. Under these circumstances, and in the absence of any such provision by the testator, the court cannot set apart any portion of the trust fund or of the estate for the purpose of establishing another fund for the payment of or to produce the annuity to the plaintiff during her life, or from which to pay the legacies to her children or their issue at her death. The court has no power to divest the legal title of the trustees to any portion of the estate. *Cochrane v. Schell*, 140 N. Y. 516, 536, 35 N. E. 971. Consequently the only manner in which such annuity and legacies can be satisfied is through the trust, and under the powers conferred upon the trustees by the fifteenth clause, as modified by the ninth clause of the third codicil.

Moreover, if the effect of the codicil was not, as already suggested, to modify the third and fourth subdivisions of the fifteenth clause of the will, and to continue the trust for the execution of the provisions thereof as modified, then as to one-fourth of the residuary estate the testator died intestate. In other words, if the effect of the codicil was, upon the plaintiff's marriage to Herzog, to revoke the provisions contained in the fifteenth clause of the will as to the plaintiff, there being no gift over of that portion, it would not continue as a part of the residue for division among the other three children or their issue, as it seems to be settled that, where the disposition of an aliquot part of the residue fails from any cause, that part will not go in augmentation of the remaining parts, as a residue of residue, but will devolve as undisposed of. 1 *Jarman on Wills*, 764; *Morton v. Woodbury*, 153 N. Y. 243, 257, 47 N. E. 283; *Beekman v. Bonsor*, 23 N. Y. 575; *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177; *Kerr v. Dougherty*, 79 N. Y. 327, 346; *Floyd v. Barker*, 1 Paige, 480, 482. It is perfectly manifest that the testator intended no such result. We think his clear purpose was to continue the trust as provided in the will, and in case of the plaintiff's marriage that it should be modified as

stated in the codicil, and that the residuary estate should then be divided according to that provision as thus modified through the instrumentality of the trust, and that the only intended effect of the codicil was to change the amount which was to go to each of his children by augmenting the shares given to the others, except the plaintiff, by the amount of the diminution of her share.

The gift to the plaintiff and her children by the codicil was not an independent or initial gift to them, but was substitutional—to take the place of the original gift which she was to enjoy in case the condition as to her marriage was not broken—and therefore must be construed as subject to the same conditions as the former one as to the property on which they are charged, or the fund out of which they are payable. *Redfield on Wills*, pt. 1, p. 360, § 26; *Theobald on Wills*, p. 137; *Bristow v. Bristow*, 5 Beavan, 289; *Cooper v. Day*, 3 Mer. 154; *Leacroft v. Maynard*, 1 Ves. Jun. 279; *Crowder v. Clowes*, 2 Ves. Jun. 449; *Giesler v. Jones*, 25 Beavan, 418; *Fisher v. Brierley*, 30 Beavan, 267.

The codicil did not operate as a revocation of the testator's previous testamentary provisions, beyond the clear import of its language, and his expressed intention to change the will in the particular mentioned by implication negatives any intention to alter it in any other respect. *Redfield v. Redfield*, 126 N. Y. 466, 27 N. E. 1032; *Viele v. Keeler*, 129 N. Y. 190, 29 N. E. 78.

The contention that the gift in the residuary clause was a gift to a class, and consequently the brother and the two sisters of the plaintiff would take the entire residue, cannot be sustained. This gift contains none of the elements necessary to constitute such a gift. A bequest is not a gift to a class, where, at the time of making it, the number of the donees is certain, and the share each is to receive is also certain, and in no way dependent for its amount upon the members who shall survive. A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number, at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number. *Matter of Kimberly's Estate*, 150 N. Y. 90, 93, 44 N. E. 945; *Matter of Russell*, 168 N. Y. 169, 61 N. E. 166.

The claim of the respondents that the codicil effected a gift to the brother and sisters of the plaintiff of her share in the residuary estate in case of her marriage, independent of the trust, and uncontrolled by its provisions and limitations, and hence that there was no intestacy, cannot be sustained. At most, it can only be said that the testator intended to partially disinherit her as to her share. But if such was the intent and effect of the codicil, as there was no gift over to them, it constituted a mere disinheritance, without a legal gift to another, which is in-

sufficient to cut off the right of heirs or next of kin to inherit. *Gallagher v. Crooks*, 132 N. Y. 338, 342, 30 N. E. 746.

Assuming, then, as we must, that the intention of the testator, by his codicil, in case the condition as to the plaintiff's marriage arose, was to merely modify the residuary clause by substituting the provision therein for the plaintiff and her children in lieu of the provisions for her contained in the fifteenth clause, and that that clause of the will as thus modified became a part of the trust to be administered by the trustees of the will in accordance with its provisions as thus modified, the question is presented whether the codicil then falls within the condemnation of the statute forbidding the suspension of the absolute power of alienation of real property or the absolute ownership of personal property for a period longer than during the continuance of two lives in being at the creation of the estate or at the death of the testator. By the express provisions of section 15 of the will, the trustees were to hold the property during the lives of two of the testator's children designated, of whom the plaintiff was not one, and pay the income to his children during the continuance of the trust. That provision as modified, if valid, imposed upon the trustees the duty of continuing the trust and retaining the title to the trust property during the lives of those two children; and in addition it required them to retain the title to that portion of the trust property necessary to pay her \$15,000 a year for the further period of her natural life, and upon her death to pay \$300,000 thereof to her surviving children or their issue. If this will and codicil disclose one purpose more clearly than any other, it is that it was the intention of the testator that the portion of his estate intended for his children and their issue should be held in trust and remain inalienable by them until the full end and termination of the trust term by the death of his two children by whose lives it was measured, and, in case the plaintiff should marry Herzog, that the share intended for her and her children should remain inalienable during the further period of her natural life. Thus it is obvious that, during the continuance of the two lives mentioned, the title to all the residuary estate was to remain in the trustees, and also that, as to so much of the trust fund as was necessary to produce the portion intended for the plaintiff and her children, the title was to remain in the trustees not only during the lives mentioned, but also during the life of the plaintiff. Consequently there was or might be a suspension of the absolute power of alienation or the absolute ownership of the property for a period longer than during the continuance of two lives in being at the death of the testator. The rule is that where, by the terms of an instrument creating an estate, there may be an unlawful suspension of the power of alienation or of the absolute ownership, the limi-

tation is void, although it turn out by subsequent events that no actual suspension beyond the prescribed period would have taken place. In other words, to render such future estates created by will valid, they must be so limited that in every possible contingency they will absolutely terminate within the period of two lives in being at the death of the testator, or the estate will be held void. *Schettler v. Smith*, 41 N. Y. 328; *Knox v. Jones*, 47 N. Y. 389, 397; *Hawley v. James*, 16 Wend. 121; *Purdy v. Hayt*, 92 N. Y. 448; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938; *Dana v. Murray*, 122 N. Y. 604, 26 N. E. 21. That the testator intended by the ninth clause of his codicil to create a future inalienable estate during the life of the plaintiff is shown by the fact that the only words of gift are contained in the direction to divide and transfer. Under such circumstances, the vesting in the beneficiaries will not take place, or the future executory limitation take effect, until such future time arrives. *Warner v. Durant*, 76 N. Y. 133, 136; *Smith v. Edwards*, 88 N. Y. 92, 103; *Delaney v. McCormack*, 88 N. Y. 174, 183; *DeLafield v. Shipman*, 103 N. Y. 463, 467, 9 N. E. 184; *Shipman v. Rollins*, 98 N. Y. 311; *Matter of Crane*, 164 N. Y. 71, 53 N. E. 47; *Schlereth v. Schlereth*, 173 N. Y. 444, 66 N. E. 130, 93 Am. St. Rep. 618. Hence the title to the portion of the testator's estate mentioned in the fifteenth clause of his will, from which the plaintiff's annuity was to be paid, and from which, upon her death, the \$300,000 was also to be paid, was to remain in the trustees, and was inalienable for a longer period than two lives in being at the death of the testator.

It is argued by the respondents that annuities do not suspend the power of alienation, and therefore, under the provisions of the codicil, the annuity to the plaintiff is alienable. We are inclined not to agree with that proposition, as applicable to this case, as it is clearly apparent from the will and codicil that the testator intended that the provision for the plaintiff should be and remain inalienable during her life. *Cochrane v. Schell*, 140 N. Y. 518, 35 N. E. 971. But if as to the annuity it could be so held, still as to the portion of the trust fund required to pay the \$300,000 to such of the children of the plaintiff or their issue as should survive her it was clearly inalienable during her life, and the title was suspended beyond the statutory limit.

These considerations lead us to the conclusion that the judgment of the Appellate Division should be reversed, and that entered upon the decision of the Special Term affirmed, with costs to all the parties in all the courts, payable out of the residuary fund.

PARKER, C. J., and O'BRIEN, HAIGHT, VANN, and WERNER, JJ., concur. GRAY, J., concurs in result.

Judgment reversed, etc.

(177 N. Y. 131)

CORR v. SUN PRINTING & PUBLISHING ASS'N.

(Court of Appeals of New York. Jan. 5, 1904.)

LIBEL—COMPLAINT—IDENTIFICATION OF PLAINTIFF.

1. Where the allegation of a complaint in an action for libel shows that the name, age, occupation, character, and reputation of the plaintiff are not the same as those of the person mentioned in the libelous article, and there is nothing in the complaint to show that the libel referred to plaintiff, except the general allegation that it was published of and concerning the plaintiff, it is demurrable as not stating facts sufficient to constitute a cause of action, Code Civ. Proc. § 535, providing that the pleader need not allege extrinsic facts for the purpose of showing the application of the defamatory matter to plaintiff, not applying.

Vann and Martin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Kate Corr against the Sun Printing & Publishing Association. From a judgment of the Appellate Division (78 N. Y. Supp. 1112) affirming a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The complaint alleges, in substance, that the plaintiff is 26 years of age, unmarried, and a resident of the borough of Brooklyn, and was and is a teacher by occupation, employed in one of the public schools of that borough, and until the publication of the libel had always borne a good character and reputation. The complaint then sets up the incorporation of the defendant, and its ownership of the newspaper in question, the Sun. It then alleges that on the 14th day of August, 1901, the said defendant wantonly, falsely, wickedly and maliciously, with intent to injure and destroy the good name, fame, and reputation of the plaintiff, and to cause it to be believed that the plaintiff was guilty of the larceny and felony in the libel described, and was a notorious woman of bad reputation, composed, printed, and published in said newspaper, in the regular edition thereof, of and concerning the plaintiff, and distributed and circulated the same widely and at large throughout said city, state, and elsewhere, the following false, scandalous, defamatory article and libel, to wit: (The alleged libel is then set forth in full.) It further alleges: "That by reason of the premises, the plaintiff has been damaged and injured in her character and reputation, and held up to public scorn, infamy, and disgrace, and has suffered and will continue to suffer great mental pain and anguish, to her damage in the sum of twenty-five thousand dollars." Judgment is thereupon demanded.

The material portions of the alleged libel are as follows: "Cop Charmer in Trouble—Woman who Infatuated Many Policemen Held on Charge of Stealing a Watch. Thom-

as H. * * * a commission merchant of * * * Brooklyn, was in a closed Myrtle avenue car on his way home at two o'clock yesterday morning, when a good-looking and well-dressed woman, who had got on the car with a young man, asked him the time. Thomas H. * * * told her, replaced his gold watch into a waistcoat pocket, and fell into a doze; he missed his watch, and prevented the woman from leaving. The man who was with her disappeared. Thomas H. * * * told the conductor to call a policeman, but he refused, and the commission merchant kept guard over the woman until the car reached the borough line at Ridgewood, where Policeman Mahland took both to the Hamburg Avenue Station. Thomas H. * * * insisted on making a complaint, and the woman was held on the charge of grand larceny. She gave her name as Kate Losee, and said she lived at 195 Hamburg avenue. The police recognized her as Kittie Carr, the daughter of a former Brooklyn detective. Several years ago many policemen were infatuated with her. One, who belonged to the old police station at Flushing avenue and Whipple street, Williamsburgh, blew out his brains in the station; another became insane; a third drank himself to death. The woman dropped out of sight about three years ago. Magistrate O'Reilly, after hearing Thomas H. * * * story, held the prisoner in five hundred dollars bail. The woman is about thirty-five years old."

James Troy and Thomas H. Troy, for appellant. Franklin Bartlett, for respondent.

BARTLETT, J. The plaintiff seeks to recover damages for an alleged libel published in the defendant's newspaper, known as the Sun, printed and published in the city of New York. The defendant interposed a demurrer to the complaint, on the ground that it appears upon the face thereof it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, with leave to the defendant to answer on terms which were not accepted, and the complaint was dismissed. The Appellate Division affirmed the final judgment duly entered.

The question involved in this appeal is the proper construction to be given section 535 of the Code of Civil Procedure, which reads as follows: "It is not necessary, in an action for libel or slander, to state, in the complaint, any extrinsic fact, for the purpose of showing the application to the plaintiff, of the defamatory matter; but the plaintiff may state, generally, that it was published or spoken concerning him; and, if that allegation is controverted, the plaintiff must establish it on the trial. * * *" We are of opinion that the complaint in this case brings it within *Fleischmann v. Bennett*, 87 N. Y. 231, which holds that, although the complaint contains the general words of section 535, the defamatory matter being published of and

¶ 1. See *Libel and Slander*, vol. 22, Cent. Dig. § 128.

concerning the plaintiff, it does not aid him where this general averment is contradicted and rendered nugatory by other allegations. This court said: "As the libel neither describes nor refers to the plaintiff, nor to the business in which he was engaged, but names a different business, and a firm of which in a preceding portion of the complaint it is alleged he is not, and never was, a member, it is manifest that the plaintiff cannot in any way be connected with the libelous matter set forth. * * * There is no principle which authorizes the introduction of any such evidence, where, on the face of the complaint, it is clearly apparent that the libelous words do not relate to and have no connection with the plaintiff or his business as stated there in." In the light of this decision let us examine the libel and the complaint in the case at bar. The libel, in substance, charges that at 2 o'clock in the morning, on a Brooklyn street car, a woman about 35 years of age was charged with robbing a sleeping man of his watch; was arrested, and at the police station gave her name as Kate Losee, living at 195 Hamburg avenue, and was held in \$500 bail; that the police recognized her at Kittie Carr, the daughter of a Brooklyn detective; that several years ago many policemen were infatuated with her—one blew out his brains; the second became insane; the third drank himself to death. We have here the description of a thief and an abandoned woman, abroad at 2 o'clock in the morning, robbing a sleeping passenger on a street car. The plaintiff comes into court and avers that this libel was published of and concerning her, and the question is whether this general averment is rendered nugatory by other allegations. The plaintiff alleges that her name is Kate Corr (not Carr); that she is 26 years of age (not 35); that she is a teacher by occupation, employed in one of the public schools of Brooklyn, and had always borne a good character and reputation. The libel does not refer to Kate Corr; it describes a woman with a different name. It is doubtless true that an action for libel may be maintained where the plaintiff is not named, but is indicated by circumstances contained in the article which are capable of direct proof that the plaintiff was the person to whom reference was made. Many cases in the lower courts illustrate this situation, as, for instance, a plaintiff is referred to by his business, his place of business, his residence, and other facts, rendering it clear that he, and no one else, was referred to in the libel. In such a case section 535 of the Code applies, and it would be sufficient for the plaintiff to aver that the article was published of and concerning him; it would be unnecessary to allege in detail the facts essential to connect him with the libel. In the case at bar the libel clearly states the name of a woman who does not bear the name of the plaintiff; it portrays a woman who, years before, was known to the police as a notoriously bad

character, at a time when this plaintiff may not have attained her majority, driving men to the insane asylum and the grave—a woman, in the language of the libel, who had "dropped out of sight some three years ago." We are of opinion that it appears upon the face of the complaint that the libel was not published of and concerning the plaintiff, and that the demurrer was properly sustained.

The judgment should be affirmed, with costs.

VANN, J. (dissenting.) When an article is not libelous on its face, but becomes so only by reference to extrinsic facts, such facts must be alleged in a traversable form, for they relate to the substance and not to the application of the charge. *Fry v. Bennett*, 5 Sand. 54, 66; *Kinney v. Nash*, 3 N. Y. 177; 13 Encyc. of Pl. & Pr. 40. To such an averment the statute, which changed the rules of pleading in actions for defamation, has no application. The office of the colloquium, as formerly used, was to connect the libelous words with the plaintiff by setting forth facts with much nicety, showing that they applied to him, and were so intended by the defendant. 2 Burrill Pr. 318; 2 Humphrey's Prec. 765; 2 Chitty on Pl. 620. Now, however, if the article is libelous on its face, but fails to identify the person libeled, the statute relaxes the old rule of pleading, by providing in express terms that the pleader need not allege "any extrinsic fact for the purpose of showing the application to the plaintiff of the defamatory matter; but the plaintiff may state generally that it was published or spoken concerning him." Code Civ. Proc. § 535. That this is an allegation of fact, and not of law, appears from the further provision that, if such "allegation is controverted, the plaintiff must establish it on the trial." No denial of a conclusion of law is ever required in a pleading. By command of the statute, therefore, any extrinsic fact which tends to show that the libel was pointed at the plaintiff need not be alleged, but he may make the general allegation that it was published concerning him. While this may not be logical or scientific, a statute is not required to be either. The Legislature had the power and exercised it. *Ita lex scripta est*. Hence the demurrer admits as a fact that the article was published "of and concerning the plaintiff." This construction is confirmed by the note of the commissioners who reported the original Code to the Legislature. Referring to section 141, which is the same in substance as section 535 of the Code of Civil Procedure, they say: This section is "designed to simplify the rules of pleading in libel and slander, in particulars in which the present rules are full of inconvenience and injustice. Where the defamatory matter does not refer directly to the plaintiff, but is connected with him by extrinsic facts, these facts must be set forth by way of preface or inducement; and so technical has this rule

become that it is frequently very difficult in pleading to show this connection to the satisfaction of the court. The real question is, was the plaintiff intended by the defamatory charge? This, it seems to us, should be matter of evidence, and not of pleading. The rule, as laid down in a leading case in our courts on the subject (*Miller v. Maxwell*, 16 Wend. 9), requires that the extrinsic facts should be so stated as that, when read in connection with the defamatory charge, and with the innuendoes connecting it with the introductory matter, the conclusion will be inevitable that the plaintiff is the person intended to be slandered. The difficulty of doing so is illustrated in the case just cited. There the plaintiff in an action for libel averred, by way of innuendo, that the defendant, in attributing the authorship of a printed article to 'a celebrated surgeon of whisky memory,' or to 'a noted steam doctor,' meant the plaintiff; and it was held, notwithstanding the innuendo, that the declaration was bad for the want of an averment in the introductory part thereof that the plaintiff was generally known by these appellations, or that the defendant was in the habit of applying to him these opprobrious epithets. And in a more recent case (*Tyler v. Tillotson*, 2 Hill, 507), where a declaration for a libel alleged that the plaintiff was the editor of a newspaper called the *Ogdensburgh Times*, and that the defendant published of and concerning him, 'as editor of the said paper, the following words: 'We shall, from time to time,' etc., 'notwithstanding the denial of the ribald convict and recorded libeler who edits the *Times* [making the plaintiff the editor of the aforesaid newspaper], called the *Ogdensburgh Times*,' etc., it was held that the declaration was bad, as it contained no sufficient averment showing that the libel referred to and was intended to designate the plaintiff."

I find no authority in this court at variance with these views. *Fleischmann v. Bennett*, 87 N. Y. 231, is not, because in that case the plaintiff pleaded himself out of court by alleging that he was not in any manner a copartner, owner, or agent in any business such as was described in the article, which referred solely to a business carried on by a certain firm, and was directed wholly against that firm and its business. While no person was referred to in the article except members of the firm, the plaintiff expressly alleged that he was not a member of the firm and that he had no connection therewith. As it affirmatively appeared that the libel could by no possibility refer to him, the demurrer was sustained. The court said: "While, no doubt, an action for libel may be maintained where the plaintiff is described in the libelous matter, directly or indirectly, without his name, and is pointed out so that it is capable of direct proof that he was intended, yet, where the allegations negative such a conclusion and show to the contrary, this rule

has no application. There is no principle which authorizes the introduction of any such evidence, where, on the face of the complaint, it is clearly apparent that the libelous words do not relate to and have no connection with the plaintiff or his business, as stated therein. * * * The averment that the publication was of and concerning the plaintiff does not, we think, obviate the difficulty, inasmuch as the previous allegation as to the plaintiff's business, and that he was not engaged in the business described in the libel, shows that it could not and did not relate to the plaintiff, and hence it is not applicable to the facts set forth in the pleading." In other words, the court held that the general allegation authorized by the statute was insufficient when it appeared by the pleading as a whole that it was not possible by proof of extrinsic facts to fasten the libel upon the plaintiff, because he expressly admitted that it did not apply to him. The pleading before us is quite different, for no allegation excludes proof of any fact tending to identify the plaintiff as the person at whom the libelous article was aimed. No contradiction is required in order to show that she was meant, and that she was the only one meant. The name of the plaintiff is correctly stated in the publication, for Kate and Kittle are the same name, one being a nickname, and the other a pet name for Catherine. Moreover, the surname of the plaintiff so closely resembles the name in the article as to be pronounced in the same way by persons who speak in a broad or guttural manner. The allegations of the complaint are not inconsistent, and they do not, as in the case cited, affirmatively exclude the plaintiff as the person libeled. Proof on the trial of a few extrinsic facts would have fixed the libel upon the plaintiff. Suppose, for instance, evidence were given, pursuant to the permission of the statute, that the plaintiff was known as Kate or Kittle Carr or Corr, some of her acquaintances pronouncing and speaking the surname one way and some the other, but all recognizing her as the person meant by either; that she was also generally known by the name of Losee, the surname of her stepfather, as it may be, or of the man who brought her up; that she resided at No. 195 Hamburg avenue, and was the daughter of a former Brooklyn detective named Corr, but widely known both as Carr and Corr; that three policemen belonging to the old police station at Flushing avenue and Whipple street, who were acquaintances of the plaintiff, severally had the experience set forth in the article, and that all these facts were well known to the defendant and its readers—can there be any doubt that such evidence would be competent?

I think the plaintiff is entitled, by virtue of the statute and the general allegation according therewith, to prove facts of the character suggested, without alleging them. Such

facts, instead of contradicting the other allegations of the complaint, simply show the application of the defamatory matter to the plaintiff. They point out the person to whom the defendant referred. They identify the object of the libel, and it is unnecessary that every detail of the identification should be correct, provided there is enough to properly convince the jury that the plaintiff is the one intended, and that her acquaintances would so understand on reading the article. The effect of the statute is to do away with the allegation of such facts as tend to identify the plaintiff as the person libeled. Unless it does this, it does nothing. The Legislature intended to simplify pleadings in cases of libel and slander, and the plain language used, in my judgment, requires the construction indicated. While there are some cases in the Supreme Court which hold otherwise, the reasoning is not satisfactory, and I think we ought to lay down the correct rule in accordance with the real meaning of the statute. For these reasons I vote to reverse.

PARKER, C. J., and GRAY and WERNER, JJ., concur with BARTLETT, J. MARTIN, J., concurs with VANN, J. HAIGHT, J., absent.

Judgment affirmed.

(161 Ind. 533)

PATE et al. v. BUSHONG.

(Supreme Court of Indiana. Dec. 17, 1903.)

WILLS—CONSTRUCTION—ESTATE GIVEN TO WIFE—ERRORS IN DESCRIPTION OF REALTY—CORRECTION.

1. Burns' Rev. St. 1901, § 2737, provides that only a life estate shall pass to a devisee unless it affirmatively appears that a greater estate is intended. A testator devised all his real estate to his wife, and provided that on her death all his realty by description should descend to his son in fee simple, and also gave him certain personalty after the wife's death, and after the expenses of her last sickness, etc., were paid. *Held*, that the widow took only a life estate.

2. Where a person makes a will the prima facie presumption is that he intends to dispose of his whole estate.

3. A will devised "30 acres of land off the south end of the east half of the south quarter of section 29," etc. Section 29 contained a southeast quarter and a southwest quarter. Testator owned 30 acres off the south end of the southwest quarter, and owned no other realty in either of the quarter sections. The will attempted to dispose of all of testator's realty. *Held*, that the case fell within the rule that, where there are two things equally answering the description in a will, the ambiguity may be removed by evidence, and that, in view of the presumption that testator intended to devise his own realty, and not that of another person, the will is sufficient to pass title to the land actually owned by testator.

4. A will devised "20 acres of the northwest quarter of section 29," etc. Testator owned no land in the northwest quarter of section 29, but did own 20 acres of the northwest quarter of section 28. He did not own any other 20-acre tract. The will attempted to dispose of all his realty. *Held* that, rejecting the false

number of the section, the description was still sufficient, in view of the presumption that testator intended to devise his own realty, and not that of another, to cover the 20-acre tract owned by testator.

Appeal from Circuit Court, Henry County; W. O. Barnard, Judge.

Suit by Abraham Pate and others against Peter P. Bushong. Judgment for defendant, and plaintiffs appeal. Transferred from the Appellate Court under act of 1901 (Acts 1901, p. 590, being section 1337u, Burns' Rev. St. 1901). Affirmed.

W. A. Brown, Forkner & Forkner, and I. N. Addison, for appellants. Bundy & Morris and D. W. Chambers, for appellee.

MONKS, J. Jackson Bushong died testate in Henry county, Ind., in 1898, leaving his widow, Lydia Bushong, his son, Peter P. Bushong, the appellee, and his five grandchildren, Minerva A. Pate, Phoebe T. Thompson, Hannah N. Addison, Cora C. Warrington, and Lillie L. Elliston, children of a deceased daughter of the testator. Said will was legally probated. After the death of said widow, appellants brought this action against appellee for partition of the lands devised to the widow, upon the theory that she took the same in fee simple under said will. The will, omitting the codicil, which is not necessary to a determination of this cause, reads as follows:

"Art. 1st: I give, will and bequeath to my beloved wife Lydia Bushong after my death, should she be living, all of my real estate and personal property that may be left of my estate after my death, except such as may be necessary to pay the expenses of my last sickness and funeral, which I direct to be promptly paid out of my estate, and also such amount of money as may be necessary to pay for a suitable monument for myself and wife, not exceeding four hundred dollars, at the discretion of my executor.

"Art. 2nd: I hereby appoint my son Peter P. Bushong my executor, with full power and authority to execute the provisions of my will and make all settlements with each of the hereinafter mentioned heirs, without bond or security.

"Art. 3rd: After the death of my dear wife, should she outlive me and after all expenses of her last sickness and funeral, and all other debts, if any, be paid out of the then remaining estate, I then will and direct as follows:

"Art. 4th: I will, give and bequeath to my only son Peter P. Bushong, the following real estate in Henry County, State of Indiana:

"The Northeast quarter of Section (29) twenty-nine, Township (18) eighteen, Range (9) nine, containing one hundred and sixty acres, and also twenty acres off the Northwest quarter of Section twenty-nine (29), Town (18), Range nine; and

"Also thirty acres of land off the south

end of the east half of south quarter of Section twenty-nine (29), Town (18) eighteen, Range (9) nine, in fee simple, and then direct him to pay the following amounts out of the estate, to-wit:

"Art. 5th: To my granddaughter or heirs, Minerva A. Kerens, the sum of four hundred and fifty dollars (\$450).

"Section 6th. To my granddaughter and children, Phebe T. Estell, the sum of two hundred and twenty-five dollars (\$225).

"Art. 7th: To my granddaughter and her children, Hannah N. Addison, the sum of two hundred and twenty-five dollars (\$225).

"Art. 8th: To my granddaughter, Cora C. Reddick, the sum of two hundred and twenty-five dollars (\$225).

"Art. 9th: To my granddaughter, Lila L. Elliston, the sum of five hundred dollars (\$500). Making a total amount of sixteen hundred and twenty-five dollars to be paid to my five granddaughters, as named in the above sections by my son, Peter P. Bushong, in the following order to-wit:

"Section 10th: Three months after the death of my wife, P. P. Bushong shall pay to my granddaughter, Lila L. Elliston, or her heirs, if any, the sum of one hundred dollars; and one year later the sum of five hundred to be equally divided between the five heirs, one hundred dollars each, and to continue each succeeding year at the same ratio until each heir shall have received three full payments as stated above, provided, however, that there is to be no interest computed on any payment.

"Art. 11th: I further direct, give and bequeath to my son, Peter P. Bushong, after the death of my wife, and after all expenses of her last sickness and funeral expenses are paid, all of the farming utensils, grain, hay and stock of all kinds that may remain on the farm.

"Art. 12. I further give and bequeath to my son, Peter P. Bushong, and my five grandchildren, all of the household goods to be divided equally among the six heirs, and should any of my granddaughters die intestate with no heirs living, I direct that the amounts be divided among those that are living.

"Given under my hand and seal this 17th day of August, eighteen hundred and ninety-three, (1893)."

At the time the testator made said will and at the time of his death, he was the owner in fee simple and in the possession of the following described real estate in Henry county, Ind., and he was not the owner of any other lands from the date of his will until the time of his death: The northeast quarter of section 29, township 18 north, of range 9 east; also 30 acres off the south end of the east half of the southwest quarter of section 29, township 18 north, of range 9 east; also 20 acres off the west side of the following described lands, to wit, commencing 16 rods south of the northwest corner

of the northwest quarter of section 28, township 18 north, of range 9 east, and running thence east 96 rods; thence south to the south line of said northwest quarter of said section, township, and range; thence west on the said line 96 rods to the section line; thence north to the place of beginning. The testator and his wife lived on the 160 acres described in the will, and the 20-acre tract adjoined the same on the east. Appellee also lived on said tract in a house near his father's house, and continued to live thereon after his father's death. After the death of the testator, Peter P. Bushong, appellee, was appointed and qualified as executor of said will, and paid over to appellants Cora C. Warrington and Phoebe T. Thompson the legacies given them by items 6 and 8 of the will, taking receipts therefor as executor.

The questions presented by the record are:

(1) Did Lydia Bushong, the widow, take said real estate for life only under said will? (2) Was there a mistake in describing the 20 and 30 acre tracts of land named in the will, and, if so, can the same be corrected, or so interpreted as to apply to the 20 and 30 acre tracts owned by the testator at the time he made the will and at the time of his death? (3) Were Cora C. Warrington and Phoebe T. Thompson estopped from claiming a share in the lands as heirs of Lydia Bushong if she took a fee, by accepting of the executor the legacies given them by the will? The trial court decided these questions in the affirmative, and rendered judgment in favor of appellee. If questions 1 and 2 are answered in the affirmative, it will not be necessary to determine the third.

The purpose of construing a will is to ascertain the intention of the testator, which must be given effect when ascertained, unless in violation of some rule of law. To ascertain such intention, the whole will must be considered, and no word or clause in the will is to be rejected to which a reasonable effect can be given. In this state only a life estate will pass to a devisee unless it affirmatively appears a greater estate was intended. Section 2737, Burns' Rev. St. 1901 (section 2567, Rev. St. 1881, and section 2567, Horner's Rev. St. 1901); Fenstermaker v. Holman, 158 Ind. 71, 74, 62 N. E. 699; and cases cited. It will be observed that the testator has not said in express terms that he devised said real estate to his widow in "fee simple," either in apt words or by the use of legal words of inheritance. Neither has he given his widow the power of disposing of said real estate in express terms, nor do we think such power can be implied from the language of the will. The will gives to Peter P. Bushong in fee simple 210 acres of real estate, all the real estate the testator owned when he made the will and at the time of his death, and not what remained undisposed of or unexpended at the death of his wife. It is clear, therefore, that the power of the widow to dispose of said real

estate cannot be inferred from items 3 and 4. Item 11 describes a kind of personal property which is consumed or destroyed by use, and the language thereof shows that it was the intention of the testator that the expenses of his widow's last sickness and her funeral expenses should be paid out of the property described therein. It is evident that the power of the widow to sell the real estate devised to her cannot be inferred from that item.

Having reached the conclusion that the widow was not given by implication or express words the power to dispose of said real estate, it is clear that, so far as the question of what interest she took in the real estate devised to her is concerned, the same is ruled by the case of *Fenstermaker v. Holman*, 158 Ind. 71, 82 N. E. 699, and that she took only a life estate therein.

Appellants claim that appellee took no title to the 20 and 30 acre tracts of land in controversy under the will of the testator, because said tracts are not described in the will. It will be observed that the 20-acre tract is described as in section 29, while the 20-acre tract owned by the testator when the will was made and at the time of his death was in section 28, adjoining the 160 acres described in the will. The 30-acre tract is definitely described in the will, except that the words, "south quarter" instead of "southeast quarter" are written in the will. When a person makes a will the presumption is that he intended to dispose of his whole estate, unless it is rebutted by the provisions of the will, or other evidence to the contrary. 2 *Redfield on Wills* (3d Ed.) § 5x, p. 116; *Cate v. Cranor*, 30 Ind. 292, 295, 296; *Roy v. Rowe*, 90 Ind. 54, 59, 60; *Mills v. Franklin*, 128 Ind. 444, 446, 28 N. E. 60; *Groves v. Culph*, 132 Ind. 186, 188, 31 N. E. 569; *Borgner v. Brown*, 133 Ind. 391, 396, 33 N. E. 92; *Korf v. Gerichs*, 145 Ind. 134, 136, 44 N. E. 24; *Missionary Society v. Mead*, 131 Ill. 388, 357, 358, 23 N. E. 603; *Vestal v. Garrett*, 197 Ill. 398, 404, 406, 64 N. E. 345. There is nothing in the will in this case or in the evidence to rebut this presumption. When the will was executed, and at the time of his death, the testator owned 210 acres of land, and no more. This he devised to his wife for life, and attempted to devise 210 acres in fee simple to appellee—all the land owned by him. While it is clear that the testator intended to dispose of all the lands he owned, the language used in describing the 20 and 30 acre tracts, if construed literally, would defeat this intention, at least as to the 20-acre tract. As we have already said, the intention of a testator must in all cases govern the construction of a will, unless in violation of some rule of law. To ascertain such intention, the court may hear evidence of the circumstances, situation, and surroundings of the testator when the will was made, and the state and description of his property. 2 *Un-*

derhill on Law of Wills, §§ 909-911, 914; *O'Hara's Wigram on Extrinsic Evidence on the Interpretation of Wills* (2d Am. Ed.) pp. 56, 161; *Schouler on Wills*, § 579; *Randolph and Talcott's Jarman on Wills*, 733-762; *Page on Wills*, §§ 816, 817; *Whiteman v. Whiteman*, 152 Ind. 263, 273, 274, 53 N. E. 225; *Patch v. White*, 117 U. S. 210, 217, 6 Sup. Ct. 617, 29 L. Ed. 860; *Black v. Richards*, 95 Ind. 184, 189-191; *Daugherty v. Rogers*, 119 Ind. 254, 258-261, 20 N. E. 779, 3 L. R. A. 847; *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631, 46 L. R. A. 168, 62 Am. St. Rep. 526; *Price v. Price*, 89 Ind. 90, 91. By thus putting itself in the testator's place, the court is able to understand and apply the language of the will, and give effect to a will containing errors or repugnancies, so far as the intention of the testator can be determined, and will pronounce judgment with such repugnancies removed or errors corrected. It is well settled that, when a latent ambiguity is disclosed by extrinsic evidence, it may be removed by extrinsic evidence. *Whiteman v. Whiteman*, 152 Ind. 263, 270, 53 N. E. 225; *Patch v. White*, 117 U. S. 210, 217, 6 Sup. Ct. 617, 29 L. Ed. 860. It is true that extrinsic evidence will not be resorted to for the purpose of changing or varying the words of a will, but courts for a long period of years have felt compelled to deal with descriptions in such a manner as to reach the intent of the testator, when that seemed practicable, by construction, and by the admission of oral evidence to remove latent ambiguities. It is well established that, however many errors there may be in a description, either of the devisee or the subject of the devise, it will not avoid the bequest if, after rejecting the errors or false words, enough remains to show with reasonable certainty what was intended when considered from the position of the testator. 1 *Redfield on Wills* (4th Ed.) 580 et seq.; 2 *Underhill on Wills*, 909-914; *O'Hara on Interpretation of Wills*, pp. 369-374; *O'Hara's Wigram on Extrinsic Evidence in the Interpretation of Wills* (2d Am. Ed.) pp. 52-54, 144-147; *Page on Wills*, §§ 473, 487, 819; *Kurtz v. Hibner* (Ill.) 3 *Albany Law Journal*, 263-267; *Trustees v. Peaslee*, 15 N. H. 317; *Winkley v. Kalme*, 82 N. H. 268; *Allen v. Lyons*, 2 Wash. C. C. 475, Fed. Cas. No. 227; *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 29 L. Ed. 860; *Roman, etc., Asylum v. Emmons*, 3 *Bradf. Sur.* 144; *Cleveland v. Carson* (N. J.) 18 *Cent. Law Journal*, 68, and note, 69-71; *Willard v. Darrab*, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468; *Judge Redfield's note to Kurtz v. Hibner* (Ill.) 10 *Am. Law Reg.* (N. S.) 97-101; *Riggs v. Myers*, 20 Mo. 239; *Gaston's Estate*, 188 Pa. 374, 41 *Atl.* 529, 68 Am. St. Rep. 874; *Black v. Richards*, 95 Ind. 184, 189-191; *Jackson v. Hoover*, 26 Ind. 511; *Whiteman v. Whiteman*, 152 Ind. 263, 268-274, 53 N. E. 225; *Miller v. Coulter*, 156 Ind. 290, 293, 59 N. E. 853; *Groves v. Culph*, 132 Ind. 186, 31 N. E.

569; *Skinner v. Harrison* Tp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137; *Elliott v. Elliott*, 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54; *Chappell v. Missionary, etc.*, 3 Ind. App. 356, 29 N. E. 924, 50 Am. St. Rep. 276.

In *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 29 L. Ed. 800, the testator devised certain specific lots to each of his near relatives, and, among others, to his brother Henry a lot described as "lot number 6 in square 403, together with the improvements thereon erected." The court said: "Now the parol evidence discloses the fact that there was an evident misdescription of the lot intended to be devised. It shows, first, as before stated, that the testator, at the time of making his will, and at the time of his death, did not, and never did, own lot 6 in square 403, but did own lot 3 in square 406; secondly, that the former lot had no improvements on it at all, and was located on Ninth street, between I and K streets, whilst the latter, which he did own, was located on E street, between Eighth and Ninth streets, and had a dwelling house on it, and was occupied by the testator's tenants—a circumstance which precludes the idea that he could have overlooked it. It seems to us that this evidence, taken in connection with the whole tenor of the will, amounts to demonstration as to which lot was in the testator's mind. It raises a latent ambiguity. The question is one of identification between two lots, to determine which was in the testator's mind—whether lot 3, square 406, which he owned, and which had improvements erected thereon, and thus corresponded with the implications of the will, and with part of the description of the lot, and rendered the devise effective; or lot 6, square 403, which he did not own, which had no improvements thereon, and which rendered the devise ineffective. * * * What he meant to devise was a lot that he owned; a lot with improvements on it; a lot that he did not specifically devise to any other of his devisees. Did such a lot exist? If so, what lot was it? We know that such a lot did exist, and only one such lot in the world, and that this lot was the lot in question in this cause, namely, lot No. 3 in square 406. Then is it not most clear that the words of the will, 'lot numbered six in square four hundred and three,' contained a false description? * * * It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject: as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing

does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances or declarations of the testator. 1 *Jarman on Wills*, 370; *Hawkins on Wills*, 9, 10. Where it consists of a misdescription, as before stated, if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will. 1 *Jarman on Wills*, 364, 365; 1 *Roper on Legacies*, 297 (4th Ed.); 2 *Williams on Executors*, 983, 1032. Mr. Williams (afterwards Mr. Justice Williams) says: 'Where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified: * * * (1) By the context of the will; (2) to a certain extent by parol evidence. * * * A court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person intended by the testator.' Again, he says, on page 1032: 'Mistakes in the description of legacies, like those in the description of legatees, may be rectified by reference to the terms of the gift and evidence of extrinsic circumstances taken together. The error of the testator, says Swinburne, in the proper name of the thing bequeathed, doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain. As, for instance, the testator bequeaths his horse Cripple, when the name of the horse was Tulip. This mistake shall not make the legacy void; for the legatory may have the horse by the last denomination; for the testator's meaning was certain that he should have the horse. If, therefore, he hath the thing devised, it is not material if he hath it by the right or the wrong name.' See, also, *Roper on Legacies*, 297."

In *Allen v. Lyons*, 2 Wash. O. C. 475, Fed. Cas. No. 227, the devise was of a "house and lot in Fourth street, Philadelphia," but it appeared on oral proof that the testator had no such property in Fourth street, but did own a house and lot in Third street, and it was held to pass under the devise.

In *Winkley v. Kalme*, 32 N. H. 268, the devise was of "thirty-six acres, more or less, of lot 37 in the Second Division of Barn-

stead"; and, it appearing that there was no such lot in that division, but that the testator owned land in lot 97 in that division, it was held to pass under will.

In *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750, the testator, by the terms of his will, devised 20 acres off the west half of the northeast quarter of the northeast quarter of section 33, township 18 north, of range 11 west. The evidence showed that the testator never owned the northeast quarter of the northeast quarter of section 33, or any part of it, but did own the northwest quarter of the northeast quarter of the section. It was held that there was a latent ambiguity in the devise, the words describing the land being in part false, and that the false description might be stricken out, and the devise sustained as embracing the land owned by the testator.

In *Whitcomb v. Rodman*, 156 Ill. 116, 40 N. E. 553, 28 L. R. A. 149, 47 Am. St. Rep. 181, the testator devised parcels of land aggregating 180 acres (all that he owned), but in devises to two sons, respectively, described two 40's in the southeast quarter of section 22, adjoining those really owned by him in the northeast quarter of said section, leaving the latter undisposed of, and it was held the devise covered the 40's owned by the testator in the northeast quarter of said section. The court said (at page 125, 156 Ill., page 555, 40 N. E., 28 L. R. A. 149, 47 Am. St. Rep. 181): "While words cannot be added to a will, yet in arriving at the intention of the testator, as has been shown by the authorities, so much as is false in the description of the premises devised may be stricken out, and, after striking out the false description, if enough remains to identify the premises intended to be devised, the will may be read and construed with the false words eliminated therefrom. Adopting that rule here, the second and third clauses will read as follows: 'Second—To my son Joseph L. Rodman I will and bequeath one hundred acres of land (100)—sixty acres (60) off of the west side of the south-east quarter of section twenty-two (22), forty acres (40) being the * * * quarter of the * * * quarter of section twenty-two (22). Third—To my son Edward L. Rodman I will and bequeath forty acres of land, being the * * * quarter of the * * * quarter of section twenty-two (22).' Bearing in mind that the testator owned two forty-acre tracts in the northeast quarter of section 22, and reading the two clauses of the will in the light of surrounding circumstances, we think all difficulty is removed in regard to the lands devised by these two provisions of the will. The testator, owning two quarters of a quarter of section 22, devised one quarter to his son Joseph, and the other quarter to his son Edward, and the two sons took and held the two tracts undivided."

In *Stewart v. Stewart*, 96 Iowa, 620, 65 N. W. 976, the testator gave to his son Fred

D. Stewart "the south half of the northeast quarter of section 30 in township 76 north of range 7 west." This tract did not belong to the testator when the will was made or at the time of his death, but he owned at said times the south half of the southeast quarter of that section, which was not described in the will. The court disregarded the word "north" in the will, and held that the will gave said devisee said south half of the southeast quarter of said section 30. The court said at page 627, 96 Iowa, page 976, 65 N. W.: "The evidence shows that the description of the land in question is in part wrong. After rejecting the erroneous portion, the remainder describes 'the south half of the east quarter of section No. 30,' etc. The section contains two tracts which may be properly spoken of as the 'east quarters,' and, under the rules of interpretation cited [*Jordan v. Woodin*, 93 Iowa, 453, 61 N. W. 948; *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 29 L. Ed. 860; *Eckford v. Eckford*, 91 Iowa, 54, 58 N. W. 1093, 26 L. R. A. 370], we are of the opinion that extrinsic evidence may be received to show what quarter was intended by the testator."

In *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570, the language of the will was: "Item 3. I give and devise to my son, Noah Young, * * * 62½ acres off of the east side of the northeast quarter of section number twenty (20), township 21 north, of range 11 west." The testator did not own 62½ acres off of the east side, but did own 62½ acres in the east half of said quarter section. The court said: "Striking out the words 'off of the east side,' the third item will read: '* * * also 62½ acres of the north-east quarter of section number twenty (20), township 21 north, range 11 west.' This description is sufficiently definite to include the land in dispute."

In *Merrick v. Merrick*, 37 Ohio St. 126-132, 41 Am. Rep. 493, the land devised was described as "the east half of the southeast quarter of said section 28," which testator did not own, but he did own "the east half of the northeast quarter of section 28." The court said: "The evidence fully supports the claim that, while the will on its face is free from ambiguity, the word 'south,' in its third item, was inserted by mere mistake of the scrivener, the testator intending that the word 'north' should be used. The sole question, therefore, is whether, on proof of such fact, it is competent for the court to declare that the east half of the northeast quarter of section 28 passed by the will. * * * Rejecting the erroneous description, the word 'south,' sufficient appears on the face of the will, in the light of the facts here disclosed, to warrant us in saying that by the will of Adam Merrick the other moiety, the east half of the northeast quarter of section 28, passed. * * * And thus the case is determined by a just and proper application of the maxim, 'Falsa demonstratio non nocet.'"

In *Case v. Young*, 3 Minn. 209 (Gil. 140),

the testator gave to his wife "the one-third of all real estate"; to his son David, "the north half of the real estate"; to his son Jacob, "the south half of the real estate." There was no other description of the real estate contained in the will. The court, at 3 Minn. 209 (Gil. 143), said: "It is insisted that it does not describe any real estate whatsoever. Had the language used been 'of my real estate,' or 'of the real estate I now own,' or 'the real estate of which I shall die seised,' it is admitted that it would have been sufficiently certain. * * * But are we to suppose that the testator here intended to devise or referred to the real estate of any other person? We ought not to presume that he intended an impossibility, but should ascertain, if possible, what his intention was, and give effect to it. We held in the case of *Baldwin v. Winslow*, 2 Minn. 213 [Gil. 174], that, where the meaning of an instrument is certain and intelligible, the subject or object to which it is to be applied may be ascertained by extrinsic evidence, if it can be done without a departure from the rational meaning of the words actually used, and that, if the meaning is involved in uncertainty, the intention may be ascertained by extrinsic testimony, and when so ascertained will be taken as the meaning of the parties, if such meaning can be distinctly derived from a fair and rational interpretation of the language employed. Applying this test to the case at bar, we find no difficulty in ascertaining, from the will itself, that it was the intention of the testator to devise lands to his sons; and extrinsic evidence, if, indeed, that would be necessary, would be admitted to identify his own lands as the subject or object to which the term 'the real estate,' as used in the will, applied."

In *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581, the testator devised to Margaret McGill "a certain parcel of ground or lots in the city of Portland and numbered as follows, to wit: No. block, 187, lot No. 2"; to Esther Brady, "that lot or parcel of ground, in the city of Portland, lot 1, in block 187." The testator did not own or claim any interest in said lots when he made his will or at the time of his death, but did own lots 3 and 4 in said block. The court at pages 313, 314, 8 Or., 34 Am. Rep. 581, said: "Then we apprehend there can be no question of the admissibility of extraneous oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was in at the time he made the will in question. This, we think, is unquestionably the rule established by the decided cases. This being done, it appears that the testator had no such lots as those described as lots 1 and 2 in the particular block named. This renders it certain that the lots named were erroneous, and the words describing them can have no possible operation, and must be rejected. The devise is the same as if the numbers of

the lots had not been mentioned at all, or had been named and the numbers left blank. We are then compelled to fall back upon the remaining portion of the description, to wit: 'A certain parcel of ground or lots in the city of Portland in block 187;' also 'that lot or parcel of ground in the city of Portland in block 187.' And by thus placing ourselves in the position of the testator, by oral evidence, at the time of the execution of his will, we find that there were two lots or parcels of ground in the city of Portland, and in block 187, belonging to the testator at that time, and also at the time of his death. This renders the devise entirely certain from the language of the will as to the intention of the testator. The description would have been sufficient by merely naming the block and city in which the lots or land lay, without specifying the numbers of them. The testator could not have intended to devise lots to which he never had any title, but must have intended to devise those which did belong to him. He had two just such lots or pieces of land as he names, and every way described as these are, with the single exception of this one false particular; and this is the very kind of case to which the maxim, 'Falsa demonstratio non nocet,' applies."

In *Cruse v. Cunningham*, 79 Ind. 402, the land was described in the will as follows: "Part of the donation lot number 158, in township number 3 north, of range 8 west, containing 200 acres." It was claimed by the heirs of the testator that the description was so uncertain that the devise was void. The court said at page 405: "In the case at bar the testator had no heirs except his father and one brother. He bequeathed nearly all his real estate, including the land in controversy, to Charity Lodge, No. 30, of Free and Accepted Masons, in Washington, Daviess county, for the purpose of building a Masonic lodge on certain specified lots, with power to sell all the other lots. The parol evidence, which was admitted over appellant's objection, showed that donation lot No. 158 in town 3 north, of range 8 west, was estimated to contain about 400 acres—in fact, it contained 418 acres, of which 10 were in the river; but it appeared that one-half of it was called 200 acres, and one-fourth of it 100 acres, and that Joseph Cruse, in his lifetime, was in possession of 200 acres of said donation lot 158, claiming to own it. Some of the witnesses said he claimed 200 acres, or perhaps one-half of the donation lot; one witness said that Joseph never claimed more than half the lot; and the evidence also showed that the other two quarters of said donation lot were owned by other parties. Under the authority of the cases hereinbefore cited, the parol evidence was properly admitted, and it showed very clearly that the property devised by Joseph Cruse to Charity Lodge, No. 30, was the same half of said donation lot which is sought to be recovered in this suit. The court committed

no error in admitting the will in evidence, nor in admitting the parol evidence in explanation of it."

In *Groves v. Culp*, 132 Ind. 186, 31 N. E. 569, the third item of the will gave to the widow "the house and lot on which I now reside, being parts of lots number fifteen and sixteen in the city of Rising Sun," for life. The fourth item was as follows: "I further give and devise the same lot number fifteen so devised to my said wife during her lifetime, together with all the appurtenances thereto belonging, to my youngest daughter, Eliza Jane Carpenter, and to her heirs in fee simple forever. * * * There was no other reference made to lot 16 in the will, except in the item designated. This court held that extrinsic evidence was admissible, and that the testator intended to devise to his daughter in fee what he devised to his wife for life, and that the same passed to the daughter under the devise to her, although lot 16 was not named in the devise to her.

From the many other cases to the same effect we cite the following: *Seebrook v. Fedawa*, 33 Neb. 413, 50 N. W. 270, 29 Am. St. Rep. 488; *Vestal v. Garrett*, 197 Ill. 398-406, 64 N. E. 345; *Hawkins v. Garland's Adm'r*, 76 Va. 149, 44 Am. Rep. 158; *Willard v. Darrach*, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468; *Wood v. White*, 32 Me. 340, 52 Am. Dec. 654; *Howard v. American*, etc., 49 Me. 288; *Flynn v. Holman* (Iowa) 94 N. W. 447; *Chambers v. Watson*, 60 Iowa, 339, 14 N. W. 836, 46 Am. Rep. 70; *Severson v. Severson*, 68 Iowa, 656, 27 N. W. 811; *Button v. American Tract Soc.*, 23 Vt. 336; *Black v. Hill*, 32 Ohio St. 313; *Peters v. Porter*, 60 How. Prac. 422; *Smith v. Smith*, 4 Paige, 271; *Pond v. Bergh*, 10 Paige, 140, at page 152; *Trustees v. Colgate*, 4 Hun, 362; *Du Bois v. Ray*, 35 N. Y. 162; *Taylor v. Tolen*, 38 N. J. Eq. 91; *Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279; *Lutz v. Lutz*, 2 Blackf. 72; *Kurtz v. Hibner*, 3 Albany Law Journal, 263-267; note by Judge Redfield to *Kurtz v. Hibner*, 10 Am. Law Reg. (N. S.) 97-101.

The rule is thus stated in *Wigram on Wills* (2d Am. Ed.) by O'Hara, pt. 1, pp. 144-147: "If the description in the will is incorrect, evidence that a subject having such marks upon it exists, must be admissible, that the court may determine whether such subject, though incorrectly described in the will, be that which the testator intended. * * * So a description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or at least sufficiently so as to enable a court to identify the subject intended, as where a false description is superadded to one which by itself would have been correct. Thus, if a testator devise his black horse, having only a white one, or devise his freehold houses, having only leasehold houses, the white horse, in the one case, and the leasehold houses, in the other, would clearly pass. In

these cases the substance of the subject intended is certain, and, if there be but one such substance, the superadded description, though false, introduces no ambiguity; and as, by the supposition, the rejected words are inapplicable to any subject, the court does not alter, vary, or add to the effect of the will by rejecting them. To such cases, the maxim, '*Falsa demonstratio non nocet*,' may with propriety be applied." By the words "inapplicable to any subject" the author means inapplicable because the subject is not in existence or does not belong to the testator.

It is said in *Page on Wills*, p. 976, § 819: "Where a testator describes the property devised by township, range, section, and quarter section, but does not locate it in the correct section or range, or the like, the weight of authority is that extrinsic evidence is admissible to show exactly what real estate the testator owned. Under this view, if he owns any real estate which corresponds in part to the description in the will, the court will reject the incorrect part of the description, and will pass the realty conveyed by the correct description."

The cases of *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581, and *Riggs v. Myers*, 20 Mo. 239, referred to above, were cited with approval by this court in *Black v. Richards*, 95 Ind. 184, 190. The court said at page 190: "From the earliest period in the history of testamentary law, there has been manifested a disposition to apply a more favorable construction to wills than to ordinary legal instruments. Regret has sometimes been expressed at the disposition thus manifested, but the courts have nevertheless continued to countenance that line of judicial policy. It must therefore be accepted and acted upon as an established rule of construction at the present time. *Riggs v. Myers*, 20 Mo. 239; *Wilkins v. Allen*, 18 How. 385, [15 L. Ed. 396]; *Cleveland v. Spilman*, 25 Ind. 95; *Brownfield v. Brownfield*, 12 Pa. 136 [51 Am. Dec. 590]; *Moreland v. Brady*, 8 Or. 303 [34 Am. Rep. 581]."

There are some cases which seem to hold that when the evidence of the circumstances, situation, surroundings, and property owned by the testator at the time he made his will shows that the testator did not own the land as described in his will, but owned other land to which a part of the description might properly apply, no latent ambiguity was disclosed, unless the words "my land," or other words stating in effect that the testator owned the land devised, are contained in the will. The rule established by the weight of the authorities, and the better reason, however, is that such evidence does disclose a latent ambiguity, whether words stating, in effect, that the testator owned the lands devised are used or not; and if, by rejecting the false description or the false part thereof, sufficient remains, when considered from the position of the testator, to identify the land

intended with reasonable certainty, the same will pass under the will to the devisee. It is true that, after rejecting the false description or the false part thereof, the words "my real estate," or words of like import, if used by the testator in making the devise, would be of great force in identifying the land intended, and might, alone or in connection with the true part of the description, if any, pass the land to the devisee in cases where, if the words were not used, the devise would fail for want of a description sufficient to identify the land. The enforcement of this rule does not reform or add any words to a will, for this cannot be done, but enables the court to construe the will after rejecting the false part of the description, and thus carry into effect the intention of the testator as expressed therein.

The 30-acre tract is described in the will as follows: Thirty acres of land off the south end of the east half of the south quarter of section 29, town 18, range 9, in Henry county, Indiana. Said section 29 contains two parts which answer to the description "south quarter"—the southeast quarter and the southwest quarter. When there are two things equally answering the description in a will, the ambiguity may be removed by evidence. 1 Bigelow's *Jarman on Wills* (6th Ed.) 434, 435; *Underhill on the Law of Wills*, § 910; *Black v. Richards*, 95 Ind. 184, 189, 190; *Cruse v. Cunningham*, 79 Ind. 402; *Skinner v. Harrison Tp.*, 116 Ind. 139, 141, 18 N. E. 529, 2 L. R. A. 137; *White v. Patch*, 117 U. S. 217, 6 Sup. Ct. 617, 29 L. Ed. 800. The agreed statement of facts in this case shows that the testator owned 30 acres off the south end of the southwest quarter of said section, and owned no other real estate in either of said quarter sections. The presumption is that the testator intended to devise his own real estate, and not real estate owned by another. 2 *Underhill's Law of Wills*, p. 1008; *Redfield on Law of Wills* (3d Ed.) p. *123; *Patch v. White*, 117 U. S. 210, 216, 220, 6 Sup. Ct. 617, 29 L. Ed. 860; *Moreland v. Brady*, 8 Or. 303, 314, 34 Am. Rep. 581; *Stewart v. Stewart*, 96 Iowa, 620, 625, 65 N. W. 976; *Flynn v. Holman* (Iowa) 94 N. W. 447, 448; *Decker v. Decker*, 121 Ill. 341, 355, 12 N. E. 750; *Huffman v. Young*, 170 Ill. 290, 296, 49 N. E. 570; *Lindgren v. Lindgren*, 9 Beav. 358, 361. Applying the rules applicable to such descriptions, there can be no doubt of the identity of the 30 acres devised to appellee.

The 20-acre tract in controversy is described, "20 acres off the northwest quarter of section 29, town 18, range 9, in Henry county, Indiana." The agreed statement of facts shows that the testator owned no land in the northwest quarter of said section, but did own 20 acres off the northwest quarter of section 28, town 18, range 9, adjoining the 160 acres in the northeast quarter of section 28 devised to appellee. The testator did not own any other 20-acre tract of land. This tract is correctly described in the will as 20

acres. The quarter section, town, and range are correctly given in the will. The only false description is the number of the section, given as 29, when it should have been 28. Rejecting the number of the section, as we are required to do, because it is false, the will devises to appellee "20 acres off the northwest quarter of section * * *, town 18, range 9, in Henry county, Indiana." It is clear from the authorities cited that, while courts of equity have no power to reform a will or add words thereto, yet a devise of real estate by a description partly false may be effective if what remains after rejecting the false reasonably corresponds with real estate indicated by the extrinsic evidence. Keeping in view the foregoing rules of construction, and the presumption that the testator intended to devise his own property, and not the property of another, and reading the will in the light of the surrounding circumstances, it is evident that said testator intended to devise the 20 acres owned by him in the northwest quarter of section 28, and that appellee took the same in fee simple under said will. By rejecting the false number of the section, and giving effect to that part of the description of the 20 acres which is true, we add nothing to the terms of the will, and violate no positive rule of law or canon of construction. So far as *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739, *Sturgis v. Work*, 122 Ind. 134, 22 N. E. 996, 17 Am. St. Rep. 349, and *Judy v. Gilbert*, 77 Ind. 96, are in conflict with this opinion, they are overruled.

The conclusion we have reached renders the determination of the question of the estoppel of Warrington and Thompson unnecessary.

Judgment affirmed.

(32 Ind. App. 38)

NELSON et al. v. STATE ex rel. HUNTER.
(Appellate Court of Indiana, Division No. 1.
Dec. 17, 1903.)

INTOXICATING LIQUORS—CIVIL DAMAGE SUIT
—PROXIMATE CAUSE.

1. Under Burns' Rev. St. 1901, § 7288, providing that every person who shall make any unlawful sales of intoxicating liquors shall be liable to any person who shall sustain any injury to his means of support on account of the use of such liquors, a wife may recover for loss of her support from death of her husband from use of liquors sold him while intoxicated.

2. Sale of intoxicating liquors to one while intoxicated, by reason of which he becomes so intoxicated that he exposes himself to the elements and contracts pneumonia, resulting in his death, is the proximate cause of his death.

Appeal from Circuit Court, Kosciusko County; H. S. Biggs, Judge.

Action by the state, on the relation of Myrtle M. Hunter, against Johnson Nelson and others. Judgment for plaintiff. Defendants appeal. Affirmed.

¶ 2. See *Intoxicating Liquors*, vol. 29, Cent. Dig. §§ 426, 438.

Stokey & Biggs, for appellants. S. J. North and Royse & Shane, for appellee.

ROBINSON, J. Suit by appellee for damages alleged to have resulted from the wrongful sale of intoxicating liquors to the husband of relatrix. The first paragraph of complaint avers unlawful sales in January, 1900, and subsequently; that when sober her husband was industrious, had some property, and was making and earning a good living for his family; that, while intoxicated, appellant Nelson sold him intoxicating liquor, and so continued until the husband had squandered and wasted all his means for drink, and was rendered wholly unfit for any business, and for a long period so continued; and that relatrix and her child were wholly without any means of support. The second paragraph avers unlawful sales in November, 1900, by reason of which the husband became intoxicated, lost his reason and judgment and all care for himself, and while in such drunken and unconscious condition contracted a severe cold, became delirious from such intoxication and cold, and continued so until his death.

The giving of certain instructions, the refusal to give an instruction tendered, and that the verdict is not sustained by sufficient evidence, are the only questions argued.

Section 7288, Burns' Rev. St. 1901, provides that "every person who shall sell, barter or give away any intoxicating liquors, in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond filed in the Auditor's office, as required by section 4 of this act [section 5315], to any person who shall sustain any injury or damage to his person or property or means of support on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction." The damages sought to be recovered by relatrix are for the loss of her means of support, resulting from the unlawful sale of liquor to her husband while in a state of intoxication. See *Mulcahey v. Givens*, 115 Ind. 286, 17 N. E. 598; *Baecher v. State ex rel.*, 19 Ind. App. 100, 49 N. E. 42; *Smiser v. State ex rel.*, 17 Ind. App. 519, 47 N. E. 229; *Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154; *Wightman v. Devere*, 33 Wis. 570. As the action is founded upon the above statute, the second paragraph of complaint is not to recover damages for the death of the husband, but for the consequent injury to her means of support. The statute says nothing about an action for the death of the husband. But it is clear that if, through such intoxication, the husband should become permanently disabled for labor and for earning a support for his family, an action for damages would be within the intent and meaning of the statute. It certainly could not be said that the wife might sue if the wrongful acts deprived her of her means of support because of her husband's perma-

nent disability, and that she might not sue if the same conditions resulted from his death.

Counsel for appellants insist that the unlawful sales, if any, to the husband, were not the proximate cause of his death, but that other agencies intervened, and that damages may be recovered only for the natural and probable consequences of the wrongful act, and not for those which arise from a conjunction of such wrongful act and other circumstances. Under the second paragraph of complaint, it must be made to appear that the intoxication was the proximate cause of the death. But it is not necessary that it should have been the immediate cause. The proximate cause in such case is the efficient cause. If the death resulted from a cause incidental to some controlling agency, although such cause is nearer in point of time to the result, such controlling agency is the dominant and proximate cause. If the two causes were independent of each other, that nearest in place and time is chargeable with the loss. But where the immediate cause of the death grew out of and resulted from some dominant cause, such dominant cause is the proximate cause of the death. So that even if it appeared that the death resulted from pneumonia, if the pneumonia was the direct result of excessive drinking of intoxicating liquor, unlawfully sold, the intoxication was the proximate and efficient cause of the death. See *Billman v. Indianapolis, etc.*, R. Co., 76 Ind. 160, 40 Am. Rep. 230; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Davis v. Standish*, 26 Hun, 608; *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236; *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14; *Bacon v. Jacobs*, 63 Hun, 51, 17 N. Y. Supp. 323. It is true, it is the general rule that injury resulting from a wrong must be such as might have been reasonably foreseen and provided against. But it is never necessary that the precise injuries which did occur could have been foreseen. If the act of the wrongdoer "has a tendency to injure some person of the general public, or many persons, and finally does, in the manner which was beforehand probable, cause such injury, it is proximate." 1 *Suth. Dam.* (2d Ed.) § 25. It cannot be said that it is not a reasonable consequence of the sale of liquors to an intoxicated person that he will expose himself to the elements and contract disease. As disease brought about through exposure by a person unable to care for himself because of intoxication is neither extraordinary or unnatural, it is, within the meaning of the law, the ordinary and natural result of the wrongful sale of liquor to a person intoxicated. See *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42; *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386; *Mulford v. Clewell*, 21 Ohio St. 191.

Nor is it necessary that all the liquor producing intoxication should have been sold by appellant. *Smiser v. State ex rel.*, supra. The charge is that sales were made to the husband while he was intoxicated. The stat-

ute makes such sales unlawful. If the husband's death destroyed the wife's means of support, it is sufficient if the intoxication, caused in whole or in part by liquor unlawfully sold by appellant, was the cause of the husband's death. The question to be determined was whether the loss of means of support could be traced to the wrongful sale of intoxicants by appellant. See *Homire v. Halfman*, supra; *Woolheather v. Risley*, 38 Iowa, 486; *Beers v. Walhizer*, 43 Hun, 254; *McCarty v. Wells*, 51 Hun, 171, 4 N. Y. Supp. 672; *Schneider v. Hosier*, 21 Ohio St. 98; *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

Liability exists in such cases although the unlawful sales may not have been made by a defendant in person, but by some one authorized to make sales and to conduct the business generally. *Boos v. State ex rel.*, 11 Ind. App. 257, 39 N. E. 197; *Reath v. State ex rel.*, 16 Ind. App. 146, 44 N. E. 808; *Keedy v. Howe*, 72 Ill. 133; *Black, Intox. Liquors*, § 298; *Peterson v. Knoble*, 35 Wis. 80.

Applying these principles, we find no reversible error in the instructions given by the court. The material part of the one instruction requested by appellants was included in the court's instructions. A careful reading of the evidence discloses some evidence which, with the legitimate inferences to be drawn, sustains the conclusion reached by the jury. The testimony as to the unlawful sales was not disputed by appellant Nelson, or any of his agents or servants. We could not disturb the verdict without weighing the evidence.

Judgment affirmed.

(32 Ind. App. 77)

**GERMAN BANK OF EVANSVILLE v.
BROSE et al.**

(Appellate Court of Indiana, Division No. 2.
Dec. 16, 1903.)

STREETS — DEDICATION — ACCEPTANCE — REFUSAL OF CITY TO RECOGNIZE—EFFECT OF USER—JURY QUESTION—SUFFICIENCY OF EVIDENCE—ADMISSIBILITY OF EVIDENCE.

1. The action of a city in assessing for sidewalk improvements the width of a street, condemnation proceedings for the laying out of which have been previously begun, though amounting to an unequivocal refusal to recognize the land as a public street, is not conclusive upon its character as a street, as evidenced by user by the public.

2. The institution of condemnation proceedings by a city for the laying out of a street, though an admission by it that the street did not previously exist, and its subsequent failure to work the street or exercise any control over it, though admissible on the issue of the street's existence, are not conclusive evidence against a former dedication.

3. Where the facts are undisputed, the question of dedication and acceptance of a public street is one of law; but, where the intent to dedicate is to be drawn as an inference of fact from the evidence, it is for the jury.

4. Conflicting evidence held to require the submission to the jury of the questions of the dedication and acceptance of a street.

5. Evidence examined, and held sufficient to sustain a finding of the existence of a street.

6. Where, on an issue as to the existence of a street, the evidence has shown user by the public, and admissions of former owners that the street existed, evidence that on the corner of an adjacent building was a sign bearing the name of the street was admissible as tending to throw light on the manner in which the thoroughfare was regarded.

Appeal from Superior Court, Vanderburgh County; John H. Foster, Judge.

Suit by the German Bank of Evansville against Thomas P. Brose and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Peter Maler and Gilchrist & De Bruler, for appellant. D. C. Givens, R. D. Richardson, and D. H. Artmeyer, for appellees.

COMSTOCK, J. Appellant, plaintiff below, brought this action against the appellees to restrain them from tearing down the fences which were put up by the plaintiff across a portion of block 87, Lamasco, in Evansville, which block was the property of the plaintiff. The only controversy was whether that portion of block 87 upon which the fences had been erected by the plaintiff and torn down by the defendant had become a street either by prescription or dedication. The complaint avers the ownership in fee simple by plaintiff of this block 87; that the defendants Brose and Arnolds, on the pretense that there is a street on the west side of block 87, were unlawfully entering upon it and driving over it and causing others to drive over it; that to prevent these acts the plaintiff erected a fence along the front of the block; that the defendants caused said fences to be destroyed, and that those defendants threaten to continue their wrongful trespasses, etc. As to the city of Evansville and its board of public works the averments are that neither the city nor the board of public works have ever exercised any authority over the real estate so claimed to be a street, nor asserted any claim to it, and they are made defendants that they may assert any right or claim to the portion of the block in question. The relief asked is that the defendants be inhibited from going upon said real estate and from asserting any title to it. The answers are general denials by all the defendants and special answers by the city of Evansville and by the defendants Brose and Arnolds, asserting in various forms of language that the place in question where the alleged trespassing occurred was a public street both by prescription and dedication. There was a reply in general denial to each of such affirmative answers. Demurrers were filed to the answers of prescription and dedication by the plaintiff, and were overruled. No question is made on this appeal on those demurrers. The issues were decided in favor of the defendants. The judgment was that the plaintiff take nothing by its action.

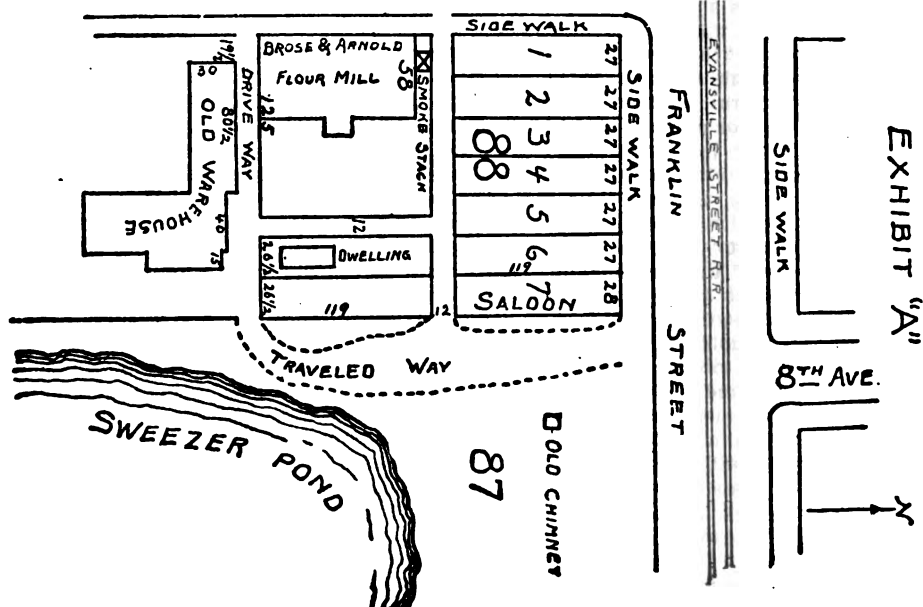
¶ 3. See *Dedication*, vol. 15, Cent. Dig. § 32.

The error assigned is the overruling of appellant's motion for a new trial. The reasons set out in the motion for a new trial relied upon for a reversal are: First. That the finding of the court is not sustained by sufficient evidence. Second. The admission in evidence, over plaintiff's objections, of the order of the board of public works of the city of Evansville rescinding the resolution of the said board of public works to open a street at the place in question. Third. Allowing the witness Fred Christman, over the plaintiff's objection, to testify to what he said to the man who was putting down the pavement in front of the real estate in question. Fourth. The permitting of the witness Henry Arnold, one of the defendants, over the plaintiff's objection, to testify that about 10 years before the time of the trial there was a sign, "Eighth Avenue," on the house of Fred Christman, adjoining the real estate in question.

This block was held and conveyed at all times as a whole from the time it was platted, in 1837, until its conveyance to the plaintiff, although there were at different times conveyances and holdings of an undivided interest in it. On the only recorded plat no street is shown over this block. Eighth avenue, which is claimed by defendants to be a street over block 87, stops, as will be seen on the plat, two blocks south of block 87, as shown by defendants' plat attached hereto. Appellees claim a complete dedication and an adverse user by the public for over 20 years.

That the evidence may be better understood, we make a copy of the map put in evidence by the defendants a part hereof, except that the fence shown on that map on the east of the place marked the "Traveled Way" and on a portion of the side of the block next to Franklin street is omitted, because, as shown by the evidence of the witness who made the map, the fence is a recent one.

As will be seen, the street called "Elighth Avenue," which appears on the original plat south of the block in question, and on defendants' plat as extending north from Franklin street, could not be continued through because of the water marked "Fish Pond" on the original plat and "Sweezer's Pond" on the defendants' map. It also appears that it could not be continued in its full width even as far south as the south boundary of block 87 because of Sweezer's Pond and its banks, and no traveled way of any width above shown on this plat goes farther south than the south line of block 87. The flour mill of the defendants Brose and Arnold fronts on Bellevue avenue, and had a vacant space behind it. The space marked "Traveled Way" from Franklin street turns off into an alley in the middle of block 88, 12 feet wide. It also turns off at the south end of block 88 into another alley 16 feet wide. Persons turning from Franklin street upon the place so marked could go to another street by passing through one of these alleys. At different times business of various kinds was carried on in the block—a distillery, a woolen mill, a furniture factory, a warehouse, a fertilizer mill, chairworks, and sawmill. The same building was used at different times for the distillery, woolen mill, chairworks, and sawmill. The chair factory was burned in 1882. Stockfleth and Wiggers, who owned the block from July, 1881, to October, 1885, carried on business there until August, 1884. After that date the block was vacant and unoccupied until the fence was built by the plaintiff before the bringing of this action. The mill of Brose and Arnold, as shown on the plat, was built in 1883. During the time that Stockfleth and Wiggers owned it they put up a fence along the front of the Franklin street line, leaving a space large enough for a wagon to go through. A



gate was made for this space, but was never hung. The posts on which the gate was to be hung were about 12 feet from a saloon kept by a man named Christman. There was some travel over this space. Mr. Stockfleth testified that he objected, and told the people that it was not a public driveway. F. W. Cook, witness for the appellees, testified that he owned block eighty-seven until 1881; that he knew the roadway in question was then in existence, and that the traveled part was 30 or 40 feet wide. "I know that we used to get our supply of coal that way, and I was under the impression that there was a street through there. I looked upon it as a street. I permitted people to use it as a street. I never made any objection to anybody traveling there. It was used as a street, and I had no objection to it. I did not question the matter at all. I was under the impression that it was a street." Upon cross-examination the witness said: "I always thought that it was open, but I never cared anything about it. And as to the hauling I could not say that it was all for the people who had possession of my property, or whether it was for some one else. I can't say that all that hauling was for my tenants. I did not think that it was a part of block 87 when I made my deed, or I would not have given a deed for that." John H. Osborn, a witness for the appellees, testified: "That the roadway in question has been traveled and has been open at all times for twenty-five years; that the traveled part was thirty or forty feet wide; that he had a talk with Charles Schultz while Schultz owned block eighty-seven, at a time when he, Schultz, was building a dryhouse and planing mill at the intersection of Eighth avenue and Ohio street; that he asked Schultz why he did not build across the gap made by Eighth avenue, and Schultz said, 'this (meaning Eighth avenue) is a street through here, and I can't close that up;' that Schultz said, about Eighth avenue, 'that there was a street clear through to Franklin street.' The foregoing is the only oral testimony throwing light upon the intent or understanding of any of the owners of the property. There was no evidence that the city had expressly accepted any dedication. It is not claimed that it ever did any work upon it. A number of witnesses testified as to the use of the ground in question. Among them was Henry Arnold, who testified as follows: That he is one of the defendants, and a member of the firm of Brose & Arnold; that he has been acquainted with the locality in question all his life, and has worked there 22 years; that as long as he can remember that driveway was used by the public, and that customers to the defendant's mill used it constantly; people go in from Franklin street and go out Illinois street; farmer, grocery, and lumber wagons use the roadway; that everybody uses the roadway; that the traveling would amount to more than a thousand wagons a

year, and probably five thousand; that the roadway was used by Ballew in his hoopole business, and also by Harper and Brinkmeyer when they did business in Ballew's building; Rosenberger & Klein stored broom corn in there; Schultz and Waltman stacked lumber in there; and Kramer had one of the sheds in there; these parties came in Illinois street and went out the roadway past Christman's; that from the time the defendants were in business at their present location [1883] until ten years ago, when the house burned down [1890], [there was a sign on the side of Christman's house nearest to block 87, which read "Eighth Avenue"]; that he does not know who put the sign there; that there are similar signs on nearly every corner in that part of the city, and that he never saw one that was not correct.

There was abundant evidence that the traveled part of the roadway was 30 or 40 feet wide, and had been used by the public as a roadway for general purposes for 30 years. The people were driving through there continually, and were not confined to those who lived or did business in that immediate vicinity, and that there had been no obstruction to driving through there for the last 25 years. There was evidence that the city had not accepted it, to wit, the city instituted proceedings on May 14, 1898, to condemn the place in question for a street, and carried them so far as to assess benefits and damages. The defendants Brose and Arnold were assessed \$145 for benefits, and the plaintiff was to receive net \$400 damages. The board of public works on November 26, 1898, assessed the whole front of block 87—480 feet—for the improvement of Franklin street, and made no deduction because of the front being taken up by the alleged street. The board of public works made a like assessment against the plaintiff on block 87 for the year 1899 for sprinkling Franklin street, and made the assessment for the whole 480 feet, with no diminution because of any space for the alleged street. By the proceedings of May 14th the city admitted that up to that date the highway claimed did not exist. By the said assessments made after the condemnation proceedings there was an unequivocal refusal to recognize any part of the said block as a public street. In addition the city never did any work in the way of repairs on the ground in question, and never exercised any control over it. There was a bridge or wooden culvert 30 or 40 feet wide from Franklin street across the gutter, which, in the opinion of one of the witnesses, was put there chiefly for the convenience of Mr. Christman. This action, however, would not conclusively affect the rights of the public or of individuals in relation to it. The erroneous acts of officials in taxing for municipal purposes cannot impair the rights of the public. *Rhodes v. Town, etc.*, 145 Ind., at page 30, 43 N. E. 942. At section 154, *Elliott on Roads and*

Streets, the author says: "The municipal corporation consists of the inhabitants, and not of the officers. The officers are, in truth, nothing more than agents of the corporation. The inhabitants therefore stand to the officers as principals, and if the principals have, by their conduct, accepted the dedication, it is of no great importance that the agents have taken no action in the matter. The inhabitants of a locality having by long-continued use treated the way as a public one, they make it such without the intervention of those who derive their authority from them. Creating towns, cities, and other public corporations, is 'but investing the people of the locality with the government thereof,' and they may themselves exercise the powers of government of highways quite as effectually by continued use as by any other method." So, while the failure of the city to work the street or exercise control over it and the condemnation proceedings were proper evidence, they were not conclusive evidence against former dedication. There was no express dedication or acceptance of the street. Was there an implied dedication and acceptance? The weight of authority is that long-continued use by public is sufficient evidence of acceptance. *Ross v. Thompson*, 78 Ind. 96. Where a highway is beneficial to the public, an acceptance will in general be implied. *Elliott*, supra, §§ 152, 154. The intent to dedicate may be inferred from facts without express declarations. Yet the facts must be such as to indicate an unequivocal intent to devote the strip of land to the public use. Mere permissive use of the land does not of itself constitute dedication. Such permissive use is an evidentiary fact tending to prove dedication. The intent need not actually exist in the mind, but it must appear to exist. User is of importance both as evidence of intent to dedicate and as evidence of acceptance. If the acts of the owner are such as to fairly lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after the acceptance by the public, recall the appropriation. *Elliott, Roads & Streets*, §§ 123, 124. Judge Elliott, in section 160 (*Elliott, Roads & Streets*, supra) quotes Mr. Woolrych as follows: "It is therefore rather the intention of the owner than the question of time which must determine the dedication." To the same effect is section 631, *Dillon's Mun. Cor.* In *Pittsburg R. Co. v. Town of Crown Point*, 150 Ind. 548, 50 N. E. 745, it is said: "However, we have no doubt that, strictly speaking, the user in the case of a street or highway, which, as between individuals, would constitute an easement by prescription, is evidence of a dedication or condemnation. In other words, that which is a prescriptive right, as between those capable of granting and receiving title, is, as between the fee owner and the public, sufficient to raise the presumption of dedication or condemnation."

In *Town of Marlon v. Skillman et al.*, 127 Ind. 136, 26 N. E. 677, 11 L. R. A. 53, the court say: "As is also the principle that all that is necessary to constitute such a dedication is the assent of the owner of the soil to the public use, and the actual enjoyment by the public of the use for such a length of time that public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment." *State v. Hill*, 10 Ind. 219; *Mauck v. State*, 66 Ind. 177; *Summers v. State*, 51 Ind. 201; *City of Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749. In *Cromer v. The State*, 21 Ind. App. 505, 52 N. E. 240, the court say: "There was no error in giving the thirteenth instruction, in which the jury was told that if a landowner, by open and visible acts, unequivocally indicates to a public and its citizens an intention to throw open a street or alley to the public, and the citizens and public have acted upon the faith that there was a dedication, the law will treat the acts of the owner as constituting a dedication." *Faust v. City of Huntington*, 91 Ind. 493. From many holdings that acceptance will be implied from general and long-continued user as of right by the public, we cite the following: *Lightcap v. Town of North Judson*, 154 Ind. 43, 55 N. E. 952; *Steinauer v. City of Tell City*, 146 Ind. 490, 45 N. E. 1056; *Rhoads v. Town of Brightwood*, 145 Ind. 21-31, 43 N. E. 942; *Ross v. Thompson*, 78 Ind. 90-96; *Elliott, Roads & Streets* (2d Ed.) § 154; *Baker v. City of St. Paul*, 8 Minn. 491 (Gil. 436); *New Orleans v. U. S.*, 10 Pet. 662, 9 L. Ed. 573; *Smith v. City of San Luis Obispo*, 30 Pac. 591, 95 Cal. 463; *Marcy v. Taylor*, 19 Ill. 634. Even though public authorities have never done any work upon the roadway. *Green v. Elliott*, 86 Ind. 53-68; *Township of Madison v. Gallagher*, 159 Ill. 105-111, 42 N. E. 316.

The cases upon the subject of dedications and acceptance of public highways are almost without number. In the great majority of them, where no express dedication appears, the question whether there was an intent to dedicate becomes a mingled one of law and fact. Where the facts are undisputed, and admit of but one legal interpretation, the question is one of law. Where the intent is to be drawn as an inference of fact from the evidence, it becomes a question of fact. In the case before us the facts are conflicting, and the intent is to be drawn as an inference of fact both as to the dedication and the acceptance of the highway from the conflicting evidence. The "primal error" claimed is the insufficiency of the evidence to sustain the finding and judgment of the court. If there is evidence fairly tending to support such finding, then under the well-recognized rule the judgment should be affirmed. Sustaining evidence is not wanting.

We have set out the other three reasons for a new trial. The admission in evidence of the order of the board of public works

rescinding the resolution to open a street at the place in question was not error. The part of the testimony of Arnold objected to appears in brackets in his testimony heretofore set out. He testified to the conditions at that locality as they appeared to him for a number of years. The fact that the name "Elighth Avenue" was on a house on a corner of the alleged street would not be conclusive upon appellant, but it was competent as tending to throw light, in connection with all the other circumstances proven, upon the manner the alleged street was regarded. Conceding, for the argument, that it was error to permit Christman to testify to what he said to the man who was putting down a pavement in front of the real estate in question, such testimony was harmless.

Judgment affirmed.

(33 Ind. App. 145)

CHICAGO, I. & L. RY. CO. v. CUNNINGHAM.¹

(Appellate Court of Indiana, Division No. 2.
Dec. 16, 1906.)

RAILROADS—MASTER—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE—ACTION—MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS—STATUTES.

1. Original bill of exceptions, though præcipe therefor contains misnomer of party, is properly in the record under the clerk's certificate complying with Acts 1903, pp. 340, 341, c. 193, § 7, requiring the clerk to certify that the transcripts contain true copies "or the originals" of all papers in the cause required by the præcipe, and Burns' Rev. St. 1901, § 661, making it the duty of the clerk to make out and certify a complete transcript of the record, even in the absence of a præcipe.

2. The regular judge, by reason of illness in his family, and not from any disqualification, appointed a special judge, who tried the cause, but was unable to attend the court at the last day of the term. Thereupon the regular judge resumed jurisdiction for the purpose of making the record show the filing of appellant's motion for a new trial, which was then filed. *Held*, that an objection to the consideration on appeal of the motion for new trial, on the ground that it was never presented to or filed with the judge who had jurisdiction of the cause, is without merit.

3. A finding that the accident causing the death of a person, on account of which the action was based, did not occur in a city where one paragraph of the complaint alleged its occurrence is sufficient to show that the verdict for plaintiff was not based on that paragraph of the complaint.

4. A railroad had a switchyard, which it operated in connection with its business, and had permitted its employés to pass over the tracks in the yard in going to and returning from their employment. Decedent, an employé, in going to his employment, in the nighttime, and while on the tracks in the switchyard, at a place he was in the habit of using with the consent of the railroad, was run over by an engine backed on a switch without warning or signals. *Held*, that such facts constitute a cause of action in favor of decedent's administrator.

5. Evidence in an action by an administrator of an employé of a railroad killed in crossing its tracks *held* to show decedent guilty of contributory negligence.

¹ Rehearing denied.

Appeal from Circuit Court, Washington County; W. H. Paynter, Special Judge.

Action by George B. Cunningham, administrator of the estate of Enoch Morris, deceased, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

E. C. Field and H. R. Kurrie, for appellant. Mitchell & Mitchell, C. M. Bright, and F. R. Cauble, for appellee.

ROBY, J. The præcipe attached to the transcript filed in this court is entitled, "Geo. B. Cunningham, Administrator of the Estate of Enoch Morris, Deceased, v. The Chicago, Indianapolis & Louisville Ry. Co." The plaintiff, as shown by the record, was Jacob Cunningham, administrator, etc. The assignment of errors names Jacob Cunningham, administrator, as appellee. The original bill of exceptions, containing the evidence, is incorporated into the transcript. The certificate of the clerk of the Washington circuit court, attached to the transcript, accords with the form specified in section 7 of the act of 1903 (Acts 1903, pp. 340, 341, c. 193); Black, Interp. of Laws, § 106. By the provisions of that act, the original bill of exceptions, containing the evidence, becomes a part of the record, when so certified, whether named in the præcipe or not. The evidence is therefore a part of the record. If appellee's contention be granted, the utmost that could follow would be that no præcipe is shown in this case, in which event it became the duty of the clerk to make out and certify a complete transcript of the record. Section 661, Burns' Rev. St. 1901; *Barns v. Pelham*, 18 Ind. App. 166-168, 47 N. E. 648; *Reid v. Houston*, 49 Ind. 181.

The regular judge of the Washington circuit court was unable to preside at the trial of this cause on the day set therefor, because of the serious illness of his family, and by agreement of the parties a special judge was appointed, who thereafter acted therein. The verdict was returned January 3, 1902. January 18th was the last day of the term, and at that time the special judge was ill and unable to attend. In this action the regular judge resumed jurisdiction for the purpose of making the record show the filing of appellant's motion for a new trial, which was then filed. The practice so followed was proper. He was not disqualified in the case. *Hadley v. Lake Erie R. Co.*, 21 Ind. App. 675-680, 51 N. E. 337; *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033.

The complaint was in three paragraphs. The parties agree that the negligence charged against appellant in the first paragraph arose from its alleged failure to observe an ordinance of the city of Lafayette requiring certain precautions in the running of railroad trains. The answers to the interrogatories show that the accident did not oc-

cur within the corporate limits of said city. The finding is sufficient to show that the verdict is not based upon the first paragraph. *Olds v. Moderwell*, 87 Ind. 582. The second and third paragraphs do not differ in such manner or to such extent as to affect the questions presented at this time. The substance of them both is that the appellant had a switch yard, operated in connection with its railroad, and had for a long time permitted its employes to pass and re-pass over the tracks in said yard in going to and returning from their employment, such use being made with its knowledge and consent; that on November 24, 1900, in the nighttime, and when it was raining, decedent, going to his employment, and while on the tracks in said switchyard, at a place he was in the habit of using with the appellant's consent, was run over and killed by an engine backed upon a switch without warning or signal. The failure to give warning is the sole negligence relied upon, there being no averment as to the rate of speed at which the engine was moved. The complaint shows that the decedent was an employe using the grounds of the employer for a usual and known purpose. The appellant, under the circumstances, owed him the duty of reasonable care, and there was no error in overruling the demurrer to the complaint.

With its general verdict for \$2,700 the jury returned answer to interrogatories from which it appears that decedent was killed November 24, 1900, at 6:30 a. m., while walking longitudinally between the rails of one of appellant's tracks in its shopyards at Lafayette. He was walking toward and facing an approaching engine. There was no evidence as to how far he could have seen the engine, or whether or not he looked. There was a path along each side of the track, on which he could have safely walked. He carried an umbrella in front of him, and close to his head. Without the umbrella, he could not have seen the engine 300 feet. It was running about four miles an hour. In addition to these facts, it appears from the evidence, without contradiction, that two persons 150 or 200 feet behind decedent saw him and the approaching engine, and endeavored to warn him of his danger, but were unable to attract his attention by the shouts. The evidence establishes the contributory negligence of the decedent. It cannot be held that he was otherwise than negligent in walking between the rails of the track, in preference to a safe path at its side, and, while so doing, carrying an umbrella close to his face, regardless of what was before him, as well as of warnings shouted from behind him. The facts disclosed by the interrogatories are inconsistent with the exercise of reasonable care by decedent. No good purpose would be served by a new trial, inasmuch as the facts established by the evidence are more strongly against appellee than the answers to the in-

terrogatories are. The motion for judgment on the interrogatories and their answers should have been sustained. It is not necessary, in view of the conclusion, to consider other questions argued.

The judgment is reversed, and the cause remanded, with instructions to sustain appellant's motion for judgment on the interrogatories and their answers notwithstanding the general verdict.

(32 Ind. App. 93)

BOARD OF COM'RS OF CLAY COUNTY v. REDIFER et al.

(Appellate Court of Indiana, Division No. 2.
Dec. 18, 1903.)

MISJOINDER OF PARTIES—WAIVER—GROUND FOR REVERSAL—CONDUCT OF COUNSEL—EXHIBITING INSTRUCTIONS TO JURY—EXPERT EVIDENCE—TIME REQUIRED TO ASSESS TOWNSHIP—MOTION FOR NEW TRIAL—SCOPE.

1. The question of misjoinder of causes of action is not raised by a demurrer for want of facts.

2. Under the express provisions of Burns' Rev. St. 1901, § 344, judgment is not reversible for any error committed in overruling a demurrer for misjoinder of causes of action.

3. On a trial of an action plaintiff's attorney exhibited to the jury an instruction which defendants had requested, and which the court had amended by interlineation, and called their attention to the amendment. The occasion of this conduct was not disclosed by the bill of exceptions. *Held*, that while counsel's conduct was improper, it was not ground for reversal.

4. The questions as to how long it would take to assess a township for taxation, and how much of such work could be done in a day, are not subjects for expert testimony.

5. Where defendants' excluded testimony bore upon their liability to only two of several plaintiffs, defendants' motion for a new trial, asking that an adverse verdict be set aside as to all the plaintiffs on that account, is properly overruled.

Roby, J., dissenting in part.

Appeal from Circuit Court, Putnam County; P. O. Colliver, Judge.

Action by Edward M. Redifer and others against the board of commissioners of Clay county. Judgment for plaintiffs, and defendant appeals. Affirmed.

A. W. Knight, for appellant. Coffey & McGregor, for appellees.

COMSTOCK, J. Appellees, who were township assessors, sued appellant and the county council of Clay county, the county auditor of Clay county, and the individual members of appellant and said county council to recover an alleged balance claimed to be due them for their services as such assessors, and also for a writ of mandate against the county council to compel it to make an appropriation of money to pay such claimed salaries, and to compel the auditor to issue his warrant to them respectively on the treasury for the amounts appropriated. The board of commissioners answered said complaint separately by a general denial and a

¶ 1. See Pleading, vol. 39, Cent. Dig. §§ 435, 503.

plea of payment, while the other defendants answered separately by a general denial only. Trial by jury, and verdict returned in favor of said several appellees for the amount found to be due each of them respectively. Motion for new trial filed by each of the defendants, and motion sustained as to all the defendants except the board of county commissioners, whereupon plaintiffs below dismissed their action against all the other defendants, and the court finally rendered judgment against said board of commissioners in favor of each of the several appellees for the amount found to be due each by the jury, and the board of commissioners appealed.

The first question discussed under the assignment of errors is the action of the court in overruling the appellant's separate demurrer for want of facts to appellees' complaint. It is argued that the complaint is bad, and appellant's demurrer thereto should have been sustained—First. For the reason that the complaint discloses upon its face that the several claims of appellees were of an unliquidated and disputable character, and had not been properly determined and ascertained before the writ of mandate was sought. Second. The validity of the several claims of appellees, and the amounts due thereon, should have been definitely ascertained and fixed by some competent officer or tribunal, whose decision, while unappealed from or unreversed, was final and conclusive, before payment could be enforced by mandate. The complaint in this case, failing to show such fact, was bad on demurrer, and a writ of mandate could not be based upon it. Third. Parties having separate and several causes of action against another party cannot join as plaintiffs, unless such parties plaintiff have a common interest in the subject of the action and in the relief demanded. Each must be interested in the relief sought by the others. In this case the appellees were authorized to join as coplaintiffs, if authorized to do so at all, for the sole reason that the ultimate relief sought, a writ of mandate, was common to all. When that element of the case became eliminated by dismissal, then the right of recovery on the several claims ceased to exist, and each was bound to recover on his separate debt in a separate action; for, as soon as the right to a writ of mandate failed to be established, a misjoinder of causes of action became apparent.

It seems a sufficient answer to these objections—First. That the county council is not a party to the appeal. The suit is now against the board of commissioners alone. Second. No mandate is asked against the board of commissioners, against whom alone judgment is rendered. Third. The record showed that the defendant in open court waived any error on the ground of misjoinder of parties plaintiff, and by this waiver is bound. The question of misjoinder of

causes of action is not raised, for there was no demurrer on that ground, and the question is not raised by demurrer for want of facts. *Cole v. Bank*, 60 Ind. 350; *Nesbit v. Miller*, 125 Ind. 106, 25 N. E. 148. Besides, section 344, Burns' Rev. St. 1901, enacts that no judgment shall be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action. By the dismissal of the complaint as to all the defendants but the board of commissioners the question of mandate is taken out of the action. In *State ex rel. Johnston v. Wayne County Council*, 157 Ind. 356, 61 N. E. 715, cited by appellant, the court held that mandate proceedings against the county council to compel it to make an appropriation for the payment of a claim could not be sustained "where the amount of the claim is not fixed by law or is not ascertained by judgment." The *State ex rel. Morgan v. Monroe County Council*, 158 Ind. 102, 62 N. E. 1000 (also cited by appellant), was a petition for a writ of mandate by the county assessor to require the county council to make an appropriation for the payment of a balance due him on his salary allowed him by the county commissioners and unpaid. The petition was held insufficient, because it did not show that an estimate had been filed by such officer as required by the statute, or that the county council had not, in its discretion, reduced the estimate and the appropriation accordingly, such officer being entitled by statute to \$3 per day for the time actually employed in the discharge of his duties. Also, that the mere fact that the board of county commissioners allowed a county assessor's claim to compensation does not of itself bind the county beyond the amount of money which had been previously appropriated for its payment. The complaint before us contains the averments in which the opinion holds that complaint was wanting. *Turner v. Board of County Commissioners*, 158 Ind. 166, 63 N. E. 210, was an action against appellee to recover for services rendered by him as an attorney at law in assisting the prosecuting attorney in the prosecution of a murder case. The services were rendered after the taking effect of what is known as the "County Reform Law" (Acts 1899, p. 343, c. 154). The court held that the complaint was insufficient because it did not allege that there was an existing appropriation to pay for such services when appellant was appointed and rendered such services. The decision was based upon section 27 of said act, which reads as follows: "No court, or division thereof, of any county, shall have power to bind such county by any contract, agreement, or in any other way, except by judgment rendered in a cause where such court has jurisdiction of the parties and subject matter of the action, to any extent beyond the amount of money at the time already appropriated by ordinance for the pur-

pose of such court, and for the purpose for which such obligation is attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort attempted beyond such existing appropriation shall be absolutely void." The section relates to allowances made by the courts, and there was but the one question before the court. In the case at bar the record presents a judgment in a cause in which the court had jurisdiction of the parties and of the subject-matter of the action. The complaint alleges that the county is indebted to each of the appellees; that the board, upon proper claim, filed with it, has rejected such claims; and that each of the appellees is entitled to a personal judgment for the amount due.

On the trial an attorney for appellees, while making his closing argument to the jury, exhibited to the jury an instruction which had been prepared by the defendant's counsel and submitted to the court in advance of the argument, with the request that the court give the same to the jury, together with other instructions prepared and submitted to the court by defendant's counsel, and to indicate such as would be given in advance of the argument, and which said above instruction had been modified as originally prepared by defendant's counsel, by inserting and interlining therein the word "unnecessary," upon the suggestion of the court, and had signified his willingness to give said instruction as modified, with others prepared by defendant's counsel; and said counsel, while so exhibiting said instruction to the jury in his argument, used the following language, to wit: "Upon this subject [counsel referring to this particular instruction] I want to read to you from the instruction which the court will give, what Mr. ——— [meaning and referring to one of defendant's counsel] claimed the law to be [then reading the instruction as prepared by counsel for appellant, though a part of which as hereinbefore stated, had been interlined]," and, continuing, said: "You will observe [exhibiting the instruction to the jury] that the court had these words inserted [referring and pointing to the part interlined by the direction of the court], and interlined as follows [referring and pointing to the part the court had caused to be interlined]," and at this point counsel for the defendant requested the court to restrain said attorney from making such comments, and to direct the jury that such remarks were improper, and should not be considered by them; but the court refused and declined to do as requested, merely replying to counsel for defendant that he would allow an exception, and the court made no further remark, nor took any action as requested by defendant's counsel. It is argued that the purpose of this manner of comment was to humiliate and disparage appellant and appellant's attorneys in the estimation of the jury, and to

leave the impression that the court did not agree with the view of the law taken by the appellant. The action of the court is given as another reason in the motion for a new trial. The bill of exceptions does not disclose what, if anything, occurred to call forth the remark of which complaint is made. If such reason existed, it was upon appellees to have made it appear. The remark of counsel was improper. But, as said in *Shular v. The State*, 105 Ind. 302, 4 N.E. 877, 55 Am. Rep. 211: "It is not every violation of the rule governing the discussion of counsel before the jury that will entitle the complaining party to have the verdict set aside. * * * If the statement be one not likely to unjustly influence the jury, the verdict will be upheld." Jurors are accustomed to the complacent reference of counsel to the rulings of the court in harmony with their own views. We do not believe that they were unjustly influenced by the conduct of which complaint is made.

Appellant undertook to prove by Dr. James and Rufus Kennedy their opinions as to the probable length of time it would take a person, exercising ordinary diligence, to assess the respective townships in which they live. The court held the evidence improper. The preliminary examinations of these witnesses showed that they were old residents of their townships; were acquainted with practically all the people, and knew their relative locations, and were, in a general way, familiar with the duties of a township assessor. The question put to Mr. Kennedy was as follows: "Now, I will renew my question, and will ask you to state, in your opinion, about how many people an assessor, exercising ordinary diligence, could assess in a day in that township." Defendant stated to the court that the witness, if permitted to answer the question, would testify that an assessor, exercising ordinary diligence, would be able to visit and make out a list of from 25 to 30 taxpayers each day of 10 hours a day. The following question was put to Dr. James: "I will ask you to tell the court and jury if you conferred with any of the people or taxpayers of your township with reference to the length of time it would be necessary to assess that township. The question is, did you make any inquiry?"—when objection was made to it also. Counsel for appellant stated that witness would testify that 30 assessor's blanks might be filled up each day in assessing Perry township. To both questions the court sustained objections. These rulings are made reasons for a new trial. The court did not err in excluding the opinion testimony. The subject of the inquiry was not a matter of science or art or trade, and not a matter of expert testimony. After a statement of all the facts the jury was competent to form an opinion. But the motion for a new trial is to set aside the verdict as to all the appellees. The offered testimony, if admitted, could only have ap-

plied to two of the appellees. The motion, not being well taken as to all, is not available. There was no agreement of waiver or misjoinder of parties plaintiff in that case. Appellants do not claim that the complaint in this cause would be sufficient in the absence of such waiver.

We have disposed of all the questions discussed and find no error for which the judgment should be reversed.

Judgment affirmed.

ROBY, J. (dissenting in part). I concur in the result reached, but not in all the reasoning. The function of the court is to state the law, and the instructions given to the jury are the instructions of the court. It makes no difference whether they were requested by one party or the other or by neither. The jury are not concerned in that behalf. In exhibiting the interlined modification, the attorney for appellees exceeded his right, and, in my opinion, the court committed reversible error in refusing to instruct the jury not to regard such matter. I think, however, that the judgment is clearly right upon the evidence, and, such being the case, it ought not to be reversed.

(184 Mass. 584)

O'BRIEN v. CONTINENTAL CASUALTY CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

INSURANCE—PROCEEDS OF POLICY—ASSIGNMENT—REMEDIES—RIGHT OF ASSIGNEE TO SUE—PRIORITY OF CONTRACT—ADMINISTRATION.

1. Where insured, two days before his death, signed an order directing insurer to pay all money due on account of the policy at his death to plaintiff, and surrendered the policy to the insurance company, and its refusal to substitute plaintiff as beneficiary was not made until after insured's death, there was no privity of contract between plaintiff and insurer, so as to entitle her to recover on the policy.

2. Where insured, two days before his death, signed an order directing insurer to pay the proceeds of his policy to plaintiff, who was a creditor, plaintiff's remedy after insured's death was to have an administrator appointed, and to claim the money collected by him on the policy under the order.

Appeal from Superior Court, Suffolk County.

Bill by one O'Brien against the Continental Casualty Company. From a judgment dismissing plaintiff's complaint, she appeals. Affirmed.

Clifton L. Bremer, for appellant. William F. Merritt and N. Thomas Merritt, Jr., for appellee.

LORING, J. The plaintiff alleges that one Cornelius Sullivan, in his lifetime, was indebted to her, and that on March 12, 1902, two

days before he died, he signed an order directing the defendant casualty company to "pay all money due on account of policy number 432,498" at his death to the plaintiff, and surrendered said policy to the defendant. She further alleges that on September 23, 1901, the defendant issued a policy to Sullivan, "by the terms of which a sickness indemnity of thirty-five dollars a month was payable to said Sullivan, and one hundred dollars was to be paid for funeral expenses to his estate, if he should die more than three months after the cause resulting in his death originated"; that a sum not exceeding \$170 is due under the policy; that by the terms of the defendant's charter beneficiaries must have an insurable interest, and the defendant refused to make the transfer because the plaintiff had no insurable interest, while in fact she had such interest, being a creditor of Sullivan as aforesaid; and, lastly, that Sullivan died intestate, without heirs or next of kin, leaving no debts other than the one due the plaintiff, and that no administrator of his estate has been appointed. On these allegations it must be assumed that the defendant's refusal to substitute the plaintiff as beneficiary was made after Sullivan's death. It is plain that on the facts stated the plaintiff made a mistake in her remedy. She should have had an administrator appointed, who could have collected the money due under the policy, and the money, when collected, would have belonged to the plaintiff, or, under the circumstances alleged in the bill, would have had to be paid to her. The contract which the defendant made was with Sullivan, and there is no privity of contract between the company and the plaintiff. If a new policy had been issued naming the plaintiff as beneficiary, it would seem that the plaintiff could not have maintained an action on the policy. Such a policy apparently comes within *Nims v. Ford*, 159 Mass. 577, 35 N. E. 100, and the class of cases mentioned at the end of the opinion in *Dean v. American Legion of Honor*, 156 Mass. 435, 440, 31 N. E. 1, and not within cases covered by *Dean v. American Legion of Honor*, ubi supra. But, however that may be, no such certificate was issued. In *Atlantic Mutual Ins. Co. v. Gannon*, 179 Mass. 291, 60 N. E. 933, relied on by the plaintiff, the company was held to have assented to the substitution of the new beneficiary. In *Marsh v. American Legion of Honor*, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382, also relied on by her, the substitution of the new beneficiary was prevented by the fraud of the former beneficiary, and the plaintiff went into equity for relief against that fraud, and it appeared that, except for the failure to surrender the certificate, the substitution would have been made in the lifetime of the member.

Decree affirmed.

(184 Mass. 555)

MORTON et al. v. CLARK et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

DECLARATION—FINDING—VARIANCE.

1. In an action for breach of an oral contract, where the declaration alleged that the payments were to be made by the acceptance and payment of drafts drawn by defendants on plaintiffs on 30 days' time, with occasionally one on 10 days' time, a finding by the court that the contract as to payment was "on 60-day drafts, * * * except occasionally on 10-day drafts," is not a material variance.

Exceptions from Superior Court, Suffolk County; Francis A. Gaskill, Judge.

Action by John Morton and others against L. B. Clark and others. From a judgment for plaintiffs, defendants bring exceptions. Exceptions overruled.

For former opinion, see 63 N. E. 409.

Robert M. Morse and W. M. Richardson, for plaintiffs. George W. Morse and James H. Hickey, for defendants.

KNOWLTON, C. J. This is an action to recover damages for a breach of an oral contract for the sale of goods. The case came before this court after the first trial, and was reported in 181 Mass. 134, 63 N. E. 409. Most of the questions now before us were raised by the defendants' requests for rulings, and they relate chiefly to the findings required by the evidence, which are essentially matters of fact. The defendants' demurrer to the amended declaration has not been argued, and we need not consider it.

The defendants contend that the judge should have found either that no contract was made, or that, if a contract was made, it was upon a 10-day or cash basis. On this subject the evidence was somewhat conflicting. There is no doubt that a contract was made, all the terms of which were sufficiently clear, and were not in dispute, except the provision as to the time of payment. There was evidence in the previous course of dealing between the parties, and in the testimony of Mortimer, the plaintiffs' agent, and in the correspondence, which tended to show that the payments were to be made by the acceptance and payment of drafts drawn by the defendants upon the plaintiffs on 30 days' time, with occasionally one on 10 days' time. This was in accordance with the averments of the amended declaration. It was a part of the course of dealing that, when drafts were made on time, interest was added to the face of the bill up to the day when the draft was payable, so that the amount received from his banker by the vendor would be the same on a draft for a long time as upon a draft for a short time; the only difference to the parties between the two modes of payment being in the amount of capital or discounts or credit for which they would have to provide. The fact that there was a subsequent misunderstanding and disagreement between the parties in regard to the terms

of payment does not prevent a finding of what they ought to have understood from their memorandum and conversation, taken in connection with their previous dealings. There is no material variance between the findings of the judge and the amended declaration. He found that the contract as to payment was "on sixty-day drafts, * * * except occasionally on ten-day drafts." His finding, by way of explanation of the term "occasionally," that it was "when the defendants were compelled to" draw on short time by a reasonable regard for the exigencies of the business, is simply giving the term its natural meaning, when it is taken in connection with the facts and circumstances existing and referred to on the occasion when it was used by the parties. See *Black v. Bachelder*, 120 Mass. 171. After this finding as to the contract, the finding that there was a breach of it necessarily followed.

It is not necessary to consider other questions raised at the trial.

Exceptions overruled.

(184 Mass. 520)

NASHUA SAV. BANK v. SAYLES.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

NOTES—PLACE OF THE CONTRACT—ACCEPTANCE OF NOTE—CONSIDERATION.

1. Where a resident of New Hampshire, who held an overdue note made by a resident of Massachusetts, wrote the maker requesting that a new note to take up the overdue one be sent him June 1st, and the maker, on May 31st, sent a note for a smaller sum than the old one, paying the difference, and the note was accepted by the creditor, the contract was a New Hampshire one.

2. Under the laws of New Hampshire, one who signs a note in blank on the back thereof is liable as a joint maker.

3. Where the payee of a note past due gave up the same for another one, relying on the signature of an indorser, the fact that he had been an indorser on the first note, but had ceased to be liable thereon, and that he received no personal benefit from signing the second note, did not relieve him from liability on the ground that the second note was without consideration as to him.

Appeal from Superior Court, Suffolk County.

Action by the Nashua Savings Bank against one Sayles. Judgment for plaintiff, and defendant appeals. Affirmed.

Alfred S. Hall, for plaintiff. John E. Abbott, for defendant.

KNOWLTON, C. J. The plaintiff, a corporation established under the laws of New Hampshire, held an overdue note for \$2,300, signed by one Weeks and indorsed by the defendant, upon which there had been no demand or notice. On May 6, 1891, more than five years after its maturity, the plaintiff's treasurer wrote to the maker in Boston, suggesting that at the time when the next pay-

¶ 2. See *Bills and Notes*, vol. 7, Cent. Dig. §§ 542, 543, 550, 557.

ment of interest should become due, on June 1st, he should send a note indorsed by the defendant to take up the old one. Weeks replied immediately, saying that the defendant was away, and that he would attend to the matter on the defendant's return. On May 15th he wrote again to the plaintiff's treasurer, asking for a blank in the form which the bank used, and a blank was sent to him. On May 31, 1890, he sent the note in suit, for \$2,000, bearing date Boston, May 31, 1890, payable at the plaintiff's bank in Nashua, N. H., six months after date, and signed by Weeks, with the signature of the defendant on the back. In the letter inclosing it he wrote, "I inclose herewith a new note for the Sayles note (two thousand dollars instead of twenty-three hundred dollars) and check for \$360, which, I believe, pays the interest up to December 1st, 1890. Please send me the old note." On the receipt of the new note and the check, the plaintiff returned the old note.

Upon these facts there is no doubt that the note in suit first took effect as a binding contract when it was received by the plaintiff bank at Nashua, and accepted with the check in payment of the old note. Until then the old note remained in force, and there had been no contract between the parties that took the place of it. The suggestion of the plaintiff was that a new note should be given on June 1st, and this note was mailed at Boston on May 31st. Nothing had been said or written by either party in regard to making the new note for a smaller sum than the old one. When the note arrived, the plaintiff was at liberty to decline to accept payment in cash for a part of the old note, with a new note for the balance. It might have said, "You must give a note for the whole amount or cash for the whole." It chose to accept the note in suit, and then first the note was delivered, and then and there the contract was made. It was therefore a New Hampshire contract on which the plaintiff now brings suit, and not a Massachusetts contract. *Lawrence v. Bassett*, 5 Allen, 140; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30; *Baxter National Bank v. Talbot*, 154 Mass. 213, 28 N. E. 163, 13 L. R. A. 52. It is unnecessary to consider whether, under the circumstances of this case, the fact that the note was made payable in New Hampshire would also make the laws of that state applicable to it. See *Andrews v. Pond*, 13 Pet. 65, 10 L. Ed. 61; *Bell v. Bruen*, 1 How. 182, 11 L. Ed. 89; *Tilden v. Blair*, 21 Wall. 241, 22 L. Ed. 632; *Coghlan v. South Carolina Railroad Company*, 142 U. S. 101-109, 12 Sup. Ct. 150, 35 L. Ed. 951; *Staples v. Nott*, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480; *New York Life Insurance Company v. McKellar*, 68 N. H. 326, 44 Atl. 516.

Under the laws of New Hampshire, a person who signs a note in blank upon the back, as this defendant signed, is liable as a joint

maker, without a demand upon the other maker or a notice of his failure to pay it.

The defendant's contention that the note was without consideration cannot be sustained. It is immaterial that the defendant was not then liable upon the old note, and that he received no personal benefit from his signing. It is enough that the plaintiff gave up the old note for this, relying upon his signature.

Judgment affirmed.

(184 Mass. 557)

BRADFORD v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

PAUPER—SUPPORT—SETTLEMENT—MARRIED WOMAN.

1. Pub. St. 1882, c. 83, § 1, cl. 1, provides that a married woman shall have the settlement of her husband, if he has any in the state; otherwise, her own at the time of marriage shall not be lost by the marriage. Clause 6 provides that any woman who resides in any place in the state five years together shall gain a settlement there. Clause 7 provides that the preceding clause shall apply to married women who have not a settlement derived by marriage under the provisions of the first clause, and to widows. *Held*, that a woman whose second husband has no settlement may acquire a settlement under clause 6, though she has formerly acquired another settlement by her first husband.

2. A married woman, when abandoned by her husband, who has acquired no settlement, may maintain a residence apart from him for the purpose of acquiring a settlement.

Appeal from Superior Court, Suffolk County.

Action by one Bradford against the city of Worcester to recover for support of a pauper. From a judgment for plaintiff, defendant appeals. Affirmed.

Arthur P. Rugg, City Sol., for appellant.
Arthur Lord, for appellee.

BRADLEY, J. If Mary A. Williams, the mother of Charles Williams, acquired a settlement in Worcester, he gained a derivative settlement through her in the defendant city, which would become liable for his support as a pauper, and this presents the question to be determined in this case. At the time of her marriage in 1871 to Henry A. Williams, the father of Charles Williams, she was a widow, and her last legal settlement, derived from a former husband, was in the town of Shutesbury.

The first contention of the defendant is that she does not fall within the description of a married woman "who has not a settlement derived by marriage," under Pub. St. 1882, c. 83, § 1, cls. 1, 6, 7, because her former settlement in Shutesbury is to be deemed a "settlement derived by marriage" within the meaning of the first clause, which is a re-enactment of Gen. St. 1860, c. 69, § 1, cl. 1, and in force at the time of her second mar-

¶ 2. See *Paupers*, vol. 33, Cent. Dig. § 32.

riage. But these clauses are to be construed together, and what is now clause 6, at the time of its original enactment in St. 1874, p. 188, c. 274, § 2, was held to apply only to unmarried women. *Somerville v. Boston*, 120 Mass. 574. And it is said in the reasons given that "the rule that the settlement of a married woman follows that of her husband has long been the statute rule of this commonwealth. St. 1789, p. 408, c. 14; St. 1793, p. 440, c. 34, § 2. It rests upon the principle of the common law. * * * It * * * concerns the unity of the marriage relation * * * because the law will not permit the separation of husband and wife." Subsequently to this decision, St. 1879, p. 570, c. 242, § 2, was passed, and now forms clause 7, the object of which was to change the law so far as it affected married women, and give them the same rights in the acquisition of a settlement as unmarried women. *Marden v. Boston*, 155 Mass. 359, 361, 29 N. E. 588.

It appears from the agreed facts that Henry A. Williams never at any time had a settlement within the commonwealth, and there was no "settlement of her husband" which she could follow as her domicile for the purpose of relief as a pauper, and that would defeat a settlement derived from her first husband.

The purpose of the first clause was to recognize the merger of the wife by the marriage relation, and the right of the husband to fix their domicile; and if he failed to maintain it for a sufficient time to acquire a settlement, which by force of law should also be that of his wife, then she should not lose her own by reason of her marriage.

The words of the seventh clause, "derived by marriage," are to be read with the words "at the time of marriage," found in the first clause, and to which they refer, and are to be taken in their plain sense and meaning. They relate to and mean a marriage then existing, and not a former marriage which has been dissolved by the death of the husband, and no longer legally exists, and by which the status of the wife is changed from that of a married woman to that of a widow, for whom as such provision is specially made; or, in other words, a present marital relation is the foundation on which the right rests, and, when that relation ceases, the protection of the statute is extended to her as a widow. The language used in the seventh clause, "married women who have not a settlement derived by marriage," in order to give her any right to relief as a pauper, must therefore be held to mean a settlement derived from a living husband, whose settlement, if he had any, either at the time of marriage or subsequently acquired during coverture, becomes by statute that of his wife.

Their marriage took place in 1871, and in August, 1875, the husband and father abandoned his wife and children, and since that

time he has done nothing for her or for their support. He has wandered from state to state outside the commonwealth, being sometimes in one and sometimes in another, and in all his wanderings, covering a period of 12 years up to 1887, he is not shown to have become a citizen or made a home in any one place, and since that time "his whereabouts have been unknown." His wife continued in the home where he left her, apparently supporting her children so far as she was able, and never received any relief as a pauper except once, in November, 1886. And it is admitted that Mary A. Williams has resided in Worcester for at least five consecutive years since the passage of St. 1879, p. 570, c. 242, during which time she has not received relief as a pauper, and nothing is disclosed to take the case out of the general rule that ordinarily residence is to be considered the same as domicile. *Phillips v. Boston*, 183 Mass. 314, 67 N. E. 250.

Under these conditions the defendant finally relies on the fiction of the common law that husband and wife are legally one person, and, wherever he may be at any time, as a matter of domiciliary law his wife is there also; and though during all this period he was physically absent from the city of Worcester, his wife, even if bodily therein, must as a matter of law be held to have been with him, and, as he did not live there "for five years together," she did not. *Stoughton v. Cambridge*, 165 Mass. 251, 43 N. E. 106. No argument is necessary to make it clear that, under such circumstances, to deny a separate legal existence to the wife is to take a position that does not in truth reflect her domestic situation, and the Legislature might well provide for this class of cases, which are by no means uncommon. In order to provide for those who may be in need of such charitable aid as it has been the policy of the state to require cities and towns to furnish at the public expense, it is within its power at any time to change the law relating to the settlement of paupers, and make such regulations under which relief is to be given as it may deem just and expedient. And it may make either citizenship or residence, or both, the test. Former settlements may be saved or declared defeated and lost, and the terms under which relief is to be extended to paupers may be thereby radically changed and made more onerous. *Goshen v. Richmond*, 4 Allen, 453; *Bridgewater v. Plymouth*, 97 Mass. 382, 390; *Endicott v. Hopkinton*, 125 Mass. 521, 522; *Worcester v. Springfield*, 127 Mass. 540; *Fitchburg v. Ashby*, 132 Mass. 495; *Dedham v. Milton*, 136 Mass. 424; *Worcester v. Great Barrington*, 140 Mass. 243, 244, 5 N. E. 491.

From time to time, by acts of the Legislature, a married woman in this state has been freed from many of the limitations of the common law relating to her person and property, and the rights of the husband as they existed before the enactment of these

statutes have been greatly abridged and survive to a very limited extent. He may still be considered as the head of the family, with the right to select and fix the home, and under the criminal law is commonly to be treated as responsible for its proper management. *Com. v. Hill*, 145 Mass. 305, 14 N. E. 124; *Com. v. Walsh*, 165 Mass. 65, 42 N. E. 500; *Harmon v. Old Colony R. R.*, 165 Mass. 100, 105, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. Rep. 499. The harsh injustice that may sometimes be the result of the rule that husband and wife are a legal entity has been recognized in divorce proceedings instituted by the wife, and for that purpose as well as for that of separate support and maintenance she is held to have a separate domicile. *Burtis v. Burtis*, 161 Mass. 508, 37 N. E. 740; *Pub. St. 1882, c. 147, §§ 31-34*; *Osgood v. Osgood*, 153 Mass. 38, 39, 26 N. E. 413.

Under the facts disclosed, Mary A. Williams could have instituted and maintained either a suit for separate support and maintenance or for a divorce from the bonds of matrimony. And there would seem to be no sufficient reason why, under our laws relating to the settlement of paupers, a married woman who has been abandoned by her husband might not have a domicile separate and distinct from his in all cases, where he has no settlement in this state.

We are of opinion on the facts disclosed by this case that Mary A. Williams was obliged to follow and claim the settlement of her husband, if he had any within the state, even if she thereby lost her former settlement; but, if he had none, she, by residing "in any one place within this state for five years together," gained a settlement of her own for the purpose of pauper relief. *Cambridge v. Boston*, 130 Mass. 359; *Marden v. Boston*, *ubi supra*; *Williamsburg v. Adams*, 184 Mass. —, 68 N. E. 230. It follows that Mary A. Williams had a legal settlement in Worcester, and Charles Williams, her son, never having acquired a settlement of his own in this state, followed that of his mother. *Pub. St. 1882, c. 83, § 1, cl. 2*.

Judgment affirmed.

(185 Mass. 18)

JOHN P. SQUIRE & CO. v. TELLIER et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

CONSTITUTIONAL LAW — LIBERTY OF CONTRACT—CLASS LEGISLATION—SALES OF MERCHANDISE IN BULK—NOTICE TO CREDITORS.

1. St. 1903, p. 389, c. 415, § 1, provides that the sale in bulk of a part or the whole of a stock of merchandise other than in the ordinary course of trade and in the usual prosecution of the seller's business shall be void as against his creditors, unless he and the purchaser make an inventory, and unless the latter notify such creditors of the proposed sale, and of the price, terms, etc. The act was passed under the authority given to the Legislature by Const. art. 4, pt. 2, c. 1, § 1, to make all manner of wholesome and reasonable laws as they shall judge to be for the good of the

commonwealth. *Held*, that the act is not unconstitutional as infringing the liberty of contract.

2. The act is not objectionable as class legislation.

Report from Superior Court, Suffolk County.

Bill by John P. Squire & Co. against Teller and others. On report from the superior court after overruling of demurrer by defendant. Demurrer overruled.

Bill in equity to reach and apply, under chapter 415, p. 389, Acts 1903, to the payment of a debt due the complainants, certain personal property which they had conveyed to one Hudon. The act in question was enacted to prevent what was termed "sales in bulk" by debtors. In the superior court Henry N. Sheldon, J., overruled a demurrer filed by defendant Hudon, and reported the case to the Supreme Judicial Court.

Moses Holbrook and M. Sumner Holbrook, for plaintiffs. Henry A. Richardson and Alfred W. Putnam, for defendant Hudon. A. E. Pillsbury and W. M. Morgan, for defendant Boston Credit Men's Ass'n.

KNOWLTON, C. J. The only question for our consideration on the demurrer to this bill is whether St. 1903, p. 389, c. 415, is constitutional. The first section of this statute is as follows: "The sale in bulk of any part or the whole of a stock of merchandise other than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser, at least five days before the sale, make a full detailed inventory showing the quantity, and so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each, and certified by the seller under oath to be to the best of his knowledge and belief a full accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall at least five days before taking possession of such merchandise or paying therefor, notify personally or by registered mail every creditor whose name and address are stated in said list, of the proposed sale and of the price, terms and conditions thereof." The second section exempts from the provisions of the act sales by executors, administrators, receivers, assignees for the benefit of creditors, trustees in bankruptcy, and public officers acting under judicial process. This is a pretty stringent regulation of a certain class of sales. The purpose of the Legislature evidently was to provide for creditors protection against a class of sales which are frequently fraudulent, and which leave creditors with no means of collecting

that which they ought to receive. The statute deals only with sales in bulk of a part or the whole of a stock of merchandise, which are not made in the ordinary course of trade and in the regular and usual prosecution of the seller's business. It does not interfere with the transaction of ordinary business, but relates to unusual and extraordinary transfers. In substance it declares that a sale of this kind shall not be made without first giving to creditors an opportunity to collect their debts, so far as the property to be sold might enable them to collect, or without subsequently making satisfactory provision for the payment of these debts. A sale made in violation of the statute is void only as against creditors, and, if the vendor's debts are paid, the sale cannot be interfered with. A purchaser, to be safe, has only to see that the vendor's creditors are provided for. The vendor may sell freely, without regard to the statute, if he pays his debts. The Legislature, when contemplating this legislation, had occasion to consider and balance against each other the general right of property owners to make contracts and dispose of their property, and the general right of creditors to be paid, and to have reasonable opportunities secured to them for the collection of their debts. That this is within a class of legislation for which there is constitutional authority is too plain for question. The object of it is like that of our numerous statutory provisions which authorize attachments on *mesne process*, and establish courts with all the necessary machinery for the collection of debts. The statute requires of the vendor nothing that cannot be done with reasonable effort. If he is unable or unwilling to pay his debts, it puts a substantial obstacle in his way when he wants to dispose of his stock of merchandise in bulk and to receive payment for himself. But under such circumstances the property in most cases ought not to be sold in bulk without first giving creditors an opportunity to consider what ought to be done with it. The Legislature undoubtedly assumed to act under what is termed broadly the police power, and more specifically to act under the authority directly conferred by part 2, c. 1, § 1, art. 4, of the Constitution of Massachusetts, which permits them "to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances * * * as they shall judge to be for the good and welfare of this commonwealth," etc. Their power to regulate and limit the making of contracts and the use and disposition of property is very broad. This is illustrated by the statutes found in titles 12 and 13 of our Revised Laws, comprising chapters from 56 to 74, inclusive. This power is recognized in many decisions of the courts. *Com. v. Blackington*, 24 Pick. 352. *Blair v. Forehand*, 100 Mass. 136-139, 97 Am. Dec. 82, 1 Am. Rep. 94; *Watertown v. Mayo*, 109 Mass. 315, 12 Am.

Rep. 694; *Com. v. Crowell*, 156 Mass. 215, 30 N. E. 1015; *Com. v. Huntley*, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; *Com. v. Gilbert*, 160 Mass. 157-159, 35 N. E. 454, 22 L. R. A. 439; *Opinion of the Justices*, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344; *Newton v. Joyce*, 166 Mass. 83, 44 N. E. 116, 55 Am. St. Rep. 385; *Com. v. Nutting*, 175 Mass. 154, 55 N. E. 895, 78 Am. St. Rep. 483; *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Butchers' Union Company v. Crescent City Company*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; *Frisbie v. United States*, 157 U. S. 160-165, 15 Sup. Ct. 586, 39 L. Ed. 657; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223; *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324. Although the requirements of the act are very strict, we cannot say that the determination of the Legislature, as between the interests of owners of stocks of merchandise and their creditors, was so far wrong as to render the statute unconstitutional. Within certain limitations, it is for the Legislature to judge of the policy and expediency of a law, if, in other respects, they have power to enact it. *Bancroft v. Cambridge*, 126 Mass. 438-441; *Sawyer v. Davis*, 136 Mass. 239-241, 49 Am. Rep. 27; *Opinion of the Justices*, 163 Mass. 589-595, 40 N. E. 713, 28 L. R. A. 344; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. The statute is not objectionable as applying only to a particular class. It applies to all who come within the reasons for its enactment. *Com. v. Danziger*, 176 Mass. 290, 57 N. E. 461, and cases cited; *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560. Similar statutes having the same object, but varying considerably in their provisions, have been enacted recently in many other states. In Tennessee and in Washington the highest court of the state has decided that the statute there enacted is constitutional. *Neas v. Borches*, 71 S. W. 50; *McDaniels v. J. J. Connelly Shoe Company*, 71 Pac. 37, 60 L. R. A. 947. The statute in Washington is very similar to that now before us. See, also, *Hart v. Roney*, 93 Md. 432, 49 Atl. 661, and *Fisher v. Herrman*, 95 N. W. 392, in which the courts of Maryland and Wisconsin seem to assume the constitutionality of their local statutes on this subject, which are somewhat less restrictive than that of Massachusetts.

Demurrer overruled.

(184 Mass. 547)

FLETCHER v. WRIGHTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

CONSTABLES—ATTACHMENT OF MORTGAGED PERSONALTY—CONVERSION—VALIDITY OF MORTGAGE—STATUTE—FAILURE TO RETURN WRIT—TRESPASS.

1. Where mortgaged personal property is levied on by a constable under a writ against the

mortgagor, the rendition of a statement in writing by the mortgagee to the constable of the amount of his claim, under Rev. Laws, c. 167, § 70, providing that the mortgagee may render such statement, and, if the same is not paid or tendered to him within 10 days thereafter, the attachment shall be dissolved, the property shall be restored to him, and the officer shall be liable to him for any damages he has sustained by the attachment, does not prevent the constable, in an action against him by the mortgagee for conversion of the property, from contesting the validity of the mortgage.

2. In an action by the mortgagee of personalty against a constable for conversion, predicated on his attaching the property under a writ against the mortgagor, a contention by the plaintiff that, inasmuch as the defendant did not return the execution into court within 60 days, nor until after he first offered it in evidence at the trial before an auditor, his subsequent return of it does not answer the requirements of the law, and he became a trespasser *ab initio*, is without merit, it appearing that he did return the execution before the paper was put in evidence.

Exceptions from Superior Court, Suffolk County; Daniel W. Bond, Judge.

Action by one Fletcher against one Wrighton. Finding for defendant, and plaintiff excepts. Exceptions overruled.

Henry T. Richardson, for plaintiff. Stephen H. Tyng and Arthur T. Johnson, for defendant.

KNOWLTON, C. J. This is an action of tort for the alleged conversion of certain goods of which the plaintiff was a mortgagee. The defendant justifies his interference with the property by saying that he attached it as a constable under a writ against the mortgagor, and subsequently sold it upon the execution issued in the case. The contentions relied on by the plaintiff are two: First, that, inasmuch as the writ was not a trustee process, and the attachment was made under Rev. Laws, c. 167, § 69, and the amount demanded by the plaintiff as due him under the mortgage was not paid within 10 days, it is not open to the defendant to contest the validity of the mortgage; second, that, inasmuch as the defendant did not return the execution into court within 60 days, nor until after he first offered it in evidence at the trial before an auditor, his subsequent return of it does not answer the requirements of the law, and he became a trespasser *ab initio*.

It is true that an attaching creditor or officer who does not pay the amount due to a mortgagee of attached personal property, in accordance with Rev. Laws, c. 167, § 69, loses his rights under the attachment. It is also true that an attachment may be made by trustee process under Rev. Laws, c. 167, § 74, and that a method is provided for contesting the validity of the mortgage in the suit without a preliminary payment by the creditor or officer, and that this is sometimes a convenient mode of determining the rights of the parties. *Jackson v. Colcord*, 114 Mass. 60; *McDonald v. Faulkner*, 154 Mass. 34, 27 N. E.

883. But the provision of section 70 of this chapter, that, if the amount due is not paid or tendered within 10 days after the mortgagee's demand, the attachment shall be dissolved, relates to a title under a valid mortgage, and we have been referred to no case in which it is held that this result will follow if the mortgage is void, or is voidable by attaching creditors. To give such an effect to a fictitious or invalid mortgage would be likely to work so great injustice that nothing less than plain provisions to that effect would warrant us in sustaining the plaintiff's contentions. So far as we are aware, this section has always been construed by courts *anisi prius* as it was construed at the trial of this case. In *Codman v. Freeman*, 3 Cush. 306-311, Chief Justice Shaw, in speaking of a demand of this kind, said: "If the officer, after such a notice, persisted in holding the goods, he did it at the peril either of proving the mortgage invalid and void, or as against the mortgagees, the plaintiffs, of being chargeable as a trespasser." We are of opinion that the defendant properly might contest the validity of the mortgage. It is well settled that a title to real estate, acquired under a judgment and execution, cannot be established unless the execution is returned into court, but, as the statute does not fix the time within which this must be done, it will be effectual if it is done at any time before the execution is put in evidence in the case in which it is relied upon. *Prescott v. Pettee*, 3 Pick. 331; *Walsh v. Anderson*, 135 Mass. 65; *Firth v. Haskell*, 148 Mass. 501, 20 N. E. 164. It is equally true that an officer cannot justify an attachment of goods on *mesne* process unless he returns his writ into court. *Russ v. Butterfield*, 6 Cush. 242; *Williams v. Babbitt*, 14 Gray, 141, 74 Am. Dec. 670; *Paine v. Farr*, 118 Mass. 74; *Wiggin v. Atkins*, 136 Mass. 292. We do not find that this court has ever decided the question whether an officer can justify a levy on an execution upon goods without a return of the execution. In *Tubbs v. Tukey*, 3 Cush. 438-442, 50 Am. Dec. 744, Mr. Justice Metcalf said: "It is well settled that when an officer is sued as a trespasser for levying a fieri facias he need not show a return thereof in order to justify his levy;" and he cited English cases and 2 Greenl. on Ev. § 597. The same doctrine is stated quite at length in *Clark v. Foxcroft*, 6 Greenl. 299, 20 Am. Dec. 309, in reference to executions similar to those used in this state. The opinion in *Pratt v. Pond*, 45 Conn. 336, states the law in the same way, and *Ingersoll v. Sawyer*, 2 Pick. 270-279, contains dicta of Chief Justice Parker of like effect. On the other hand, it was held in *Munroe v. Merrill*, 6 Gray, 236, that an officer who arrests a debtor on execution, and afterwards discharges him, and returns the execution unsatisfied without stating the arrest in his return, cannot justify under the execution if sued by the debtor for the arrest. Although this case does not cover the question now

raised, it contains reasoning, as do some of the other cases, which tends somewhat to support this part of the plaintiff's contention. We do not find it necessary to decide the question, for, if we should assume that the defendant could not justify without returning his execution, we are of opinion that for this purpose he could return it at any time before it was received in evidence. There is no good reason why this part of the rule which applies to the return of executions levied upon real estate should not also apply to executions levied upon goods and chattels. The defendant in this case returned the execution a long time after the levy, but before the paper was put in evidence. This objection cannot avail the plaintiff.

Exceptions overruled.

(124 Mass. 491)

NEW YORK, N. H. & H. R. CO. v. BLACKSTONE.

(Supreme Judicial Court of Massachusetts, Worcester. Jan. 6, 1904.)

HIGHWAYS—CHANGE OF WIDTH—PROPERTY TAKEN—RAILROADS—BRIDGES—COMPENSATION—ELEMENTS—AWARD—CONSTRUCTION.

1. Rev. Laws, c. 111, § 135, provides that the land of a railroad may be taken for highways or townways, and that all damages caused by such taking or otherwise shall be assessed as provided in case of the taking of land by railroad corporations, or for highways, etc.; and section 136 declares that a special commission shall determine which party shall carry the decision of the commissioners into effect, and which party shall pay the charges and expenses of making the alterations, together with future charges for keeping the railroad crossing and approaches in repair, as well as the cost of the application. *Held* that, where the award of the special commission for land taken from a railroad to widen a street did not require the railroad to contribute to the alteration and damages suffered by it, the railroad was entitled to the same compensation under section 135 as a stranger would have been.

2. An award of special commissioners to assess damages for land taken to widen a street under a railroad's track directed that the town should pay the entire expense of land damage occasioned by the taking of the land and property, and that all other charges and expenses occasioned by carrying the decision into effect, including the cost of the hearing before the special commission, should be paid, two-thirds by the railroad, and one-third by the town. The first article of the commission's award provided that the town should carry into effect so much of the decree of the county commissioners as required the taking of land and other property, which was the taking of 1,050 square feet, and "all buildings, erections, and structures standing on the above described and bounded tract of land." *Held*, that the term "land damage" was not limited to the value of the land taken, apart from the erections thereon, and hence, where the land taken supported one of the abutments of the railroad bridge, the railroad was entitled to damages for the taking of the abutment as well as the land.

3. Where, in proceedings for the taking of land belonging to a railroad company to widen a street under the railroad's tracks, the award of a special commission cast the burden on the railroad of maintaining a bridge over the street, the railroad company was not entitled to compensation because the decree of the

county commissioners required the maintenance of a bridge 33 feet wide in place of the old bridge, which was only 19 feet wide.

4. Where, in proceedings to widen a street under a railroad right of way, a special commission provided that the town was to carry into effect so much of the decree as required the taking of land and other property to widen the street; that all construction was to be carried into effect by the railroad, including the remaking of the street, as well as the rebuilding of the railroad bridge and its abutments; that in the future the railroad bridge and its abutments were to be maintained by the railroad, and the street by the town, the town to pay the entire expense due for land and property taken to widen the street, and all other charges and expenses to be borne, two-thirds by the railroad company and one-third by the town—under such award the railroad was entitled to recover from the town the extra expense of the new railroad bridge and a new abutment made necessary by the change, after deducting the increased value that the new structure had over the old to the railroad.

5. Where land belonging to a railroad under its tracks was taken by a town to widen a street, the railroad was entitled to damages suffered by reason of its being forced to remove a water crane and valve pit to a new location, made necessary by such change of the street.

Report from Superior Court, Worcester County; Charles A. De Courcy, Judge.

Petition by the New York, New Haven & Hartford Railroad Company against the Town of Blackstone to recover compensation for the taking of certain of its land for the widening of a street. On report from the superior court. Verdict set aside.

Arthur P. Rugg, for petitioner. F. N. Thayer and M. N. Thayer, for respondent.

LORING, J. The selectmen of Blackstone brought a petition for the widening of St. Paul street between two abutments supporting an overhead bridge on which the tracks of the New England Railroad were laid. The county commissioners decided in favor of the widening, and a special commission was appointed under what is now Rev. Laws, c. 111, § 136, to determine which party should carry the decision into effect, and which party should pay the charges and expenses of the alteration, the future charge of maintenance, and the costs of the several proceedings. Their award was in substance this: The town was to carry into effect so much of the decree as required the taking of land and other property to widen St. Paul street; all construction was to be carried into effect by the railroad, including the remaking of St. Paul street, as well as the rebuilding of the railroad bridge and its abutments; in the future the railroad bridge and its abutments were to be maintained by the railroad, and St. Paul street by the town; the town was to pay the "entire expense" due for land and property taken in widening St. Paul street; and all other charges and expense were to be borne, two-thirds by the railroad company and one-third by the town. In pursuance of the decree the town took 1,050 square feet of land within the location of the railroad owned by

it in fee, and covered by the abutment of the railroad bridge on the northerly side of St. Paul street, and "all buildings, erections, and structures standing on the above described and bounded tract of land." The railroad brought the petition now before us to recover compensation for this taking.

The petitioner's first exception is to the introduction in evidence of the award of the special commission. Its contention here is that it is entitled to compensation under what is now Rev. Laws, c. 111, § 135, and that the right so given is not affected by the award of a special commission under section 136, and that it was so decided in *New England Railroad Co. v. Board of Railroad Com'rs*, 171 Mass. 135, 50 N. E. 549. But we are of opinion that the special commission appointed under what is now Rev. Laws, c. 111, § 136, in apportioning the expenses between the railroad and the town, could have provided that the railroad should contribute to the alteration its land and all damages suffered by it. In the absence of such a provision in the award of the special commission, the railroad would have the same right to compensation which a stranger would have under what is now Rev. Laws, c. 111, § 135. But if the special commission does make a provision in its award that the railroad shall bear the burden of the compensation due for its property taken to carry out the alteration, and the railroad feels aggrieved, its remedy is to take an appeal to a jury under what is now Rev. Laws, c. 111, § 138. The petitioner's right to compensation, therefore, depends upon this: First, would it be entitled to compensation apart from the award of the special commission? Second, does that award take it away?

The real question in the case at bar is the true construction of the fifth article of the commissioners' award, directing the town to "pay the entire expense of land damage occasioned by the taking of land and property for the widening of said St. Paul street," in connection with the seventh article, directing that "all other charges and expense occasioned by carrying into effect such decision, including cost of the hearing before said special commission," shall be paid, two-thirds by the railroad and one-third by the town. The ruling of the superior court was "that the value of the land subject to its use for railroad purposes was the only thing that the petitioner was entitled to recover under the award of the special commission." We are of opinion that this was wrong. Had the award provided that the town should pay the "damage occasioned by the taking of land and property for the widening of St. Paul street," it would hardly be contended that the railroad could not recover compensation for the taking of the abutment which covered the land taken, as well as for the land taken. The insertion of the word "land" before "damage" does not lead to a different conclusion. Compensation for land taken under the power of eminent domain, and for the buildings on it, is

technically "land damages." The building is technically not only a part of the land, but is technically land; and an action for compensation for land taken under the power of eminent domain, and buildings which are upon that land, is, as matter of technical law and ordinary parlance, spoken of as an action for "land damages." To exclude the value of the abutment, and to confine the railroad to the value of the land, is to read out of the article the provision that the town shall pay the damage occasioned by the taking of property as well as of land. This conclusion is re-enforced by reference to the first article of the award, by which the special commission provided that the town should carry into effect so much of the decree of the county commissioners as requires the taking of land and other property, and by reference to the taking made in pursuance of this article, which was a taking of the 1,050 square feet and "all buildings, erections, and structures standing on the above described and bounded tract of land." We are therefore of opinion that the petitioner was entitled at least to the value of the abutments then on the land, as well as to the value of the land. But the petitioner is not entitled to compensation because it was required by the decree of the county commissioners to maintain a bridge to span a street 33 feet wide in place of the old street 19 feet wide. By the third article of the award of the special commission this burden was cast upon the railroad, and the petitioner's exception to this evidence must be overruled.

This brings us to the petitioner's contention that, as part of the damages to which it is entitled, it has a right to compensation by reason of the fact that the parcel of its land which has been taken is land on which one abutment of its railroad bridge was constructed, and that the taking of the land to widen St. Paul street, over which its railroad bridge is constructed, has forced it to rebuild the bridge and this abutment. Apart from the burdens cast upon the parties by the award of the special commission, the petitioner would be entitled to these damages. *Boston & Albany Railroad v. Cambridge*, 150 Mass. 283, 34 N. E. 382. The defendant's contention here is that the cost of the construction of the new abutments and of the new bridge is covered by the seventh article. But that is not so. That article does not provide that all charges and expenses occasioned by carrying the county commissioners' decree into effect shall be paid, two-thirds by the railroad and one-third by the town; what it does provide is that "all other charges and expense" so occasioned shall be so paid; that is to say, all other charges and expenses not provided for in the fifth article, which throws on the town the entire expense of the land damages occasioned by the taking of land and other property. In addition to the rebuilding of the railroad bridge and its abutment, there was the rebuilding of St. Paul street. The seventh article, therefore, finds in the rebuilding of the

street other charges of construction in addition to those covered by the fifth article, and finds in the maintenance of the bridge thrown on the railroad by article 3, and that of the street thrown on the town by the fourth article, charges and expenses other than charges and expenses of construction. Effect, therefore, can be given to this article, even if it does not cover the cost of construction of the railroad bridge and its abutment. The only ground on which it could be held that these damages cannot be recovered is that by the terms of the fifth article the damages to which the petitioner is entitled are "land damages," and not all damages "occasioned by the taking of land and property." But we are of opinion, for the reasons already given, that that is not enough to exclude these damages to which the petitioner otherwise would be entitled, and that evidence that "the extra expense of the new bridge and new abutment constructed in accordance with the decree of the county commissioners, after deducting the increased value that the new structure had over the old to the railroad for use in its railroad business, was \$11,878," should have been admitted as bearing on the damages to which they are entitled by the taking of their land. The special commission evidently took the following view of the matter: This widening is for the sole benefit of the traveling public, and in no respect or aspect for the benefit of the railroad. The burden of paying for the highways is, under our system of laws, thrown on the town in which they are located. It is therefore fair that the land damages legally due for widening this public way, whatever they may be, shall be paid by the town, and that the balance (since the burden of widening the way is thrown on the town alone) should be put more heavily on the railroad.

The damages suffered by being forced to remove the water crane and valve pit to a new location was also a subject for which the petitioner was entitled to compensation. The other matters claimed by the petitioner would seem to be properly included in the offers of evidence which we have discussed.

In accordance with the terms of the report the entry must be:

Verdict set aside. Case to stand for hearing before an assessor.

(184 Mass. 516)

WILSON v. HEAD et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

GAMING — SPECULATIVE CONTRACTS — RECOVERY OF MONEY PAID — STATUTES — AMENDMENT — VESTED RIGHTS.

1. St. 1890, p. 479, c. 437, relative to wagering contracts, consists of four sections, the second of which provides for a recovery of payments made on contracts to purchase commodities by one having no intention to perform the same by receipt or delivery of the commodities. St. 1901, p. 391, c. 459, § 1, provides that section 2 of said act (St. 1890, p. 479, c. 437) "is

hereby amended by striking out the whole of said section and substituting the following," etc. The amended section allows a recovery only when there is an affirmative intention that there shall be no actual purchase or sale, and also prescribes a limitation in certain cases. The first and third sections of the original act were left without change, and the fourth section, relating to evidence, is amended in the same way as the second, in accordance therewith. *Held*, that the effect of St. 1901 was merely to amend the original act by limiting the right of recovery in the designated particulars, and it did not repeal the original, except so far as it is inconsistent with the amendment.

2. St. 1890, p. 479, c. 437, giving a right to recover money paid on wagering contracts, created a purely statutory right, not afforded by the common law, and did not give a right, which could not be divested, to recover money paid prior to St. 1901, p. 391, c. 459, which took away in certain cases the right of recovery under the former statute.

3. Rev. Laws, c. 8, § 4, cl. 2, providing that the repeal of an act shall not affect any suit or prosecution pending at the time of the repeal for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed, applies only to strictly penal statutes, and not to statutes like St. 1890, p. 479, c. 437, amended by St. 1901, p. 391, c. 459, relative to the recovery of money paid on wagering contracts.

Exceptions from Superior Court, Suffolk County; Edward P. Pierce, Judge.

Action by one Wilson against one Head and others. There was verdict for defendants, and plaintiff excepted. Judgment for defendants.

I. R. Clark, for plaintiff. Solomon Lincoln and Ropes, Gray & Gorham, for defendants.

KNOWLTON, C. J. The plaintiff seeks to recover, under St. 1890, p. 479, c. 437, for money paid for the purchase of stocks on margin. In the opening of his case at the trial he stated and offered to prove facts which would entitle him to a verdict under that statute, were it not for the enactment of the amendatory act of 1901, p. 391, c. 459. The question before us is, what is the effect of the amendments contained in the later statute? The first section of St. 1901 is as follows: "Section 2 of chapter 437 of the acts of the year 1890 is hereby amended by striking out the whole of said section, and substituting the following," etc. The difference between the original section 2 and the section as amended is that the latter allows a recovery of payments for securities or commodities contracted for on margin only when the contracting party has an affirmative intention "that there shall be no actual purchase or sale," while the former allows such a recovery not only when there is such an affirmative intention, but also when there is a mere negative state of mind in regard to the subject; that is when he has, "at the time of the contract, no intention to perform the same by the actual receipt or delivery of the securities or commodities and payment of the price." There is also a proviso in the amended section limiting the re-

covery to cases when no actual purchase or sale of the commodities or securities, and no valid contract therefor, has been made in accordance with the terms of the contract or employment. This is simply a limitation of the right of recovery given in the original statute. The first and third sections of the original act are retained without change. The fourth section is amended by striking it out, and substituting a new one in the same way as the amendment is made to the second. This fourth section relates to what shall constitute prima facie evidence in favor of the plaintiff, and the new one is the same as the old, except as it is changed to adapt it to the change in the second section. Except in the amendments to these two sections, there is no reference to the former statute, and it is left in full course. The question is whether these changes in two sections of the act have repealed the whole act, or any part of it, and, if a part, what part? It is plain that the Legislature intended to amend the original act, and not to repeal it. The form of the amendments has no significance as tending to show a repeal. The substance of the provision in regard to each amendment is that the language of the section shall be changed so as to read as follows, with the words of the new section following. The fair construction of the new statute is that the original statute shall remain in force, except as it is changed by the amendments. There is no hint or suggestion of a repeal of the statute as a whole. Those parts of the original statute which are inconsistent with the amended statute, and those only, are repealed by implication. *Com. v. Kimball*, 21 Pick. 373, 376; *Wright v. Oakley*, 5 Metc. 400-406; *United Hebrew Benevolent Ass'n v. Benshimol*, 130 Mass. 325; *Steamship Co. v. Joliffe*, 2 Wall. 450-459, 17 L. Ed. 805; *Bear Lake Co. v. Garland*, 164 U. S. 1-12, 17 Sup. Ct. 7, 41 L. Ed. 327; *Ely v. Holton*, 15 N. Y. 595-598; *Reid v. Supervisors*, 128 N. Y. 364-373, 28 N. E. 367; *Dashiell v. Mayor*, 45 Md. 615-622. The original statute gave a right of recovery in certain cases. The effect of the amendment is to limit this right in two particulars, and thereby to take away the right in certain cases included in the former statute. Every case in which there can be a recovery under the amended statute is included in the original statute, and recovery in it could be had as well without the amendments as with them. The effect of the amendments is simply to show that, of the cases in which there is a right of recovery under the original act, those in which there is only a negative lack of intention as to performance of the contract, as distinguished from an affirmative intention that there shall be no purchase or sale, shall no longer give a right of recovery, and that those in which there is an actual purchase or sale of the securities or commodities, or a valid contract therefor, shall no longer give such a right.

As to all other cases included in the original act, the law remains unchanged. It is necessary to consider the effect of the amendments upon cases which arose prior to the enactment of St. 1901, and which are included in the original statute, but not included in the amended statute. Did the statute create rights which vested before the amendments were in force, so that the Legislature could not constitutionally take them away? These rights were purely statutory—to recover money paid under a kind of gambling contract, under which there can be no recovery at common law. *Wall v. Metropolitan Exchange*, 168 Mass. 232-234, 46 N. E. 1062. As was said in *Corey v. Griffin*, 181 Mass. 229-232, 63 N. E. 420, 421, the statute was "intended to suppress a well-known species of gambling. * * * The object is not to punish the winner nor to protect the loser, as such, but simply to prevent this kind of gambling by subjecting the participant to a liability which, except for some great purpose of preventing injury to the public morals, would seem to be unfair and unjustifiable." See *Crandell v. White*, 164 Mass. 54, 41 N. E. 204. Such a statute does not give vested rights which the Legislature may not take away. When the remedy provided by the statute is lost by an amendment taking it away in certain classes of cases, nothing further of benefit remains in those cases. *Bartlett v. King*, 12 Mass. 537, 7 Am. Dec. 99; *Nichols v. Squire*, 5 Pick. 168; *New London Northern Railroad Company v. Boston & Albany Railroad Company*, 102 Mass. 386-389; *Louisiana v. The Mayor of New Orleans*, 109 U. S. 285-287, 3 Sup. Ct. 211, 27 L. Ed. 936; *People v. Livingston*, 6 Wend. 526-530; *Van Inwagen v. Chicago*, 61 Ill. 31; *Bailey v. Mason*, 4 Minn. 546 (Gil. 430).

It is contended that Rev. Laws, c. 8, § 4, cl. 2, which provides that the repeal of an act shall not affect "any suit, prosecution or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed," saves the rights of parties who have claims that might be enforced under the original statute, but which are not within the amended statute. We are of opinion that this clause applies only to statutes which are strictly penal. In terms, it relates only to cases in which proceedings are pending at the time of the repeal. In *New London Northern Railroad Company v. Boston Railroad Company*, 102 Mass. 386-390, Mr. Justice Gray, in referring to this provision, which is a part of St. 1869, c. 410, says, "It does not extend to proceedings of a civil nature." St. 1890, p. 479, c. 437, viewed in reference to the persons made liable, has features which are quasi penal. But it has been expressly held to be a remedial, and not a penal, statute. *Wall v. Metropolitan Stock Exchange*, 168 Mass. 232, 46 N. E. 1062. See, also, *Cole v. Groves*, 134 Mass. 471-472; *Huntington v. Attrill*, 146 U. S. 657-667, 13

Sup. Ct. 224, 36 L. Ed. 1123; Kimbro v. Colgate, 5 Blatchf. 229, Fed. Cas. No. 7,778. The amendments therefore cut off all right of action which are not included in the statute as amended. The case stated by the plaintiff in his opening was one that was included in the original statute, but not included in the amended statute.

Judgment for the defendant.

(184 Mass. 565)

LOUGHLIN v. PARKINSON et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

GAMING—WAGERING CONTRACTS—RECOVERY OF PAYMENTS—AMENDED STATUTE—PLEADING.

1. St. 1901, p. 391, c. 459, amended St. 1890, p. 479, c. 437, relative to wagering contracts, so as to limit the right to recover money paid on such contracts in certain cases, but left the prior act in force, except as amended. *Held*, that a declaration founded on transactions prior to the amendment, following the language of the amendment, but stating a case within the unchanged portion of the original statute, was good.

Appeal from Superior Court, Suffolk County.

Action by J. H. Loughlin against John Parkinson and others. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Demurrer overruled.

F. F. Sullivan and Jos. M. Sullivan, for appellant. Warner, Warner & Stackpole, for appellees.

KNOWLTON, C. J. This action comes before us on a demurrer to the plaintiff's amended declaration. The several counts set forth causes of action under St. 1890, p. 479, c. 437, and under the amendatory St. 1901, p. 391, c. 459, for the recovery of money paid for stocks contracted to be bought on margin. They follow substantially the language of the later statute, although they all describe transactions which occurred before the amendatory act was passed. We do not understand from the argument that the counts are deemed by the defendant insufficient in form. If St. 1890, p. 479, c. 437, is still in force, in reference to transactions which occurred prior to the enactment of St. 1901, p. 391, c. 459, and which come within the description of the amendatory act, for reasons stated in *Wilson v. Head*, 69 N. E. 817, we are of opinion that all the cases in which there may be a recovery under the later statute are included in the earlier statute, and that, as to such cases, the earlier statute has never been changed, but remains in force. The language in which the averments are made, although it takes the form found in the later statute, states a case in every count which is also within that part of the earlier statute which remains unchanged, and the entry must therefore be: Demurrer overruled.

(184 Mass. 488)

RICE v. RICE.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1904.)

HUSBAND AND WIFE—SEPARATION—MAINTENANCE—PERSONAL LIBERTY—INFRINGEMENT—PROBATE ORDERS—APPEAL—DEATH OF WIFE—DISMISSAL.

1. Rev. Laws, c. 153, § 33, authorizes a wife living apart from her husband for justifiable cause to sue to prohibit him from restraining her personal liberty, and for maintenance; chapter 162, § 19, declares that a decree granting such relief shall have effect, notwithstanding an appeal, until otherwise ordered by a justice of the superior court; and chapter 153, § 36, declares that, if a court having jurisdiction has entered such a decree in favor of a wife, the surviving husband shall not be entitled to waive the provisions of a will made by her, as authorized by chapter 135, § 16. *Held*, that where a wife obtained an order against her husband, as authorized by chapter 153, § 33, and died, leaving a will, pending an appeal by the husband from the probate court to the superior court, her executor, on suggesting her death, was not entitled to have the appeal dismissed, but it became the duty of the superior court to proceed with the case so far as necessary to make an order finally disposing of all the questions involved in the appeal.

Appeal from Superior Court, Essex County.

Petition by Margaret Rice, revived after her death in the name of Jeremiah W. Buckley, as executor of her last will, against John Rice. From an order granting a motion to dismiss defendant's appeal from a probate decree to the superior court, he appeals. Reversed.

Horace I. Bartlett, for appellant. Edmund S. Spalding and Nathaniel N. Jones, for appellee.

KNOWLTON, C. J. Under Rev. Laws, c. 153, § 33, the petitioner filed in the probate court a petition averring that she was living apart from respondent, her husband, for justifiable cause, and that there was no issue of the marriage, and praying that he might be prohibited from imposing any restraint upon her personal liberty and from entering certain premises belonging to her, and that he should pay such sum as the court might order. On this petition the court made a decree stating that the petitioner was then living apart from the respondent for justifiable cause, and ordering that he be prohibited from imposing any restraint upon her personal liberty until the further order of the court. From this decree the respondent appealed to the superior court, and the appeal was duly entered there. Afterwards the petitioner deceased, and the respondent moved that her executor or administrator be summoned as a party to the proceedings. The executor of her will then appeared specially and suggested the death of the petitioner, and moved that the appeal be dismissed. This motion was allowed, and the respondent appealed to this court.

A petition of this kind, in a case where there are no children of the marriage, is

brought for relief which is personal to the petitioner, and which cannot be granted, with any effect, after her death. Like an ordinary suit for a divorce, unless there are peculiar conditions, it is abated by the death of either party before the determination of the issue. *Rawson v. Rawson*, 156 Mass. 578, 81 N. E. 653; *Brigham, Petitioner*, 176 Mass. 226, 57 N. E. 328; *Stanhope v. Stanhope*, 11 P. D. 108. It is clear that this suit would abate, and the petition be dismissed, were it not for the fact that a decree was entered for the petitioner by the probate court. That decree, with the appeal from it, raises questions which are not free from difficulty. By Rev. Laws, c. 162, § 19, it is provided that such a decree or order "shall have effect, notwithstanding an appeal, until otherwise ordered by a justice of the superior court," etc. Rev. Laws, c. 153, § 36, declares that "if a court having jurisdiction has entered a decree that a married woman has been deserted by her husband, or is living apart from him for justifiable cause, . . . the surviving husband shall not be entitled, under the provisions of section 16 of chapter 135, to waive the provisions of a will made by her." This case shows that the petitioner made a will, for the executor is before us. If these statutes are given effect literally, the respondent is precluded by the decree from waiving the provisions of this will. On the face of the record, this decree, from which he took an appeal, seems to affect his rights of property, and we must determine what action he may take in regard to it. There are different possible views of the situation. One is that, the decree having been appealed from, and the petitioner having deceased before the case was heard in the appellate court, the suit should abate, the decree be set aside, and the petition dismissed. Another is that, the death having occurred while the decree was in force, under the statute, the appeal should be dismissed, and the decree left with the same effect upon the respondent's rights as if there had been no appeal. Another is that the executor, representing the petitioner and the claimants under the will, should be permitted to prosecute the petition in the appellate court for the purpose of protecting the rights of property which the decree gave, and which were left undetermined after the appeal. Action in accordance with either of the first two views would not lead to a result founded on a final determination of the facts in issue between the parties, but upon an arbitrary adjudication as to the effect of existing incidental conditions.

It has been said in many cases that when rights of property have arisen, founded on proceedings for a divorce, and one of the parties has deceased before the conclusion of the proceedings, his representative may become a party to the suit for the purpose of enabling the court to determine the issue and make the decree which shall settle such rights.

Thomas v. Thomas, 57 Md. 504; *Downer, Administrator, v. Howard*, 44 Wis. 82; *Danforth v. Danforth*, 111 Ill. 236; *Nickerson v. Nickerson*, 34 Or. 1, 48 Pac. 423, 54 Pac. 277; *Israel v. McArthur*, 6 Colo. 85. See, also, *Barney v. Barney*, 14 Iowa, 189; *Wilson v. Wilson*, 73 Mich. 620, 41 N. W. 817; 2 *Nelson on Divorce*, 671. We do not know the value of this right to waive the provisions of the petitioner's will. Plainly, it is a right of property, which has some value. If the effect of the appeal had been to vacate the decree, we should think the most natural and logical view would be to say that the death of the petitioner before the entry of any effectual decree leaves the parties as if no suit had been brought. But under the statutes cited, which leave the decree in force until it is otherwise ordered by the superior court, and which give the decree this effect upon the right of waiver, it seems almost necessary that further action should be taken to determine the rights of the parties. We are of opinion that the executor should be permitted to represent the petitioner, and that the case should stand for hearing under the appeal upon the question whether the petitioner was living apart from the respondent for justifiable cause.

The effect of appeals and the jurisdiction of the appellate court in cases of this kind were considered at length in *Smith v. Smith*, 68 N. E. 846. That decision makes it plain that it became the duty of the superior court, after the entry of the appeal, to proceed with the case so far as necessary to make an order which should finally dispose of all the questions involved in the appeal. The decree to be certified by the superior court to the probate court in this case should leave nothing for further action in the lower court. The order allowing the motion was erroneous.

Order revoked.

(184 Mass. 502)

SELECTMEN OF TOWN OF DANVERS v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1904.)

MUNICIPAL CORPORATIONS — STATES — CONTRACTS — WATER RATES — ESTIMATE — COMMISSIONERS — REFEREES — AWARD — CONSTRUCTION — COSTS.

1. Where commissioners were appointed to determine the amount of compensation to be paid by the commonwealth for water supplied by the town of Danvers to the Danvers Lunatic Hospital, as authorized by Acts 1898, p. 723, c. 564, such commissioners were referees and not masters in chancery, so that the only questions of law open for review on an award made by them were those which they referred to the court.

2. Where referees were appointed to make an award, a full statement in the award of the principles of law on which the referees proceeded is insufficient to submit to the court the correctness of such principles and of their application to the case, unless, as a matter of

construction of the award, it can be held as a matter of law that the correctness of such propositions has been submitted by the referees to the court.

3. Where a town entered into an arrangement with the commonwealth by which a waterworks system was established at their joint expense, which provided that on the expiration of 20 years the amount which the commonwealth should pay for water for certain of its public buildings should be fixed by a commission if the parties could not agree, the town, after the expiration of such period, was not entitled to charge the commonwealth a profit on water consumed at the commonwealth's institutions, but the sum reasonably due from the commonwealth depended on its share of the expense actually incurred in maintaining and operating the system of waterworks, and not on what might be calculated would have been the expense to operate the plant ending at the commonwealth's reservoir, which was constructed by it at its own expense, had such a plant been erected.

4. Where a contract between the commonwealth and a town for the joint construction and operation of a waterworks contemplated the possible extension of the system to other towns, the cost of subsequent extensions of distributing pipes was properly included in the estimate to determine the amount of the commonwealth's just contribution for water under the contract.

5. Where the commonwealth and a town entered into a joint agreement for the construction of waterworks, under which the commonwealth was bound to pay a sum to be subsequently determined for water used after the expiration of 20 years, evidence as to the sums paid at the state prison for water, and in other towns, was properly excluded.

6. Where the commonwealth and a town jointly agreed to construct certain waterworks, and the commonwealth constructed a reservoir at its own expense which the town was entitled to use for storing water, and it was provided that after the expiration of 20 years the amount which the commonwealth should pay the town for water subsequently used should be determined by a commission, which determined that the reasonable value of the town's use of the reservoir was \$1,350, such sum was properly excluded in determining the cost of filling the reservoir, for the purpose of determining the value of the water to be paid by the commonwealth.

7. Where a contract between the commonwealth and a town for the construction of waterworks provided that, on the introduction of water into a reservoir constructed by the commonwealth, the latter should pay to the town \$12,500, and that, after 20 years, water rates to be paid by the commonwealth to the town should be fixed by an award of commissioners, after the expiration of such period the commonwealth had no interest in the waterworks by reason of such payment, and was therefore not entitled to have the same considered in determining the water rates it should be required to pay.

8. Where a question is not raised on a trial before commissioners acting as referees, it cannot be taken advantage of as a ground to have the case recommitted.

9. Where the commonwealth and a town agreed for the joint construction of a waterworks system under a contract providing that the town should forever maintain its proposed works between the sources of supply and the commonwealth's reservoir, and also provided that the reservoir should be maintained at the sole expense of the commonwealth, it was not error for the commissioners, in determining the reasonable water rates to be charged to the commonwealth after the expiration of a contract period under the contract, to deduct a

certain sum for depreciation of the town's works between the source of supply and the reservoir.

10. Where the commonwealth and a town jointly agreed to construct certain waterworks under a contract by which the commonwealth was obligated to pay for water after 20 years, and it constructed a reservoir on land previously owned by it for its use, which it permitted the town to use for storage purposes, the commonwealth was not entitled to credit for interest on the value of the reservoir site in determining the amount it should pay for water, though the town was allowed the cost of land which it purchased solely for such use.

11. Where the commonwealth was liable to a town yearly for certain sums due for water rates for the use of the commonwealth's institutions, it was also liable for interest on such sums from the end of each year.

12. Where, in proceedings to determine the amount of water rates to be paid by the commonwealth to a town for water used for public institutions, as authorized by Acts 1898, p. 723, c. 564, the award of the commissioners did not provide for costs, and the town was in the main successful, the town was entitled to costs before the commissioners.

Exceptions from Supreme Judicial Court, Essex County.

Proceeding between the commonwealth and the selectmen of the town of Danvers for the determination of the value of water used by the commonwealth in connection with the Danvers Lunatic Hospital. An award was made by commissioners, and both parties bring exceptions. Award modified.

Daniel N. Crowley, for petitioners. Herbert Parker, Atty. Gen., and Wm. B. Sullivan, for respondent.

LORING, J. By chapter 564, p. 723, of the Acts for the year 1898, it was provided that if the town of Danvers and the trustees of the Danvers Lunatic Hospital failed to agree as to the amount of compensation to be paid by the commonwealth for water supplied by said town to the hospital in pursuance of a contract between the commonwealth and the town, dated June 23, 1876, the Supreme Judicial Court, on application of either party, should appoint three commissioners to determine the sum to be paid for such water each year from December 1, 1896, to December 1, 1899. It further provided that "the award of said commissioners or a majority thereof shall be returned into said court * * * and when accepted by said court shall be final and conclusive for such term of years." The commonwealth and the town having failed to agree, commissioners were appointed, who have made an award which is now before this court on a report made by a single justice.

At the hearing before the commissioners 11 requests for rulings were made by the town, and 23 were made by the commonwealth. It is stated in the award that exceptions "were duly saved" to the refusal to give the rulings requested and to the rulings given. In this court a motion was made by the commonwealth to recommit the award, with instructions to find in accordance with

the rulings requested by it, and a motion was made by the town for a modification of the award, and when modified for confirmation of it, and for the "cost of the reference." We are at a loss to understand on what the commissioners were proceeding when they undertook to save exceptions to their rulings. They seem to have assumed that they were acting as masters in chancery. But if they were, they could not save exceptions to rulings of law. See *O'Brien v. Keefe*, 175 Mass. 274, 56 N. E. 588, where the proceeding before masters is explained. But they were referees, and not masters in chancery, and the only questions of law open on an award made by referees are those referred by them to the court. *Fairchild v. Adams*, 11 Cush. 549; *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455. A full statement in the award of the principles of law on which the referees proceeded is not enough to submit to the court the correctness of those principles of law and of their application to the case. Unless it can be held as matter of construction of the award that the correctness of the law has been submitted by the referees to this court, the statement of law in the award will be taken to be a statement of what the referees have found, made for the information of the parties, and not a reference of the correctness of it to this court. *Ellicott v. Coffin*, 106 Mass. 365; *Carter v. Carter*, 109 Mass. 309; *Rogers v. Mayer*, 151 Mass. 280, 23 N. E. 836. See, also, *Smith v. Boston & Maine Railroad*, 16 Gray, 524. In view of the misapprehension of the parties as to what was before the court, we have had some doubts as to whether the award should not be re-committed. But, on a full consideration of the whole case, we do not think it clear that there has been such a mistrial as to make that necessary in justice to the parties.

It appears from the commissioners' award that in October, 1873, Hathorne Hill, in Danvers, was purchased by commissioners as the site of the Danvers Lunatic Hospital. For the four years preceding, the town of Danvers had been considering the establishment of a town system of waterworks. In March, 1874, a committee appointed by the town reported in favor of taking water from Middleton Pond in the town of Middleton, with a reservoir on Wills Hill. Wills Hill is in Middleton, immediately adjoining the pond. In the same year the Legislature gave the town a right to take the waters of this pond for a water supply. St. 1874, p. 122, c. 191. In the spring of 1875 "the commissioners for the insane hospital proposed to the committee of the town that the town should build its works in connection with the hospital, and thereby save an expense to both parties, proposing to give the town the right to build the reservoir on the hospital grounds, the use of all material for the same, and including the right to lay the necessary pipes for a sum then specified." This was not accepted by the town. In May, June, and July,

1875, several meetings of the town were held to see if the town would vote to construct a system of waterworks, under the act, for a cost not exceeding \$200,000, but the scheme was not adopted by the town. On April 28, 1876, the Legislature authorized the commissioners to contract with the town for a permanent supply of water for the lunatic hospital, and also gave them leave to take water from the same pond as a water supply for the hospital. St. 1876, p. 219, c. 224. After some negotiations between the town and the commissioners, the town passed a vote on May 8, 1876, authorizing its water commissioners to make a contract with some person for the construction of waterworks at and from Swan and Middleton ponds, and to contract with the commissioners of the lunatic hospital in reference to a supply of water to the hospital, "provided that the substantial effect of said contracts taken together shall be that the cost to the town of said works shall not exceed one hundred and fifty thousand dollars, * * * said works * * * to include * * * a reservoir to be placed on Hathorne Hill in Danvers in place of Wills Hill in Middleton." In pursuance of that vote, a contract was made between the town and the commissioners of the lunatic hospital on June 23, 1876, which is the contract under which the water now in question was furnished. The provisions of that contract are as follows: First. The state agreed to construct and fully complete a reservoir at its sole expense, with a minimum capacity of five million gallons, located near the hospital, "which reservoir shall be perpetually kept by the state, at its sole expense in a perfect and pure condition." Second. The town was "to have the perpetual right" to use the reservoir "as a storage basin for a supply of water to said town, and to such other places as the town may hereafter desire," with a right to lay pipes through the grounds of the hospital as part of the system of waterworks of the town. Third. The town agreed by December 1, 1896, to "complete and thenceforth forever maintain its proposed waterworks between the sources of supply and reservoir and perpetually thereafter keep a constant and ample supply of water in the reservoir, and permit the state to take therefrom, in any manner and at any time, all the water which the state through any of its authorized agents may desire or deem proper for the use of the hospital, and of all buildings that at any time may be owned by the state on the grounds, and also for use on the grounds themselves, as now laid out, for any purposes whatever. The state may at any time, at its own expense for pipes, take water for any purposes before named directly from the pipes to be laid by the town." Fourth. "Upon the introduction of the water to the reservoir by the town" as agreed, "the state shall pay to the town of Danvers the sum of \$12,500, and from such time an-

nually thereafter for the term of 20 years, shall pay to the town the sum of \$1,000 as full compensation for the future supply of water for the hospital and other buildings and grounds." Fifth. "At the expiration of said twenty years the state and town shall by mutual agreement fix upon the annual water rates thereafter to be paid by the state." The town immediately made a contract with one George H. Norman, by which the waterworks were to be constructed for the sum of \$162,500, and the commissioners erected a reservoir on Hathorne Hill at a cost of \$37,500 or thereabouts. Upon the introduction of the water into the reservoir, the commissioners paid the town the \$12,500. The 20 years during which the water rates were fixed by the contract expired on December 1, 1896, and the commissioners, in their award which is now before us, have fixed the rates for the three years next succeeding.

The question to be decided by the commissioners was almost entirely, if not entirely, a question of fact. The case which they had to deal with was what was reasonably due for the services performed by the town in putting water into the reservoir on Hathorne Hill, for the use of the commonwealth, under the contract of June 23, 1876. By the contract the water was to be put in the reservoir by the town, and the town was to be paid for doing so. But the parties did not agree upon the price, nor did they state in their contract what basis should be adopted for fixing the price. Stripped of detail, the case was one where the town had furnished the commonwealth with something of value to be paid for by the commonwealth, but without an agreement as to the amount to be paid. Under those circumstances the court has to find what is a reasonable price, and that is almost purely an inference of fact. The parties and the commissioners have treated what in our opinion were questions of fact as questions of law, but on the whole we do not for this reason think that the case must go back for a further trial.

The commissioners ruled, in accordance with a request made by the commonwealth, that the sum to be paid "should be based on the cost to place the quantity of water used at the hospital in the reservoir." In making an estimate of this cost, the commissioners have taken 1,000 gallons as the unit, and have determined what it cost to put 1,000 gallons of water in the reservoir. They first found the cost of the works outside the reservoir, and allowed interest on that amount at a fair rate; to this they added an allowance for yearly depreciation, and they added the operating expenses. This total cost divided by the number of gallons pumped gave the cost per gallon, and that multiplied by the number used by the hospital gave the sum to be paid by the state, with this modification: the state was held to be entitled to a credit for the use made by the town of

the reservoir. The cost of the plant outside the reservoir was found to be \$292,441.18, in place of the original contract price of \$162,500. The difference is made up of \$16,504 for 3 miles and 3,088 feet of distributing pipe laid when the works were built, in addition to the amount called for by the contract, \$1,463.26, not accounted for, paid to the contractor at that time, and \$49,485.16, expended at and between the pond and the reservoir since the original construction of the works, plus \$62,488.76, expended between the reservoir and the houses since then, for additional distribution pipe and similar purposes. The commissioners found that $4\frac{1}{2}$ per cent. was a fair rate of interest. This made the interest charge \$13,159.85. They found that the proper yearly allowance for depreciation was \$5,618.86, and the cost of maintenance and operation \$6,000, making a total of \$24,778.71. The total amount of water pumped was 234,500,000 gallons, making the cost of 1,000 gallons 10.57 cents. The amount used by the hospital was 45,625,000 gallons, which made a yearly sum of \$4,822.56. From this they deducted four-fifths of the interest, calculated at the same rate on the cost of the reservoir. They found that "the state had private and particular reasons for a reservoir of the size and location built, and derives special advantages therefrom not participated in by the town," and ascertained the value of the reservoir to each party by taking the amount of water consumed by the two respectively. This they found to be as 4 to 1. This gave the commonwealth a credit of \$1,350.

The principal contention of the commonwealth is that it has nothing to do with the plant on the town side of the reservoir, that interest should be allowed on the cost of the plant at and between the pond and reservoir only, and that the allowance for depreciation and for operating expenses should be confined to this portion of the plant; further, that, if the cost on which interest is to be charged is not so limited, interest should not be charged on the \$79,092.76 (\$16,504 + \$62,488.76) expended for distribution pipes beyond those called for by the original contract; and that, in place of being charged interest on the \$12,500 contributed by the town (as it is, for this \$12,500 is included in the \$292,441.18), it is entitled to a credit for interest on that for the same reason for which it is given a credit for interest on four-fifths of the cost of the reservoir. The main contention of the town is that it is entitled to a profit on the water furnished the commonwealth, as it is on water furnished other water takers or consumers, and that the commonwealth is not entitled to the credit of \$1,350 given it for the use of the reservoir. It further contends that, if it is to be charged for the use of the reservoir, that sum should be taken into account in computing the cost of the unit of 1,000 gallons. It also contends that it is entitled to interest on the

three yearly payments from the end of each year. On the main contentions of the commonwealth and the town we see no error of law. In asking for a profit on the water supplied by it, the town in substance asks to be allowed to treat the commonwealth on the basis on which it would have had the right to treat it if it had built a complete system of waterworks at its own expense. But that was not the case. On the contrary, it was not prepared to expend more than \$150,000 on a system of waterworks, and a complete system cost \$200,000. Under these circumstances it joined the commonwealth in establishing this system in which the commonwealth provided the reservoir, and the town provided the rest of the plant, at a cost of \$162,500, on the promise of the commonwealth to pay it \$12,500 on the completion of the plant. The commonwealth, on the other hand, in asking to limit the town to interest on the cost of the works at and between the pond and the reservoir, and to the depreciation on that portion only, and to the operation of it, is asking to be allowed to stand on the same basis as if it had built a system of its own, ending at the reservoir, and was indebted to the town for the erection and maintenance and operation of a part of that system. In our opinion neither contention is correct. On the contrary, it is plain that the town was not prepared to build and did not build a system of its own, but accepted the co-operation of the commonwealth in furnishing the reservoir and in the payment of \$12,500 to keep the cost of the waterworks to itself within the \$150,000, to which the citizens decided to limit the town. The system of waterworks in question is a system produced by the town and commonwealth for their joint use, and for that reason the town is not entitled to charge the commonwealth a profit on water consumed at its hospital. It is also plain that the commonwealth elected to come into the town system of water, and was not prepared to establish a system ending at the reservoir on Hathorne Hill. After electing to come into the system, it cannot ask to be treated as if a supply pipe had been constructed to the reservoir and the system had ended there. The sum reasonably due from it depends upon its share of the expense actually incurred in maintaining and operating this system of waterworks, and not on what might be calculated would have been the expense to operate a plant ending at the reservoir, had such a plant been built. There is a similar if not the same reason for charging the commonwealth with a share of the whole system that there is for charging the water taker next the reservoir the same rate charged the water taker at the end of the most remote distributing pipe. For these reasons we are of opinion that there was no error of law in refusing to give the town a profit on the one hand, and on the other hand in refusing to limit it to the cost, maintenance, and operation of the

plant at and between the pond and the reservoir. Nor was there any error of law in including in the cost subsequent extensions of the distributing pipes. In connection with the last two of these propositions, it is to be noted that the contract contemplates the possible extension of the system to other towns. It is there provided that the reservoir is to be used "as a storage basin for a supply of water to said town and to such other places as the town may hereafter desire."

We are also of opinion that the evidence as to the sums paid at the state prison and in other towns was properly excluded.

As to the contention of the town that, if it is to pay for the use of the reservoir, the \$1,350 paid by it should be included in estimating the cost of delivering the 1,000 gallons, the question was not, what did it cost to deliver 1,000 gallons? it was, what did it cost the town to put 1,000 gallons in the reservoir? The \$1,350 is paid for the use made by the town of the reservoir for water not consumed by the commonwealth, the hospital standing the balance of interest on the cost of the reservoir, to wit, \$337.50, for the use which it makes of the reservoir. We see no error of law here.

We are also of opinion that no reduction is to be made from the sum awarded by the commissioners by reason of this payment of \$12,500. By the terms of the award such a reduction is to be made if, "as matter of law, the true construction of that clause of the contract and of the whole contract should be that the sum of \$12,500 was paid as a contribution by the state towards the cost of that portion of the waterworks owned by the town, or if it should be determined to be a sum paid in advance as water rates for the period of 20 years and forever." If this is a question of law at all, we see no error in the view taken by the commissioners, to wit, that after the period of the 20 years at any rate the commonwealth had no interest in the plant by reason of this payment, and was not entitled to consideration by reason of it. The commonwealth, in arguing the motion of the town to have the award re-committed for modification, has pointed out that not only is it denied a credit by reason of the payment of \$12,500, but that it is made to pay interest on this sum, for it is included in the \$292,441.18 on which it is charged interest. But that question was not raised by any of the rulings requested by the commonwealth, and does not appear to have been called to the attention of the commissioners; and for that reason it cannot be taken to be ground for sending the case back because of a mistrial. In disposing of this matter on this ground, we should add that the commissioners would be warranted in treating it as they did. It might well be taken that the \$12,500 paid the town stands on a different footing from that of the \$37,500 expended in constructing the commonwealth's reservoir. For the \$12,500

paid the town, the commonwealth did not stipulate in the contract for an undivided interest in the plant outside the reservoir, or for the ownership of a specified portion of it. The title to the plant outside the reservoir was and is in the town, while the title to the reservoir built with the \$37,500 is in the commonwealth. The view may well be taken that on the expiration of the 20 years, if not before, the commonwealth was not entitled to consideration by reason of this payment.

The commonwealth's next claim is that no sum should be charged for depreciation of the town's works between the pond and the reservoir, because by the terms of the contract the town is obliged to "forever maintain its proposed waterworks between the sources of supply and the reservoir." This clause in the contract is in marked contrast to the clause as to the maintenance of the reservoir; it is provided that the reservoir is to be maintained "at its sole expense." We see no error of law in this.

It appears that since the completion of the works an additional reservoir has been built on Wills Hill, and the commonwealth claims that the cost of this should not be included in the plant on which it pays interest, and on which it pays the cost of maintenance and operation. It is not stated in the report why this was built. We cannot say that it was not a proper expenditure, and no error of law appears in including it in the calculation.

The commonwealth's next claim is to "be credited with interest on the value of the site for the reservoir." Its contention here is that, as the town is allowed for land purchased and land damages paid, it is entitled to a credit for the use of its land. We see no error of law in omitting this. The commonwealth already owned the land, and needed a reservoir for its own use. The land for the cost of which an allowance is made to the town was purchased by it for this purpose, and this purpose only.

The question of interest on the yearly sums found due has been referred to the court by the commissioners. We think that the commonwealth is liable for interest as damages from the end of each year. The case is like *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. 502.

The award being silent on the matter, the petitioner is entitled to costs before the commissioners. *Woolson v. Boston & Worcester Railroad*, 103 Mass. 580, but neither party is entitled to costs in this court.

The entry must be:

Judgment on the award in favor of the plaintiffs for the sum of \$10,417.68, with interest at 6 per cent. on \$3,472.56, part of said sum of \$10,417.68, from December 1, 1897, and on \$3,472.56, also part thereof, from December 1, 1898, and on \$3,472.56, the balance of said \$10,417.68, from December 1, 1899, and costs of hearing before commissioners.

(184 Mass. 550)

ROWLEY v. D'ARCY.

D'ARCY v. ROWLEY.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—SALES BY ASSIGNEE—PUFFING BY CREDITORS—EFFECT ON SALE—CREDITORS' LIABILITY.

1. Where, at an assignee's auction sale of his insolvent's property, certain creditors combined to puff the price, but there was no evidence that the conduct of the bidders aroused any suspicion in the mind of the purchaser at the time, or that such puffers were either employed or acting on behalf of the assignee, or that their conduct was known to him, the purchaser was not entitled to have the sale vacated by reason of the acts of such creditors.

2. Where certain creditors attended an assignee's sale of their debtor's property, and combined to puff the price by fictitious bids, such creditors, as between themselves, could not stipulate for immunity from any risk of being held personally liable for their several offers by the assignee.

Exceptions from Superior Court, Suffolk County; Edward P. Pierce, Judge.

Actions by C. W. Rowley, as assignee of the firm of Berkman Bros., against one D'Arcy, to recover the price of property purchased at an assignee's sale at auction, and by D'Arcy against Rowley, as assignee, to be relieved from the sale. From a judgment in favor of the assignee in both cases, D'Arcy brings exceptions. Overruled.

Frank N. Nay and Leon M. Abbott, for purchaser. George R. Swasey, Clarence W. Rowley, and John S. Slater, for assignee.

BRALEY, J. The principal question in these cases is whether the defendant D'Arcy can be held to pay any further sum under a written contract of sale made between the parties, or is entitled to recover back what he has already paid, on the ground that he bought the property at auction, at which, unknown to him, fictitious bids were made to raise the price, and in consequence of which he was deceived and defrauded. As a verdict was ordered for the assignee, the evidence is to be considered in the light most favorable to this contention. It was understood by the parties to these suits that there was to be a final sale of the rights of the debtors in the property described in the contract, to be held at the office of the assignee, and at the time appointed they and other creditors of the debtors attended. The property was offered for sale by the assignee, and bids were called for, and made by different persons. And it appears that, in response to a call for bids by the assignee, some of the creditors would make a bid; then the bidding would cease for a time, and they would leave the room, apparently for consultation between themselves, after which they returned, and bidding would be resumed. All the proceedings appear to have been conducted with great deliberation, and a period of four hours elapsed between the time

when the property was put up and when it was sold. The conduct of the bidders and the manner of bidding does not seem to have aroused at the time any suspicion in the mind of the defendant D'Arcy that the sale was not being fairly conducted, and it is to be noted in this connection that during all this period his counsel was present to assist and advise him, so far as advice might be deemed necessary. Finally the successful bid or offer was made by the buyer and accepted by the assignee in writing, and this was followed by, and formed the basis of, the contract in suit. While some of the conditions that attended the sale are unusual, yet the characteristic features of a sale by auction are found. At a time duly appointed and announced, property to which the vendor had a good title is openly put up and offered for sale, bids are made, and it is sold to the highest bidder. Such a sale must be considered and treated as having been made by auction.

It was clearly the purpose of the assignee and of the creditors present, and who made bids, to realize for the property the highest obtainable price; and in good faith, by proper means, they might lawfully carry out this purpose, in order to prevent a sacrifice of the estate of the insolvent debtors. *Phippen v. Stickney*, 3 Metc. 384, 388, 389. But a combination by them to enhance the price to be obtained by fictitious bids at a sale to be made without reserve to the highest bidder would be a fraud practiced upon those who bid without knowledge of the arrangement, and give to the buyer a right to avoid the sale. *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332. From the testimony of one of the witnesses, it might be inferred that some of the bids made by the creditors, and before the final bid of the defendant D'Arcy, to whom the property was struck off, were of this character; and in his answer in the first case, which must be taken to state the position taken by him at the trial, he relies upon this by-bidding to avoid the sale. But he does not aver that these puffers were employed by the assignee, or acting in his behalf, or that their conduct was known to him. He alleges that they were employed by the creditors of the estate in whose behalf the property was put up and offered for sale. His offer of proof, which was excluded at the trial, does not aid him, for, if the evidence offered had been admissible under the pleadings, and is taken most strongly against the assignee, while he might, if the offer were true, be found guilty of grave misconduct in his office, there is no statement from which it can be specifically inferred that by-bidders were to be employed by him, or with his knowledge or consent allowed to bid at the auction. If the scheme outlined was to

be put through, by-bidding would have been fatal to its success, as it was not desired to enhance the price of the property to be sold, but the purpose was to enable the defendant D'Arcy to get it as cheaply as possible, provided he made certain payments to the assignee. As assignee, the plaintiff Rowley held by a good title the property of the debtors, to be properly administered, and applied in their behalf to the payment of their debts, and also represented the rights of the creditors that all the property of the debtors should be ascertained, turned into money, honestly accounted for, and paid over to them to the extent of the indebtedness proved, less the proper expenses of administration and distribution; and, in all suits and proceedings in which the estate was involved, it was his duty to appear, represent, and act for them. Upon the assignment being made to him of the property of the insolvent debtors, he was vested with an absolute title to their estate, which he could sell either by public auction, or at private sale, so as to convey a good title to the purchaser. Pub. St. 1882, c. 157, §§ 46-50; *Tuite v. Stevens*, 98 Mass. 305; *Crowley v. Hyde et al.*, 116 Mass. 589. The control of the sale was wholly in his power and under his direction, and no other person, on the evidence, could legally release any bidder from the obligation incurred by his bid. And the creditors who made the fictitious bids could not, as between themselves, provide immunity from any risk of being held personally liable for their several offers. For anything that appears in the case, each bidder could have been held by the assignee to have taken and paid for the property, if it had been struck off to him. All of the evidence is recited in the exceptions, and fails to show any misrepresentations by the assignee, or that he knew of and participated in the conduct and purpose of the creditors at any time before the final bid was made and accepted, and the written contract executed and delivered. The essential element of fraud which must be shown on the part of the vendor, or of the person who absolutely controls and directs a sale by auction in order to avoid it, is absent. And as the assignee is not shown to have either procured or assented to the fictitious bids made at the auction, the sale is not voidable on the part of the buyer, and must stand. *Peck v. List*, 23 W. Va. 388, 48 Am. Rep. 398; *Nat. Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 159-165; *McMillen v. Harris*, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345, 78 Am. St. Rep. 93; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Rigg v. Schweitzer et al.*, 170 Pa. 549, 33 Atl. 116; *East v. Wood*, Adm'r, 62 Ala. 313; *Veazie v. Williams*, 8 How. 134, 12 L. Ed. 1018.

Exceptions overruled.

(184 Mass. 586)

SEARS v. CROCKER et al. MERCHANTS' NAT. BANK v. SAME. GRAY et al. v. SAME.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1904.)

BOSTON TRANSIT COMMISSION—CONSTRUCTION OF SUBWAY AND TUNNEL—LAND IN STREETS—NECESSITY OF FORMAL TAKING—ADDITIONAL SERVITUDE.

1. The construction of a subway and tunnel in the street under the authority of St. 1894, p. 771, c. 548, § 31, without a formal taking of land in the streets, is not illegal on the ground that it would impose an additional servitude on lands previously taken for streets, and thus deprive of their property the owners of the fee of the streets.

2. Authority to take lands for a tunnel and subway, conferred on the Boston Transit Commission by St. 1894, p. 771, c. 548, § 31, though it includes land taken and held under the right of eminent domain, does not imply that there is no right to use the public ways without such taking.

3. St. 1902, p. 457, c. 534, § 19, declaring that "the city shall have, hold, and enjoy in its private and proprietary capacity for its own property" the several subways and the tunnel built or to be built under the statutes that have been passed, does not vest in the city rights of private property, or take from abutting owners on the streets any part of their property, so as to require a formal taking of land in the streets by the Boston Transit Commission as a prerequisite to the construction of the tunnel and subway under the authority of St. 1894, p. 771, c. 548, providing (section 31) for the taking of property "held under or by title derived under eminent domain or otherwise."

Case Reserved from Supreme Judicial Court, Suffolk County; James M. Morton, Judge.

Three separate bills in equity by Joshua M. Sears and others against George M. Crocker and others, constituting the Boston Transit Commission. Bills dismissed.

Lewis S. Dabney, Elihu G. Loomis, John C. Gray, Edw. W. Hutchins, and C. F. Choate, Jr., for petitioners. Thos. M. Babson, for respondents.

KNOWLTON, C. J. These three cases present the same questions, and they may be considered together in one opinion. They are bills in equity to obtain an injunction against the defendants, as members of the Boston Transit Commission, to prevent the construction of a subway and tunnel from Scollay Square to East Boston through public streets in front of the premises of the several plaintiffs, without a formal taking of land in the streets. The plaintiffs contend that the construction of the tunnel or subway without a formal taking of land in the streets is unauthorized and illegal, because it would impose an additional servitude upon lands previously taken for streets, and in that way would deprive the plaintiffs of property as owners of the fee in parts of these streets, and because St. 1894, p. 771, c. 548, § 31, provides for the taking of property "held under or by title derived under eminent domain or otherwise." They also say

that their position is established and their contention confirmed by the provisions of St. 1902, p. 457, c. 534, § 19, that "the city shall have, hold and enjoy in its private capacity, for its own property, the existing subway, the East Boston tunnel, the Cambridge street subway, and the tunnel and subway built under this act," etc. The question whether the construction of the tunnel will create an additional servitude upon the plaintiffs' lands in the public streets lies at the foundation of these cases, and should be answered at the outset. The rules and principles applicable to such questions have often been considered by this court. *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 28 Am. Rep. 264; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Lincoln v. Com.*, 164 Mass. 1, 41 N. E. 112; *Howe v. West End Street Railway Company*, 167 Mass. 46, 44 N. E. 386; *White v. Blanchard Brothers Company*, 178 Mass. 363, 59 N. E. 1025; *New England Telegraph and Telephone Company v. Boston Terminal Company*, 182 Mass. 397, 65 N. E. 835; *Eustis v. Milton Street Railway Company*, 183 Mass. 586, 67 N. E. 663. In the last two cases the doctrine was stated broadly, in accordance with previous decisions, that this public easement includes "every kind of travel and communication for the movement or transportation of persons or property, which is reasonable and proper in the use of a public street." In the early settlement of the country and in the location of streets in later times these ways were appropriated to the use of the public for the movement of persons and property from place to place, just as the adjacent lands were appropriated to the use of private owners. The original proprietors of lands in Boston and the original proprietors of lands in New York did not foresee the growth of population and business which has induced landowners to erect buildings 15 or 20 stories high, and to excavate under them basements and cellars and subcellars to be ventilated by the use of engines, to be lighted by electricity, and filled with merchandise. They did not think that the surface of the streets would be insufficient for the use of the people with convenience and comfort in moving to and fro and passing in and out in the transaction of business or the pursuit of pleasure. It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if the surface alone is used. Our system, which leaves to the landowner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it in any way that

is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of abutters. The increase of requirements for the public within the streets of our large cities has probably equaled, if it has not surpassed, the increase of requirements for business along the streets.

The Legislature, the guardian of public interests and of private rights, has determined that the space below the surface of certain streets in Boston is needed for travel. The question is whether action under the statutes involves an acquisition of a new right as against the landowner, or only an appropriation and regulation of existing rights. It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travelers or abutters. If it is not an unreasonable mode of using them, the mere fact that it deprives abutters of the use of vaults and other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel. The necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable. In the present case the travel which is being provided for is from place to place within the city. There are stopping places on the subway at convenient points. In that respect it is different from a tunnel designed only or chiefly for travel for long distances. The new method is a substitution in part of a subterranean use of the streets for a use of their surface for the same general purpose. It is impracticable to have direct communication between the premises of abutters and the cars in the tunnel, but by going a short distance access to them may be had from any place. We are of opinion that this use of the streets is within the purposes for which the lands were taken, and that no additional servitude is created by it.

The cases bearing upon this subject which have been decided in other courts differ so much from this in their facts and in the legislation to which they relate that they are not very important. See *Ramsden v. Manchester, South Junction & Altingham Railway Company*, 1 Ex. 723; *In re New York District Railway Company*, 107 N. Y. 42-52, 14 N. E. 187; *Hodgkinson v. Long Island Railroad*, 4 Edw. Ch. 411; *Adams v. Saratoga & W. Railroad Company*, 11 Barb. 414; *Chicago v. Rumsey*, 87 Ill. 348; *Summerfield v. Chicago (Ill.)* 64 N. E. 490-494; *Baltimore & Potomac Railroad Company v. Reaney*, 42 Md. 117. The authority to take lands, conferred upon the defendants by St. 1894, p. 771, c. 548, § 31, although it includes land

taken and held under the right of eminent domain, does not imply that there is no right to use the public ways without such taking. Indeed, the first part of the section gives the right to use these ways before it refers to the subject of taking. It then goes on to authorize the taking of private property, and closes by giving a broad general authority. Nor is St. 1902, p. 457, c. 534, § 19, so significant in their favor as the plaintiffs contend. It declares that "the city shall have, hold, and enjoy in its private or proprietary capacity for its own property" the several subways and the tunnel built and to be built under the statutes that have been passed. This is in accordance with the previous intimations of this court as to ownership of the subway first constructed. *Mahoney v. Boston*, 171 Mass. 427-429, 50 N. E. 939; *Browne v. Turner*, 176 Mass. 9-13, 56 N. E. 969. But it does not purport to give a private proprietary right to anything more than the subways and tunnels as structures. It does not deal with the rights of the public to use the streets, or with any right of private property in the streets themselves. It leaves the subways lawfully resting in the public streets by virtue of the rights of the public therein, and it gives the city the same kind of ownership of the structures that gas companies and electric lighting companies have in their pipes and conduits, except that the city is charged with certain special trusts in the ownership of these subways. This provision of the statute does not purport to take from landowners on the streets any part of their property. The statute gives damages to all persons injured in their property by the acts of the commission, but the question whether these plaintiffs are entitled to damages under this provision is not before us.

Bills dismissed.

(184 Mass. 529)

EDWARDS v. BRUORTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

MUNICIPAL CORPORATIONS—STREETS—LAYING
OUT—STATUTES—BENEFITS—CON-
STITUTIONAL LAW.

1. The provisions of St. 1891, p. 880, c. 323, and St. 1892, p. 444, c. 402, relative to laying out streets, which are unconstitutional, as directing an assessment without reference to benefits, do not render the entire statute invalid.

2. The provisions of St. 1891, p. 883, c. 323, § 9, and St. 1892, p. 467, c. 418, § 4, relative to laying out streets, to the effect that if a building be erected within the boundaries of any way shown on any plan after the filing thereof under the statute, and not removed by the owner when required by the commissioners, no damage to the estate occasioned by the establishment of the highway can be recovered, are unconstitutional.

3. The unconstitutionality of such provision does not affect the validity of other portions of the act.

Exceptions from Superior Court, Suffolk County; Albert Mason, Judge.

Action by one Edwards against one Bruorton. Judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

Olcott O. Partridge, for plaintiff. B. D. Barker, for defendant.

KNOWLTON, C. J. This is an action of contract for breach of a covenant in a deed. A public street called "Jersey Street" was laid out by the street commissioners of Boston, over a part of the premises, under the authority of St. 1891, p. 880, c. 323, and St. 1892, p. 444, c. 402, and other amendatory acts, and the existence of this street constitutes a breach of the covenant in the deed if the statute gave the board authority to lay it out. It is contended that the statute is unconstitutional in two particulars: First, that it purports to authorize an assessment of the whole cost of construction as a betterment tax upon property benefited, without reference to the amount of the benefits; and, secondly, because in section 9 (St. 1891, p. 883, c. 323) it provides that no compensation shall be given for land taken for a street, if the owner, after the filing of a plan in accordance with the statute, shall erect any building within the boundaries of any way, and not remove it when required by the street commissioners. It is further contended that these unconstitutional provisions render the entire statute void.

It has been held repeatedly that the statute is unconstitutional in that part which directs an assessment upon abutters, because the assessments are to be made without reference to benefits received. *Lorden v. Coffey*, 178 Mass. 489, 60 N. E. 124; *White v. Gove*, 183 Mass. 333, 67 N. E. 359; *Harwood v. Boston Street Commissioners*, 183 Mass. 348, 67 N. E. 362. The question now before us is whether this is a defect which renders the whole of the statute unconstitutional, or only that part of it which provides for the assessment. The general rule of law applicable to the question is familiar. It is that if the different parts of a statute are separable, so that the part which is unobjectionable can well stand alone, and if it is so far independent of the part which is unconstitutional that the Legislature presumably would have enacted it without the other if they had known that the other was unconstitutional, the act can be given effect in the part which is unobjectionable, and set aside only in the other part. If, on the other hand, the valid and invalid parts "are so mutually connected with each other * * * as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not pass the residue independently, * * * all the provisions which are thus dependent must fall." *Fisher v. McGirr*, 1 Gray, 1, 21, 61 Am. Dec. 381; *Warren v. Charlestown*, 2 Gray, 84; *Com. v. Clapp*, 5 Gray, 97-100; *Com. v. Hitchings*, Id. 482, 485, 486; *Sparhawk v. Sparhawk*, 116 Mass. 315-320; No-

lan's Case, 122 Mass. 330; *White v. Gove*, 183 Mass. 333, 67 N. E. 359. The cases in which the doctrine has been applied are numerous, and some of them present difficulties of determination upon the question whether the valid and invalid parts of the statute are essentially and inseparably connected in substance. In statutes providing for the expenditure of money for the benefit of the public, containing an unconstitutional provision for raising money by taxation, it has been held in different jurisdictions that the invalid part may be disregarded, and the substantial part enforced, leaving payment to be provided for in a constitutional way. This was decided in *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280—a case in which an avenue was widened under a statute providing that the cost should be assessed on the abutters, which was assumed to be unconstitutional in that particular. A similar application of the principle is found in *Gordon v. Cornes*, 47 N. Y. 608-617; *Matter of Oneida Street*, 37 App. Div. 266, 55 N. Y. Supp. 959; *Skaneateles Water Co. v. Skaneateles*, 161 N. Y. 154-170, 55 N. E. 562, 46 L. R. A. 687; *Sparrow v. State Land Office Commissioner*, 56 Mich. 567-572, 23 N. W. 315; *State v. St. Louis County District Court*, 66 Minn. 161-165, 68 N. W. 860; *Huntington v. Worthen*, 120 U. S. 97-102, 7 Sup. Ct. 469, 30 L. Ed. 588; and *People v. Knopf*, 183 Ill. 410-422, 56 N. E. 155. A few of the analogous cases dealing with subjects other than taxation are *Cole v. County Commissioners*, 78 Me. 532-538, 7 Atl. 397; *New England Engineering Company v. Oakwood Street Railway Company (C. C.)* 75 Fed. 162-167, and *Field v. Clark*, 143 U. S. 649, 692, 697, 12 Sup. Ct. 495, 36 L. Ed. 294. Cases dealing with the general question, in which the whole statute was held void, are *Warren v. Charlestown*, 2 Gray, 84, 99, 100; *Nolan's Case*, 122 Mass. 330; *Mesmeier v. State*, 11 Ind. 482-485; *Slauson v. Racine*, 18 Wis. 398-404; *State v. Montgomery*, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386; *Copeland v. St. Joseph*, 126 Mo. 417, 29 S. W. 281; and *Reelfoot Levee District v. Dawson*, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

The cases first cited, in their application of the principle, fully cover the case at bar. The defective part of the statute with which we are now dealing, relates only to the mode of taxation by which the money shall be raised to pay for the streets laid out and constructed. It provides an unconstitutional mode of special taxation. If that mode cannot be adopted, it is not to be presumed that the Legislature intended that no street should be laid out under the statute. If streets are needed and laid out, they can be paid for by general taxation, or a proper mode of special taxation can be prescribed. In this commonwealth it never has been held or intimated by the court that a defect in the mode of taxation prescribed for meeting the expense

of constructing a street or sewer should render the whole proceeding invalid. The contrary has always been assumed. In *Harwood v. Street Commissioners*, 183 Mass. 348, 67 N. E. 362, it was assumed in terms in reference to the statute now before us. See, also, *Weed v. Boston*, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642; *Hall v. Street Commissioners*, 177 Mass. 434, 59 N. E. 68; *Stark v. Boston*, 180 Mass. 293, 62 N. E. 375. The constitutionality of the provision for the assessment of betterments does not affect the invalidity of other parts of this statute.

The act provides compensation for persons whose land is taken for a street. St. 1891, p. 884, c. 323, § 10; St. 1892, p. 467, c. 418, § 5. It creates an exception to this general provision by declaring that if a building is erected within the boundaries of any way shown on any of the plans after the filing of the plan in accordance with the statute, and not removed at the expense of the owner when required by the board of commissioners, no damage to the estate on which the building is, occasioned by the subsequent establishment or change of grade of any highway, shall be recovered by or paid to the owner of the estate. St. 1891, p. 883, c. 323, § 9; St. 1892, p. 466, c. 418, § 4. This was intended to prevent any use of property inconsistent with the plan after the filing of a plan, and before the laying out of a way. If it could have that effect, it might materially interfere with the use which an owner might desire to make of his estate for many years, after the filing of a plan, and before the laying out of a way. The statute prescribes no compensation for this interference with private property. The Legislature cannot constitutionally so interfere with the use of property without giving compensation to the owner. This was held in reference to a similar statute in *Forster v. Scott*, 136 N. Y. 577-583, 32 N. E. 976, 18 L. R. A. 543.

In the act before us there is no express prohibition of the owner's use of his property, but it is declared that, if he uses it otherwise than in accordance with the plans of the street commissioners, it may be taken from him for a way without giving him compensation. This attempt to except him from the general rule in regard to the taking of property under the right of eminent domain is unconstitutional and ineffectual. Here again we have the question whether the defect defeats the whole statute. It is connected with the scheme of the act as the assessment of betterments is connected with it, but we do not think it is so closely connected with it as to have been deemed by the Legislature an essential part of it. Without such a provision the filing of the plans would be likely in most cases to guide the owners in making erections upon their property. This unconstitutional part of the law is an exception which stands by itself. If the law is administered without it, the only change from the original enactment is that a person who

has built in the manner described will receive his damages when the land is taken for a street, instead of being left without compensation. Although the subject is not free from difficulty, we are of opinion that this part of the act should be held so far separable from the other portions as to leave the remainder valid. The two unconstitutional parts have no connection with each other, and although the fact that the statute is defective in these two particulars, instead of in only one, strengthens the argument against holding the other parts valid, we do not think it makes the argument insuperable. We are of opinion that the street laid out became a legally located public way, and that its existence constitutes a breach of the covenant in the deed.

Exceptions overruled.

(184 Mass. 469)

CITY OF WORCESTER v. BOARD OF APPEAL.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 5, 1904.)

TAXATION—STOCK HELD IN TRUST FOR CORPORATION.

1. Under Rev. Laws, c. 14, § 61, providing a system for distribution among cities and towns of the excise tax on corporate franchises (based on the cash value of the stock, less the value of real estate and machinery subject to local taxation), with the evident purpose of giving to towns a share thereof measured by the number of shares which under the former system would have been taxable in that town, the provision that if stock is held by trustees the proportion of the tax corresponding to the amount of stock so held shall be paid to the city or town where the stock would have been taxed under chapter 12, § 23, cl. 5, does not apply to stock owned by the corporation itself, but held by a trustee for it, as under the former system such stock would have been reached for taxation only through the increased valuation of the shares owned by individual stockholders.

Case reserved from Supreme Judicial Court, Worcester County.

Petition for certiorari by the city of Worcester against the board of appeal in tax matters. Reserved for full court. Petition dismissed.

Arthur P. Rugg, for petitioner. F. H. Nash, Asst. Atty. Gen., for respondent.

HAMMOND, J. A domestic manufacturing corporation, having its home office and sole place of business in the city of Worcester, had purchased certain shares of its own stock as an investment, and they were held by a resident of that city as trustee for the sole benefit of the corporation. The only question is whether, under Rev. Laws, c. 14, § 61, there should be credited and paid to the city the tax upon these shares.

The petitioner contends that such a corporation, having its home office and sole place of business in the city, is a person who resides in that city, within the meaning of

those words as used respectively in Rev. Laws, c. 14, § 61, and Id. c. 12, § 23, cl. 5, and that consequently the tax upon these shares should be credited to the city. Without doubt, the language of the statute is broad enough to cover a corporation, but in view of the history of the legislation upon the subject of the taxation of the personal property of corporations, and the decisions of this court as to the interpretation of the statutes, we are of opinion that the position of the petitioner is unsound. In the early tax acts no mention is made of corporate stock by name. Bank shares are first mentioned in 1793 (St. 1793, p. 354, c. 9A), "shares or property in any incorporate bridges or turnpike roads" in 1800 (St. 1800, p. 120, c. 77), and "shares in any incorporated company possessing taxable property" in 1804 (St. 1804, p. 268, c. 144). Shares in insurance companies do not seem to have been mentioned specifically until the act of 1822. In all cases the shares were to be assessed "according to the just value thereof" to the individual shareholders in the places where they respectively resided. There was no express provision for assessing the property of a corporation in any other way. An idea seems to have prevailed, however, to some extent at least, that, within the meaning of the general provisions of the tax acts providing that real estate and personal property were to be assessed to the owner thereof, a corporation was an owner; and hence arose in some towns the practice of assessing a corporation for both its real and personal estate. When the shareholders were assessed the full value of their shares, and the corporation was also assessed for its real and personal estate, there was a plain case of double taxation as to a portion at least of the corporate property, both real and personal. Finally it occurred to the Salem Iron Factory, a domestic corporation, to test the validity of the tax assessed upon it. For several years between 1796 and 1810 the assessors of Danvers had assessed a tax upon this corporation for its real estate, "consisting of a factory and the land under and adjoining the same," situated in that town, and also for the "personal estate used in and about the factory." The corporation paid the taxes, and brought an action to recover back. It was argued for the plaintiff that the property of the corporation could not be lawfully taxed twice, and, since the stockholders were taxed for the full value of the shares, the whole tax assessed upon the corporation, as well that part upon the real as that part upon the personal estate, was invalid. The defendant, not denying that if the tax was valid there was double taxation, maintained that this was a matter to be corrected by the Legislature, and not by the courts. The court said there was no doubt that the "property itself was a subject of taxation," and that it depended "on the construction of the several tax acts whether the taxes should be assessed on the plaintiff as the legal owner

of the specific lands and goods, or on the several stockholders and members of the corporation as the persons beneficially interested in the property"; and then stated that "the latter course seems best to comport with the general scope and object of the successive statutes for the valuation and taxation of estates within the commonwealth." The shares being taxable to the individual shareholders in the towns where they respectively reside, the court proceeds to say that "it appears unjust and contrary to the spirit of our laws that the corporation should also be taxed for the same property," and hence the tax upon personal property was illegal. But a distinction was made between the tax on personal and that on real estate. Under the law, real estate owned by a corporation was included in the valuation of a town upon which the state tax was based, but the corporation was "not included among the inhabitants of that town liable to taxation." The court, remarking that "it would be unjust if real estate which is included in estimating the amount of taxes chargeable on the inhabitants of a town, by being transferred to another owner should be exempted from contributing to the discharge of such taxes," held on that ground that the tax upon the real estate was valid. The court seemed to feel that this decision as to real estate might result in double taxation, but remarked that, "if this result should appear to be injurious to the plaintiff, a different decision would not be the less so to the defendants, and the injustice, if any exists, can be remedied only by the Legislature." *Salem Iron Factory v. Danvers*, 10 Mass. 514. We have reviewed this case at some length, because it shows the ground upon which a distinction was made, for purposes of taxation, between the real and personal estate of a corporation, and because it also shows that this distinction was not expressly stated in the statute, but is the result of a judicial interpretation of its general provisions. It is to be noted, in passing, that the distinction is based in no respect upon any supposed difficulty in ascertaining, for purposes of taxation of personal estate, the residence of a corporation. Although this decision was made in 1813, no change material to this question appears in the language of the statutes until St. 1832, p. 461, c. 158. By this statute it was provided that "all the machinery employed in any branch of manufactory, and belonging to any corporation * * * or persons of this or any other state," should be assessed where such machinery was situated, and that in assessing the shares of a manufacturing corporation there should "first be deducted from the value thereof, the value of the machinery and real estate belonging to such corporation, otherwise specifically taxed." Here first appears in the statutes the idea of subtracting for purposes of assessment the value of the machinery and real estate of a corporation from the value of the shares held

by the stockholders. These provisions were re-enacted in Rev. St. 1836, c. 7, § 10, cl. 2, Rev. St. 1836, c. 23, § 34, and Gen. St. 1860, c. 11, § 12, cl. 2, and they continued to be the law until the change hereinafter named.

In *Boston & Sandwich Glass Co. v. Boston*, 4 Metc. 181, the principle enunciated in *Salem Iron Factory v. Danvers* as to the taxation of the personal property of a corporation was affirmed. And it was accordingly held that the provision of St. 1839, p. 67, c. 139, that "all stocks in trade, including stock employed in the business of manufacturing * * * in towns within the state, other than where the owners reside, * * * if the owners hire or occupy manufactories, stores, shops or wharves therein," did not apply to a manufacturing corporation. A still more striking illustration of the application of the same principle is shown in *Middesex R. R. v. Charlestown*, 8 Allen, 330. In that case it was held that a corporation was not an owner within the meaning of Gen. St. 1860, c. 11, § 12, cl. 3, which provides that "horses employed in stages or other vehicles for the transportation of passengers for hire shall be assessed to the owners in places where they are kept." This court, speaking by Hoar, J., said: "The stockholders are liable to taxation upon their shares in the towns where they dwell. The value of the personal property owned by the corporation is included as a subject of taxation in the value of the shares." In a word, the general provisions of law for the taxation of personal property were not applicable to corporations. Except as to machinery, which is specially mentioned, the personal property was reached through the shareholders. See, in addition to the cases above named, *Dunnell Mfg. Co. v. Pawtucket*, 7 Gray, 277; *Worcester Ins. Co. v. Worcester*, 7 Cush. 600; *Worcester Co. Inst. for Sav. v. Worcester*, 10 Cush. 128, 129; *Murray v. Berkshire Ins. Co.*, 104 Mass. 586, 589. And this interpretation, so far at least as respects domestic corporations, was adopted, not upon the ground that it might be difficult to ascertain the residence of a corporation for purposes of taxation (although this consideration is sometimes alluded to), but plainly and simply upon the ground that the opposite interpretation would result in a form of double taxation.

Upon the facts appearing in this case, the shares in question became by the purchase in substance the personal property of the corporation, and, if the corporation had taken the certificate in its own name, it is plain that under the former system of taxation the general provisions of the statute that personal property should be assessed to the owner would not have been applicable. The value of these shares would have been reached for taxation through the increased valuation of the shares still outstanding in the hands of the individual stockholders. Inasmuch, however, as the certificate was not held by the corporation, but by a trustee

for its benefit, it may be urged by the petitioner that under the former system the stock would have been assessable to such trustee under Gen. St. 1860, c. 11, § 12, cl. 5 (now Rev. Laws, c. 12, § 23, cl. 5). But the same reasons which lead to the conclusion that the first and third clauses of that section are not applicable to corporations like this lead also to a similar conclusion as to the fifth clause. As in the first and third clauses the word "owners" does not include corporations, so for the same reasons in the fifth the word "person" does not include them. Hence, even if it be assumed in favor of the petitioner that the shares in question had not been substantially withdrawn, but were still outstanding, it seems plain that under the former system of taxation no tax could have been legally assessed on account of this stock, either upon the corporation under the first clause or upon the trustee under the fifth. But for obvious reasons this method of reaching for taxation the property of corporations, especially that part represented by shares in the hands of nonresidents, was defective; and by St. 1864, p. 131, c. 208, and St. 1865, p. 661, c. 283, a change was made so far as respects corporations like the one in question. An excise tax was imposed upon the corporate franchise, and the stockholders were relieved from taxation upon their shares (*Com. v. Hamilton Mfg. Co.*, 12 Allen, 298; *Mfrs.' Ins. Co. v. Loud*, 99 Mass. 146, 96 Am. Dec. 715), and this system has ever since been continued (*Pub. St. 1882, c. 13, §§ 38-40*; *Rev. Laws, c. 14, § 61*). This excise tax is based upon a certain percentage of the actual cash value of the stock, less the value of the real estate and machinery subject to local taxation (*Rev. Laws, c. 12, § 23, cl. 2*), and it is paid by the corporation to the state. In *Rev. Laws, c. 14, § 61*, is set forth the system for the distribution of this tax among the cities and towns. The clause upon which the petitioner relies is as follows: "If stock is held by * * * trustees, the proportion of tax corresponding to the amount of stock so held shall be paid to the cities or towns where the stock would have been taxed under the provisions of clauses * * * five * * * of section twenty-three. * * *" Without reciting in detail the provisions of the method of distribution, it is evident that its purpose was to give to towns a share of this excise tax corresponding to that which under the former system they had to tax upon the personal property of these corporations; or, in other words, that the share of each town in the excise tax is measured by the number of shares which under the former system would have been taxable in that town. Such seems to be the natural meaning of the language used. Under that system, as we have seen, no part of the stock in question would have been taxable as such in Worcester, and therefore it cannot be considered in ascertaining the sum to be paid to that city on account of the ex-

cise tax. The word "person" in clause 5 can have no broader signification with respect to the distribution of the excise tax under the present law than it had with respect to assessment under the former. For cases somewhat instructive upon the question here involved, see, in addition to those before cited, *Murray v. Berkshire Life Ins. Co.*, 104 Mass. 538; *Boston Investment Co. v. Boston*, 158 Mass. 461, 33 N. E. 580.

Petition dismissed.

(185 Mass. 25)

HILL v. ALLEN et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 8, 1904.)

**LEASE—OPTION TO PURCHASE—NOTICE OF
ELECTION TO EXERCISE OPTION—
LIABILITY FOR RENT.**

1. A lease for three years provided that the lessees should pay rent at the rate of \$150 per year, payable in monthly installments of \$12.50 on the 15th day of each month during the term, with the right reserved to the lessor to enter and expel the lessees for nonpayment of rent. It also provided that the lessees should have the right to purchase the premises at any time before the expiration of the lease for a certain sum; the lessor binding himself to give a deed on tender of the amount, and, "if the lessees shall elect to purchase at any time during the continuance of the lease," all moneys paid as rent should be considered as paid on account of the purchase price. Defendants entered under the lease, but paid no rent, and were expelled at the end of four months. In an action by the lessor for four months' rent, one of the lessees testified that, in the same month after the execution of the lease, she told the lessor she would buy the place, and he said "Yes," and that she said to the lessor she had "elected to buy the farm." The other lessee testified that he was present and heard the conversation. There was no tender of the purchase price, and no demand for a deed. *Held*, that a contention of the lessees that, as they had an option to buy at any time during the term, they were not obliged to pay rent after saying they would buy, and that, without doing anything further, they could go on and occupy the farm free of rent for three years, was without merit, and they were liable for rent for the time they occupied the premises.

Exceptions from Superior Court, Middlesex County; Henry N. Sheldon, Judge.

Action by one Hill against one Allen and another. From a judgment for plaintiff, defendants bring exceptions. Exceptions overruled.

Stephen H. Tyng and Lowell E. Fales, for plaintiff. H. N. Allin, for defendants.

LATHROP, J. This is an action on a written lease, dated November 14, 1899, to recover the balance of rent due for four months from November 15, 1899, to March 15, 1900. At the trial in the superior court the judge ruled that the plaintiff was entitled to recover this amount, and the case is before us on the defendant's exceptions to this ruling. The lease in question was for three years from November 15, 1899, at the rent of \$150 a year, payable in monthly installments of \$12.50 on the 15th day of each and every

month during the continuance of the lease, with a right reserved to the lessor to enter and expel the lessees for nonpayment of the rent. The lease contained the following clause: "With the right and privilege of said lessees at any time on or before the expiration of this lease to purchase the above described leased premises for the sum of twenty-six hundred dollars; and the said lessor hereby binds himself to give unto the said lessees a good and sufficient deed of said leased premises upon the tender of said amount at any time as aforesaid; and if the said lessees shall elect to purchase said premises at any time during the continuance of this lease, then, and in that event, all moneys which shall have been paid as rent as hereinafter provided shall be deemed and considered as paid on account for the purchase of said premises and applied in part payment of said sum of twenty-six hundred dollars." The defendants admitted that they entered under the lease on November 14, 1899, but did not pay any rent, and were expelled in the following April. The first-named defendant testified that on November 29, 1899, she had a conversation with the plaintiff, in which she told him she would buy the place, and he said "Yes." She further testified: "I told him I had elected to buy that farm." The other defendant testified that he was present and heard the conversation. Nothing further appears to have been done. There was no tender of the \$2,600, and no deed was demanded.

The contention of the defendants is that, as they had the option to purchase the farm at any time during the term of the lease, they were not obliged to pay rent after saying they would buy the place, and that, without doing anything further, they could go on and occupy the farm free of rent for three years. But it was clearly the duty of the defendants, under the terms of the option, within a reasonable time after notifying the plaintiff of their intention to purchase, to tender the \$2,600 and demand a deed. Until this was done, they were liable for rent. See *Pomroy v. Gold*, 2 Metc. 500; *Brown v. Davis*, 138 Mass. 458.

Exceptions overruled.

(185 Mass. 24)

HOLT v. CUTLER et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 8, 1904.)

**HIGHWAYS—USE—BICYCLES AND TEAMS—NEG-
LIGENCE—EVIDENCE—SUFFICIENCY.**

1. Defendant's servant was driving a wagon at a walk. Plaintiff, a girl of 18, was riding a bicycle in the same direction as the wagon, and while attempting to pass between it and the sidewalk, a distance of four or five feet, it swerved toward her, and she was knocked off her bicycle and was injured. While she testified that she rang her bell, it did not appear that the driver of the wagon heard it, and there was no evidence that he knew of her presence until the accident happened, or had any reason to suppose that she was trying to pass. *Held*, that there was no evidence of the driver's negligence.

Exceptions from Superior Court, Middlesex County; F. K. Lawton, Judge.

Tort for injuries by one Holt against one Cutler and others. There was a verdict for defendants, and plaintiff excepted. Exceptions overruled.

T. W. & D. H. Coakley and John J. O'Connor, for plaintiff. Hamilton & Eaton, for defendants.

LATHROP, J. If we assume in this case that there was enough evidence of due care on the part of the plaintiff to warrant the submission of the case to the jury, we fail nevertheless to find any evidence of negligence on the part of the defendants' servant. The servant at the time of the accident was driving a two-horse loaded wagon at a walk. The plaintiff, a girl of 18, who was riding a bicycle, and going in the same direction as the wagon, attempted to pass between the wagon and the sidewalk, a distance of four or five feet. When she was opposite the middle of the wagon, it swerved or swayed towards her, and she was knocked off her bicycle, and sustained the injuries complained of. She testified that she rang her bell, but it does not appear that the driver of the wagon heard it, or gave any indication of having heard it; and there was no evidence that he knew of her presence until the accident happened, or had any reason to suppose that she was trying to pass him. There was therefore no evidence of his negligence, even if he turned the horses—a fact that does not clearly appear.

Exceptions overruled.

(184 Mass. 545)

BROCK v. ROGERS.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

FRAUD—RIGHT OF ACTION—GUARDIAN AND WARD.

1. A guardian accepting a mortgage, through false representations, in exchange for lands, the legal title to which was in the name of her ward, cannot maintain an action in her own name for the deceit.

2. A guardian accepting a mortgage, through false representations, in exchange for lands of her ward, cannot maintain an action in her own name for the deceit, though, after the action was brought, the ward died, and plaintiff was the only heir at law of the ward.

Exceptions from Superior Court, Suffolk County; Francis A. Gaskill, Judge.

Action by one Mrs. Brock against one Rogers. Tort for alleged false representations alleged to have been made by defendant to plaintiff relative to a certain mortgage signed by one Vincent, and payable to defendant, which plaintiff took as consideration for the sale of a parcel of real estate in Boston,

and which then stood in the name of Roy E. Brock, the plaintiff's son, for whom she was guardian, the plaintiff claiming that the real estate, although standing in the name of her son, was really hers. The court directed a verdict for defendant, and plaintiff excepted. Exceptions overruled.

C. F. Eldredge, for plaintiff. Foster Rogers and Chas C. Long, for defendant.

BRALEY, J. At the time when the alleged false representations were made by the defendant the title to the property was in Roy E. Brock, a minor son of the plaintiff, and of whose person and estate she was the duly appointed guardian; and all the proceedings in conducting and making the sale, and conveying the land to the defendant were undertaken and completed by her as such guardian under a license from the probate court authorizing the sale of the ward's estate, and in which she had no legal interest. *Chapin v. Livermore*, 13 Gray, 561, 562; *Rollins v. Marsh*, 128 Mass. 116-118; *McKim v. Mann*, 141 Mass. 507, 508, 6 N. E. 740; *Lombard v. Morse*, 155 Mass. 136, 137, 29 N. E. 205, 14 L. R. A. 273. In order to maintain an action for deceit, the plaintiff must not only allege and prove the falsehood and fraud, but also that thereby she has suffered damage. *Tyron v. Whitmarsh*, 1 Metc. 1-6, 35 Am. Dec. 339. If the defendant made the representations as alleged in the declaration, in which the case is put on the sole ground that it was her property which was obtained by the fraud of the defendant, the plaintiff wholly fails to prove that by reason of them she had been induced to part with any property belonging to her. And she has no cause of action. It appears that since this action was brought her son has died, and that she is his only heir at law. But this event cannot operate retroactively to vest her with a title to the real estate as of the date of sale. She takes as his heir at law, and becomes such only on his death. Upon the death of the ward the authority of the guardian ceases, and the only duty that remains is to settle his accounts and turn over any property in his possession to the rightful heir. *Richmond v. Adams National Bank*, 152 Mass. 359-364, 25 N. E. 731. Besides, the defendant bought from her as guardian, and the grantee in the deed took the title of her ward to the land, and she is now estopped to set up in her own right in this action an adverse claim of title in herself for the purpose of laying a foundation upon which to rest an action of tort for the defendant's alleged deceit at the sale. *Heard v. Hall*, 16 Pick. 457-461. The ruling at the trial that the present action could not be maintained by this plaintiff in her own name was right. Exceptions overruled.

(184 Mass. 590)

DOHERTY et al. v. MERCANTILE TRUST CO. et al.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1904.)**CORPORATIONS — FRAUD ON CORPORATION —
SUIT BY STOCKHOLDER—DEMAND ON
CORPORATION—SUFFICIENCY.**

1. Shares of stock pledged to secure certain bonds were sold by the owners to a corporation, subject to the pledge, and a bill by the stockholders of the corporation sought to restrain a sale of the stock under the pledge, alleging a conspiracy to bring about a foreclosure by an unwarranted omission to declare dividends on the pledged stock. *Held*, that the bill could not be maintained, it appearing that the only step complainants had taken to bring about corporate action was a request that the corporation institute proceedings to stop the sale, without any reference to any facts on which such a suit could be maintained.

Appeal from Supreme Judicial Court, Suffolk County; John H. Hardy, Judge.

Bill by Joseph E. Doherty and others against the Mercantile Trust Company and others. From a judgment denying a motion to dismiss the bill, defendants Kidder, Peabody & Co. appeal. Bill dismissed.

J. L. Thorndike and E. R. Thayer, for Boston Gaslight Company and others. Gaston, Snow & Saltonstall, for Kidder, Peabody & Co. Chas. O. Engstrom and Frank J. Humphrey, for Doherty and others. Harrison Dunham and Henry D. Yeaton, for intervening plaintiffs.

LORING, J. This is a bill in effect to enjoin the Mercantile Trust Company of New York from selling certain shares in the capital stock of the Boston Gaslight Company, the South Boston Gaslight Company, the Roxbury Gaslight Company, and the Bay State Gaslight Company of Massachusetts. The bill was filed on January 30, 1903, and the sale is alleged to have been advertised to take place on the 10th day of February then next ensuing. The shares of the four Massachusetts gas companies in question were pledged with the trust company by one Addicks and one Dillaway, under two tripartite indentures dated January 1, 1889, to secure an issue of 12,000,000 Boston United Gas bonds, first series, and an issue of 4,000,000 Boston United Gas bonds, second series, some of which are outstanding. On March 13, 1889, Addicks and Dillaway sold and transferred these shares of stock to the Bay State Gas Company of New Jersey, subject to the pledge to the trust company, in consideration, among other things, of 9,950 fully paid shares of the capital stock of that corporation. The capital stock of that corporation consisted of 10,000 shares. On August 9, 1889, Addicks and Dillaway sold and transferred to the Bay State Gas Company of Delaware the 9,950 shares of stock in the New Jersey corporation, mentioned above, for \$5,000 in cash and 19,950 fully paid up shares of that corporation. In the indentures of January 1, 1889, to which it was a party,

the New Jersey corporation agreed to pay to the trust company any sum necessary to make up the interest, the sinking fund, and other payments due under said indentures; and by an agreement between the New Jersey company and the Delaware company dated April 9, 1890, the Delaware company agreed to pay the New Jersey company the sums necessary to enable it to perform that covenant, and the New Jersey company assigned to the Delaware company any sums to which it might become entitled during the terms of the bonds aforesaid, as dividends on the stocks of said four Massachusetts gas companies. The bill alleges a conspiracy to defraud the stockholders of the Delaware company of their interest in the four Massachusetts companies. The means of carrying this fraud into effect alleged in the bill were the omission to declare dividends although the earnings quite justified them, the creation thereby of a default, and a foreclosure sale by the trustee of these shares of stock. This suit is brought by persons who claim to be stockholders in the Delaware company. The case was sent to a master. When the plaintiffs' evidence in support of their right to maintain the bill had been put in, the defendants requested the master to report the facts on that point, and on the master's making a preliminary report on those facts they moved the court to dismiss the bill, on the ground that for various reasons stated in the motion it could not be maintained by the plaintiffs in its present form. The motion was overruled by the superior court, and the question is here on a report as to the correctness of that interlocutory order.

It is enough to dispose of the interlocutory order that no proper steps were taken by these plaintiffs to get the Delaware corporation to bring a bill to enforce the rights which the plaintiffs are seeking to enforce in behalf of that corporation. The rights which the plaintiffs seek to enforce are the rights of the Delaware corporation in the stock of the four Massachusetts gas companies mentioned above. The Delaware company had the right during the term of the gas bonds mentioned above to receive from the Mercantile Trust Company all surplus dividends of the four Massachusetts gas companies. This right was given to the New Jersey corporation by tripartite indentures of January 1, 1889, and assigned by the New Jersey corporation to the Delaware corporation by the agreement of April 9, 1890. It had also an interest in these shares by reason of its being at least the beneficial owner of 9,950 out of 10,000 shares in the capital stock of the New Jersey corporation, which owned the shares of the four Massachusetts gas companies in question, subject to the pledge. And the Delaware company, whose rights the plaintiffs now before the court seek to enforce, had the right to prevent a foreclosure sale by advancing the money necessary to keep the pledge good to the New

Jersey company, to be by it used for that purpose. The New Jersey company was bound so to use it by the terms of the agreement of April 9, 1890, and the New Jersey company had the right and owed the duty of advancing these sums under the tripartite agreement of January 1, 1889.

There is no allegation in this bill, and no evidence was introduced to the effect, that the directors of the Delaware company were parties to the fraud set up in the bill, or that for other reasons the plaintiffs were excused from making the proper effort to get them to enforce the rights of the Delaware company which they were elected to enforce and care for. All that the plaintiffs did to set the corporation in motion was to serve on one Donahue, in Boston, a letter to the "Bay State Gas Company of Delaware and to the President and Board of Directors of said corporation," and to mail the same letter addressed to the "Bay State Gas Co. of Delaware, J. Edw. Addicks, Wilmington, Delaware." Donahue was the secretary of the company in Boston, and the letter was served on him on January 24, 1903. The letter sent to the company at Wilmington was received by the assistant secretary of the corporation on January 28, 1903. No answer had been received from the letter when the suit was begun on January 30, 1903.

It is not necessary to go further in pointing out that this is not enough than to state that the letter is a naked request to the company to institute proceedings to stop the sale of the shares of stock of the four Massachusetts gas companies, without stating or referring to the facts alleged in the bill, or any facts at all on which such a bill could be founded. For all that appears, the directors of the Delaware company are honest men, anxious and willing to protect the rights of the Delaware company, and, if they had been informed of the facts set forth in this bill and satisfied of their truth, would have brought a bill to prevent the sale. It is not enough, to enable a stockholder to bring a bill to enforce in behalf of a corporation the rights which, if successful, will inure to the corporation, to make a naked request that such a bill should be brought, without submitting to the directors the facts on which it could be brought. See *Brewer v. Boston Theatre*, 104 Mass. 378; *Dunphy v. Traveller Newspaper Association*, 146 Mass. 495, 16 N. E. 426; *Dillaway v. Boston Gaslight Co.*, 174 Mass. 80, 54 N. E. 359. See, also, *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827.

Bill dismissed, with costs.

(186 Mass. 14)

PARKER et al. v. HILL.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 7, 1904.)

TRUSTEES—COMPENSATION.

1. Under Rev. Laws, c. 150, § 14, providing that a trustee shall have such compensation for his services as the court may allow, compensa-

tion is to be just and reasonable in each case considered by it; and a trustee is not entitled to any certain commission for changing investments, or for any service without regard to other circumstances.

Case Reserved from Supreme Judicial Court, Middlesex County; Henry K. Braley, Judge.

Parker and others, trustees, filed an account, claims for compensation in which were opposed by Hill, guardian ad litem, and disallowed by the probate court. The trustee appealed to the Supreme Judicial Court, where the case was reserved on the record, and agreed facts for the full court. Affirmed.

Loring & Coolidge, for appellants. Arthur D. Hill, pro se.

KNOWLTON, C. J. The appellants are trustees under a will, and they appeal from a disallowance by the probate court of two items in their account, in each of which they ask to be allowed a commission of 5 per cent. on the proceeds of certain property which belonged to the capital of the fund in their hands, and which they turned into money, and held for reinvestment.

The law relating to the compensation of trustees differs greatly in different places. In England the rule has been that they should be allowed no compensation for the performance of their official duties. In some of the American states, statutes have been passed providing for the allowance of commissions at graduated rates on the sums received and paid out. In this commonwealth "an executor, administrator, guardian or trustee shall be allowed his reasonable expenses incurred in the execution of his trust, and shall have such compensation for his services as the court in which his accounts are settled may allow." Rev. Laws, c. 150, § 14. In Pub. St. c. 144, § 7, from which this section was taken, in the place of the last word, "allow," were the words "deem just and reasonable." This change of language does not change the meaning of the section, or the principles on which allowances are to be made. It is compensation that is to be allowed, and the amount should be neither more nor less than is just and reasonable. This case has been argued by the appellant as if it were a rule of law that trustees are to be allowed a commission of 5 per cent. on all income received and paid out, and the burden of the argument is that this rule should be extended to sums received from capital and reinvested. There is no such rule of law in Massachusetts. The only rule of law is that a trustee is to receive a just and reasonable compensation for all services performed in the execution of his trust. Under the statute, there can be no such rule of law applicable alike to cases in which the amount of service rendered is necessarily large, and to cases in which the service rendered is very small in proportion to the

amounts received and paid. The meaning of the statute is that the compensation is to be just and reasonable in each case, considered by itself alone. In respect to the amount and value of the services, cases differ otherwise than in the amounts of the receipts and disbursements. In the cases in which the allowance of an amount expressed in the form of a commission of 5 per cent. has been approved by this court, the decision has been only that the amount was reasonable upon the facts shown in the particular case, not that this amount would be reasonable in all cases, or as a rule to be followed in cases generally. In *May v. May*, 109 Mass. 252-258, in which the court disallowed compensation expressed in the form of a commission for moneys received and paid out in changing investments, the court said: "The true principle would be adequate reward according to the circumstances of the case. *Post v. Jones*, 19 How. 150 [15 L. Ed. 618]. We should, however, be very unwilling to sanction the practice of putting that compensation in the form of a commission upon the amount expended or reinvested, and therefore we cannot allow these charges in their present form." In *Blake v. Pegram*, 101 Mass. 592-600, in which sundry charges for commissions were disallowed, the true principle was stated by Mr. Justice Wells, as follows: "Such a commission upon income received and paid over is allowable only as a convenient measure of compensation for services supposed to have been actually rendered. It implies something more than mere nominal services and the responsibility of the trust. There is no rule of law and no principle of right by which such commissions are to be charged or allowed without regard to the rendition of actual services therefor." It is often difficult to measure the compensation which should be allowed for the services of a trustee in the care and management of an estate. The amount of property in his charge, and the amount of income received from it, are to be taken into account in determining at what rate he shall be compensated for the care and thought and intelligence, as well as the manual service, which are given to the performance of his duties. When the value of these, considered in relation to the trustee who has been the actor, and to the beneficiary who has been the recipient, is ascertained, it may sometimes be expressed conveniently in the form of a percentage on the amounts received and disbursed. Many cases may be so similar in all the elements to be considered in determining what amount of compensation is reasonable that they may be grouped in a class, and in each case the same percentage of the income received and paid over may properly represent the compensation to be allowed for all the services rendered. Undoubtedly there are other cases in which a compensation determined according to a percentage allowed in cases belonging to a com-

mon class, without reference to other considerations, would be too high, and others in which it would be too low. In some cases there would be special services of a peculiar kind, whose value could easily be fixed according to usual standards. Everything that a trustee does rightly and properly is to be paid for, and nothing is to be given as a commission except for services actually rendered, and as a measure of reasonable compensation for the service.

The claims for commissions for changing investments were rightly disallowed in this case. But this service was to be paid for as well as any other service. Occasional changes of investments are a part of the ordinary services of trustees, and are similar to services commonly rendered by trustees in watching their investments to see whether any action should be taken in regard to them.

We find in this account allowances for services in the form of commissions upon income received and paid. We infer from the record and the argument that these allowances were made as a proper measure of compensation for all the services of the trustees during the period covered by the account. If this inference is correct, no specific allowance should be made for the changes in the investments. If this is a mistake, and if the allowances made in other parts of the account do not fairly compensate the trustees for all their services, their compensation should be increased so as to make it just and reasonable.

The decree of the probate court will be affirmed unless within 10 days after this decision an application is made by the trustees that the account be opened as to their compensation for all services. If such an application is made, the case will stand for a further hearing in the probate court. So ordered.

(184 Mass. 594)

LEONARD v. ELDREDGE et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 7, 1904.)

BROKERS—COMMISSIONS—DISCHARGE—EFFECT.

1. Where a real estate broker, having failed to effect a sale to a prospective purchaser, was discharged, and assented to the discharge, and another broker was employed by the principal, through whom a sale to the purchaser procured by the first broker was effected, the first broker was not entitled to commission on the sale, the principal having acted in good faith, and not merely to escape payment of commissions.

Exceptions from Superior Court, Bristol County; Franklin G. Fessenden, Judge.

Action by one Leonard against one Eldredge and another. Verdict for defendants. Plaintiff excepted. Exceptions overruled.

It appeared that the defendants employed plaintiff to sell the property, and that he secured an offer from one Vinal, which the de-

¶ 1. See *Brokers*, vol. 3, Cent. Dig. §§ 45, 59.

defendants refused. Defendants then took the keys from plaintiff, and he did not see the keys afterwards. There was also evidence that when defendants took the keys they told plaintiff's clerk that the plaintiff was not to do anything more about the property; that plaintiff afterwards went to the house, and took away his signs, and there was evidence that he considered himself discharged. Defendants then employed one Bourne, another broker, to sell, and he put it up at auction, it being bid in by defendants. After the auction Vinal asked plaintiff if he thought defendants would sell at his original offer, and plaintiff made the offer again for him to defendants' attorney, but received no reply. Plaintiff then advised Vinal to see Bourne, and said it made no difference to him; that he should consider him his client. On cross-examination plaintiff testified that he understood that the sale of the property had been taken out of his hands. Vinal saw Bourne, and bought the property through him. The verdict was for the defendants, and plaintiff excepted.

Hitch & Sparrow, for plaintiff. Raymond & Mitchell, for defendants.

HAMMOND, J. The plaintiff, having failed to sell the property, was discharged by the defendants in good faith, and he assented to the discharge. After that he had no right to act further for the defendants, and he so understood, and made no further attempt in their behalf. Immediately after the discharge the defendants employed one Bourne, a real estate broker and auctioneer; who soon afterwards offered the property at public auction, at which it was bid in by the defendants. Finally, in October, Vinal, the person who in July had made through the plaintiff the offer which was not accepted, made through Bourne another offer, which was accepted.

In the absence of any express stipulation or usage to the contrary, there can be no doubt that the right of the principal to discharge at any time the broker is absolute. But it does not necessarily follow that the broker is thereby deprived of his commission where a sale is subsequently made to the person introduced by him. In *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441, the following language is used: "If, in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker with the view of concluding the bargain without his aid and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But, if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the

absolute right, before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor."

Without now deciding whether the rule stated in the last paragraph is of universal application, it is sufficient to say that it is applicable to the facts of this case, and that the instructions to the jury were correct. The doctrine of efficient cause has no application to a case like this.

Exceptions overruled.

(184 Mass. 476)

STEVENS v. BOSTON ELEVATED RY. CO.
(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1904.)

**NEGLIGENCE—INJURIES—STREET RAILROADS—
PRECAUTIONS SUBSEQUENTLY ADOPTED
—RULES—VIOLATION—EVIDENCE.**

1. The adoption of additional precautions for safety by a defendant after an accident cannot be proved as tending to show negligence in the method used at the time of the accident.

2. In an action for injuries by an elevated railroad, evidence that defendant had adopted a rule requiring the sounding of the gong, in connection with other testimony that defendant's motorman disobeyed the rule, and that such disobedience was one of the causes of the accident, was admissible.

Exceptions from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Action by one Stevens, as administratrix, etc., against the Boston Elevated Railway Company. From a judgment in favor of plaintiff, defendant brings exceptions. Overruled.

Whipple, Sears & Ogden, and Alexander Lincoln, for plaintiff. W. G. Thompson, for defendant.

KNOWLTON, C. J. The only exception now relied on by the defendant is to the admission in evidence of the defendant's rule in regard to sounding the gong, in connection with testimony that the defendant's motorman disobeyed the rule, and that this disobedience was one of the causes of the accident. The decisions in different jurisdictions are not entirely harmonious upon the question now raised, but we are of opinion that the weight of authority and of reason tends to support the ruling of the judge in the present case.

It has been settled by various adjudications in this commonwealth that the adoption of additional precautions for safety by a defendant, after an accident, cannot be proved, as tending to show liability for the meth-

¶ 1. See *Negligence*, vol. 37, Cent. Dig. § 253.

od used at the time of the accident. *Menard v. Boston & Maine Railroad*, 150 Mass. 386, 23 N. E. 214; *Shlinners v. Proprietors, etc.*, 154 Mass. 168, 28 N. E. 10, 12 L. R. A. 554, 26 Am. St. Rep. 226; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Hewitt v. Taunton Street Railway Company*, 167 Mass. 483, 485, 486, 46 N. E. 106; *Dacey v. New York, New Haven & Hartford Railroad Company*, 168 Mass. 479-481, 47 N. E. 418. This is the general rule in other jurisdictions. *Morse v. Minneapolis Railroad*, 30 Minn. 465, 16 N. W. 358; *Columbia Railroad Company v. Hawthorne*, 144 U. S. 202, 207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405, and cases there cited.

On the other hand, the violation of rules previously adopted by a defendant in reference to the safety of third persons has generally been admitted in evidence as tending to show negligence of the defendant's disobedient servant for which the defendant is liable. The admissibility of such evidence has often been assumed by this court without discussion. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137-140; *Connolly v. New York & New England Railroad Company*, 158 Mass. 8, 10, 11, 32 N. E. 937; *Floytrup v. Boston & Maine Railroad*, 163 Mass. 152, 39 N. E. 797; *Sweetland v. Lynn & Boston Railroad Company*, 177 Mass. 574, 578, 579, 59 N. E. 443, 51 L. R. A. 783. See, also, in other courts, *Chicago, etc., Railroad Company v. Lowell*, 151 U. S. 209-217, 14 Sup. Ct. 281, 38 L. Ed. 131; *Warner v. Baltimore & Ohio Railroad Company*, 168 U. S. 339-346, 18 Sup. Ct. 68, 42 L. Ed. 491. In *Floytrup v. Boston & Maine Railroad*, *ubi supra*, Mr. Justice Barker said in the opinion, "The evidence of the usage of the road that one train should not enter a station while another train was engaged in delivering passengers there was competent upon the question whether the defendant's servants managed the train in a proper manner." Similar statements of the law may be found in numerous cases. *Dublin, Wickford & Wexford Railway Company v. Slaterry*, 3 App. Cas. 1155-1163; *Delaware, etc., Railroad Company v. Ashley*, 67 Fed. 209-212, 14 C. C. A. 868; *Cincinnati Street Railway Company v. Altemeier*, 60 Ohio St. 10, 53 N. E. 300; *L. S. & M. S. Railway Company v. Ward*, 135 Ill. 511-518, 26 N. E. 520; *Georgia Railway Company v. Williams*, 74 Ga. 723-773; *Atlanta Cons. Railway Company v. Bates*, 103 Ga. 833, 30 S. E. 41. The only decision to the contrary of which we are aware is in the case of *Fonda v. Railway Company*, 71 Minn. 438-449, 74 N. W. 166, 70 Am. St. Rep. 341.

It is contended by the defendant that there is no sound principle under which such evidence can be admitted. The evidence is somewhat analogous to proof of the violation of an ordinance or statute by the defendant or his servant which is always received as evidence, although not conclusive, of the defendant's negligence. *Wright v. Malden & Melrose Railway Company*, 4 Al-

len, 283; *Lane v. Atlantic Works*, 111 Mass. 136; *Hall v. Ripley*, 119 Mass. 135; *Hanlon v. South Boston, etc., Railway Company*, 129 Mass. 310. Such an ordinance or statute, enacted by a body representing the interests of the public, imposes *prima facie* upon everybody a duty of obedience. Disobedience is therefore a breach of duty, unless some excuse for it can be shown which creates a different duty, that, as between man and man, overrides the duty imposed by the statute or ordinance. Such disobedience in a matter affecting the plaintiff is always competent upon the question whether the defendant was negligent. So, a rule made by a corporation for the guidance of its servants in matters affecting the safety of others is made in the performance of a duty, by a party that is called upon to consider methods, and determine how its business shall be conducted. Such a rule, made known to its servants, creates a duty of obedience as between the master and the servant, and disobedience of it by the servant is negligence as between the two. If such disobedience injuriously affects a third person, it is not to be assumed in favor of the master that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to be held an implication that there was a breach of duty towards him, as well as towards the master who prescribed the conduct that he thought necessary or desirable for protection in such cases. Against the proprietor of a business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety.

A distinction may well be made between precautions taken voluntarily before an accident, and precautions which are suggested and adopted after an accident. This distinction is pointed out in *Columbia Railroad Company v. Hawthorne*, 144 U. S. 202-207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405. Mr. Justice Gray, referring to changes made by a defendant after an accident, says in the opinion, "It is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant." In *Morse v. Minneapolis & St. Louis Railway*, 30 Minn. 465, 16 N. W. 358, it is said, referring to the same subject, that "a person may have exercised all the care which the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional

safeguards." See, also, *Illinois Central Railroad Company v. Swisher*, 61 Ill. App. 611. In *Menard v. Boston & Maine Railroad*, 150 Mass. 386, 23 N. E. 214, and in some of the earlier cases, there is language which goes further than the decision, and which might imply that such evidence as was received in this case is incompetent, but the case is authority only for that which was decided.

Exceptions overruled.

(186 Mass. 1)

COMMONWEALTH v. McGRATH.

(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 7, 1904.)

LIQUOR NUISANCE—SALES OF CIDER—STATUTES—CONSTRUCTION.

1. Rev. Laws, c. 100, §§ 1, 2, provide that no person shall sell, expose, or keep for sale spirituous or intoxicating liquor except as authorized by the chapter, and that ale, porter, lager beer, cider, all wines, any beverage which contains more than 1 per cent. of alcohol by volume at 60° Fahrenheit shall be deemed to be intoxicating liquors within the meaning of the chapter. Held that the provision relating to the percentage of alcohol related to cider, and hence proof that defendant kept cider for sale containing more than 1 per cent. of alcohol was sufficient to sustain a conviction.

2. Where, in a prosecution for selling cider without a license in violation of Rev. Laws, c. 100, § 1, providing that no person shall sell or expose for sale spirituous or intoxicating liquors except under certain exceptions prescribed, defendant did not claim to have sold the cider under a license, and did not come within any of the exceptions, an instruction that a sale of all cider unless under a license was prohibited, while erroneous, was not prejudicial to defendant.

Exceptions from Superior Court, Norfolk County; L. Le B. Holmes, Judge.

One McGrath was convicted of maintaining a liquor nuisance, and he brings exceptions. Overruled.

Asa P. French, Dist. Atty., and R. W. Nutter, Asst. Dist. Atty., for the Commonwealth. T. E. Grover and D. W. Murray, for defendant.

LATHROP, J. This is a complaint charging the defendant with keeping and maintaining, on March 23, 1903, and during the preceding six months, a certain tenement in Hyde Park, by him used for the illegal sale and illegal keeping for sale of intoxicating liquors. The following facts appeared in evidence at the trial in the superior court: The defendant kept a grocery in Hyde Park, selling the usual goods dealt in by grocers. In October, 1902, he bought 50 barrels of windfall apples, some of which he sold, and the remainder of which he had made into cider, and obtained therefrom 8 barrels of cider. He sold 1 barrel to a neighbor, and also sold 2½ barrels in his shop by the quart and gallon, the cider so sold being taken from the premises, and not drunk thereon. Shortly before January 1, 1903, he noticed that "the cider did not taste as sweet as it did," and

sold no more from that time on. The 4½ barrels remaining were seized upon a search warrant on March 15, 1903. On the evidence the judge ruled as follows: "If the jury find that the defendant, during the time covered by the complaint, sold cider or kept it for sale upon his premises, he would be guilty of the offense charged, as the sale of all cider, unless under a license, is prohibited by law in this commonwealth." The jury returned a verdict of guilty, and the case is before us on the defendant's exception to the above ruling.

It is to be noticed in the first place that the defendant did not justify the sales made by him as being under a license, and that St. 1903, p. 486, c. 460, which took effect on June 22, 1903, has no application, because the statute was passed after his conviction. The case is to be determined upon the construction to be given to the provisions of Rev. Laws, c. 100, §§ 1, 2. Section 1 begins as follows: "No person shall sell, or expose or keep for sale, spirituous or intoxicating liquor, except as authorized in this chapter." Then follow certain exceptions, one of which, if it applied to the defendant, was declared to be unconstitutional in *Commonwealth v. Petranich*, 183 Mass. 217, 68 N. E. 807. Section 2 reads as follows: "Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit, and distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter." The question on this part of the case is whether the provision of the section as to the percentage of alcohol applies to cider. St. 1875, p. 669, c. 99, § 18, provides: "The terms intoxicating liquor, or liquors, in this act shall be construed to include ale, porter, strong beer, lager beer, cider and all wines, as well as distilled spirits." This was amended by St. 1880, p. 192, c. 239, § 5, by adding the following words at the end of the section above cited: "Any beverage containing more than three per cent alcohol, by volume, at sixty degrees Fahrenheit, shall be deemed to be an intoxicating liquor within the meaning of this act." So it is declared in Pub. St. 1882, c. 100, § 27: "Ale, porter, strong beer, lager beer, cider, all wines, and any beverage containing more than three per cent of alcohol, by volume, as well as distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter." St. 1888, p. 180, c. 219, § 1, amended the section just cited by striking out the word "three" and inserting the word "one." It was held in *Commonwealth v. Snow*, 133 Mass. 575, under the Statutes of 1875, above cited, that on a complaint for unlawfully keeping intoxicating liquor with intent unlawfully to sell the same, and the proof was of a sale of lager beer, the question whether it was kept for sale not being contested, the government need not prove that it contained more than 3 per cent. of alcohol. So, under

the Public Statutes, as amended by the Statutes of 1888, it was held that it was not necessary to prove that cider contained more than 1 per cent. of alcohol. *Commonwealth v. Brothers*, 158 Mass. 200, 206, 33 N. E. 386. While the phraseology in the Revised Laws is slightly changed from that in the Public Statutes, as amended by the Statutes of 1888, there is no change in the law. The first part of the ruling was therefore right.

The second part of the ruling, in which the judge gave the reason for the ruling, was stated too broadly, but the defendant was not prejudiced thereby, for, so far as he was concerned, the ruling was right, as he did not come within any of the valid exceptions in section 1.

Exceptions overruled.

(184 Mass. 541)

CONNESS v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

EMINENT DOMAIN—ASSESSMENT OF COMPENSATION—VALUE FOR SPECIAL PURPOSE—EXPERT TESTIMONY—REVIEW—DISCRETION OF COURT.

1. The sum to be awarded for land taken for a public purpose is its fair market value, having reference to all the uses to which it is adapted; and, while its value for a special purpose is not the test, it may be considered, with a view to ascertaining what it is worth in the market for any use for which it would bring the most.

2. On an issue as to the value of land taken for a public purpose, two witnesses—mechanical engineers—were allowed to testify as to its value for a mill site after they had testified that it was well adapted therefor. One of them, so far as appeared, had no knowledge of the value of land in the vicinity, nor hardly any of land elsewhere, while the other had shown that he was familiar with its value for manufacturing purposes, but not for other purposes. It was not claimed that it would be practicable to use the stream directly for water power on the land, but only that the owner could take water for steam and other manufacturing uses other than power, and, under the reservation in the taking, the owner of the part of the land which was left would have a right to take water in any reasonable manner, and to the same extent as theretofore, for mercantile or manufacturing purposes, and to discharge it into the river. Besides this, both sides introduced many other competent witnesses familiar with prices, though they did not know the value of mill sites. *Held*, that it would have been a better exercise of judicial discretion in such case if the testimony of the engineers had been excluded, but that as the presiding justice might find on the evidence that the land had elements of value as a mill site, and as there was no testimony in regard to the selling price of mill sites as such, the exceptions to the admission of their testimony could not be sustained.

Exceptions from Superior Court, Suffolk County; Chas. U. Bell, Judge.

Petition by John Conness against the commonwealth for the assessment of damages on account of land taken by the metropolitan park commissioners. There was a verdict in

favor of the petitioner, and respondent excepts. Exceptions overruled.

Moorefield Storey and Ezra R. Thayer, for petitioner. Robert G. Dodge, Asst. Atty. Gen., for respondent.

KNOWLTON, C. J. The questions in this case relate to the admissibility of the testimony of two witnesses called by the petitioner as experts to testify in regard to damages to real estate. One of them, so far as appears, had no knowledge of the prices at which land was bought and sold in the vicinity of the land taken by the respondent, nor hardly any knowledge of the prices of land in other places. The other testified that he was "perfectly familiar with values in Dorchester and other places around Boston for manufacturing purposes, but not for any other purposes, and had nothing to do with any other purposes." Both of these witnesses were mechanical engineers who were familiar with the use of steam and water power, and with mills of various kinds in many places. They were competent to give an opinion on the question whether the petitioner's property was adapted to use as a site for a mill, but their testimony tended to show that they had been occupied chiefly with mechanical subjects in connection with mills, rather than with prices or values. After they had testified that the petitioner's property was well adapted for a mill site, one of the witnesses was allowed to answer the question, "What is the fair market value of this combination of the site here with the water for the purposes of a rubber business?" and to say that it would be worth \$50,000 for such a mill site. The other witness gave similar testimony. The respondent objected to the questions and answers, both in form and substance, and saved exceptions.

The subject thus presented was considered in *Cochrane v. Commonwealth*, 175 Mass. 299, 56 N. E. 610, 78 Am. St. Rep. 491, and similar questions have arisen in previous cases. The sum to be awarded for real estate taken is the fair market value of the property, having reference to all the uses to which it is adapted. Its value for any special purpose is not the test, although it may be considered, with a view of ascertaining what the property is worth in the market for any use for which it would bring the most. *Moulton v. Newburyport Water Company*, 137 Mass. 163-167; *Providence & Worcester Railroad Company v. Worcester*, 155 Mass. 35-42, 29 N. E. 56; *Teale v. Boston*, 165 Mass. 88-92, 42 N. E. 506; *Maynard v. Northampton*, 157 Mass. 219, 31 N. E. 1062; *Fales v. Easthampton*, 162 Mass. 422, 38 N. E. 1129; *Butchers' Association v. Commonwealth*, 169 Mass. 103-118, 47 N. E. 599. In the case first mentioned, while it was decided that there may be trials in which it is necessary to receive the testimony of witnesses

¶ 1. See *Eminent Domain*, vol. 12, Cent. Dig. §§ 353, 356, 355.

who have little or no knowledge of prices in the neighborhood where the taking occurred, some of the objections to such testimony were mentioned; and it was said that "for these reasons the usual rule should be departed from, and testimony of this kind admitted only when without it it is impossible to prove the value of the property in question." Such testimony is almost necessarily affected largely by the peculiar conditions and the nature of the management of some particular business with which the witness is acquainted. In the present case the first witness testified that he "knew by personal experience the expense of running and the profits of a rubber works, because in the Boston Belting Company case he had been employed to go over the entire expenses and profits of the business of the Boston Belting Company for seventeen years." We suppose this refers to an examination of the books and papers of a company which may have been very exceptional in its management and its profits. So, too, the market value for any particular use may be largely affected by the selling price of land in the vicinity. The question is not what a manufacturer could afford to give for a site if he could not get it at a less price, or could not get another at a lower rate, but what the property will bring in the market, in view of the great or small demand for it, and the condition of the market as to supply and demand in other places where the proposed business might as well be carried on. Ignorance of the market price of land in the vicinity leaves the testimony of mechanical engineers and mill managers of little worth as to market values. Because of these and other considerations, we deem such testimony very objectionable, and we think the proposition quoted above from *Cochrane v. Commonwealth* should be treated as a rule of practice, and followed pretty strictly.

In view of the fact that "it was not claimed by the petitioner that it would be practicable to use the stream directly for water power on the petitioner's land, but only that he could take water from the river for steam and other manufacturing uses other than power," and the further fact that, under the reservation in the taking, the owner of the part of the land which is left will have a right to take water from the river in any reasonable manner, and to the same extent as heretofore for mercantile or manufacturing purposes, and to discharge the water into the river, and in view of the ignorance of these experts of the selling prices of land in the vicinity, and the introduction of many witnesses on both sides who were familiar with the prices at which property sold in that part of Dorchester, although they did not know the value of mill sites, we think it would have been a better exercise of judicial discretion if the testimony of these two witnesses as to values had been excluded. On the other hand, the questions which arose in passing upon the competency of the evidence at

the trial were questions of fact, and we cannot sustain the exceptions if there was any evidence to warrant the view taken by the presiding justice. *Amory v. Melrose*, 162 Mass. 557, 39 N. E. 276; *Com. v. Sturdivant*, 117 Mass. 122-137, 19 Am. Rep. 401. He might find that the land had elements of value as a mill site. There was no testimony before the court in regard to the selling price of mill sites as such. The evidence tended to show that the experience of these witnesses enabled them to judge of the value of a mill site somewhat better than persons generally. We cannot say that there was no evidence on which he could find the qualifications of these witnesses to be such as might enable them to aid the jury in fixing the market value of the property, under the findings which he might make, and which the jury subsequently might make, as to its condition and qualities. Notwithstanding the objections to such testimony, there was evidence on which it could be admitted, in the discretion of the presiding justice, and the entry will therefore be: Exceptions overruled.

(184 Mass. 562)

STOWELL et al. v. GRAM et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

CONTRACTS—ASSIGNMENT—NOVATION—ESSENTIALS—EVIDENCE—SUFFICIENCY—STATUTE OF FRAUDS—PERFORMANCE OF CONTRACT.

1. Where a contractor, who was financially embarrassed, made a bill of sale of certain property to another, and assigned the contract to him who was to assist him in his embarrassment, the assignee could not be held by plaintiff, the other party to the contract, on his promise to perform the contract, as such promise was within the statute of frauds.

2. To establish a novation on which plaintiff can charge the assignee of the contractor, it must be shown that plaintiff relieved the contractor from his obligations, and agreed to look to the assignee alone, and that, as a part of the same arrangement, the contractor relieved the plaintiff from his obligations, and the assignee agreed with the plaintiff to perform the contract as his own.

3. In an action by plaintiff against the assignee of the contractor for breach of the contract, evidence examined, and held insufficient to show that the original contract was given up by consent of all parties, and a new contract substituted between plaintiff and assignee, so as to constitute a novation.

Report from Superior Court, Suffolk County; Francis A. Gaskill, Judge.

Action by Edwin Stowell and others against Theodore C. Gram and others. There was a verdict for defendants, and question of law reported. Judgment for defendants.

John E. Hannigan and Wallace Wilson, for plaintiffs. G. W. Anderson, for defendants.

KNOWLTON, C. J. In the present case the presiding justice directed a verdict for the defendants, and reported to this court the

¶ 1. See *Novation*, vol. 37, Cent. Dig. §§ 2, 5, 7.

question of law whether there was any evidence that would warrant a verdict for the plaintiffs. The plaintiffs made a contract for the manufacture of certain articles with one Holt, who became financially embarrassed after he had begun the work, and then arranged with these defendants that they should take a bill of sale of certain property and an assignment of this contract, and assist him in his embarrassment. The question is whether there was evidence which would warrant a finding that the contract between the plaintiffs and Holt was given up, and that a new contract of the same kind, covering the unfinished work, was made between the plaintiffs and the defendants. The defendants cannot be held liable upon a promise to see that Holt's contract was performed, for such a promise would be within the statute of frauds. To establish a novation on which the plaintiffs can charge these defendants, it must be proved that the plaintiffs released Holt from his obligations under the contract, and agreed to look to the defendants alone, and that as a part of the same arrangement Holt released the plaintiffs from their liability to him, and that the defendants agreed with the plaintiffs to perform the contract as their own. The writing under which the defendants acquired their rights from Holt was a bill of sale of the tools, fixtures, machinery, and office furniture used in his business, and the furniture and the furnishings of every kind in a certain dwelling house. The writing also included an assignment of this contract with the plaintiffs. The dwelling house was referred to in the testimony as a lodging house which cost Holt \$1,200. Holt testified that the bill of sale was given as security to the defendants for money which they were to lend him and furnish for his assistance. This testimony was uncontradicted, and was confirmed by other facts in the case. The conduct of the parties and the entire evidence were inconsistent with any other theory than that the title of the defendants under the writing was held only as security. There was no testimony that Holt ever agreed with the defendants or the plaintiffs to give up, except as security for his debt to the defendants, the benefits, by way of profits or otherwise, to which he might be entitled from the performance of his contract, and the dealings of all the parties tend to show that the contract with Holt was treated as subsisting while the defendants were engaged with him in the performance of it. When the plaintiffs made their first payment after the defendants took possession under their bill of sale, they took a receipt signed by Holt in the name of the Holt Novelty Company, the name under which he did business, and in the receipt the money was said to be "in payment of an account with the Holt Novelty Company." The next payment made by the plaintiffs was upon an order signed by Holt, requesting payment to the defendants of all money due him on the contract, and reciting

that he had made to them an assignment of the contract. A receipt subsequently signed by the defendants recited that the money was received "on account of contract made with Holt Novelty Company." Without reviewing the evidence further, we are of opinion that there was nothing before the jury which would have warranted them in finding that the contract with Holt was given up by agreement of all parties, and that a new contract was made between the plaintiffs and the defendants.

Judgment for the defendants.

(184 Mass. 571)

GARGANO v. POPE et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

ATTORNEY AND CLIENT—CONTRACT FOR SERVICES—CHAMPERTY—EQUITY—JURISDICTION—PARTIES IN PARI DELICTO—"CLEAN HANDS"—BILL.

1. A contract for attorneys' services, by which the attorneys agreed to look solely to a certain percentage of the recovery for their compensation, without any right to recover for services rendered either before or after the recovery against the client, was void for champerty.

2. That facts relied on in a bill in equity could have been set up as an equitable defense to an action by defendants was not a bar to plaintiff's obtaining relief thereon in a court of equity jurisdiction.

3. Equity has jurisdiction to relieve a client from a champertous contract for attorneys' services on the ground of constructive fraud.

4. Under Rev. Laws, c. 159, § 1, prescribing the jurisdiction of the Supreme Court, such court has full equity jurisdiction.

5. Where a contract for attorneys' services, payable only out of the recovery, provided that it should cover services rendered and to be rendered, the fact that the attorneys had rendered services before the execution of the contract did not affect its invalidity for champerty.

6. Where a champertous contract for attorneys' services was entered into between the attorneys and their client, the client was not debarred from relief in equity on the ground that she was in pari delicto, and did not come into equity with clean hands.

Appeal from Superior Court, Suffolk County.

Bill by one Gargano against one Pope and others. From a decree in favor of plaintiff, defendants Dowd and Tebbetts appeal. Affirmed.

Stephen H. Tyng and Charles W. Ward, for appellants. Arthur D. Hill, John E. Crowley, and Louis E. Wyman, for appellee.

LORING, J. The only exception to the master's report taken by the defendants Tebbetts and Dowd is that he erred in his finding of law that the agreement in question was void for champerty. The master's finding is as follows: "Findings of Law. * * * I find that the said agreement is void for champerty. It is a contract by the defendants to prosecute a suit at law for a percentage of the proceeds. There is no indi-

¶ 1. See Champerty and Maintenance, vol. 2, Cent. Dig. § 24.

cation that there was to be any compensation in case of failure, and in case of success a debt for services was not in the contemplation of the parties. The provision as to lien was inserted to give the defendants a more secure hold on the proceeds." The parties reduced their agreement to writing, and we agree with the master in the construction to be given to that agreement. The cases are reviewed in *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009, and nothing need be added here.

Apart from the objection that the defendants waived their demurrer (if the part of the answer relied on be taken to be a demurrer) by going to a hearing on the merits, there is nothing in the objection that the facts relied on as entitling the plaintiff to relief could have been set up as an equitable defense. That does not bar the plaintiff from obtaining relief in a court of equity, if the court has jurisdiction. *Cook v. Richardson*, 178 Mass. 125, 59 N. E. 675.

There is a jurisdiction in equity to relieve against a void contract made by a solicitor on the ground of constructive fraud, of which equity has jurisdiction. For an instance of the exercise of a similar jurisdiction, see *Reynell v. Sprye*, 1 De G., M. & G. 660. See, also, *O'Brien v. Lewis*, 32 L. J. c. 569.

Since St. 1877, p. 558, c. 178, now Rev. Laws, c. 159, § 1, this court has full equity jurisdiction. The cases are collected in *Niles v. Graham*, 181 Mass. 41, 62 N. E. 986.

The allegation in the bill, admitted by the answer, "that at the time of the execution of said agreement * * * [these defendants] were acting as attorneys for the plaintiff in the matter of her claim against the [other] defendants," does not prevent this conclusion. The agreement covers the "services rendered and to be rendered."

The plaintiff is not barred of her remedy as one in *pari delicto*, or who has not come into equity with clean hands. The money has not been paid to the attorneys, and therefore it is not necessary to go so far as the court went in *Reynell v. Sprye*, 1 De G., M. & G. 660; *Cox v. Donnelly*, 34 Ark. 762; *Hale v. Sharp*, 4 Cold. 275.

Decree affirmed.

(185 Mass. 10)

SPRAGUE et al. v. DORR.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

WATERS AND WATER COURSES—POLLUTION—RIPARIAN PROPRIETORS—RIGHTS—PRESCRIPTION—TAKING WATER FOR MUNICIPAL PURPOSES—MUNICIPAL BOARDS—RULES—POLICE POWER.

1. St. 1895, p. 580, c. 488, § 24, authorizes the making of rules and regulations for the sanitary protection of all waters used by the metropolitan water board for the supply of any city, town, or water company. *Heid*, that a rule made under such section, prohibiting riparian proprietors from polluting a stream used for the water supply of a city, was a proper exercise of the state's police power, and was not, there-

fore, invalid as an infringement of the property rights of such owner.

2. Where the water of a stream had been appropriated for the water supply of a city, as authorized by St. 1895, p. 585, c. 488, the adoption of rules by the water board of such city prohibiting the pollution of the water was binding on a riparian proprietor without any taking of his property or provision for compensation.

3. Where a riparian proprietor claimed a prescriptive right to pollute the waters of a stream used to supply water to a city, such right was taken away by St. 1895, p. 572, c. 488, prohibiting such pollution, and providing (section 12) for the assessment of damages in case of the taking or interference with the use of a riparian proprietor's water rights by the water board of a city.

4. Where a metropolitan water board took all the waters that flowed through defendant's premises for the purpose of diverting the same for public uses, under St. 1895, p. 565, c. 488, "at or near the line of taking, and not elsewhere," and at the time of such taking Pub. St. 1882, c. 80, § 96 (Rev. Laws, c. 75, § 124), prohibited the discharge of polluted matter into the waters of a stream used for municipal purposes, a riparian proprietor some distance above the line of taking was not entitled to pollute the waters under an alleged prescriptive right not acquired before the date of the enactment of section 96, since the resolution of the board should be construed as taking "all the waters of the stream," to be diverted at a point below for use under the act.

Report from Superior Court, Suffolk County; John H. Harday, Judge.

Bill by one Sprague and others against one Dorr. On report from the superior court. Decree for plaintiffs.

Ralph W. Stewart, Asst. Atty. Gen., for plaintiffs. Boyd B. Jones and Chas. C. Milton, for defendant.

KNOWLTON, C. J. This is a bill in equity, brought by the members of the metropolitan water board to obtain an injunction against the discharge by the defendant of human excrement and the contents of water-closets and privies into Quinepoet river, a stream flowing through the defendant's premises in the town of Holden, and forming one of the tributaries of the South Branch of the Nashua river, a source of water supply for the cities, towns, and water companies named in St. 1895, p. 565, c. 488. The bill is brought under sections 27 and 28 (page 581) of this statute, to enforce rules and regulations made by the State Board of Health under the authority of section 24 (page 580). The defendant is the owner of a manufacturing establishment on this river, and he admits that, in violation of these rules and regulations, he is maintaining privies, whose contents are discharged directly into the stream. The plaintiffs, seeking to apply the principles on which St. 1902, p. 458, c. 535, is founded, "offered to pay the entire expense of constructing water-closets and privies at such point or points upon the defendant's premises as they claimed would reasonably accommodate the defendant's employes, and at the same time prevent the discharge of human excrement and the contents of privies and urinals into the water of the river," but the defend-

sant refused to allow this, contending that it would seriously interfere with his business and property. No question is made as to the reasonableness or validity of the rules and regulations, except that they are in "conflict with the defendant's rights of property." See *Brodhine v. Revere*, 182 Mass. 598, 66 N. E. 607. The statute (section 24) authorizes the making of "rules and regulations for the sanitary protection of all waters used by the metropolitan water board for the water supply of any city, town or water company," etc. That the exercise of such authority by the Legislature is within the police power as it is generally defined by the courts, and within the particular provisions of chapter 1, § 1, art. 4, of the Constitution of Massachusetts, is too plain for discussion. It may involve a regulation and modification of a use of streams which otherwise might be made under the common-law rights of riparian proprietors. These rights include every reasonable kind of use of the water as it passes by, having a proper regard for the rights of other proprietors on the stream below. It has often been said that riparian proprietors have no right to pollute the waters of a stream. In thinly settled and remote regions, upon streams whose waters are not appropriated to domestic use, impurities may sometimes be discharged into the water without interfering with any use of it that other riparian proprietors desire to make; but when the water is to be used for drinking, as the waters of most streams may be used, and of many streams are in fact used, the uses of riparian proprietors must be limited with a strict regard to cleanliness and sanitation. Hence statutes, special and general, have been passed from time to time, touching this subject. St. 1878, p. 133, c. 183; Rev. Laws, c. 75, § 124. These laws, so far as they merely prevent the discharge into streams of polluting matter of such kind and amount as will corrupt or impair the quality of the water, are a reasonable regulation of the exercise of private rights of property in reference to the common good, and they are not an interference with property that calls for compensation to the owners. As the water flowing through the defendant's premises is used as a part of the metropolitan water supply for numerous cities and towns, these rules and regulations control the exercise of his ordinary rights as a riparian proprietor, and are binding upon him without any taking of his property or provision for compensation. *Newton v. Joyce*, 166 Mass. 83, 44 N. E. 116, 55 Am. St. Rep. 385, and cases there cited.

The defendant contends and the plaintiffs deny that he has acquired by prescription a right to discharge these impurities into the stream. We need not decide the question thus raised, for, if he has acquired by prescription a right of property in the stream which he would not otherwise have, this right to pollute the stream is taken away by the statute and the action of the board in

taking the waters. For damages to his property he is entitled to compensation under section 12 (page 572) of the act. Damages "in property" are given whether they are sustained by a taking of property, "or by the interference with the use of any water, or by any other act or thing done by said board under this act." The metropolitan water board, under date of February 23, 1898, took all the waters that flow through the defendant's premises "for the purpose of diverting the same for the uses of said act, at or near said line of taking, and not elsewhere." The line of taking is on the stream at a considerable distance below the defendant's premises. A copy of this taking was filed in the registry of deeds in accordance with the statute, and all the other requirements of the act affecting the legality of the taking were duly complied with. The defendant contends that this taking was not sufficiently broad or definite in its description to include his prescriptive right. We are of opinion that this contention is not well founded. All the waters were taken to be diverted at a point below for use under the act. Pub. St. 1882, c. 80, § 96 (Rev. Laws, c. 75, § 124), was then in force, under which the discharge of polluting matter into waters so used was forbidden. Under St. 1895, p. 582, c. 488, § 30, in the absence of rules and regulations of the board of health, this general law applied to these waters as soon as they were taken; for it is not contended that prescriptive rights had been acquired by the defendant previously to July 1, 1878, the date of the enactment of the general law. Moreover, the statute authorizing the taking also authorized the making of rules and regulations for the sanitary protection of the waters. The act of taking, without express mention of any prescriptive right to pollute the waters, necessarily deprived the defendant of this right, if he had it, and brought him within the provision for compensation. As a riparian proprietor without other rights, the rules and regulations are binding upon him, and, if he has a prescriptive right to pollute the water, they are still binding, and must be enforced; for he is entitled to compensation for the loss of such a right. Whether, in the exercise of the police power for the preservation of the public health, the Legislature, without providing compensation, might forbid the pollution of water by one who has acquired a prescriptive right to pollute it as against other proprietors, we need not decide.

Decree for the plaintiffs.

(184 Mass. 596)

SELLECK et al. v. GARLAND.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

ACTION ON CONTRACT—DEFENSE—EVIDENCE—
APPEAL—REVIEW.

1. In an action on a contract to pay plaintiff a sum of money on confirmation by judgment of title to certain land in defendant, plaintiff

having shown the judgment, it was incumbent on defendant to show payment.

2. An objection on appeal by defendant that the confirmation of title, being by judgment, could not be shown by his testimony as a witness for plaintiff, will not be considered, the point not having been raised below or exception taken to the admissibility of the evidence.

Exceptions from Superior Court, Suffolk County; Frederick Lawton, Judge.

Action by J. H. Selleck against James S. Garland. Judgment for plaintiffs, and defendant brings exceptions. Exceptions overruled.

Thomas J. Barry, for plaintiffs. William H. Garland, for defendant.

LATHROP, J. The only questions argued before us are the refusal of the judge to give the second and sixth requests for instructions. The assignment was given as collateral security for the payment of a judgment. The gist of the second request is that there was no evidence that the judgment was not paid. A prima facie case having been made out by the plaintiffs, they were entitled to recover, unless the defendant showed that the judgment had been paid. Payment is a matter of defense, and, if relied on by the defendant, must be alleged and proved. *Hilton v. Smith*, 5 Gray, 400; *Noxon v. De Wolf*, 10 Gray, 343, 348; *Clark v. Murphy*, 164 Mass. 490, 41 N. E. 674. The gist of the sixth request is that a reasonable time had not elapsed in which to pay the money. By the terms of the assignment the money was to be paid "with all convenient speed" after the title to the property was confirmed and possession given to the defendant. We are of opinion that on the evidence there was enough to show that there was a breach of the agreement on the part of the defendant.

At the argument of the case the defendant contended that the confirmation of his title, being by a judgment, was a matter of record, and that his admission as to his title to the real estate could not be received in place of the record. The answer to this is that no such point was raised in the court below, or exception taken to the admissibility of the evidence of the defendant, who was called as a witness by the plaintiffs.

Exceptions overruled.

(184 Mass. 566)

BOSTON ELECTRIC LIGHT CO. v. BOSTON TERMINAL CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1904.)

CONSTITUTIONAL LAW—IMPAIRMENT OF VESTED RIGHT—PUBLIC STREET—CONDUITS FOR ELECTRIC WIRES—FRANCHISE—CONSTRUCTION OF STATUTE.

1. An electric light company, as well as its predecessors in title, was incorporated under Pub. St. 1882, c. 106, which did not give any authority to use the public streets. Permission was given such predecessors to erect poles in the streets of Boston, on condition, among others, that they should remove them when so di-

rected by the board of aldermen, and that, if any of the conditions of the grant were not complied with, the board might remove the poles at the company's expense. Various ordinances were passed regulating the use of the public streets, none of which gave the electric light company any rights not terminable by the board of aldermen. St. 1894, p. 516, c. 454, provided for the gradual removal of all wires in the public streets of a certain portion of Boston. It included in terms "every person, firm, or corporation operating or intending to operate wires," etc., and gave to those then operating such wires an option to place them in underground conduits. The superintendent of streets was to issue permits for opening and occupying the streets necessary to carry out the act. Under the ordinances then in force these permits were conditioned that the person applying should remove the conduits and wires whenever directed to do so by the city council. *Held*, that the latter statute did not confer any franchise on the electric light company, which built a conduit thereunder, so as to render St. 1896, p. 520, c. 516, vacating certain portions of two streets in which the conduits were, unconstitutional, as impairing a vested right.

2. A right to revoke permission to use the streets of a city for laying electric wire conduits, reserved by ordinances and permits, may be exercised by the Legislature.

Exceptions from Superior Court, Suffolk County; Albert Mason, Judge.

Action by the Boston Electric Light Company against the Boston Terminal Company. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Everett W. Burdett and Chas. A. Snow, for plaintiff. Samuel Hoar and Woodward Hudson, for defendant.

KNOWLTON, C. J. This is an action of tort to recover the value of conduits laid by the plaintiff in portions of two public streets in Boston, which were discontinued by St. 1896, p. 520, c. 516, and taken by the defendant for a part of the site of the terminal station erected under the authority of this statute. The plaintiff brought a petition for damages for the taking of these conduits, which was before this court, and is reported in 182 Mass. 307, 65 N. E. 835. In that case it was decided that no part of the petitioner's property was taken, and, after a consideration of the uses to which public streets may be put in this commonwealth, and the rights of parties using them, under our general laws, the opinion proceeds as follows: "All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in public streets, and as giving them rights of property there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey private rights of property. Most of them expressly state the limitations upon the authority given, and make the petitioners subject to possible future proceedings terminating or modifying their rights." The statutes and ordinances relied on were then cited. The plaintiff now attacks the constitutionality of St. 1896, p. 520, c. 516, and seeks to bring this action within that

class of cases in which a statute has been held to confer upon a corporation a franchise, which includes a private right of property in streets and public places, that is protected by the Constitution of the United States under the contract created by action of the corporation under the statute. In view of the plaintiff's contention, it may be well to consider more particularly the authority under which these conduits were laid. The plaintiff was incorporated under the general laws contained in Pub. St. 1882, c. 106, for the purpose of conducting the business of manufacturing, generating, transmitting, and supplying electricity to be used in lighting in the city of Boston. This statute authorizes the organization of corporations for carrying on business of many different kinds, but it contains no special mention of business of this kind, and does not purport to give any authority to use the public streets. Most of the poles formerly used by the plaintiff on the streets referred to were erected by its predecessors in title—those in Kneeland street by the Brush Electric Lighting Company, and those in Federal street by the American Union Telegraph Company; which corporations, as we infer from the bill of exceptions, were organized under the same statute as the plaintiff. In reference to the erection of poles by each of these corporations the mayor and aldermen of Boston passed an order giving permission to erect the poles in the streets upon numerous stated conditions, one of which was that the company "shall remove said poles when so directed by said board" (of aldermen). Another was as follows: "Also on condition that if any of the above conditions are not complied with, the board of aldermen may remove said poles at the expense of said company." Ordinances were passed from time to time in regard to regulation and control of rights in the public streets, none of which purported to give to the plaintiff or to any similar company any rights which were not subject to control or termination at any time by the board of aldermen or the city council. The ordinance of 1885 (chapter 28), as amended by the ordinance of March 24, 1886, contains provisions as follows: "Telegraph, telephone and electric light companies, whether chartered by this or any other state, may lay wires under the streets of the city under the following regulations and not otherwise: * * * Second, that said company shall remove its conduits whenever directed so to do by the city council." It is therefore too plain for discussion that at the time of the passage of St. 1894, p. 516, c. 454, the plaintiff was using the streets of Boston for the support of its poles and wires under a license revocable at any time by the public authorities.

This statute provided for a gradual removal, under the direction of an officer called a "commissioner of wires," of all the wires and electrical appliances, with certain excep-

tions, in the public streets of a specified portion of the city of Boston, which included Federal street and Kneeland street. It applied to all owners or users of wires, cables, and conductors within this specified portion, and included in terms every "person, firm, or corporation operating or intending to operate wires, cables, or conductors in said section of said city." It gave to those then operating such wires the option to remove them without placing them elsewhere, or to put them underground in conduits to be constructed under regulations. It was made the duty of the superintendent of streets "to issue, subject to the usual conditions, all permits for opening and occupying the streets of said city, necessary to carry out the intent of this act, upon application of said commissioner." The usual conditions of permits were prescribed by the ordinances then in force. Ordinances bearing upon this subject are the Revised Ordinances of 1892, c. 3, § 21; Id. c. 36, §§ 8, 14, 16; and the ordinance of 1885 (chapter 28), as amended by the ordinance of March 24, 1886. The revised regulations of the board of aldermen of 1892 (chapter 5, § 1) leave the issuing of permits subject to existing ordinances as to terms, specifications, and conditions, and do not change the conditions affecting this case. Section 14 of chapter 36 of the Ordinances of 1892 deals particularly with permits to open and occupy portions of the streets for the purpose of laying, maintaining, and using "wires, pipes, or conduits under the surface thereof," and prescribes as one of the conditions that the person applying for the permit "shall remove the conduits and wires whenever directed * * * so to do by the city council." Other ordinances then existing also provided that such conduits might be laid only upon condition that they should be removed at any time when directed by the city council. The petitioner laid its conduits under a permit containing this condition. It now contends that it acquired a right of property in the street, such that the street could not be discontinued and appropriated to another public use without giving it compensation.

Under the charter of the city of Boston the control and management of the rights of the public in the streets and highways were vested in the mayor and aldermen and the city council. It has been the policy of these bodies to retain this control, and not to permit the acquisition of private rights in the public easement by individuals or corporations. Under our system of laws the fee remains in the original owner or his successors in title, and the land may be used by him in any way that is not inconsistent with the rights of the public under the easement acquired by them when the street was laid out. Upon a discontinuance the easement is terminated, and the entire estate reverts to the owner of the fee. It seems pretty plain that by St. 1894, p. 516, c. 454, the Legislature did not intend to create private rights which

should interfere with the power of the public authorities at any time to discontinue a street, or with the right of the owner of the fee, on the termination of the easement, to have his property unincumbered by any subsequently created interest. It cannot be supposed that every "person, firm, or corporation" who elected to put wires underground rather than to remove them was given a franchise which included an individual right of property in the public easement that previously had been taken from the landowner. Rather the meaning of the statute seems to be, that persons, firms, and corporations who were then using streets for the maintenance of poles or wires under a revocable license should remove them, and should be permitted, if they chose, to put them underground under a like revocable license. For years the ordinances had allowed conduits to be put underground only by virtue of such a revocable license, and St. 1894, p. 518, c. 454, only authorized this under permits containing the usual conditions. This construction of the statute is in accordance with the general policy of our law in regard to this easement of the public. The locations of our street railways in public streets are subject to revocation. Rev. Laws, c. 112, § 32. The construction of gas mains in a highway or street gives no right excepting a right to use the highway or street while it is a highway or street, and does not prevent the public authorities from altering or discontinuing it without a liability in damages. *Id.* c. 121, § 17; *Natick Gas Light Company v. Natick*, 175 Mass. 246-252, 56 N. E. 292. Under the statute just cited the erection and maintenance of gas pipes or poles and wires for lighting by electricity are subject to the direction and control of the mayor and aldermen or the selectmen. Though private corporations have sometimes been granted franchises by special acts of the Legislature, which give them permanent rights of property in public streets, the provisions of these laws are not applicable to the plaintiff in this action.

The contention that the right of revocation reserved by the ordinances and the permit to the city council cannot be exercised by the Legislature is without foundation. The Legislature is the supreme authority in regard to public rights in the streets and highways. This reservation of a right of revocation was a limitation of the plaintiff's right to continue its peculiar use of the street as one of the public by the maintenance of a conduit, and it was a part of the regulation of the rights of all the public. The reservation to the city council was to that body as a representative of the public, and not to it in a narrow or individual sense. The Legislature could at any time supersede the city council in the exercise of its powers, and could do anything that ought to be done in regard to this public easement. The important fact is that the plaintiff had been given no right which was not subject to the control of this ease-

ment by the proper authorities. See *City of Richmond v. Southern Bell Telephone Company*, 85 Fed. 19, 28 C. C. A. 659; *Southern Bell Telephone Company v. Richmond*, 103 Fed. 34, 44 C. C. A. 147.

The cases cited by the plaintiff in regard to legislative franchises which include rights of property in public places are not applicable to this case.

Exceptions overruled.

(194 Mass. 473)

A. J. TOWER CO. v. SOUTHERN PAC. CO.
(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1904.)

SHIPPING—INFLAMMABLE GOODS—OIL CLOTHING—STOWING ON DECK—CUSTOM—FOUNDATION FOR EVIDENCE—QUALIFICATION OF WITNESS—PRESUMPTION OF FACT FOR JURY.

1. In an action by a shipper against a carrier for loss of oil clothing (shipped under a bill of lading providing that inflammable goods shall be transported if the carrier chooses, on deck or elsewhere, and shall be at the shipper's risk), which goods were carried on the deck of defendant's steamer, became loose during a storm, and were thrown overboard to save other goods from damages and to prevent their interfering with the navigation of the vessel, defendant, by introduction, without objection, of the deposition of the steamer's captain that the oil clothing was stowed on deck because of their inflammable nature, laid a foundation for introduction of evidence to show a general usage that because of its character it was customary among steamship companies to stow oil clothing on deck, and to class it as inflammable goods.

2. The existence of a custom among steamship companies, in carrying oil clothing for shippers, to class it as inflammable goods, and stow it on deck, and the extent to which it prevails, may be shown by witnesses who, from long experience and observation, know what they and others do with such goods when they are loaded on vessels for carriage.

3. An experience of from 12 to 40 years in loading and stowing cargoes of vessels is sufficient to qualify witnesses to testify to a custom of steamship companies in carrying oil clothing for shippers to classify it as inflammable goods, and to stow it on deck.

4. Though in an action by a shipper against a carrier, a steamship company, for loss in a storm of oil clothing carried on the steamer's deck, there is ample uncontradicted evidence of a custom of steamship companies to classify oil clothing as inflammable goods, and as such to carry them on deck, raising a presumption that both parties to the contract of shipment knew it, and that it was thus part of their contract, the presumption is one of fact for the jury.

Exceptions from Superior Court, Suffolk County; Elisha B. Maynard, Judge.

Action by the A. J. Tower Company against the Southern Pacific Company for loss of goods shipped under a bill of lading providing that inflammable goods shall be transported, if the carrier chooses, on deck or elsewhere, and shall be at the shipper's or owner's risk. Verdict was ordered for defendant, and plaintiff brings exceptions. Exceptions sustained.

Robert F. Herrick, for plaintiff. Foster & Turner and George Hogg, for defendant.

¶ 3. See Evidence, vol. 20, Cent. Dig. § 253.

BRALEY, J. The goods named in the declaration having been delivered to and accepted by the defendant for transportation, it could not, as a common carrier, be relieved from the liability incurred by its undertaking to safely carry and deliver them, unless the oil clothing that constituted the consignment is within the exceptions provided for in the contract of affreightment. It is conceded that no loss would have occurred from any danger of the seas if the cases of oil clothing had been stowed below deck; and the defendant now seeks to be relieved from the payment of damages caused to the plaintiff by their loss on the ground that, being within the excepted articles classed as "inflammable goods," it had the right to transport them as it might choose, on deck or elsewhere, even if, by reason of their being stowed on deck, they became loose while in transit during a severe storm, and were thrown overboard, not only to save other goods from damage, but to prevent their interfering with the necessary and proper navigation of the ship. The burden of making out this defense is on the defendant. And for this purpose it might show by competent evidence the composition and classification of the goods that were shipped, and in so doing it would prove not only that they were within the class of merchandise that in the contract were at the shipper's or owner's risk, but that carrying them on deck would not be negligence on the part of the carrier. After the captain of the ship had stated in his deposition, to the admission of which in evidence no objection was made by the plaintiff, that the cases of oil clothing were stowed on deck because of their inflammable nature, a foundation had been laid for the introduction of evidence to show a general usage that because of its character it was customary among steamship companies to stow oil clothing upon deck, "and that it was to be classed as inflammable goods." *Daniels et al. v. Hudson River Ins. Co.*, 12 Cush. 416, 59 Am. Dec. 192. The existence of such a custom or usage and the extent to which it prevailed could be shown by witnesses who, from long experience and observation, knew what they and others did with such goods that were to be stowed on board, and then carried by vessels from port to port. All the deponents described what they did and had seen done in like conditions. They testified to a fact. *Haskins v. Warren*, 115 Mass. 514-535; *Hutchins v. Webster*, 165 Mass. 439-441, 43 N. E. 186. Whether the personal knowledge and experience of the several deponents was sufficient to qualify them to give such evidence was to be passed upon and determined by the judge presiding at the trial, and no good reason appears why his discretion was not exercised properly. An experience in loading and stowing cargoes of vessels, extending in the case of one witness over a period of 40 years and in that of another for at least 12 years, was sufficient.

The form of some of the questions objected to, as to what were the reasons for such a usage, did not call for the opinion of the witnesses as to whether or not it existed, but for a statement by them why oil clothing was stowed in this way; and because of its uniformity and long continuance such a method of stowage was evidence that it had ripened into a custom. Their testimony, with that of other witnesses, showed a general, uniform course of dealing as applied to the particular contract in issue so far as it related to the shipping and transportation of goods properly classified as oil clothing. Where a custom is general as applied to a particular transaction, the presumption is that both parties to the contract knew of it, and that it became incorporated in their contract, and is binding on them. And in an action on a contract in which one party introduces evidence of such general custom and claims that it enters into and forms a part of the agreement, he is not obliged to prove actual knowledge of it by the other party. There was ample evidence in this case, not contradicted by the plaintiff, not only of such a usage and custom, but that it "was the largest manufacturer of such goods in New England, and had for many years shipped goods to be carried by these steamship companies." For these reasons it became unnecessary for the defendant, in order to bind the plaintiff, to prove that it had actual knowledge of the custom relied on. *Stevens v. Reeves*, 9 Pick. 198-201; *Packard v. Earle*, 113 Mass. 280-283. But such a presumption is one of fact for the jury, and not of law for the court. *Winsor et al. v. Dillaway*, 4 Metc. 221-223; *Mooney v. Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277. The case should have been submitted to the jury to pass upon and determine this question, with instructions that the defendant must prove the alleged usage, and if, upon all the evidence, they were satisfied that such a usage or custom existed, then from its long continuance and the extent to which it had prevailed they would be warranted in finding that it was known to the plaintiff, and formed a part of the agreement; and, the defendant having brought itself within the exceptions of the bill of lading, the plaintiff could not recover.

Exceptions sustained.

(185 Mass. 22)

IN RE HUBBARD.

(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 7, 1804.)

ESTATES OF DECEDENTS—ADMINISTRATION—ADMINISTRATOR DE BONIS NON—APPOINTMENT—DEBT DUE FROM ESTATE.

1. Rev. Laws, c. 137, § 8, authorizes an appointment of an administrator de bonis non after the death, resignation, etc., of the administrator, if there are debts to the amount of \$20 remaining due from the estate. Chapter 141, § 9, makes an administrator not liable to the action of a creditor not commenced with-

in two years from the giving of an administration bond, save as subsequently provided. By section 10, the Supreme Court, where an action has not been prosecuted within the time limited, if of opinion that justice requires it, may give a creditor judgment against the estate; and section 13 provides that a creditor whose right of action does not accrue within two years from administration may have an order for the retention by the administrator of assets sufficient to satisfy the same. *Held* that, where there were no equitable considerations, and the creditor took no steps under section 13 to preserve his rights, and they became barred under section 9, there was no "debt due from the estate," within the meaning of chapter 137, § 8, so as to authorize the appointment of an administrator de bonis non.

Report from Supreme Judicial Court, Norfolk County.

Petition by Charles Hubbard for administration de bonis non of the estate of John E. Humphrey, deceased. Petition dismissed.

Carver & Blodgett, for petitioner. Gaston, Snow & Saltonstall, for sureties on bond.

KNOWLTON, C. J. This is a petition for administration de bonis non of the estate of John E. Humphrey, deceased. Humphrey died May 12, 1891. On October 26, 1892, Erastus Worthington, public administrator, was appointed administrator of his estate. On November 21, 1894, the final account of this administrator was allowed, and it appeared that there were no assets of the estate. On January 20, 1898, Erastus Worthington died. This petition is brought under Rev. Laws, c. 137, § 8, which authorizes the appointment of an administrator de bonis non after the death, resignation, or removal of a sole or surviving executor or administrator before the estate has been fully administered, if there is personal property of the deceased not administered to the amount of \$20, or debts to that amount remaining due from the estate, or anything remaining to be performed in the execution of the will, or if there is an order of distribution in accordance with the provisions of Rev. Laws, c. 150, § 26. In the present case there is no personal property not administered, there is nothing to be done in the execution of a will, and there is no order of distribution. The petitioner contends that there is a debt remaining due from the estate. But the debt referred to was long ago barred by the special statute of limitations (Rev. Laws, c. 138, § 9; *Id.*, c. 141, § 9). There is thus "a positive bar arising from lapse of time, which cannot be waived by the administrator, nor in any way be answered or avoided. Its effect is therefore controlling and decisive." *Heard v. Lodge*, 20 Pick. 53-58, 32 Am. Dec. 197. After the running of this special statute, a previously existing debt can in no way be made effectual as a "debt remaining due from the estate," for which the estate can be held answerable, unless there are special equitable considerations which bring the case within Rev. Laws, c. 141, § 10. *Thayer v. Hollis*, 3 Metc. 369; *Lamson v. Schutt*, 4

Allen, 359; *Aiken v. Morse*, 104 Mass. 277; *Robinson v. Hodge*, 117 Mass. 222. In the present case there is no suggestion of such equitable considerations. We are of opinion that a "debt remaining due from the estate," within the meaning of this statute, is a debt which is enforceable in such a way that the estate may be legally liable to pay it.

The liability on which the petitioner relies as a foundation for this petition arose upon a bond to discharge certain real estate from a mechanic's lien, as appears by the opinion in *Holmes v. Humphreys*, 181 Mass. 181, 63 N. E. 396. No proceedings appear to have been taken to preserve the rights of the obligees in the bond under Rev. Laws, c. 141, §§ 13-15, and the liability is not now a debt due from the estate, which authorizes the appointment of an administrator de bonis non.

Petition dismissed.

(134 Mass. 593)

O'BRIEN v. CITY OF WOBURN.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 7, 1904.)

MUNICIPAL CORPORATIONS—STREETS—INJURIES TO PEDESTRIANS—DEFECTS—NEGLIGENCE—EVIDENCE—CITY ORDINANCE—ATTTESTATION—JUDICIAL NOTICE—BILL OF EXCEPTIONS.

1. In an action against a city for injuries sustained by means of an alleged defect in a sidewalk, evidence of the number of miles of street defendant had to care for, and the amount available for the work, together with the valuation of its taxable property, and the amount appropriated and expended for highways, was competent to show that defendant's failure to remedy the defect in question was not due to a want of reasonable care and diligence.

2. In an action for injuries caused by a water shut-off in a sidewalk, which extended above its surface, a question asked of the superintendent of the city waterworks as to whether the city water or highway department took care of the shut-off boxes, as to keeping them level with the sidewalk, and a question asked of the city treasurer as to whether or not the water department of the city was not supported by water rates charged to water takers, and was not more than self-sustaining, were competent to rebut the city's defense of freedom from negligence by reason of the fact that the money available for the use of streets was insufficient to repair defects of the nature of that in question.

3. An objection to parol evidence of a fact in an action for injuries to plaintiff by a defect in a city sidewalk, on the ground that the fact was shown by a particular city ordinance, could not be sustained on appeal, where the bill of exceptions did not show that the ordinance was introduced in evidence in the superior court, and the ordinance was not presented to the Supreme Court on the argument of the exceptions.

4. A court cannot take judicial notice of a city ordinance.

5. Where it did not appear that a city ordinance was duly attested by the city clerk as required by St. 1889, p. 1073, c. 387, § 1, in order to be introduced in evidence, such ordinance

¶ 1. See *Highways*, vol. 25, Cent. Dig. §§ 325, 329; *Municipal Corporations*, vol. 36, Cent. Dig. § 1594, 1612.

could not be considered as affecting the right of a litigant to introduce parol proof on the subject covered by the ordinance.

Exceptions from Superior Court, Middlesex County; Jabez Fox, Judge.

Action by one O'Brien against the city of Woburn. From a judgment in favor of plaintiff, defendant brings exceptions. Overruled.

J. G. Maguire and G. L. Mayberry, for plaintiff. Francis P. Curran, for defendant.

LATHROP, J. The plaintiff stumbled over a water shut-off in the sidewalk of Green street, in the defendant city, fell, and sustained personal injuries, for which she seeks to recover damages in this action. The shut-off was in the traveled part of the sidewalk, and extended above the surface thereof, according to some of the witnesses, from a half inch on one side to an inch and a quarter on the other side; and, according to other witnesses, it so extended an inch and a half on one side, and two inches on the other. It is not controverted that it was competent for the jury to find that this was a defect. *Redford v. Woburn*, 176 Mass. 520, 57 N. E. 1008.

To show that, considering the number of miles of street the defendant had to care for, and the amount available for the work, its failure to remedy the defect ought not to be regarded as a want of reasonable care and diligence on the part of the defendant, it put in evidence, without objection, the number of miles of streets in Woburn, the valuation of the taxable property, the amount of money that could be raised by taxation, and the amount appropriated and expended for highways. This evidence was competent. *Rooney v. Randolph*, 128 Mass. 580; *Hayes v. Cambridge*, 136 Mass. 402; *Id.*, 138 Mass. 461; *Sanders v. Palmer*, 154 Mass. 475, 28 N. E. 778; *Weeks v. Needham*, 156 Mass. 289, 31 N. E. 8.

The only exceptions in the case are to two questions asked of two witnesses for the defendant by the plaintiff on cross-examination. Spencer, the superintendent of the waterworks of the defendant city, was asked whether the water department or the highway department took care of the shut-off boxes between the water mains and the premises of private takers, as to keeping them level with the sidewalk. The witness testified that the shut-offs were taken care of by the water department, and not by the highway department. The other question was put to the city treasurer, and was whether or not the water department of the defendant was not supported by water rates charged to water takers, and was not self-sustaining, and whether the income so received from the water department did not more than pay the expenses of said department. The witness answered in the affirmative.

We see no objection to these questions and answers. They were clearly competent for the purpose of meeting the evidence put in

by the defendant, and to show that the city had received from sources other than taxation sums of money which it had applied to remedy defects of the nature of the one in this case. See *Hayes v. Cambridge*, 138 Mass. 461.

One objection made to the first question was that the fact inquired of could not be proved by oral evidence. In support of this objection, the defendant has relied upon an ordinance of the defendant city, which he has set forth in his brief, and which requires records to be kept by each department of the city, and accounts to be kept of money expended. The short answer to this objection is that it does not appear from the bill of exceptions that the ordinance was put in evidence in the superior court, nor were the ordinances handed to this court at the argument before us. The court cannot take judicial cognizance of a city ordinance. To admit an ordinance of a city in evidence, it must be attested by the clerk of the city. *St. 1889, p. 1073, c. 387, § 1; Rev. Laws, c. 175, § 73.* Nothing of the kind appears here. It is unnecessary to consider, therefore, whether the ordinance, if properly attested and put in evidence, would have had any application to the question asked.

Exceptions overruled.

(185 Mass. 4)

EAST TENNESSEE LAND CO. v. LEESON.

SAME v. HOPEWELL.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

FOREIGN CORPORATIONS—ACTIONS—JUDGMENT—INTEREST—INSOLVENT CORPORATIONS—RECEIVERS—INTERVENTION—FINAL DECREE—RESTRAINING ORDER.

1. Under *Rev. Laws, c. 177, § 8*, providing that judgments for the payment of money shall bear interest from date, a decree for the payment of money made up in part of interest bears interest from the date of rendition.

2. A receiver of a foreign corporation, having begun suits against promoters, and having been compelled by judgment of the court to substitute the corporation as nominal plaintiff, filed an intervening petition as trustee; reciting that in that capacity he had become liable for the expense of the suits, and praying that it be ordered that any recovery should inure to his benefit. *Held*, that the filing of the petition did not prevent the entry of a final decree in favor of the corporation, as the receiver might abandon his petition in intervention, and he did this by taking the final decree.

3. As a matter of form, the amount of costs should be stated in a decree.

4. A decree will not be set aside for mere matter of form.

Appeal from Superior Court, Suffolk County; Jas. R. Dunbar, Judge.

Consolidated suits by the East Tennessee Land Company against Joseph R. Leeson and John Hopewell, Jr. From a decree for plaintiff, defendants appeal. Affirmed.

This suit was originally instituted by one Hayward, as receiver of the East Tennessee

Land Company, an insolvent foreign corporation, against these defendants, as promoters of the corporation; and in that action (176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725) it was found that the promoters, subsequent to the creation of the corporation, and while they were the sole stockholders, voted to issue its corporate stock to themselves in payment for services rendered in securing options on land which they assigned to the corporation. The stock so issued equaled the estimated profits to be derived from such options. Thereafter the promoters invited the public to subscribe to the stock, without disclosing the facts to the subscribers, or obtaining their consent to the payment of such remuneration, and it was there held that the promoters were guilty of fraud, and that an action could be maintained against them without returning the lands acquired under the options. It was also held that the receiver of such foreign corporation could not maintain the actions, but that there must be a substitution of the corporation as the nominal party plaintiff, and that the plaintiff might elect to sue either for the recovery of the stock, or for damages for the loss thereof. The corporation was so substituted, though the receiver continued in the active control and prosecution of the proceedings, and plaintiff elected to proceed for damages. Subsequently the receiver, as such, filed a petition in intervention, reciting that, under the orders of the United States Circuit Court directing the institution and prosecution of these suits, the petitioner had been charged with the entire burden of expense thereof, and praying that it be ordered that any recovery had as against the defendant should inure to the benefit of the petitioner as receiver, and that he alone should be entitled to collect the same.

See 66 N. E. 427.

I. R. Clark, for appellants. W. H. Russell, W. B. Winslow, L. G. Farmer, and G. W. Easley, for appellee.

LORING, J. This is a frivolous appeal.

1. By Rev. Laws, c. 177, § 8, a judgment bears interest from its date, although the amount of the judgment in part is made up of interest. The same rule applies to a decree in equity.

2. The filing of the intervening petition by the receiver did not prevent the entry of a final decree. By taking a final decree in these suits, the receiver, who is prosecuting them in the name of the East Tennessee Land Company, abandoned his intervening petition. He had a right to do so. The cases cited by the appellant as to when a case is ripe for judgment under a rule of court allowing judgment to be entered up as

of course have nothing to do with this case.

3. The restraining orders printed as part of the record in these suits did not prevent the entry of a final decree. These orders recite that the two suits now before us are pending, and that decrees for the payment of \$38,339.25 have been entered in each of them in favor of the plaintiff, from which decrees appeals have been taken. They then recite that "the proceeds of said decrees, if the same are affirmed, will be a fund out of which the several plaintiffs herein claim that their demands against said East Tennessee Land Company should be paid," and that the "parties plaintiff in these suits, and the said East Tennessee Land Company and its receiver, desire the immediate collection of said decrees, if they be affirmed"; and thereupon it is ordered that no compromise of the suits now before us shall be made without the authority of the court entering the restraining order, and "if said decrees be affirmed by the said Supreme Judicial Court, as against said Leeson and Hopewell, for the said sums or for any sums, and if execution shall be awarded upon said decrees, then, in the event of the payment of said amounts by the said Leeson or the said Hopewell, either with or without execution, the same shall be collected by, and paid into the hands of, Henry E. Bellew, one of the assistant clerks of this court, as receiver of said funds." It is manifest that the order was made in another suit or in other suits, and was filed in this suit by mistake, or to charge the plaintiff with notice that this order had been made in the other suit. It was not the determination of any issue raised in these suits.

4. It is true that the restraining order is not well drawn. It provides that, in case the decrees are affirmed and execution issues, then, in the event of payment, with or without execution, the same shall be collected by the receiver. If there is any doubt whether, under that order, payment can be made without execution being taken out, or if there is any doubt whether payment can be made in accordance with the execution to the plaintiff in these suits, the remedy of the defendants is to apply in those suits for a modification of the restraining order. The final decree entered in the suits now before us disposed of all issues raised by the plaintiff or defendants not abandoned by them.

5. As matter of form, the amount of costs should have been stated in the decree. But the decree will not be set aside for a mere matter of form.

The entry must be: Decree affirmed, with double costs, and interest at the rate of 12 per cent. per annum from the date when the appeal now before this court was taken.

(184 Mass. 534)

HARRIMAN et al. v. TYNDALE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1904.)

SPECIFIC PERFORMANCE—CONTRACT TO CONVEY LAND—TENDER OF PAYMENT—PURCHASE FROM TRUSTEE IN BANKRUPTCY—STIPULATIONS—AGREEMENT OF ADMINISTRATOR—PREFERENCES.

1. A contract signed only by D., by which he agrees to convey land to M. on the payment of a certain sum at certain times, entitles M. to a good title on his compliance with the conditions as to payment.

2. D. contracted to convey land to M. on payment of a certain sum, \$1,000 at one time, \$4,000 at another, and the balance at another. The \$1,000 was paid, and the \$4,000 tendered when due, but D. refused to accept it; stating, however, his willingness to accept it and carry out the agreement on the removal of an injunction, and promising to inform M. when the injunction was dissolved. *Held* that, until he received further information from D., there was no duty of M. to make or tender payments, though H., to whom M. had assigned the contract as collateral, and who was M.'s counsel, learned, in his capacity as assignee in insolvency of a third person, of the dissolution of the injunction.

3. A purchaser from a trustee in bankruptcy of the bankrupt's interest in a contract for conveyance of land to him has all the rights therein that the bankrupt would have had but for his bankruptcy, and is entitled to enforce the contract as though M. had not previously assigned it as collateral to H., except that the proceeds of the suit are applicable in the first instance to H.'s debt.

4. D. contracted to convey land to M. At the time D. had no title. Afterwards D. controlled the title, and caused it to be conveyed to W., to be secretly held for D.'s benefit. T., administrator of D., commenced suit against W. for the land. Thereafter the demands against the estate of D., based on said contract of M. and D., were submitted to arbitration; it being agreed that, if the award should be that there was a right to specific performance, the money value thereof should be received in place of specific performance. Subsequently the suit of T. against W. was compromised and settled, and afterwards it was stipulated between T. and the representatives of M. that the matters submitted to arbitration were to be determined as if said suit had not been terminated. *Held*, that a finding that M.'s representatives were entitled to specific performance against D.'s administrator was authorized.

5. A stipulation of the administrator of an insolvent estate that, if it be decided that one has the right of specific performance of an agreement of deceased to convey land, there shall be a money judgment for the right, which shall be a preferred claim, is valid against other creditors of the estate only to the extent of the money that the estate has received in settlement of its claim against another for the land.

Appeal and Exceptions from Superior Court; John H. Hardy, Judge.

Submission to arbitration of demands of Hiram P. Harriman and Stephen Jennings, on a contract, against Theodore H. Tyndale, administrator de bonis non cum testamento annexo of Micah Dyer, Jr., deceased. The superior court overruled exceptions of defendant to the report of the arbitrator, and allowed plaintiffs' motion for judgment. Defendant appeals, and brings exceptions. Judgment affirmed. Exceptions overruled.

The agreement for arbitration, the stipulation of the parties, the contract on which the demands were based, and the arbitrator's report, in part, are as follows:

Agreement for arbitration:

"Know all men by these presents, That we, Stephen Jennings, of Boston, in the county of Suffolk, Hiram P. Harriman, of Wellfleet, in the county of Barnstable, and Theodore H. Tyndale, of Weymouth, in the county of Norfolk, as he is administrator de bonis non with the will annexed of Micah Dyer, Jr., late of said Boston, deceased, hereby agree to submit the demands of said Stephen Jennings and Hiram P. Harriman against the estate of said Micah Dyer, Jr., based upon an agreement under which the said Hiram P. Harriman had certain rights, a copy of which said agreement is hereto annexed marked 'A,' and all other demands between them, as the case may be, to the Honorable Hosea M. Knowlton, of New Bedford, in the county of Bristol, whose award being made and reported within one year from this date to the Superior Court, the judgment and decree thereon shall be final; it being agreed that in case said arbitrator shall award that said parties are entitled to a specific performance of said agreement he shall file his award accordingly, and shall determine the money value of such specific performance, and said Hiram P. Harriman and Stephen Jennings shall accept and receive the same in place of such specific performance. And in case said arbitrator should award damages for a breach of contract for said agreement, judgment on said award shall have the same effect as is provided by section 30 of Chapter 142 of the Revised Laws, in the case of a judgment against the insolvent estate of a deceased person."

Stipulation:

"In the matter of the claims or demands submitted to Hosea M. Knowlton, Esquire, between the above-named parties, it is agreed and stipulated that the discharge and dismissal of the suit pending between Alfred A. Marcus and Walter R. Dyer, in relation to the property No. 94 Essex street, and the dismissal or other entry in the bills in equity pending between said Theodore H. Tyndale, as administrator as aforesaid, and Walter R. Dyer et als., in the Superior Court for the county of Suffolk, shall not in any way affect the rights of the parties to said submission to arbitration before mentioned, pending before Hosea M. Knowlton, the matters submitted before said Hosea M. Knowlton to be determined by him as though none of the above-mentioned suits or actions had been terminated or dismissed subsequent to the date of said submission."

Contract:

"Know all men, that I, Micah Dyer, Jr., of Boston, in the county of Suffolk and Commonwealth of Massachusetts, in consideration of one dollar and other valuable considerations paid by Alfred A. Marcus, of said Boston, the receipt whereof is hereby acknowledged, do

¶ 1. See *Frauds, Statute of*, vol. 23, Cent. Dig. § 15.

hereby agree to convey, or cause to be conveyed, to said Alfred A. Marcus, his heirs or assigns, estate number ninety-four (94) Essex street, in said Boston, together with whatever may be due from the city of Boston, for damages occasioned by the taking of a portion of said estate heretofore, and which suit is now pending against city, upon the payment to me by the said Alfred A. Marcus, his heirs or assigns, of the sum of forty-five thousand dollars (\$45,000) and the interest on two mortgages, one of \$18,000 and one of \$12,000, said interest due for a time not exceeding five months, also the taxes of the year 1895; upon the condition that one thousand dollars (\$1,000) of said amount shall be paid on or before March 12, 1896, at which payment the payment of the balance may be extended to April 13, 1896, when, if \$4,000, four thousand dollars, more is paid, the payment of the balance may be extended to June 12, 1896; the said Marcus, his heirs or assigns, to pay all expenses of the lawsuit against the city of Boston for said damages.

"The deed of said premises to be given to be dated the twelfth day of March, eighteen hundred and ninety-six.

"Witness my hand and seal this fifth day of March, eighteen hundred and ninety-six.

"Micah Dyer, Jr."

Arbitrator's report:

"Pursuant to the stipulations hereto annexed, the parties therein named came before me on several different days. I heard their testimony and that of their witnesses, examined their vouchers, and report and award as follows:

"Wherever the word 'Tyndale' is hereinafter used, thereby is meant 'Theodore H. Tyndale, administrator de bonis non with the will annexed of Micah Dyer, Jr.'; by the word 'Micah' is meant 'Micah Dyer, Jr.'; by the word 'Walter' is meant his son 'Walter R. Dyer'; and by the word 'Marcus' is meant 'Alfred A. Marcus,' unless a different person is designated.

"At some time between the 16th and 21st days of November, 1892, one Simeon Marcus, of Boston, in whom stood the record title, sold and conveyed to one Morris Gutlon, of said Boston, for \$34,000, the estate numbered 94 Essex street, in said Boston, consisting of about 1,964 feet of land, on which stood a dilapidated dwelling house. November 21, 1892, Gutlon executed a first mortgage on said property to one Foster for \$18,000, which was on the 16th day of November, 1895, assigned to the Warren Institution for Savings. On the 22d day of November, 1892, Gutlon executed a second mortgage on said property to Micah Dyer, Jr., for \$12,000, which was on the same day assigned to one Reuben E. Demmon. Gutlon thereupon proceeded to tear down the old house, and erected in place of it a mercantile building. On the 8th day of June, 1893, Gutlon conveyed said estate, subject to said mortgages, for a nominal consideration, to one William P. Fitzgerald, who

was a straw man employed by Simeon Marcus and his father, Alfred A. Marcus, in their various real estate transactions, who on the same day executed a third mortgage on said property for \$30,000 to Julia K. Dyer, wife of Micah, as collateral security for a note of A. A. Marcus & Son for \$17,000 held by Micah. It had been Micah's practice for many years to purchase large quantities of real estate and mortgages in his wife's name, either from motives of convenience or prudence, treating them thereafter in all respects as his own; she, at his request, and without question, signing such instruments as were presented to her for signature. She paid nothing for, and received nothing from, these transactions. In accordance with this practice, said \$30,000 mortgage was taken in her name, although it really belonged to Micah. Julia K. Dyer subsequently became financially embarrassed, owing to indorsing notes to a large amount for her son Willard K. Dyer, without her husband's knowledge, and was obliged to go into insolvency, being adjudicated an insolvent on March 9, 1895, shortly before which event, to wit, on February 25, 1895, and in anticipation of it, she assigned said \$30,000 mortgage to Micah through one Willard O. Ruggles. Neither her assignment to Ruggles, nor his to Micah, were recorded, however, until nearly two years later, to wit, February 20, 1897, up to which date said Julia K. Dyer, so far as the record showed, remained the owner of said mortgage. Some time after said Gutlon completed his building on said premises, but prior to March 5, 1896, the city of Boston widened Essex street, and, as incidental thereto, cut off the front of the building erected by said Gutlon, and took 151 square feet of the land, leaving 1,813 square feet in the lot, and the building thereon in an untenable condition.

"Such being the condition of the estate, on the 5th day of March, 1896, Micah made a written agreement under seal with Marcus, a copy of which, marked 'A,' is attached to the stipulations hereto annexed. It appeared from the testimony of Marcus, which was not contradicted, that at the time said agreement was made, and for some time both before and after that date, Harriman was his counsel. But the only specific legal services performed by Harriman for Marcus during that period, as disclosed by the evidence, were that Harriman prepared said agreement at the request of Marcus, in part from Marcus' instructions and in part from Micah's memoranda, and that, at Marcus' request, he did what he could to get the money from the city, referred to in said agreement, and, to that end, had conferences with the city conveyancer, hunted up said Fitzgerald, who at the time held the legal title to the property, and informed Marcus what was necessary to be done in order to collect said money; but for these services he was paid nothing. At the time said agreement was made, said estate was subject to the three mortgages

above stated, to wit, the first mortgage, for \$18,000, held by the Warren Institution for Savings, upon which interest at the rate of 4½ per cent. had been paid up to November 21, 1895; the second mortgage, for \$12,000, held by Demmon, upon which interest at the rate of 5 per cent. had been paid up to November 22, 1895; and the third mortgage, for \$30,000, standing in the name of Julia K. Dyer, but really belonging to Micah, and given as security for the Marcus note of \$17,000 as aforesaid. The claim against the city for damages occasioned by the widening of Essex street had not at that time been settled, but was still in litigation. The city subsequently paid \$6,218 in settlement of this claim, although when such payment was made was not shown, which sum was received and retained by Micah or Walter; but what, if any, expenses were incurred in collecting this amount did not appear. The taxes upon the property for the year 1895 were \$435.20.

"It was contended by Tyndale that under this agreement the title to the estate which Marcus was to get was subject to the two mortgages therein stated, aggregating \$30,000, while it was contended on the other hand by Jennings and Harriman that Marcus' title thereunder was to be free from incumbrances. In accordance with said agreement, Marcus paid Micah \$1,000 on the 12th day of March, 1896, said sum being advanced to him by Harriman for that purpose; and at the same time Marcus executed under seal, upon the original agreement, for a nominal consideration, a blank assignment of all his rights thereunder, which agreement, with the assignment thereof, was thereupon delivered by Marcus to Harriman to secure him for the \$1,000 then advanced by him, and for such further advances as he might make thereafter to said Marcus or on his account. At about this time (Fitzgerald being the nominal owner of the equity) Micah undertook to get title to said estate through the foreclosure of the \$30,000 mortgage standing in the name of his wife; and to that end Willard O. Ruggles, claiming to be the assignee and holder of said mortgage, but in reality acting for and in behalf of Micah, advertised said property for sale on April 3, 1896, pursuant to the power of sale contained in said mortgage, the date of the first publication of the notice of such sale being March 9, 1896. As stated above, at that time the record title to said mortgage stood in Julia K. Dyer. She had been adjudicated insolvent March 9, 1895, and Harriman had been appointed her assignee in insolvency. Subsequently Henry W. Putnam was appointed co-assignee with him. Immediately upon learning of the threatened foreclosure by Ruggles, to wit, on April 2, 1896, Harriman, as assignee in insolvency of Julia K. Dyer, and being at that time the sole assignee, brought a bill in equity against Ruggles, and obtained an injunction restraining him from making such foreclosure. It was

claimed by Tyndale that said injunction having been obtained by Harriman, whereby Micah was prevented from acquiring title to the estate, and therefore, as Micah said, and as Marcus and Harriman believed, from carrying out said agreement in the way intended, Marcus and Harriman could not avail themselves of Micah's supposed disability so to do as an excuse for not tendering the price at the times and in the sums provided in the agreement.

"On April 13, 1896 (the day when the payment of \$4,000 was due under said agreement), Marcus went to the office of Micah, and made him a legal tender of \$4,000. Harriman accompanied Marcus at the latter's request, merely as a witness, taking no part in the conference. At that time Marcus knew of the injunction and its effect. He nevertheless made the tender as a matter of precaution, in order to preserve his rights under the agreement. Micah refused to accept the money on the ground that, having been enjoined from foreclosing the \$30,000 mortgage, he therefore was, as he said, and as Marcus and Harriman both believed, prevented from carrying out the agreement as he had intended, but stated his willingness to do so, and promised Marcus that as soon as the injunction was dissolved, and he was free to make the conveyance, he would let Marcus know. After that date Marcus made no further tender to Micah under the agreement. Between April 13, 1896, and February 2, 1897, Marcus saw Micah a number of times when the matter of the agreement was brought up; Micah always stating that as soon as he was relieved of the injunction he stood ready to carry out the agreement. As a matter of fact, the injunction was not dissolved until February 2, 1897, and then without the knowledge of Marcus, although with the knowledge of Harriman; and neither then, nor at any time thereafter, did Micah notify Marcus of the fact that he was able and willing to carry out the agreement. An offer of composition having been made to and accepted by the creditors of Julia K. Dyer shortly before February 2, 1897, and it having been arranged that the money for the dividend should be furnished by the National Security Bank, and that Micah and his son Walter should become liable to the bank therefor, the assignees in insolvency of Julia K. Dyer, under a decree of the court of insolvency, and for the purpose of carrying out said settlement, on the 2d day of February, 1897, had said injunction dissolved, and on that day conveyed to Charles R. Batt, cashier of the National Security Bank, all the estate which they claimed to be of Julia K. Dyer in their hands, except said \$30,000 mortgage, which was not included in this conveyance. At the same time, and for the same purpose, Micah and his son Walter conveyed to said Batt certain pieces of property, the title to which stood in their several names. Instead of making any attempt to acquire

title to 94 Essex street (the injunction being then dissolved), and putting himself in a position to carry out said agreement, on February 21, 1897, without the knowledge of Marcus, and for the purpose of assisting in carrying through his wife's composition, and, by means of the conveyance through Batt to Walter, of securing the property to his family, out of the reach of his creditors, and to hinder, delay, and defraud them (which facts, however, did not appear till long afterwards), Micah assigned to said Batt the \$30,000 mortgage above referred to, having recorded the day previous the assignments thereof from Julia K. Dyer to Ruggles, and from Ruggles to him, made two years before. Micah was taken sick shortly after. He did not go to his office after April 16, 1897, and died November 24, 1897, and there was no evidence that on or after March 5, 1896, he had or acquired any title to said premises, except as herein stated. During his sickness Marcus made no attempt to enforce his rights under the agreement.

"The above conveyances were made to said Batt upon a trust declared by him at the time, to the effect that, after the bank had been reimbursed for such sums as it had advanced for the composition dividend, all of the property remaining in his hands as trustee was to be conveyed by him to Walter, free and discharged of all trust. Batt foreclosed the \$30,000 mortgage on 94 Essex street March 18, 1897; the property being bid in for him at the sale by one McLeod, subject to the two mortgages, of \$18,000 and \$12,000, respectively, above referred to; Martha H. Dyer, wife of Walter, to whom the \$12,000 mortgage had been previously assigned by Demon, releasing it to McLeod. He conveyed the property to Batt, trustee, March 20, 1897, who thereby got the title, subject to the \$18,000 mortgage held by the Warren Institution for Savings. As a part of this transaction, at the request of Micah, Fitzgerald, the nominal owner of the equity, executed a conveyance thereof in blank; the deed being delivered to Micah by Marcus, or with his knowledge and consent; the same being required by the city of Boston before it would settle the claim for damages caused by the widening of Essex street, above referred to. Said deed of Fitzgerald was never recorded, and whose name (if any one's) was inserted as grantee therein, and whether said deed was retained by Micah, or was delivered by him to some one else, did not appear. This property, with other parcels, Batt conveyed to Walter, under the terms of the trust, on July 2, 1897. Walter was a party to the aforesaid trust arrangement, and took the conveyance of said property upon a secret trust for Micah, and with knowledge of his aforesaid fraudulent purpose. Upon getting title from Batt, Walter at once gave a second mortgage on the property, for \$7,000, to the Warren Institution for Savings, and a third mortgage, for \$9,000, to one Potter, and

shortly after put a new front on the building, made some alterations in the interior, and put in an elevator.

"Such was the condition of the estate on November 24, 1897, the date of Micah's death. Walter had known all along of the agreement with Marcus in regard to 94 Essex street, and took title thereto with such knowledge. In December, 1897, his (Micah's) son Walter was appointed executor of his will. He was subsequently removed from his position as executor, and Theodore H. Tyndale was appointed administrator de bonis non with the will annexed of the estate of Micah Dyer, which was subsequently represented to be, and was in fact, insolvent. After Walter was appointed executor of his father's will, and before his removal from that office, Marcus brought a suit in equity against him individually, and not as representing Micah, seeking a specific performance of the aforesaid agreement regarding 94 Essex street. After a hearing a final decree was entered dismissing the bill. It was claimed by Tyndale that thereby the rights of Marcus and his assigns to specific performance under this submission to arbitration became *res adjudicata*. Subsequently Tyndale, as administrator, etc., brought suit against Walter to recover certain of the properties in his hands (among them, 94 Essex street) on the ground that they had been conveyed to him by Micah through the trust to Batt, or otherwise, when Micah was insolvent, and with intent to hinder, delay, and defraud Micah's creditors. This suit was referred to a master, who found and reported, in substance, that such conveyance was made by Micah when insolvent, and with intent to hinder, delay, and defraud his creditors. Before a final hearing the suit was compromised, under a decree of the probate court, for a certain sum of money and other considerations; the bill being dismissed, and Tyndale giving to Walter a release under seal of all claims and demands which as administrator, etc., aforesaid, he had against him. Tyndale, as administrator aforesaid, did not thereunder, nor at any time, get the legal title to 94 Essex street. Said decree was entered October 28, 1902, without objection; a citation upon Tyndale's petition therefor having been duly published. Harriman had previously entered his appearance as attorney for Stephen Jennings in opposition to the allowance of said petition, but withdrew his appearance on the day when the decree was entered as aforesaid. Pending these matters, to wit, on March 20, 1900, Alfred A. Marcus and Simeon Marcus, both individually and as composing the firm of Alfred A. Marcus & Son, went into bankruptcy, and William T. Way, Esq., was appointed their trustee. * * * On the 8th day of May, 1901, as trustee aforesaid, said Way sold and conveyed to Stephen Jennings, of Boston, for the sum of \$894, all the right, title, and interest of said bankrupts in and to all property and choses in action

KNOWLTON, C. J. The first question to be considered upon these bills of exceptions is whether there was error of law in the admission or exclusion of evidence. At the time of his death in September, 1893, the testator was about 84 years of age. The will in question was executed in April, 1895. It was contended by the appellant that he was not then of sound mind, but was afflicted with senile dementia, a progressive disease, which continued to the time of his death. Without objection by either party, the court fixed January 1, 1897, as the time up to which witnesses might testify of their observation of him in regard to his appearance and conduct and apparent condition. The determination of the question how far subsequently a party may go for testimony to show a person's mental condition at a given time must be left very largely to the discretion of the presiding justice, and there is nothing to indicate that this discretion was not wisely exercised in the present case. *Shaller v. Bumstead*, 99 Mass. 112-130; *Com. v. Pomeroy*, 117 Mass. 143-148; *Lane v. Moore*, 151 Mass. 90, 23 N. E. 828, 21 Am. St. Rep. 430. The appellant asked the attending physician to testify of what disease the testator died. The question was excluded, and the appellant excepted. This question related to the condition of the testator more than a year and a half after the date by which the testimony of other witnesses as to his condition was limited, and nearly three years and a half after the execution of the will. The admissibility of the evidence was urged at the trial on the ground that it would be a foundation for expert testimony tending to show, from his condition at the time of his death, that this progressive disease was upon him, and made him of unsound mind, at the time of the execution of the will. We are of opinion that the testimony was rightly excluded. It was not the duty of the judge to receive it merely because an expert would testify that, in his opinion, it had some significance.

The other questions of evidence involve a consideration of the rule as to testimony of nonexpert witnesses in regard to the mental condition of a testator. The rule in this commonwealth differs from that in some places, but it has long been well established, and this court has repeatedly refused to change it. Such witnesses are not permitted to give their opinion in regard to the mental condition of one whose sanity is called in question. *May v. Bradlee*, 127 Mass. 414; *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1114; *Smith v. Smith*, 157 Mass. 389, 32 N. E. 348; *Clark v. Clark*, 168 Mass. 523, 47 N. E. 510. Good reasons can be given for and against the rule, which we need not now consider. In the practical application of it difficulties are encountered when we attempt to draw the line between facts which indicate a mental condition and a statement of the condition itself, and especially when we try

to discriminate between facts given by way of description, which necessarily involve in their statement more or less of opinion as to familiar objects and well-known matters, and the inferences and deductions from these facts, which take the form of direct opinion as to the mental condition of the person. An exception to the ordinary rule that witnesses cannot give their opinions in testimony allows them to state their judgment and estimate as to many things, such as the size, weight, or color of objects, and the measurement of time or space. *Com. v. O'Brien*, 134 Mass. 198; *Com. v. Sturtivant*, 117 Mass. 122-133, 19 Am. Rep. 401; *O'Neill v. Hanscom*, 175 Mass. 313, 56 N. E. 587. Questions to such witnesses, bearing upon the mental condition of a testator, should be so framed as to call for facts and not for opinions. These facts involving a narration and description of appearances and conduct and conditions, may be such as cannot be given without including some element of opinion that comes within the exception stated above. A witness may properly be asked if he has observed any facts that have relation to the subject upon which information is sought. Such a question can usually be answered by "Yes" or "No." If he answers in the affirmative, he may be asked to state what he observed. If the purpose is to prove a negative, the question may be so framed as to direct the attention of the witness to his observation as to peculiarities of speech or manner or conduct, or anything else indicating an unusual mental condition.

The question of the appellant to Mrs. French, "From these facts, * * * what do you infer in your own mind as to Mr. Jordan's mental capacity?" was rightly excluded. It called directly for the inference and opinion of the witness as to the testator's mental capacity. The questions put by the executor, "Whether you noticed any failure of memory?" "Did you ever notice anything to indicate that he was not of sound mind?" were competent. They directed the attention of the witness to what he had noticed by way of external indications in regard to an internal condition, and they were put for the purpose of proving a negative. The question to Goodrich, "Whether or not you noticed any failure of intelligence on his part?" and the question to Hall, "Was his memory good or bad?" might be interpreted as calling for nothing but observation of external manifestations. It would be possible to interpret them as calling for an opinion as to the testator's mental condition. It would be easy for a judge directing the course of a trial to deal with such questions by requiring modification or explanation, or otherwise, in such a way as to preserve the rights of the parties, and leave no doubt as to the competency of the testimony admitted. The answers to these questions in the present case show that the inquiries were treated as calling for the observation of the witness, and in each an-

swer the witness referred to what he had seen. There was no error in admitting the testimony as given in the answers. *Barker v. Comins*, 110 Mass. 477-487; *Nash v. Hunt*, 116 Mass. 237. One Middleton was asked, "When you last saw Mr. Jordan, what facts did you observe as to his powers of comprehension, mental grasp, coherency, power of reasoning, memory, intelligence, will, and accuracy?" A similar question was put to one Kelley. The first witness answered, "His powers seemed to be complete and perfect." The second witness answered, "So far as I remember, each time that I saw Mr. Jordan I should say that he was in possession of clear faculties and mental powers." These questions called only for the facts observed by the witnesses in reference to a stated subject. Neither of the answers was responsive. Neither witness stated anything that he had observed, but each volunteered a statement of his opinion as to the testator's condition of mind. It is hardly possible to conceive of a statement more directly presenting such an opinion than each of these answers. The appellant objected to each of the answers, and moved that it be stricken out. The court admitted them, and the appellant excepted. There is no case in this commonwealth that is a precedent for the ruling. The great reluctance of this court to set aside a verdict on account of the admission or rejection of some piece of evidence of slight importance, when it seems improbable that a different ruling would have changed the result, has often led to an adoption of the interpretation of the presiding judge when there is doubt as to the construction that should be put upon the testimony in reference to its competency. This has often been illustrated when it was uncertain whether the witness was giving an account of external indications or a statement of his opinion as to a mental condition. In the present case there is no room for such doubt, and we are of opinion that the evidence ought not to have been admitted.

The appellant contends that there was error in the proceedings after the case had been given to the jury. After the jury had been in deliberation about 20 hours, they were sent for by the presiding justice, and, without a request for further instructions, were given the instructions which appear in the record. They were told, in substance, that if they should conclude that there were some things in the working out of this will which might be unjust, they could not compromise it, and say how it should be decided, as in an ordinary civil case, but that they must answer the questions "Yes" or "No." The judge then suggested to them that if that should be their opinion, after having come to a decision upon the issues, there would be no objection to their stating in writing their recommendation as to what should be done by the parties by way of working a remedy for such injustice. The subject was

presented to the jury pretty fully by the judge, who said, among other things: "The parties themselves would not be bound to carry out your suggestions, and perhaps the court could not; but possibly, coming from the jury, who had heard the whole case, it might be of value and useful to the parties in working out what you regard as more even and adequate justice." This was on Friday, May 30th, a legal holiday. None of the counsel engaged in the trial was in court when these suggestions were made. The court did not convene again until the following Monday. The jury continued their deliberations for about six hours and a half, and then apparently agreed upon a verdict for the executors, which they sealed up in accordance with the directions of the judge, and brought into court the next Monday. The sealed envelope containing the verdict signed by the foreman, which was passed to the clerk when the jury assembled, contained also a paper of considerable length, which recited that they were unable to arrive at a unanimous verdict, and that there was one juror, naming him, "who, from the preponderance of the evidence in his mind, could not join in the verdict except upon protest." It then referred to the instructions of the judge in regard to submitting plans and propositions to be handed to the contestants, "if possible to enable them to arrive at some amicable settlement of the controversy without further recourse to the courts," and requested that the document be attached to the verdict, and remain a part of it, and stated a proposition in four parts for settling the estate by a material change of the provisions of the will. This paper was unsigned, but was in the handwriting of one of the jurors. The envelope was opened by the clerk, and the papers were exhibited to the court. The issues and answers were read to the jury, and when the usual question was put by the clerk to the jury as to the issues, the foreman answered to each, "We do," but to the second and third one of the jurors answered at the same time, "Under protest." That part of the second paper which stated the proposition for settlement was then read to the jury by the clerk, but the introductory part was not read. Upon its being read no juror dissented. The court then addressed the jury, thanking them for their service, and referring to their recommendations, which he said he understood to be the unanimous result of all their judgments (to which they all nodded assent), and told them that the suggestions would be conveyed to the parties, who would have a right to take them and act upon them. He then excused the jury from further consideration of the case. At this point the juror who had answered "Under protest," inquired of the judge whether, if the case was not settled in that way, the verdict would stand as a disagreement of the jury. The judge answered in the negative, with a brief explanation, when the ju-

ror began to make further statements, which the judge interrupted, declining to hear anything more at that time. On Monday forenoon the counsel for the appellant asked that an exception be noted to the instructions given on the preceding Friday. A question is reserved by the presiding judge in his certificate as to whether the exception taken on Monday forenoon could be allowed under the forty-eighth rule of the superior court. An affidavit was made by the juror who answered "Under protest," in reference to his understanding of the verdict and the accompanying paper, in which he stated his purpose to say, when he was interrupted by the judge, that he dissented from the verdict. The appellant filed a "motion to make the record conform to the facts," asking the judge to expunge the answers of the jury to the issues, and to record a disagreement of the jury. Upon the facts presented at the hearing of this motion, the appellant asked the judge to rule that there was no unanimous verdict, and that the record should be corrected by recording a disagreement of the jury. To the refusal so to rule he excepted.

On this part of the case the first question is whether the exception to the instructions given on Friday, May 30th, was properly taken by a request made before noon on June 2d. The forty-eighth rule of the superior court is as follows: "When further instructions are given in the absence of counsel, after the jury have retired, the presiding justice may permit exception thereto at any time within twenty-four hours next following." The court has power to instruct juries in the absence of counsel, and, if the parties or their counsel fail to attend, they might, if it were not for such a rule, lose their right to except to the instructions so given. *Kullberg v. O'Donnell*, 158 Mass. 405, 33 N. E. 528, 35 Am. St. Rep. 507; *Rainier v. Boston Mutual Life Ass'n*, 167 Mass. 109, 44 N. E. 1088; *Tim v. Rosenfeld*, 168 Mass. 393, 47 N. E. 106. This rule of the superior court is reasonable, and should be held binding upon parties. Twenty-four hours after the instructions were given had elapsed on Saturday, at 11 o'clock in the forenoon, and the exception was not taken until nearly noon of the following Monday. We are of opinion, therefore, that this exception was not properly saved, and that it could not be allowed.

On the proceedings stated in the supplemental bill of exceptions the validity of the verdict is called in question. Upon this question the instructions and their probable effect, the formal verdict, the accompanying paper, and the proceedings in court when the verdict was received, are all to be considered. There is no doubt of the power of the court to instruct the jury on a legal holiday, or in the absence of counsel. *Rev. Laws, c. 166, § 5; Id. c. 158, § 4; Kullberg v. O'Donnell*, 158 Mass. 405, 33 N. E. 528, 35 Am. St. Rep. 507. The instruction given was unusual in kind, going considerably further in its

suggestions of an inducement for an agreement than *Com. v. Tukey*, 8 Oush. 1, which is often referred to in practice. The trial in the present case was a very long and important one, and it was right for the presiding justice to do everything that he properly could under the rules of law to assist the jury in coming to an agreement. There was nothing incorrect in the instructions given, and in the form of statement of the subject to which they related they were carefully guarded. But they were a voluntary presentation of a matter which was entirely outside of the issues to be decided, and they naturally would have a tendency to divert the attention of the jury from the real question which they were to decide. There is reason to fear, from the language of the paper accompanying the verdict, that there was a misunderstanding of the probable effect of the paper on the part of some of the jurors. Without any inaccuracy in the statement of the presiding judge, some of the jurors may have been led to attach greater importance to their recommendation than it deserved, and to yield formal acquiescence in the verdict, while at the same time reciting in the paper that the jury were "unable to arrive at a unanimous verdict." The protest of one of the jurors when the verdict was received is significant, and it is impossible to know whether he would not immediately have declined to agree to the verdict, while the jury were before the judge and they were speaking of the case, if he had been permitted to speak further. We are by no means certain that there was a unanimous verdict of the jury, so obtained and so received as properly to be given effect. But, looking more narrowly at the questions raised by the supplemental bill of exceptions, we discover no error of law in the refusal to change, the record and to treat the result as a disagreement. The jurors, by their foreman, had signed the verdict; it was affirmed, all the jurors assenting to it, although one said that he did it under protest. The judge was not bound to continue a colloquy with the juror after the verdict had been recorded. While the language of the accompanying paper and the conduct of the juror might well cause misgivings in regard to the verdict, there was no error of law in declining to treat it as illegally received and recorded. This exception is overruled, but, by reason of error in the admission of evidence, the entry will be:

Exceptions sustained.

(184 Mass. 601)

POST v. LELAND et al.

(Supreme Judicial Court of Massachusetts,
Suffolk. Jan. 7, 1904.)

BROKERS—GAMING CONTRACTS—MARGINS—EV-
IDENCE—INSTRUCTIONS—STATUTE—LET-
TERS—SECONDARY EVIDENCE.

1. Where no attempt was made to show that any search had been made for letters written by defendant to plaintiff, or that they were lost, it was proper to exclude secondary evidence as to their contents.

2. St. 1890, p. 479, c. 437, § 2, provides that whoever employs another to buy or sell securities on a margin may recover any payment made, or the value of anything delivered, if the other party had cause to believe that no intention to actually perform existed. *Held* that, in an action against a broker to recover moneys paid by plaintiff to defendant as margin for the purchase of securities, it was proper to exclude evidence that when plaintiff received a notice from defendant stating that he had "bought" certain stock on plaintiff's account he did not understand what was meant.

3. Any error in the exclusion of such evidence was harmless as to plaintiff; he subsequently testifying on cross-examination that at the time he received the notice he could speak and write English only a little, and did not understand the notice when he received it.

4. It was proper to exclude letters written by defendant to plaintiff's wife relating to other transactions between her and defendant.

5. In an action against a broker under the statute, the evidence showed that plaintiff employed defendant to buy stocks on a margin, and that defendant bought the stocks, and carried the certificates until they were sold for the benefit of plaintiff. Plaintiff requested a charge that he could recover if he proved that he did not intend to perform the contract by the actual receipt and delivery of the securities and the payment of the price, and the defendant had reasonable cause to believe that no intention to actually perform existed. The court charged that plaintiff must show that, in his employment of the defendant, he did not intend to have him buy any stocks, and that defendant had cause to believe that plaintiff did not intend that he should buy any. *Held*, that the refusal of the requested instruction was not error.

6. The plaintiff requested a charge that if plaintiff had no intention to perform, and the defendant had cause to believe that no intention to perform existed, the mere fact that defendant may have owned or controlled the securities, or that there was a buying or sale of them by defendant with other brokers, would not relieve defendant from liability, or the mere fact that defendant was in a position to deliver the securities, had plaintiff called for them. *Held*, that the instruction was properly refused, as misleading, since the fact that the broker had purchased the stock, and held it subject to his control until payment of his lien, was an element bearing on the question of whether the broker had cause to believe that the customer was carrying on a wagering contract.

7. It was not error to read to the jury an extract from an opinion of the Supreme Court wherein it was stated that, where a broker is employed to buy and carry stocks, his relation to the customer is that of an agent, and that the fact that after they have been bought by the broker he is to receive them from the seller, and pay for them mostly with his own funds, and carry them for the customer so long as he keeps the margin good, and that in so carrying the stocks the relation between the customer and broker is a contractual one, does not make the transaction a wagering one, within the statute.

8. Where plaintiff employed defendant as broker to buy and sell stocks for him, and the broker actually bought the stocks with his own money, and received the certificates, and the stocks were actually sold on the order of plaintiff, there was no wagering contract, within St. 1890, p. 479, c. 437, § 2.

Exceptions from Superior Court, Suffolk County; Daniel W. Bond, Judge.

Action by Louis Post against A. S. Leland and others. Verdict for defendants, and plaintiff brings exceptions. Exceptions overruled.

E. H. Savary, for plaintiff. Benjamin L. M. Tower and Ernest O. Hiller, for defendants.

LATHROP, J. This is an action of contract, under St. 1890, p. 479, c. 437, against brokers, to recover various sums of money paid by the plaintiff to the defendants as margin for the purchase of certain securities bought and afterwards sold by the defendants. The case was sent to an auditor, who found for the defendants. It was afterwards tried in the superior court before a jury. A verdict was returned for the defendants, and the case is before us on the plaintiff's exceptions to the exclusion of evidence, and to the refusal to give certain instructions requested. We will consider these in their order.

1. The first exception relates to the refusal of the judge to admit secondary evidence of the contents of letters from the defendants to the plaintiff. The plaintiff testified in the first place that he had received letters, but that they might be lost; he did not know. Then he testified that he had not any letters, which he subsequently qualified by saying: "We did not bring the letters here." There was no attempt to show that any search had been made for the letters, or that they were lost, and the judge rightly excluded secondary evidence of their contents.

2. The plaintiff offered to show that, when he received a notice from the defendants stating that they had "bought" certain stock on his account, he did not understand what was meant. This evidence was rightly excluded. *Snell v. Snow*, 13 Metc. 278, 282, 46 Am. Dec. 730. But if any error was committed, the plaintiff was not harmed by the exclusion of the evidence, as he subsequently testified on cross-examination that at the time he received the notice he could speak and write English only a little, and did not understand the notice at the time he received it. The exclusion of evidence at one stage of a trial is no ground of exception if it is subsequently admitted. *Robinson v. Fitchburg & Worcester Railroad*, 7 Gray, 92, 96; *Hopkins v. Damon*, 138 Mass. 65.

3. The next exception relates to the exclusion by the judge of the answers, in whole or in part, to certain interrogatories put to one Berrenberg, whose deposition was taken by the plaintiff. It appeared that the witness was with the plaintiff several times when he visited the defendants in regard to the transactions in question. The answers to the sixth and seventh interrogatories were excluded. The last part of the answer to interrogatory 8, and the answers to interrogatories 13, 14, and 15, were also excluded. In his answer to the fifth interrogatory, which called for conversations between the plaintiff and the defendants, or either of them, between the spring of 1893 and the late fall of 1894, the witness replied: "I overheard quite a number of conversations, but cannot recall particulars." So far as the answers to interro-

atories 6, 7, 8, 14, and 16 are concerned, they were irresponsible, and were properly excluded. Interrogatory 16 was irrelevant, and the answer to it was properly excluded.

4. The fourth exception relates to the exclusion of two letters written by the defendants to the plaintiff's wife, relating to another transaction between her and the defendants. These were properly excluded.

5. The bill of exceptions states that at the close of the evidence the plaintiff asked the court to instruct the jury as follows: "(1) The plaintiff can recover if he proves by a fair preponderance of evidence that he did not intend to perform the contract in question by the actual receipt and delivery of the securities and commodities, and the payment of the price, either by the receipt and delivery himself, or by the defendants as his agents, of the securities and commodities, and the defendant had reasonable cause to believe that no intention so actually to perform existed. (2) If the plaintiff had no intention at the time of the various contracts for the buying or sale of the various securities to actually perform the same by actual receipt or delivery of the securities and the payment of the price, and the defendants had reasonable cause to believe no intentions to actually perform existed, the mere fact that the defendants may have owned or controlled the various securities which were the subject-matter of the various contracts, or that there was a buying or sale of the various securities by the defendants with other brokers, will not relieve the defendants from liability, or the mere fact that the defendants were in a position to deliver the various securities if they had been called for by the plaintiff." The judge declined to give these instructions. As to the first request for instructions, the evidence showed that the case, if it was within St. 1890, p. 479, c. 437, fell within the second clause of section 2, as the plaintiff employed the defendants to buy stocks for him upon a margin, and that the defendants actually bought the stocks, received certificates for them, and carried them for the plaintiff, though these certificates were not delivered to the plaintiff, but were held by the defendants until they were sold for the benefit of the plaintiff. The judge was not bound to give the request in the language therein used, and the instruction given that the plaintiff must show, by a fair preponderance of the evidence, that in his employment of the defendants he did not intend to have them buy any stocks or sell any stocks, and that the defendants had reasonable cause to believe that the plaintiff did not intend to have them buy any stock or sell any stocks, was sufficient. See *Rice v. Winslow*, 180 Mass. 500, 62 N. E. 1057. The second request for instructions, if given, would have tended to mislead the jury. The fact that the broker has actually purchased the stock at the request of his customer, and holds it subject to his control until his lien is paid, is an element bearing upon the question of whether

the broker has reasonable cause to believe that the customer is carrying on a wagering contract.

6. Some exceptions were taken to portions of the judge's charge, but we see nothing in them which calls for comment. The charge was an able one, and fully covered the questions raised.

7. The plaintiff excepted to the reading by the court to the jury of the following extract from the opinion of the court in *Rice v. Winslow*, 180 Mass. 500, 502, 62 N. E. 1057, 1058: "Where a broker is employed to buy and carry stocks on a margin, his relation to the customer in buying the stock is that of an agent. For the purchase of the stock the broker receives the same commission, and in the purchase of the stock he owes to his customer the same duty that he owes to him where he is employed to buy stocks which are to be taken and paid for by the customer in place of being taken and paid for by the broker for the customer. The fact that after the stocks have been bought by the broker he is to actually receive them from the seller, and to pay for them for the most part out of his own pocket, or with funds raised on his personal responsibility and the pledge of the stocks, and then carry them for his customer so long as his customer keeps him indemnified from loss by keeping the margin agreed upon good, and that in so carrying the stocks the relation between the customer and the broker is a contractual one, does not make the transaction a wagering transaction; and such a transaction is not within either clause of St. 1890, p. 479, c. 437, § 2." We see no objection to this. It is a correct statement of law, and illustrated one phase of the case before us.

8. The last exception relates to the refusal of the judge to give the following request for instructions asked for by the plaintiff at the close of the charge: "That as to whether the stock certificates were delivered or received by the plaintiff might be taken into consideration by the jury as bearing on the question whether the plaintiff intended the defendants, or either of them, to carry the stock for him, and as to whether there was reasonable ground for the defendants to believe this." We are of opinion that the refusal to give this instruction was right. It was entirely immaterial whether the plaintiff intended that the defendants, or either of them, should carry the stocks for him, or whether the defendants had reasonable ground to believe this. There was evidence in the case showing that the plaintiff employed the defendants as brokers to buy and sell stocks for him, and that the brokers actually bought the stocks with their own money, and received certificates for them, and that the stocks were actually sold upon the order of the plaintiff, or under authority given by him. If the jury found that the facts were in accordance with this evidence, there was no wagering contract, but a legitimate transaction, although settlements were made without actual deliv-

ery of the certificates of stock to the plaintiff, and the case was not within St. 1890, p. 479, c. 437. *Rice v. Winslow*, 180 Mass. 500, 62 N. E. 1057; *Winward v. Lincoln*, 23 R. L. 476, 51 Atl. 108.

Exceptions overruled.

(184 Mass. 523)

WOOD et al. v. EDISON ELECTRIC ILLUMINATING CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1904.)

LANDLORD AND TENANT—LEASE—CONSTRUCTION—RENEWAL—PAYMENT OF TAXES—NOTICE OF RENEWAL—WAIVER.

1. A lease of a wharf for five years gave the lessees an option to a further term of five years on condition on written notice of intention to renew and the execution of a written lease for the additional term similar to the first lease, which contained a provision that the lessees pay taxes. Subsequently the lessees surrendered by agreement a portion of the N. dock, receiving a diminution in rent for the term, with a provision that, if they should exercise their option, they should receive a certain diminution for the renewed term, and were released from obligation to pay taxes on the portion surrendered. Before the time for notice of renewal, the parties, without notice, executed an agreement on the back of the original lease, whereby the lease was "extended" for five years and eight months, with no provision as to rent, covenants, or taxes except by reference to a contemporaneous agreement and to the original lease. The contemporaneous agreement was a modification of the lease, whereby the lessees agreed to surrender the balance of the N. dock and lessors agreed to improve the wharf, "all taxes on the N. dock and all increased taxes by reason of improvement of the wharf" to be paid by the lessor. The lessees paid all taxes for the new term, except those expressly assumed by the lessors. *Held*, in an action by them against the lessors to recover the taxes, that there was evidence warranting a finding that the agreement was not a new lease, but that the lessees had exercised their option to continue the original lease, and were therefore bound to pay the taxes.

2. The provision for notice was for the lessors' benefit, and might be waived by them.

3. Where there was uncertainty in the meaning of several writings constituting a lease as to whether the lease was a new or was an extension of an old lease, the construction given the writings by the parties could be considered.

Report from Supreme Judicial Court, Suffolk County; John W. Hammond, Judge.

Action by one Wood and others against the Edison Electric Illuminating Company. Heard before a single justice of the Supreme Court, and reported to the full court. Judgment for defendant.

Charles F. Kittredge and Carl H. Richardson, for plaintiffs. J. Otis Wardwell and C. H. Wardwell, for defendant.

KNOWLTON, C. J. The plaintiffs, by assignment, are the successors in title to the lessees, and the defendant is the successor in title to the lessors, of a large part of Liv-

erpool Wharf, in Boston, under a lease bearing date August 2, 1888, and running five years from the 1st day of September in that year. This lease, with certain modifications, was extended five years and eight months to May 1, 1899. The important question in the case is which of the parties was to pay the taxes on the property after the expiration of the original term. The presiding justice, for the purposes of the trial, ruled as matter of law that the lessees were not bound to pay (or, in other words, that there was no evidence which would warrant the jury in finding that they were bound to pay), directed a verdict in accordance with this ruling and other rulings which are made immaterial by our decision, and reported the case to this court.

The original lease contains a provision giving the lessees an option and right to a further term of five years on condition that they give written notice of their desire at least one year before the expiration of the first term, and within thirty days thereafter execute a written lease for the additional term, of like tenor with the first, with a special provision in regard to the rent of a part of the property, and with a requirement that the lessees pay the taxes except upon a certain office in the basement. On March 1, 1892, the parties executed an agreement under seal in regard to a part of the leased premises, namely, the northerly dock, which was then being filled by the defendant, which, by the lease, was to be used by the lessees when completed. By this agreement the lessees released from the leased premises a portion of this northerly dock between designated lines, and an allowance in diminution of the rent was made to the lessees for the remainder of the term, and it was further provided that, if the lessees should "exercise their option to continue said lease for an additional five years, as provided therein, then said Chapin, Wood & Co. shall be allowed a monthly deduction from their rent for said additional five years at the rate of sixty-seven and thirty-two one hundredths dollars per year, and be released from all obligation to pay taxes and assessments upon said portion of the northerly dock contained within the lines A, B, C, D. This agreement in no way to affect the provisions of said lease, except as far as the payment of rent and taxes and assessments as hereinbefore provided, and the portion of the premises given up as hereinbefore provided, is concerned." The part within the lines A, B, C, and D was the part of the northerly dock released by the lessees, and the deduction of \$67.32 per year from the rental was a much less deduction than that made for the remainder of the original term. The lease continuing in force with this modification, the parties, less than two months later, on April 21, 1892, wrote and executed upon the back of the lease an agreement under seal for its extension for the term of five years and eight months from the date

¶ 3 See *Landlord and Tenant*, vol. 22, Cent. Dig. § 105.

of its expiration. They agree that the lease is "extended" for the period named. The agreement states nothing about the rent, or any other terms, conditions, or covenants, except by reference to the lease and to the agreement of March 1, 1892, and to another agreement of April 21, 1892, executed apparently contemporaneously with this. The agreement of April 21st, referred to in the extension, is also a modification of the lease, whereby the lessees agree to give up that portion of the northerly dock included in their lease which was not given up by their agreement of March 1, 1892, and the defendant agrees to build out the front of Liverpool Wharf a distance of 30 feet, and allow the lessees to use it as a part of the leased property. There are various provisions as to the mode of use and as to the payment of fees and percentages. The contract provides for the continuance of the use for a period of five years and eight months from the expiration of the original term of the lease. The agreement also contains this provision: "All taxes upon the twenty-six hundred thirty-one square feet of Northerly Dock hereby released, and all increased taxes which shall be payable on account of additions to and improvements upon Liverpool Wharf and Northerly Dock Wharf shall be paid by said corporation" (the defendant). After the expiration of the original term the defendant made bills to the lessees for the taxes, making deductions for the tax upon that portion of the northerly dock given up by the agreement of March 1, 1892, and also upon the remaining portion given up by the agreement of April 21, 1892, and upon the improvements, and making a deduction also from the rent at the rate of \$67.32 per year in accordance with the agreement of March 1, 1892; and the lessees paid these bills without question as to liability or otherwise than as to the amount for six years, covering the whole period of the extension and an additional period of their holding. Not until the autumn of 1899, when a controversy had arisen as to other matters, and they were advised by counsel that under the writings they were not obliged to pay the taxes, did the plaintiffs ever question their obligation. They afterwards brought this suit to recover back the money as paid by mistake.

We are of opinion that the jury would have been warranted in finding that the lessees exercised their option to continue the lease, and that the written extension of the term was given and received on April 21, 1892, as and for the additional lease of like tenor mentioned in the original lease. The original lease was treated as subsisting, with certain modifications agreed to by the parties. Notice in writing from the lessees to the defendant was for the defendant's benefit, and might be waived. Moreover, the time for giving it had not arrived when the extension was agreed upon, for the original term had then considerably more than a year

to continue. The fact that the parties made the extension run eight months longer than the five years is of little significance. On the exercise of the option they all might agree upon such a modification. There is nothing in the form of the writing of extension which is inconsistent with its being given in pursuance of the exercise of an option by the lessees. It was not necessary that it should be a lease with formal covenants. It refers to the existing lease for its provisions. It adopts the changes contained in the agreement of March 1, 1892, and the other agreement of April 21, 1892. Each of these agreements assumes that the provision as to taxes, founded on the exercise of the option, is in force. Each releases the lessees from the payment of the taxes on that portion of the property which is surrendered to the defendant, and treats the lessees as bound to pay the other taxes in accordance with the language of the lease applicable to the exercise of the option. The agreement for the extension makes the agreement of March 1 and April 21, 1892, controlling as to the matters to which they relate. The agreement of March 1st purports to cover the rights of the parties as to the changed conditions for the additional term, and unless its provision is adopted there is no provision anywhere in reference to these changed conditions. It makes a provision only upon the hypothesis that the lessees exercise their option, and in that case it recognizes their obligation to pay taxes, and assumes and releases them from their obligation as to a part of the premises which they gave up, continuing by implication the obligation as to the rest of the premises. Both parties subsequently acted upon this provision for more than six years, not only as to the taxes, but also as to the deduction of \$67.32 from the annual rent. All parties seem to have understood that the extension of the lease was made in pursuance of the lessees' expression of their desire and choice to continue the lease, and that the taxes were to be paid by them in accordance with the provisions of the original lease in case of renewal, subject to the modifications which released them from that obligation as to taxes assessed upon the property given up. It was a question of fact, to be determined by way of inference from the papers and from all the evidence, whether the lessees exercised their option, and whether the extension of April 21st was given in pursuance of their election to continue the lease. If there was uncertainty in the meaning of the several writings taken together and applied to the situation and the circumstances of the parties, the construction put upon them by the parties themselves may be considered, and in a case like this it is important evidence. We are of opinion that the jury might have found that the plaintiffs were bound to pay the taxes.

Judgment for the defendant on the third count, and for the defendant for the larger sum in the declaration in set-off.

(185 Mass. 6)

WENTWORTH et al. v. EICHORN et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1904.)

DEEDS—CANCELLATION—SUIT—FINDINGS—CONSTRUCTION—RESTRICTIONS ON REAL ESTATE—MUTUAL RELEASES—FAILURE OF PARTY TO EXECUTE—REMEDY.

1. A number of lots being burdened with restrictions created by a common grantor, a deed was drawn up whereby the various owners were to mutually release the restrictions. The owner of one of the lots sued one of the others on the ground that she had refused to deliver the deed or cause it to be recorded after it had been signed by all the intended parties, and the prayer was for a cancellation as to plaintiff. *Held*, that an allegation of defendant's answer to the effect that the deed had been "executed by all the parties named as grantors" amounted to an allegation that she had delivered the deed.

2. The court found that defendant had not "delivered the deed to plaintiff," and the findings mentioned the admitted fact that she had signed the deed, and retained it in her custody, refusing to record it. *Held*, that there was no finding that the deed had not been "executed" by defendant, the finding as to delivery to plaintiff not being a finding that there had been no "delivery," inasmuch as there were a number of grantors and grantees in the deed, and the statement as to retention of the deed being a mere statement of an admitted fact.

3. A finding that there was no evidence to sustain the allegations of the complaint, "other than the admitted fact that defendant had signed the deed of release and had retained it in her custody, refusing to record the same," did not amount to a finding that the deed had not been delivered by defendant.

4. The fact that, owing to the failure to have the deed recorded, one of the then owners of a lot had taken it without notice that his grantor had executed the deed, did not entitle plaintiffs to have their signatures to the release canceled.

5. Plaintiff could not maintain the suit, it not being the proper remedy.

Appeal from Superior Court, Suffolk County.

Suit by George F. Wentworth and another against Mary C. Eichorn and another. From a decree dismissing the bill, plaintiffs appeal. *Affirmed*.

C. E. Wentworth, for appellants. T. E. Grover and Fred Joy, for appellee Mary C. Eichorn.

LORING, J. This case comes up on appeal by the plaintiffs from a final decree dismissing the bill. The evidence on which that decree was made is not before us. The final decree states that the following facts were found by the court: The plaintiffs since 1896 have been the owners of a lot of land on Pine street and Broadway extension in Boston, numbered 8 on a plan recorded in Suffolk Deeds, Libro 471, folio 282; that said lot, together with all other lots shown on said plan, was subjected to certain restrictions by a deed from Bass to Brooks in July, 1841; that the defendant Eichorn has been since July, 1896, the owner of another of said lots; that between January 1, 1897, and September 1, 1898, the deed releasing the restrictions on said lots was signed by the owners of all

said lots, including the defendant Eichorn; and that "on or about the latter date the defendant Eichorn signed the said release, but did not deliver the same to the plaintiffs, or record the same, and there was no fraud or mistake in obtaining the signatures to the instrument." The plaintiffs alleged in their bill of complaint that they executed the deed of release on September 1, 1898, and delivered it to one Joy, and that the delivery by them of said deed to Joy "was not an absolute delivery intended to pass any title, but was only a conditional delivery for the purpose of having the deed of release executed by the persons whose signatures were necessary there to in order to completely remove the said restrictions, and it was understood and intended by the plaintiffs that, if the said deed was not so executed within a reasonable time, * * * this conditional delivery was to be void and of no effect." The decree states that there was no evidence to sustain the allegation as to the conditional delivery except the language of the release. The plaintiffs also alleged that the defendant Eichorn, "by retaining the said deed under her control and refusing to allow it to be recorded or to deliver it to the plaintiffs, has refused to become a party to the said deed"; that, as said Eichorn has not executed the deed, the purpose for which the plaintiffs delivered said deed to Joy has not been accomplished, and the delivery is void; that the plaintiffs' conditional delivery was an offer; that this offer has not been accepted by Eichorn, and the plaintiffs have revoked their said offer; and that the defendant Eichorn has it in her power to disregard this revocation by recording the deed. The decree states that there was no evidence to sustain these allegations "other than the admitted fact that Mrs. Eichorn had signed the deed of release, and had retained it in her custody refusing to record the same." The plaintiffs also alleged that one Wilson has been since October, 1900, the owner of lot 13 on said plan; that he is a necessary party to the deed, and has never executed the same. The relief asked for in the bill was that the deed might be brought into court, and the plaintiffs "allowed to cut out or obliterate their signatures thereto affixed," and that the defendant Eichorn might be "required to produce the said deed of release and to surrender the same to be canceled under the order of this court." After a statement of these findings of fact, and of a finding to the effect that the predecessor in title of the lot now owned by Wilson "had properly signed and delivered the deed of release," the decree is as follows: "It not appearing upon the facts in evidence, aside from such adjudication, that the plaintiffs are entitled to the relief prayed for, and the allegations in the bill of complaint not having been sustained, thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the plaintiffs' bill be dismissed, with costs to the defendant Mary C. Eichorn, and also to

the other defendants who appeared in this action, to be taxed by the clerk, and executions issue therefor." The decree also refers to a former suit between the same parties which "was opposed as a bar," but it is further stated in the decree that "the findings in this case and this decree are not based on the adjudication" in that suit. It is alleged in the bill and admitted in the answer that it was adjudged in the other suit that the defendant Eichorn was not bound by an agreement on which the plaintiffs relied as showing that their execution of the deed releasing the restrictions was conditional. Beyond this allegation in the bill, not admitted in the answer, the character of the former suit between the parties does not appear.

The plaintiffs' argument is that on the face of the deed of release the deed is not to take effect until executed by all, and that it is found that it has not been executed by Mrs. Eichorn. They rest their contention that it has not been executed by Mrs. Eichorn on two findings, namely, that she "signed the said release, but did not deliver the same to the plaintiffs, or record the same," and that "Mrs. Eichorn had signed the deed of release, and had retained it in her custody, refusing to record the same." But the defendant Eichorn, in her answer, alleges "that said deed was executed by all the parties named as grantors." That is an allegation that she has delivered it. The finding that she has not delivered the deed to the plaintiffs, who are two of a large number, each of whom is grantor and grantee, is not a finding that the deed has not been delivered. As to the other finding, all that appears is a statement in the decree that there was no evidence upon the point, "other than the admitted fact that Mrs. Eichorn had signed the deed of release and had retained it in her custody, refusing to record the same." If that is a finding at all, it is not a finding that the deed has not been delivered by Mrs. Eichorn.

So far as the Wilson lot is concerned, it is found that "between January 1, 1897, and September 1, 1898, the said deed of release of the restrictions upon said lots was signed by the plaintiffs, as well as other owners of the said lots," and it was not until 1900 that it was conveyed to Wilson by his "predecessor in title," "who had properly signed and delivered the deed of release." Whether Wilson did or did not take with notice of the release does not appear. If by the failure to have the deed recorded between September, 1898, and 1900, Wilson has taken lot 13 without notice of the release of the restrictions, that fact does not entitle the plaintiffs to have their signatures to the release canceled. The plaintiffs have mistaken their remedy. If they have a remedy, it is on the ground that, as each party to the deed of release is a grantee as well as a grantor, the deed of release is as much theirs as Mrs. Eichorn's, and for that reason they have a right to have it recorded.

Upon that question we do not express a final opinion, as it is not before us.

Decree affirmed.

(177 N. Y. 548)

COLBY et al. v. TOWN OF DAY.

(Court of Appeals of New York. Jan. 5, 1904.)

APPEAL—GENERAL EXCEPTIONS—SUFFICIENCY.

1. Where an exception to the decision of a trial judge was general, and to each and every part thereof, with no specific exception to any particular finding or conclusion, the Appellate Division on appeal had no authority to reverse the judgment; the exception being insufficient to present any question of law.¹

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Ellery Colby and others, as trustees of Ellery Colby and others, against the town of Day. From a judgment of the Appellate Division (77 N. Y. Supp. 1022) reversing a judgment in favor of plaintiffs, and dismissing the complaint, plaintiffs' appeal. Reversed.

Nash Rockwood, George R. Salisbury, and Oscar B. Glezen, for appellants. William D. McNulty, for respondent.

PER CURIAM. It must be assumed that the judgment herein was reversed by the Appellate Division for errors of law only. Code Civ. Proc. § 1338; *Hinckel v. Stevens*, 165 N. Y. 171, 173, 58 N. E. 879, and cases cited. Therefore the question is presented whether the exception filed by the defendant was sufficient to present any question of law which justified such reversal. We think there was not. The exception was general to the decision of the trial judge, and to each and every part thereof, with no specific exception to any particular finding or conclusion. This court has recently held that such an exception was insufficient to present any question of law for review. *Drake v. N. Y. Iron Mine*, 156 N. Y. 90, 50 N. E. 785.

It follows that the court below had no authority to reverse the judgment of the Special Term, and hence its judgment must be reversed, and that of the Special Term affirmed, with costs to the plaintiffs in all the courts.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. HAIGHT, J., absent.

Judgment reversed, etc.

(177 N. Y. 218)

ISHAM et al. v. NEW YORK ASS'N FOR IMPROVING THE CONDITION OF THE POOR et al.

(Court of Appeals of New York. Jan. 12, 1904.)

APPEAL—PARTIES IN INTEREST.

1. Where all the beneficiaries under a will and the executors have submitted a question in

¹ See *Appeal and Error*, vol. 2, Cent. Dig. §§ 1634, 1637.

controversy to the Appellate Division, the executors alone have no such direct interest in the controversy as will entitle them to appeal to the Court of Appeals.

2. Under a will creating a trust, the beneficiary was empowered to dispose of the property by will, and gave the same to various charitable institutions, and directed her executors, after the payment of numerous bequests, to pay out of the residue any inheritance taxes due on any of the legacies, whether to the state or federal authorities. *Held*, that the various dispositions of the trust estate constituted legacies, and are entitled to have the transfer taxes paid out of the residuary estate.

Appeal from Supreme Court, Appellate Division, First Department.

Submission of controversy between William B. Isham and others, executors of Mary J. Walker, and the New York Association for Improving the Condition of the Poor and others. From a judgment of the Appellate Division (79 N. Y. Supp. 1048) in favor of defendants, plaintiff executors appeal. *Affirmed*.

Henry W. Simpson, for appellants. Edward E. Sprague and John L. Cadwalader, for respondent New York Association for Improving the Condition of the Poor. Charles T. Payne, for respondent Lincoln Hospital and Home. Charles L. Jones and Russell E. Burke, for respondents Orphans' Home and others. Edward W. Sheldon, for respondent New York Society for the Relief of the Ruptured and Crippled. Harry N. Avery, for respondent New York Institution for the Blind. Charles E. Sentell, for respondent Home for Old Men and Aged Couples. Stanley W. Dexter, for respondent Children's Aid Society. John H. Cole, for respondent Society of St. Johnland. George O. Kobbé, for respondent Home for Incurables. Hoffman Miller, for respondent St. Luke's Hospital.

GRAY, J. The parties to this action united in submitting the controversy between them upon an agreed statement of the facts. The question in difference was whether, under the twenty-third clause of the will of Mary J. Walker, the transfer tax payable upon a fund of \$500,000 theretofore held in trust for her during her life, and which she disposed of in her will by the exercise of a general power of appointment, should be paid out of the trust fund itself, or out of the residuary estate. The trust fund had been created for her by her father's will, which directed the trustee to pay over the principal as she might by will direct, and which authorized her to so dispose of the same. When she made her will she first proceeded to "give and bequeath" the trust fund, over which she was given the power of disposition by will, to various charitable institutions, and then she made bequests to various persons, aggregating a very large sum of money; her individual personal estate amounting to some three millions of dollars. Having made these bequests, she next directed and authorized her executors, in the twenty-third clause, "to pay out of my residuary estate any and all trans-

fer or inheritance taxes that may be imposed or become due upon any of the legacies hereinbefore made, whether such taxes be State or Federal." In the succeeding clause, she constituted her sister Emily A. Watson her residuary legatee; including in that disposition any of the legacies which might lapse, and all of her estate not effectually disposed of. Upon the question arising as to how the transfer tax upon the trust fund should be paid, the executors instituted this proceeding, and joined as parties defendant Emily A. Watson and all other persons interested in the result. All appeared by their attorneys, and, upon the submission of their controversy to the Appellate Division, that court determined it by ordering the executors of Mary A. Walker to pay the transfer taxes in question out of her residuary estate. From the judgment of that court, the executors have appealed to this court; but Emily Watson has not appealed herself, nor has she requested the executors to appeal.

In my opinion, the executors were not authorized to take this appeal and to continue the controversy, when those directly concerned in the determination of the question had acquiesced therein. I do not think they have any standing in court to complain further as to a result which did not affect them. They performed their duty in presenting to the court the question of how the will should be construed, and they did so in such a way as that all interested therein would be bound by the determination made. When a judgment was reached, directing them how to act, they were protected, and they were under no obligation to proceed to champion the right of Emily Watson, who submitted to the judgment, and did not appeal at all. If appeals are allowed by statute, they are to be taken only by those who are aggrieved, in the sense that they had a direct interest in the controversy, which was affected by the result. This must be so, in reason; and the proposition, as it relates to executors or administrators of the estates of deceased persons, is supported by authority. *Bryant v. Thompson*, 128 N. Y. 426, 28 N. E. 522, 13 L. R. A. 745; *Matter of Hodgman's Estate*, 140 N. Y. 421, 35 N. E. 660; *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795.

Upon the merits of this controversy, I do not think any reasonable doubt can be entertained as to the correctness of the determination made below. Whether we regard the intention, as exhibited by the comprehensiveness of the language used by the testatrix in directing the payment of "any and all transfer or inheritance taxes" out of her residuary estate, or whether we regard the effect and nature of the exercise by her of the power of appointment, it must be very clear that the appointees of the fund were to take their shares thereof without diminution through imposition of federal or state taxes upon the transfer. It may be true that they take under the execution of the power of appoint-

ment, and therefore through a source of title emanating from the will of this testatrix's father; but that does not affect the question presented, which is whether, in exercising the power, she has made a gift or a legacy to the extent of its exercise. She evidently supposed she was doing precisely that, for she used the words "I give and bequeath," and the authorities are to that effect. In *Matter of Dow's Estate*, 167 N. Y. 227, 60 N. E. 439, 52 L. R. A. 433, 88 Am. St. Rep. 508, and in *Matter of Delano*, 176 N. Y. 486, 68 N. E. 871, we have held that it is the execution of the power that gives to the person the property passing under it. The effect of conferring a general power of appointment is to invest its donee with a power of disposition as broad as though she was disposing of her own property. In its exercise she in fact makes a gift or bequest to persons of her own selection. In addition to the *Delano Case*, reference may be profitably had to the English cases of *Attorney General v. Marquis of Hertford*, 3 Exchequer, 670, 683, and of *Freem v. Clement*, L. R. 18 Ch. Div. 499, 508, where that is held to be a gift or bequest which passes by the exercise of a power of appointment. A legacy is a disposition of personal property by will, and, when this testatrix directed her executors to pay the transfer taxes that might be imposed upon any of the legacies which she had made, she meant, and she must be assumed, in law, to have meant, all the preceding dispositions by her, whether of the trust fund or of her individual estate.

I advise the affirmance of the judgment appealed from, with costs to the respondents, who have appeared in this court by attorney, payable by the appellants personally.

PARKER, O. J., and HAIGHT, MARTIN, VANN, and WERNER, JJ., concur. BARTLETT, J., concurs in result on the merits, but dissents as to the costs payable personally by executors; being of opinion that the executors were entitled to appeal, and should be awarded costs with the respondents.

Judgment accordingly.

(177 N. Y. 140)

WESTPHAL et al. v. CITY OF NEW YORK.

(Court of Appeals of New York. Jan. 5, 1904.)

DRIVEN WELLS—INJURY TO ADJOINING LAND-OWNERS—DAMAGES—INJUNCTION.

1. Where a city, by establishment of driven wells and pumping stations, has affected the natural flow of underground waters as to certain farm lands, in an action by the owners thereof for damages suffered, and for an injunction, a judgment that the city pay a certain sum for damages suffered, and another sum for permanent damages, and that the landowners, on payment thereof, should release to the city the right to maintain its pumping stations, is proper.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by August Westphal and others against the city of New York. From a judg-

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ment of the Appellate Division (78 N. Y. Supp. 56) affirming a judgment for plaintiffs for part of their claim, they appeal. Affirmed.

Charles Coleman Miller, for appellants. George L. Rives, Corp. Counsel (James McKeen, of counsel), for respondent.

GRAY, J. These plaintiffs, as owners of farm lands now within the city limits of the defendant, upon allegations to the effect that, by the establishment of driven wells and of pumping stations, the latter was liable for having caused and for continuously causing injuries of an irreparable nature to them, through the drying up of a water course and the absorbing of the natural underground waters, demanded a judgment for damages suffered in the past, for a permanent injunction against the operation of the wells, and such other relief as to the court might seem just. The trial court, concisely stating its decision, found that the operation of the defendant's waterworks lowered the water level under the plaintiffs' lands to a certain depth, to their damage up to the time of trial in the sum of \$350, and to the permanent damage of their land in the sum of \$300, and directed judgment to be entered in their favor, which, as entered, adjudged the payment of the past damages, and that the defendant should be enjoined unless it paid the amount of the permanent damage. It contained the further provision that, upon payment or tender of the latter amount, the plaintiffs should execute a release to the defendant of the right to maintain its pumping stations, etc. An injunction was refused, except in the event of the defendant's failure to make such payment. The judgment has been affirmed by a unanimous determination of the Appellate Division. The plaintiffs had appealed to that court, and they have appealed here, manifestly, because of their dissatisfaction with the amount of the recovery; but no questions have survived the unanimous affirmance below, except such as relate to the correctness of the conclusion upon the facts stated, and to the relief granted by the judgment as entered. With respect to that, the appellants complain that such a judgment was not demanded, and they insist that their constitutional rights have been violated, as its effect, because their property is taken from them without due process of law. They argue that the defendant gave no notice of its intention to acquire their property, as it was bound to do in exercising the right of eminent domain, and that the right to an appraisal of their property by a jury or by three commissioners has been denied them. This argument seems to proceed upon considerable misapprehension of the jurisdiction of a court of equity, and of the procedure of the trial court in administering equitable relief upon the facts.

The defendant, to supply a public need of

its citizens, established the driven wells and pumping stations upon its own property; but the effect of their operation has been to withdraw or to abstract waters from the surrounding lands, to the injury of the plaintiffs. This was a natural effect, and, as a consequential injury, there has been an invasion of the plaintiffs' property rights, which constituted a technical trespass, for the resultant damages of which a right of action accrued. The act, however, which affected the plaintiffs, was the use by defendant of its own property in a manner authorized by law; and as there was no intentional appropriation of the plaintiffs' property rights, nor any actual entry upon their lands, it is rather absurd to object that the failure of the defendant to give notice of an intention to acquire the property of the former raises a bar against the right to acquire the easements appropriated through the provisions of this judgment. But the judgment is not open to objection on the ground mentioned, nor upon the other ground that an appraisal of the value of the property taken, under constitutional methods of procedure, is denied. What the court adjudged to the plaintiffs was the recovery of a sum of money for the damages sustained up to the trial, and then that they should recover a certain amount, found to be the damage to the fee, and that an injunction would only be ordered in the event that the defendant failed to pay that amount. The court, upon what must be regarded by us as conclusive evidence, ascertained the value of the property rights appropriated, and required the defendant to pay that value, in order to obviate an injunction. In this feature, the judgment was not mandatory upon the plaintiffs. The equitable relief administered by the court was to compel the defendant to pay to the plaintiffs the value of what they had been deprived of by its acts, and to award an injunction only if the defendant refused to comply. In effect, relief by way of injunction was denied to the plaintiffs, as prayed for, but was available to them as a means of enforcing the defendant's compliance with what the court deemed an equitable solution of the controversy. The court was not bound to grant a permanent injunction, because the injury was likely to continue, when it could be seen that the controversy might be settled by compelling the defendant to pay for the right to continue its work, and thus to fully compensate the plaintiffs for the injury to their property, as though the right had been acquired through condemnation proceedings formally conducted to that end. A court of equity is only bound to award that relief upon the facts which they appear to warrant when all the circumstances are taken into consideration. By coming in and submitting the matters in controversy between them and the defendant to a court of equity, the plaintiffs consented to the exercise of a jurisdiction which is plenary and unfettered in administering that full relief which will settle the controversy

upon just principles. The plaintiffs renounced the right to pursue their remedy at law for the injuries suffered, and brought the matter on the equity side of the court, whereby it gained jurisdiction generally to adjust the disputes of the parties finally. *Lynch v. Metr. Elev. Ry. Co.*, 129 N. Y. 274, 280, 29 N. E. 315, 15 L. R. A. 287, 26 Am. St. Rep. 523. When the court determined that full relief was possible, without enjoining the continuance of the waterworks, by compelling the defendant to acquire the right to do so upon a basis of compensation furnished by the proofs, it acted quite within its equitable province. *American Bank Note Co. v. N. Y. Elevated R. Co.*, 129 N. Y. 252, 270, 29 N. E. 302. In the case cited, it was held that the injunction of a court of equity and its alternative damages are to be deemed a substitute for the ordinary proceedings for condemnation.

I consider that other questions relating to the city's right or authority to resort to this means of procuring a water supply require no discussion. It exists and is clearly recognized in those charter provisions which authorize the acquisition of real estate for the satisfaction of municipal public needs, and the payment of claims or damages resulting therefrom or thereupon. Sections 484, 485, Laws 1897, p. 168, c. 378.

The judgment should be affirmed, with costs.

PARKER, C. J., and VANN, J., concur.
BARTLETT, MARTIN, and WERNER, JJ., concur in result. HAIGHT, J., absent.

Judgment affirmed.

(177 N. Y. 189)

ULSTER COUNTY v. STATE.

(Court of Appeals of New York. Jan. 12, 1904.)

COUNTIES—RAILROAD AID BONDS—TAXES ER-
RONEOUSLY PAID TO STATE—RECOV-
ERY—RIGHT OF ACTION.

1. Laws 1869, p. 2306, c. 907, as amended by Laws 1871, p. 558, c. 283, provides that "all taxes" except school and road taxes collected in any town on the assessed valuation of any railroad in said town for aid in the construction of the road shall be paid over to the treasurer of the county in which the town lies, to be used in the establishment of a sinking fund for the redemption of such bonds. A county paid into the state treasury part of its state tax derived from taxes so levied on railroads in towns which aided in their construction by the issue of bonds. Held, that such county could recover the amount thereof from the state on presentation and proof of its claim under Laws 1899, p. 725, c. 336, authorizing the state court of claims to hear and determine such claims.

2. The fact that the amount so paid by the county did not exceed that required by the general tax laws did not entitle the state to retain such moneys, as under Laws 1869, p. 2306, c. 907, § 4, as amended by Laws 1871, p. 558, c. 283, such money was to be devoted to a specific purpose, and in so far as the general tax law was antagonistic to such special act it must be deemed to have been repealed.

3. The fact that if the state refunds to a county taxes paid by the county into the state treasury, which moneys, by Laws 1869, p. 2306, c. 907, § 4, as amended by Laws 1871, p. 558,

c. 283, should have been devoted to a sinking fund to cancel railroad aid bonds, it would create a deficiency in the revenues of the state, is no defense to an action by the county to recover such moneys.

4. Where a county pays into the state treasury moneys derived from taxes levied upon railroads in towns which issued bonds to aid their construction, instead of applying the money to the establishment of a sinking fund, as provided by Laws 1869, p. 2306, c. 907, § 4, as amended by Laws 1871, p. 558, c. 283, the county, being liable to the towns for the moneys thus illegally diverted, is a proper party, under Laws 1899, p. 725, c. 336, to sue the state to recover such moneys.

O'Brien and Martin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by the county of Ulster against the state of New York. From an order of the Appellate Division (80 N. Y. Supp. 128) reversing a judgment dismissing plaintiff's claim and granting a new trial, the state appeals. Affirmed.

Under various statutes a number of the towns in Ulster county issued bonds to aid in the construction of certain railroads running through them. In 1869 the Legislature passed an act (chapter 907, p. 2306, § 4) providing that: "All taxes except school and road taxes, collected for the next thirty years, or so much thereof as may be necessary, in any town, village, or city, on the assessed valuation of any railroad in said town, village or city, for which said town, village or city has issued or shall issue bonds to aid in the construction of said railroad, shall be paid over to the treasurer of the county in which said town, village or city lies, and said money so paid over, including interest collected on bonds held by said treasurer as a sinking fund, shall be invested by said treasurer in state, city, town, county or village bonds, issued pursuant to law of this state on United States bonds, within sixty days after receiving the same, and shall be held by said county treasurer as a sinking fund for the redemption and payment of the bonds issued or to be issued by said town, village or city, to aid in the construction of said railroad." This act was amended in 1871 (page 558, c. 283) so as to permit the purchase of such railroad bonds with moneys arising from the taxes levied upon such railroads. The amended act further provided for the cancellation of the bonds so purchased, and for other things not material to the present inquiry. For many years after the passage of these acts no attempt was made to carry out their provisions in Ulster county or the bonded towns thereof. In 1888 the bonded towns commenced proceedings to compel the treasurer of Ulster county to set aside the state and county taxes levied upon such railroads for the purposes specified in the statutes of 1869 and 1871. Considerable litigation ensued between the bonded towns and the county, which resulted in the establishment of the right of the former to recover of the latter all state and county taxes not devoted to the purposes of the sinking fund provided for in

said acts. Some of the claims thus created have been paid, while others are yet to be paid. In various years, and from the moneys arising from taxes levied upon and collected from railroads which had been assisted by the issuance of bonds by the towns of Ulster county, the treasurer of that county paid into the state treasury in the form of state taxes the sum of \$42,451.87. In 1899 the Legislature passed an act (chapter 336, p. 725, Laws 1899) to confer jurisdiction upon the state court of claims to hear, audit, and determine the alleged claims of the several counties containing towns, villages, and cities bonded to aid in the construction of railroads, etc., on account of the payment to the state of the state taxes collected from such railroads, etc. By the first section of this act jurisdiction to hear, audit, and determine such claims is conferred upon the court of claims, with power to award judgments without interest. The second section directs the disposition of the moneys paid under any such judgment. The third section provides that awards shall be made and judgments rendered only when the facts proved shall make out a case against the state which would create a liability were the same established in a court of law or equity against an individual, corporation, or municipality. It further provides that the lapse of time shall not affect such claims, if filed within one year after the passage of the act. Under this act the present action was brought, with the result above stated.

John Cumneen, Atty. Gen., for the State.
John J. Linson, for respondent.

WERNER, J. (after stating the facts). Although this is the first action brought to this court by a county against the state under the enabling act of 1899 (chapter 336, p. 725, Laws 1899), the principle here involved has been decided in actions brought by towns against counties under the acts of 1869 and 1871 (chapter 907, p. 2306, Laws 1869, and chapter 283, p. 558, Laws 1871). Matter of Clark v. Sheldon, 106 N. Y. 104, 12 N. E. 341; Id., 134 N. Y. 335, 32 N. E. 23, 19 L. R. A. 138; Bridges v. Bd. Supervisors Sullivan Co., 92 N. Y. 575; Crowninshield v. Bd. Supervisors Cayuga Co., 124 N. Y. 585, 27 N. E. 242; Kilbourne v. Bd. Supervisors Sullivan Co., 137 N. Y. 173, 33 N. E. 159; Barnum v. Bd. Supervisors Sullivan Co., 137 N. Y. 179, 33 N. E. 162.

The only question that remains open for discussion is whether the principle applied in the cases above cited, as between the towns and counties, is controlling in the similar situation now occupied by certain counties toward the state. The incidental questions, which are suggested rather than argued, may be brushed aside with a bare mention. First. The statutes of limitations, which were urged in bar of the action of the towns against the counties, have no application here, because this court has held in Bd. Sup'rs Cayuga Co. v. State, 153 N. Y. 281, 47 N. E. 288, that a claim against the state cannot be

barred by lapse of time so long as there is no tribunal in existence with authority and jurisdiction to adjudicate upon it; and this equitable rule has also found expression in the enabling act (1899), which provides that lapse of time shall not be a barrier to valid claims filed within one year of the passage of the act. Second. The form in which relief shall be sought in such cases has been settled in *Strough v. Board of Supervisors Jefferson County*, 119 N. Y. 212, 23 N. E. 552, upon the theory that an action as for moneys had and received is the appropriate remedy where there has been a diversion of taxes from the purposes for which they were assessed and levied, and a payment thereof to an officer or department of government not entitled thereto. Third. The school and road taxes excepted from the operation of the statutes of 1869 and 1871 are those collected in the various tax districts for local purposes, and the exception referred to does not relate to that portion of the state tax which may be devoted to highways and schools at large. *Kilbourne v. Bd. Supervisors*, supra. Fourth. The taxes collected from such bonded railroads and paid to the county treasurer constituted a trust fund in his hands, upon which the law had impressed a distinct purpose, and any diversion of it from that purpose was illegal. *Matter of Clark v. Sheldon*, supra.

Upon the main question we take up the discussion with the observation that certain moneys derived from taxes levied upon railroads in towns which aided in their construction through the issue of bonds were directed by law to be devoted to a certain purpose, namely, to the establishment of a sinking fund to be used in the redemption and cancellation of such bonds. The depositary selected by the Legislature for this purpose was the county treasurer. The duty imposed upon him by statute was not performed. A part of the moneys that should have gone into the sinking fund have been paid into the state treasury. Under a precisely identical condition as between the towns and the county, the latter has been held liable to refund the moneys which it wrongfully—that is, illegally—obtained.

How is the case different as between county and state than it was between town and county? One difference that did exist has been obviated. The state could not be sued unless and until it created a tribunal to hear and determine such claims as the one at bar, while the county could be sued in the regular courts at any time within six years after the cause of action accrued. Is there any other difference? It is argued by the learned Attorney General that under the general tax laws of the state the county of Ulster has paid into the state treasury no more than it was required to pay; that its state tax, like that of every other county, is based upon its aggregate assessable property, which can neither be diminished nor

increased by the taxing officers, and therefore the state has received no more than it was entitled and bound to collect. This is the same argument that was presented in the cases cited, and it is a perfectly accurate statement of the law as far as it goes, but it stops just short of the point to which we are brought by the statutes of 1869 and 1871. These latter statutes have provided that a certain portion of the moneys derived from taxes levied in the towns of the county of Ulster shall not go into the treasuries of the county or state, but into the custody of a trustee for a specified purpose. The moneys have gone into the respective treasuries of county and state. The same power that commanded the taxation of all property not exempt by law has devoted to a specific purpose the moneys derived from certain taxes. This has been held to be within the constitutional prerogatives of the Legislature (*Matter of Clark v. Sheldon*, supra), and to the extent that this supplementary and special legislative fiat is inconsistent with the general tax laws of the state the latter must be held to have been pro tanto repealed or modified. The power to make laws includes the power to repeal and amend. The right to tax is co-ordinate with, not superior to, the right not to tax. Taxation for general purposes is hedged about by no sanctity that cannot be invoked in behalf of taxation for special purposes within constitutional limitations.

As the tax laws stood prior to 1869, it was the duty of the counties to pay and the right of the state to receive the annual state tax upon all assessable property. As the laws were amended in 1869 and 1871, a certain class of newly-created property was in effect and for a time exempted from taxation for state purposes. The moneys which, under the general laws, would have properly gone into the state treasury, were directed by the Legislature to be used in lightening the burdens of the tax districts which had assumed unusual burdens in creating this new property. No subsequent statute has changed this situation.

As a part of the learned Attorney General's argument, to the effect that the state has received no more than it was entitled to receive from the county of Ulster, it is urged that there is no inconsistency between the general tax laws and the statutes of 1869 and 1871; that it was no less the duty of the county treasurer to create the sinking fund referred to than it was the obligation of the county to pay a state tax upon all of its assessable property, but that all this could have been easily accomplished by adding enough to the general tax to create the sinking fund. We agree that there is no such inconsistency between the general tax laws and the special statutes as to render them absolutely hostile to each other, but that is as far as we can follow the argument. To us it seems plain to a demonstration that the railroads in ques-

tion were to be taxed only once, and that for a specified purpose. If the sinking fund was not to be created and augmented by the proceeds of that tax, it is apparent that there would either have to be an additional tax upon the railroads, or an increased tax upon the county at large; or, if not that, at least a double tax upon the bonded towns. One of three results would be inevitable: If the railroads were taxed for general purposes, and also to create a sinking fund, they would be subjected to double taxation. If the bonded towns were to be taxed for general purposes upon all their assessable property, and enough more to create a sinking fund, they would not only be paying a two-fold tax, but they would be subjected to the very burden from which the statutes of 1869 and 1871 were designed to relieve them. If the county at large were to be taxed for general purposes upon all assessable property, and for the purposes of the sinking fund as well, those towns and municipalities not bonded would be compelled to share the burdens belonging wholly to others. Surely, all these hypothetical possibilities suggested by counsel for the state would be much more inequitable than the claim of the plaintiff that the intention of the Legislature was to relieve the primary tax districts from the burdens assumed in the creation of new taxable property by devoting a portion of the moneys derived from its taxation to the payment of the debt created with the property.

Two other reasons are advanced for the dismissal of the plaintiff's claim. One is that the allowance of this and similar claims will create a deficiency in the revenues of the state; the other is that in the imposition of an additional general tax to supply this deficiency other counties will be compelled to share the burden which should be borne by the county of Ulster alone. This is in reality another statement of the argument already noticed. Assuming, although not admitting, that there can be such a thing as a deficiency in the revenues of the state, it cannot affect the merits of the case at bar, because this court has held (*Matter of Clark v. Sheldon*, supra), in the case of a town against a county, under conditions where an actual legal deficiency was created, that it could have no effect upon the liability of a county whose treasurer had used the moneys derived from taxes upon railroads in bonded towns for purposes not authorized or permitted by law. There is, however, no such thing as a legal deficiency in the revenues of the state. Unlike a county or town, the state is not limited to the imposition of a tax exactly equal to its expenditures or obligations; on the contrary, it may, and in fact sometimes does, levy a tax that amounts to more or less than the actual needs for the current year. As a matter of business policy, economy, and convenience, the annual aggregate income from taxation is doubtless based upon the anticipated outgo, but the power to tax for more or less is not thereby affected. So, also,

the contention that other portions of the state will be compelled to bear part of the burdens that really belong to a single county is answered by the suggestion that, if the moneys which should have been applied to the purposes directed by the statute had not been paid into the state treasury, the other portions of the state would have borne no new or additional burden. They would simply have been deprived, for the time being, of the contribution which newly created property would have added to the general fund.

The final question to be decided is whether the county stands in such legal relation to the situation that it has a right of action on its own behalf and as trustee for the towns. Why not? Concededly, it has refunded to the towns some of the moneys which have been diverted from their proper destination, and its liability to refund the rest has been legally established. This liability is based upon the fact that it had no right to such moneys. A part of these moneys have found their way into the state treasury. The state has no more right thereto than the county. The county having paid to the state moneys that should have been deposited with a trustee for the benefit of the towns, the state should, *ex æquo et bono*, return them to the county. Apart from all this, however, the enabling act of 1899 has designated the county as the proper party to present the claim. The county is the only tax district that is brought into direct relations with the tax department of the state. Through the county these moneys reached the state, and there is manifest propriety and justice in providing that through the same agency they shall be returned to the proper custodian, the trustee designated by the state.

The order of the Appellate Division should be affirmed, with costs, and judgment absolute ordered for the plaintiff upon defendant's stipulation.

PARKER, C. J., and GRAY, BARTLETT, and CULLEN, JJ., concur. O'BRIEN and MARTIN, JJ., dissent.

Order affirmed, etc.

(177 N. Y. 145)

PEOPLE v. LOCHNER.

(Court of Appeals of New York. Jan. 12, 1904.)

LABOR LAWS—REGULATING HOURS OF WORK—POLICE POWER—CONSTITUTIONAL LAW.

1. Laws 1897, p. 485, c. 415, art. 8, § 110, providing that no employé shall be required to work in a bakery or confectionery establishment more than 60 hours in any one week, nor more than 10 hours a day, except for the purpose of making a shorter workday on the last days of the week, nor more hours in any one week than will make an average of 10 hours per day for the number of days which the employé shall work, is an exercise of the police power relating to the public health.

2. Laws 1897, p. 485, c. 415, art. 8, § 110, restricting the hours of labor in bakeries, is not

§ 2. See Constitutional Law, vol. 10, Cent. Dig. §§ 656, 844.

a violation of the fourteenth amendment of the United States Constitution, providing that no state shall make any law abridging the privileges of the citizens, nor deprive any person of liberty or property without due process of law.

3. Laws 1897, p. 485, c. 415, art. 8, § 110, regulating the hours of labor in bakeries, is not a violation of Const. art. 1, § 1, providing that no member of the state shall be deprived of any of the rights or privileges secured to any citizen thereof unless by the law of the land.

O'Brien, Bartlett, and Martin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Joseph Lochner was convicted of a misdemeanor, and from a judgment of the Appellate Division (76 N. Y. Supp. 396) affirming the same he appeals. Affirmed.

William S. Mackie and Smith M. Lindsley, for appellant. Timothy Curtin, for the People.

PARKER, C. J. Defendant's conviction is under subdivision 3, § 3841, Pen. Code, which makes a violation of article 8, c. 415, p. 485, Laws 1897, a misdemeanor. The judgment is affirmed by the Appellate Division.

Defendant urges as ground for a reversal that article 8—which on its face purports to be, as we shall see later, an exercise of the police power of the state—offends against the first section of the fourteenth amendment to the United States Constitution. That section provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is also claimed that the statute violates those provisions of the state Constitution which declare that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers" (Const. art. 1, § 1), "nor be deprived of life, liberty or property without due process of law" (Const. art. 1, § 6).

The first cases in which the fourteenth amendment is discussed by the United States Supreme Court are the Slaughter House Cases, 83 U. S. 36, 21 L. Ed. 394, wherein is challenged the Louisiana statute authorizing the removal of noxious slaughter houses from the more densely populated part of New Orleans, and their location where they could least affect the health and comfort of the people, and to that end granting a corporation exclusive right for 25 years to maintain slaughter houses within three parishes containing between 200,000 and 300,000 people, and including New Orleans. This is held to be a police regulation for the health and comfort of the people, and therefore within the power of the state Legislature, and not affected by the fourteenth amendment, which

the court says is not intended to interfere with the exercise of police power by the states.

In *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, the Supreme Court has before it a San Francisco ordinance prohibiting work in public laundries within defined territory from 10 p. m. to 6 a. m., claimed to be repugnant to the fourteenth amendment. The court rules that the ordinance is well within the police power, and in the course of the opinion says: "Neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." Page 31, 113 U. S., page 359, 5 Sup. Ct., 28 L. Ed. 923.

There are many interesting cases in the United States Supreme Court sustaining statutes of different states which in terms seem repugnant to the fourteenth amendment, but which that court declares to be within the police power of the states. Among them are statutes declaring a railroad company liable for damages to an employé although caused by another employé (*Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107); fixing the damages at double the value of stock killed when due to the neglect of a railroad company to maintain fences (*Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585); requiring locomotive engineers to be licensed, and providing that the railroad company employing them pay the fees of examination (*Nashville, C. & St. L. Ry. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352); requiring cars to be heated otherwise than by stoves on railroads over 50 miles in length (*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853); providing for immediate payment of wages by railroad companies to discharged employées (*St. Louis, I. M. & St. P. Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746); prohibiting options to sell grain (*Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623); providing for inspection of mines at expense of owners (*St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872); and one declaring void all contracts for sales of stocks on margins (*Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323).

I shall call special attention to but one other case, namely, *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. In that case the court reviews at length many of the cases arising under the fourteenth amendment, beginning with the Slaughter House Cases. The case involves a Utah statute (Laws 1896, p. 219, c. 72) providing that "the period of employment of workmen

In all underground mines or workings shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger." Violation is made a misdemeanor. The conviction of one Holden under that statute is affirmed by the United States Supreme Court. It is argued by defendant in that case that the statute has no relation to the health or safety of the public or the persons affected, or, if so, only in a very remote degree, while its direct and principal effect is to interfere with the rights and liberties of the contracting parties; that the right to contract contains three essential and indispensable elements, guaranteed and protected by the United States Constitution, namely, "the right of the employer and employé to agree upon (1) the character of the service to be performed, (2) the amount to be paid for such service, and (3) the number of hours per day during which the service is to continue"; that the destruction or abridgment of one element is a destruction or abridgment of the whole of said right to contract; that the statute abridges the "privileges and immunities" in that it deprives the employer and the employé of perfect freedom and liberty to pursue unmolested a lawful vocation in a lawful manner; that the rights of the employer and employé in that direction were unlimited before the adoption of the fourteenth amendment, and that since its adoption it is beyond the power of any state to make any laws abridging or destroying such rights. This latter contention—which, if sustained, would practically prevent all further development of the police power on the part of the states—is overborne by the court. Many cases passed upon by the court since the adoption of the fourteenth amendment are cited, furnishing illustrations tending to justify the boast of the devotees of the common law that by the application of established legal principles the law has been and will continue to be developed from time to time so as to meet the ever-changing conditions of our widely diversified and rapidly developing business interests. The court quotes from Mr. Justice Matthews in *Hurtado v. California*, 110 U. S. 516, 530, 4 Sup. Ct. 111, 118, 28 L. Ed. 232: "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. * * * The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. * * * There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its sup-

ply have been exhausted. On the contrary, we shall expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms." The court illustrates by forceful examples the necessity of recognizing in legal decisions the change of conditions. After calling attention to the fact that in the early history of the country there was no occasion for any special protection of a particular class, as we were almost purely an agricultural country, it instances coal mining and the manufacture of iron. When these industries began in Pennsylvania as early as 1716, they were carried on in such a limited way, and by such primitive methods, that no special laws were deemed necessary to protect operatives; but since that time they have assumed such vast proportions in that and other states, and developed so many dangers to the safety and life of those engaged in them, that laws to meet such exigencies have become necessary. It calls attention to many protective statutes enacted in many different states providing for fire escapes in hotels, theaters, factories, and other large buildings; inspection of boilers; appliances to obviate the dangers incident to railroad and steamboat transportation; the protection of dangerous machinery against accidental contact; the shoring up of ventilation shafts; means for signaling in mines for fresh air; the elimination, as far as possible, of dangerous gases; and safe means of hoisting and lowering employes in mines. It is said that statutes providing such safeguards "have been repeatedly enforced by the courts of the several states, their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional" (169 U. S. 366, 394, 18 Sup. Ct. 383, 389, 42 L. Ed. 780), which, of course, means that the courts of the several states making these decisions hold that such statutes do not deprive citizens of any of the rights or privileges guaranteed by the Constitution, nor deprive them of property without due process of law, for every state Constitution contains such a provision or its equivalent. Of such illustrations the court further says (page 387, 169 U. S., page 386, 18 Sup. Ct., 42 L. Ed. 780): "They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible, and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land." This broad-minded view—which is character-

istic of the development of the law by this great court since the adoption of the fourteenth amendment—should, and doubtless will, be followed by the courts of the several states whenever called upon to determine whether statutes offend against the provisions of state Constitutions similar or equivalent to the provisions of the fourteenth amendment. The cases cited, and the reasoning of the court, to which but brief reference is here made, demonstrate that this statute does not offend against the fourteenth amendment, and it necessarily follows that it is not repugnant to equivalent provisions in our state Constitution.

This court throughout all its history has maintained the same position as that taken by the United States Supreme Court. Many authorities could be cited in support of that assertion, but none need be, for they are all in one direction. The impossibility of setting the bounds of the police power has up to this time prevented any court from attempting it, and the reason for it is well stated by Judge Gray in *People v. Ewer*, 141 N. Y. 129, 132, 36 N. E. 4, 5, 25 L. R. A. 794, 38 Am. St. Rep. 788. He says: "It is difficult, if not impossible, to define the police power of a state; or, under recent judicial decisions, to say where the constitutional boundaries limiting its exercise are to be fixed. It is a power essential to be conceded to the state in the interest and for the welfare of its citizens. We may say of it that when its operation is in the direction of so regulating the use of private property or of so restraining personal action as manifestly to secure or to tend to the comfort, prosperity, or protection of the community, no constitutional guaranty is violated, and the legislative authority is not transcended." In that case the constitutionality of section 292, Pen. Code, is questioned. That section makes it a misdemeanor to exhibit as a dancer a female child under 14 years of age. The court denies that the statute violates our Constitution because it deprives the mother, the person arrested, of the rights and privileges secured to her by the Constitution.

In *People ex rel. Nechamcus v. Warden*, etc., 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718, the constitutionality of c. 602, p. 1148, Laws 1892, is challenged. The act provides for examination and registration of master plumbers, and makes it a misdemeanor for any person to engage in that trade without such registration. This court holds the statute to be within the police power of the Legislature, and therefore not repugnant to the Constitution. Judge Gray says in the opinion (page 535, 144 N. Y., page 688, 39 N. E., 27 L. R. A. 718): "There has been much discussion upon the subject of what is a valid exercise of the police power of the state through legislative enactment, and there is little to be added to what this and other courts have said. The police power extends to the protection of persons and of property

within the state. In order to secure that protection, they may be subjected to restraints and burdens by legislative acts. If the act is a valid and reasonable exercise of the police power of the state, then it must be submitted to as a measure designed for the protection of the public, and to secure it against some danger, real or anticipated, from a state of things which modifications in our social or commercial life have brought about. The natural right to life, liberty, and the pursuit of happiness is not an absolute right. It must yield whenever the concession is demanded by the welfare, health, or prosperity of the state. The individual must sacrifice his particular interest or desires if the sacrifice is a necessary one in order that organized society as a whole shall be benefited. That is a fundamental condition of the state, and which, in the end, accomplishes by reaction a general good, from which the individual must also benefit."

In *Health Department v. Rector*, etc., 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579, the court considers a provision of the New York consolidation act requiring that tenement houses already erected shall be furnished by the owners with water, "whenever they shall be directed so to do by the board of health," "in sufficient quantity at one or more places on each floor occupied or intended to be occupied by one or more families." The health department served a notice requiring defendant to supply water, as commanded by the statute, in buildings owned by it. Defendant refused to do so, and an action was brought by the health department to compel compliance. Defendant contends in that case that the statute violates that provision of the state Constitution which declares that no member of this state shall "be deprived of life, liberty or property without due process of law." This court holds that the statute does not offend against the Constitution, but that it is a valid exercise of the police power; that the Legislature, by virtue of that power, can direct that improvements or alterations shall be made in existing houses at the owners' expense when it clearly appears that it tends in some plain and appreciable manner to guard and protect the public; and that a compensation need not be made to the owner in such case, the effect of the act being not to appropriate private property, but simply to regulate its use and enjoyment by the owner. Judge Peckham, writing the opinion of the court, says (page 43, 145 N. Y., page 836, 39 N. E., 45 Am. St. Rep. 579): "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner."

People v. Haynor, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707,

is a case as near the border line, perhaps, as any to be found in this state; certainly very much nearer to it than the case under consideration. It exhaustively considers the authorities in this state bearing upon the police power. The case involves the constitutionality of what is known as the "Sunday Barber Law," which makes it a misdemeanor for any person to carry on the business or work of a barber on the first day of the week except in the city of New York and the village of Saratoga, where such business or work may be carried on until 1 o'clock in the afternoon of that day. The statute is held to be constitutional, because a valid exercise of the police power. The opinion is written by Judge Vann. After a careful examination of the authorities, he presents the underlying question in this way (page 201, 149 N. Y., page 543, 43 N. E., 31 L. R. A. 689, 52 Am. St. Rep. 707): "The vital question, therefore, is whether the real purpose of the statute under consideration has a reasonable connection with the public health, welfare, or safety." After stating that the object of the act is to require the observance of Sunday, not as a holy day, but as a day of rest and recreation, he proceeds—with argument buttressed by authority in this state and in other jurisdictions—to answer the question in the affirmative. In the course of the argument he says (page 208, 149 N. Y., page 544, 43 N. E., 31 L. R. A. 689, 52 Am. St. Rep. 707): "According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of general rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of the citizens, as this causes the least inconvenience through interference with business. It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. * * * The statute under discussion tends to effect this result, because it requires persons engaged in a kind of business that takes many hours each day to refrain from carrying it on during one day in seven. This affords an opportunity, recurring at regular intervals, for rest, needed both by the employer and the employed; and the latter, at least, may not have the power to observe a day of rest without the aid of legislation. * * * As barbers generally work more hours each day than most men, the Legislature may well have concluded that legislation was necessary for the protection of their health." The pertinency and controlling force of that argument to the question under consideration here will be manifest when we come to an examination of the statute.

No authorities can be found in this court

which conflict with the cases to which I have called attention. *Rodgers' Case*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605, is cited in opposition, but why I cannot see. The police power is not even considered in that case. The defense to that portion of the statute which is condemned as unconstitutional because it requires a stipulation in all contracts with the state and municipalities that the contractor shall "pay the prevailing rate of wages at least," being rested on the grounds (1) that the state, as proprietor, can do what an individual proprietor can do, namely, insist upon any reasonable provision in a contract as a condition for doing the work; (2) that the state is proprietor not only as to contracts for work for the benefit of the entire state, but also as to contracts for work authorized by it for the various subdivisions of the state made for convenience of administration; (3) that hence it violates no provision of the Constitution.

Having shown by an examination of a few of the leading authorities relating to the police power that the decisions of this court are in harmony with those of the United States Supreme Court, and having specially brought out some of the argument in those decisions for the purpose of presenting something of the vast scope of that power, we come next to the question, in what spirit should the court approach the consideration of a statute said on the one hand to offend against the Constitution, and on the other to be a proper exercise of the police power? The courts are frequently confronted with the temptation to substitute their judgment for that of the Legislature. A given statute, though plainly within the legislative power, seems so repugnant to a sound public policy as to strongly tempt the court to set aside the statute, instead of waiting, as the spirit of our institutions require, until the people can compel their representatives to repeal the obnoxious statute. In the early history of this country eminent writers gave expression to the fear that the power of the courts to set aside the enactments of the representatives chosen to legislate for the people would in the end prove a weak point in our governmental system, because of the difficulty of keeping the exercise of such great power within its legitimate bounds. So far in our judicial history it must be said that the courts have, in the main, been conservative in passing upon legislation attacked as unconstitutional; but occasionally, and especially when a case is one on the border line, it is quite possible that the judgment of the court that the legislation is unwise may operate to carry the decision to the wrong side of that border line. Certain it is that the courts have greatly extended their jurisdiction over many administrative acts that were originally supposed not to present cases for the court to pass upon, and in that way the courts have come to play a very im-

portant part in state and municipal administration. Some expression of our views on that subject is given in *Matter of Guden*, 171 N. Y. 529, 535, 64 N. E. 451. Now, when considering the mental attitude with which the court should begin an examination of this question, it is well to have in mind not only the great breadth and scope of the police power, and the legislative control over it as expressed in some of the opinions from which we quote *supra*, but it is also well to have in mind some of the expressions of this court as to the way in which the court should approach the consideration of such a question as this, involving the constitutionality of a statute.

Judge Andrews says in *People v. King*, 110 N. Y. 418, 423, 18 N. E. 245, 246, 1 L. R. A. 293, 6 Am. St. Rep. 389: "By means of this power the Legislature exercises a supervision over matters affecting the common weal. * * * It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community, and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion with which courts cannot interfere." Judge Gray says in *Necamcus' Case*, *supra*: "The courts should always assume that the Legislature intended by its enactments to promote those ends [public health, comfort, and safety], and, if the act admits of two constructions, that should be given to it which sustains it, and makes it applicable in furtherance of the public interests." 144 N. Y. 529, 536, 39 N. E. 686, 688, 27 L. R. A. 718. "Whether the legislation is wise is not for us to consider. The motives actuating and the inducements held out to the Legislature are not the subject of inquiry by the courts, which are bound to assume that the lawmaking body acted with a desire to promote the public good. Its enactments must stand, provided always that they do not contravene the Constitution, and the test of constitutionality is always one of power; nothing else. But in applying the test the courts must bear in mind that it is their duty to give the force of law to an act of the Legislature whenever it can be fairly so construed and applied as to avoid conflict with the Constitution." *Bohmer v. Hafen*, 161 N. Y. 390, 399, 55 N. E. 1047, 1048. Where there "is room for two constructions, both equally obvious and reasonable, the court must, in deference to the Legislature of the state, assume that it did not overlook the provisions of the Constitution, and designed the act * * * to take effect. Our duty, therefore, is to adopt the construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution." *Supervisors v. Brogden*, 112 U. S. 261, 268, 5 Sup. Ct. 125, 28 L. Ed. 704; *People ex rel. Burrows v. Supervisors of Orange Co.*, 17 N. Y. 236, 241; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50, 54; *Gilbert*

El. Ry. Co. v. Handerson, 70 N. Y. 361, 367; *N. Y. & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, 551, 42 N. E. 1088, 1091. The court is inclined to so construe the statute as to validate it. *People v. Equitable Trust Co.*, 96 N. Y. 387, 394; *People ex rel. Sinkler v. Terry*, 108 N. Y. 1, 7, 14 N. E. 815; *Matter of N. Y. El. R. R. Co.*, 70 N. Y. 327, 342; *People ex rel. Killen v. Angle*, 109 N. Y. 564, 567, 17 N. E. 413; *Rogers v. Common Council of Buffalo*, 123 N. Y. 173, 181, 25 N. E. 274, 9 L. R. A. 579; *People ex rel. Carter v. Rice*, 135 N. Y. 473, 484, 31 N. E. 921, 16 L. R. A. 836. "Every act of the Legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear." *People ex rel. Kemmler v. Durston*, 119 N. Y. 569, 577, 24 N. E. 6, 8, 7 L. R. A. 715, 16 Am. St. Rep. 859. "Before an act of the Legislature can be declared void as repugnant to the Constitution, the conflict must be manifest." *Matter of Stilwell's Estate*, 139 N. Y. 337, 341, 34 N. E. 777, 778. "If the act and the Constitution can be so construed as to enable both to stand, and each can be given a proper and legitimate office to perform, it is the duty of the court to adopt such construction." *People v. Rosenberg*, 138 N. Y. 410, 415, 34 N. E. 285, 286. The statute under consideration in that case is held to be within the police power, as is the statute considered in the following case: "It is not necessary to the validity of a penal statute that the Legislature should declare on the face of the statute the policy or purpose for which it was enacted." *People v. West*, 106 N. Y. 293, 297, 12 N. E. 610, 613, 60 Am. Rep. 452.

Having considered the authorities bearing upon the subject of the exercise of police power at greater length than could be justified were it not for the different view that obtains in this court as to the authority of the Legislature to pass the statute in question, and having glanced at a few authorities indicating the frame of mind in which the court should approach the consideration of the question of the constitutionality of an act of the Legislature, we come to the consideration of the statute in question, aided by the principles established by the United States Supreme Court and the courts of this state, to which reference has been made. I quote the whole statute, notwithstanding its length, in order that it may be at once determined upon its mere reading whether the purpose of the Legislature was to subserve, in some measure, the public good under the police power of the state:

"Article VIII.

"Bakeries and Confectionery Establishments.

"Sec. 110. Hours of labor in bakeries and confectionery establishments.—No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in

any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.

"Sec. 111. Drainage and plumbing of buildings and rooms occupied by bakeries.—All buildings or rooms occupied as biscuit, bread, pie or cake bakeries, shall be drained and plumbed in a manner conducive to the proper and healthful sanitary condition thereof, and shall be constructed with air shafts, windows or ventilating pipes, sufficient to insure ventilation. The factory inspector may direct the proper drainage, plumbing and ventilation of such rooms or buildings. No cellar or basement, not now used for a bakery shall hereafter be so occupied or used, unless the proprietor shall comply with the sanitary provisions of this article.

"Sec. 112. Requirements as to rooms, furniture, utensils and manufactured products.—Every room used for the manufacture of flour or meal food products shall be at least eight feet in height and shall have, if deemed necessary by the factory inspector, an impermeable floor constructed of cement, or of tiles laid in cement, or an additional flooring of wood properly saturated with linseed oil. The side walls of such rooms shall be plastered or wainscoted. The factory inspector may require the side walls and ceiling to be whitewashed, at least once in three months. He may also require the wood work of such walls to be painted. The furniture and utensils shall be so arranged as to be readily cleansed and not prevent the proper cleaning of any part of the room. The manufactured flour or meal food products shall be kept in dry and airy rooms so arranged that the floors, shelves and other facilities for storing the same can be properly cleaned. No domestic animals, except cats, shall be allowed to remain in a room used as a biscuit, bread, pie, or cake bakery or any room in such bakery where flour or meal products are stored.

"Sec. 113. Wash rooms and closets; sleeping places.—Every such bakery shall be provided with a proper wash-room and water-closet or water-closets apart from the bake-room, or rooms where the manufacture of such food product is conducted, and no water-closet, earth-closet, privy or ashpit shall be within or connected directly with the bake-room of any bakery, hotel or public restaurant.

"No person shall sleep in a room occupied as a bake-room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored. If the sleeping places are on the same floor where such products are manufactured, stored or sold, the factory inspector may inspect

and order them put in a proper sanitary condition.

"Sec. 114. Inspection of bakeries.—The factory inspector shall cause all bakeries to be inspected. If it be found upon such inspection that the bakeries so inspected are constructed and conducted in compliance with the provisions of this chapter, the factory inspector shall issue a certificate to the persons owning or conducting such bakeries.

"Sec. 115. Notice requiring alterations.—If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries, in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent or lessee of such premises, either personally or by mail, requiring such alterations to be made within sixty days after such service, and such alterations shall be made accordingly." Laws 1897, pp. 485-487, c. 415.

That the public generally are interested in having bakers' and confectioners' establishments cleanly and wholesome in this day of appreciation of, and apprehension on account of, microbes, which cause disease and death, is beyond question. Not many years ago the baking was largely done in the family; but now in a large percentage of the houses in cities and villages the baker is relied on to a large extent to furnish bread, biscuits, cake, and pie, as well as confectionery, while over many country roads the bakers' wagons go twice a week or more to supply the farmers and inhabitants of small settlements with their wares. Indeed, it can be safely said that the family of to-day is more dependent upon the baker for the necessities of life than upon any other source of supply. That being so, it is within the police power of the Legislature to so regulate the conduct of that business as to best promote and protect the health of the people. And to that end the Legislature undertakes to provide—by a statute which bears on its face evidence of an intelligent draftsman acquainted with the dangers of unsanitary conditions in such establishments—for proper drainage and plumbing of the building and rooms occupied for such purpose.

Is there room to doubt that the sole purpose of the Legislature in prohibiting the use of cellars for bakeries unless the occupant first complies with the sanitary provisions of this article is to protect the public from the use of the food made dangerous by the germs that thrive in darkness and uncleanness? Is it possible that any one can question that the sole purpose of the Legislature is the safeguarding of the public health when it provides for floors, ceilings, and side walls of such material as that they may be readily cleansed; compels the keeping of flour or meal food products in dry and airy rooms, so arranged that the storing facilities can be properly cleaned, and prohibits the keeping

of domestic animals within such rooms? And will any one question the motive which induced the prohibition of a "water-closet, earth-closet, privy or ashpit . . . within or connected directly with the bake-room of any bakery, hotel or public restaurant"? If not, why should any one question the object of the Legislature in providing in the same article, and as a part of the scheme, that "No employé shall be required or permitted to work" in such an establishment "more than sixty hours in any one week," an average of 10 hours for each working day. It is but reasonable to assume from this statute as a whole that the Legislature had in mind that the health and cleanliness of the workers, as well as the cleanliness of the workrooms, was of the utmost importance; and that a man is more likely to be careful and cleanly when well, and not overworked, than when exhausted by fatigue, which makes for careless and slovenly habits, and tends to dirt and disease. If there is opportunity—and who can doubt it?—for this view, then the Legislature had the power to enact as it did, and the courts are bound to sustain its action as justified by the police power, as we see from the authorities referred to earlier in this opinion.

I hear but one argument advanced for the purpose of convincing the mind that the object of this statute is not to protect the public, and that argument is that article 8 is to be found in the labor law. Therefore it is said it is a labor law, not a health law. The question presented by that argument is, does the label or the body of the statute prevail? Does calling a statute names deprive it of its intended and real character? If a statute relating principally to banking happens, in the course of codification, to be incorporated as an article in the general corporation law, does it cease to operate on the banking business? I submit without argument that the questions answer themselves. Assuming, however, for the purpose of argument only, that the label is of such substantial importance that it may be accepted as against the obvious meaning of the statute, then I say that article 8 bears its own title, which is "Bakeries and Confectionery Establishments." All that is contained in that article relates to bakeries and confectionery establishments and their conduct, and to no other subject whatever. Therefore it is fully, appropriately, and harmoniously entitled.

Again, inasmuch as it is obvious, as we have seen, from a mere reading of the statute, that the legislative purpose is to benefit the public, we must assume—even if the object of the Legislature in limiting the hours of work of employés is not to protect the health of the general public who take the wares made by such employés—that the Legislature intends to protect the health of the employés in such establishments; that, for

some reason sufficient to it, it has reached the conclusion that in work of this character men ought not to be employed more than an average of 10 hours a day. Now, that being so—and certainly no more restricted view of that statute can be taken by those who would destroy it—we find that the action of the Legislature is within the police power, not only under the authorities of the United States, but of this state, and of this court.

Special attention has already been called to *Holden's Case*, 169 U. S. 806, 18 Sup. Ct. 383, 42 L. Ed. 780. A Utah statute making it a misdemeanor to employ a man more than 8 hours per day in "underground mines or workings" is sustained, and a conviction thereunder upheld, by the United States Supreme Court, on the ground that it is within the police power of the state to pass such a statute. That interesting case—to which I have made extended reference supra—is in point and controlling so far as the fourteenth amendment is concerned, and should be controlling in this court so far as equivalent provisions of our state Constitution are concerned. It must also be held, under the authority of *Havnor's Case*, supra, even though it may be assumed from the reading of the statute that the object of the Legislature is to protect employés in such establishments from working more than 10 hours a day, that it is within the police power, and therefore not repugnant to the state Constitution. The statute which that case passes upon makes it a misdemeanor to carry on the business of a barber on the first day of the week, and a judgment of conviction under that law is affirmed in this court because "the statute under consideration has a reasonable connection with the public health, welfare, or safety." Certainly, if this court could so hold in that case, it must so hold in this, even under the construction of the statute which those would give to it who are affected by the fact that article 8, c. 32, p. 2028, *Heydecker's Gen. Laws*, is grouped with 12 other articles, the compilation being known as the "Labor Law," instead of being in the *Domestic Law*, with articles entitled "Flour and Meal," "Beef and Pork," or in the *Public Health Law* with articles such as "Adulteration," "Practice of Medicine," or the like.

Again, many medical authorities classify workers in bakers' or confectioners' establishments with potters, stonecutters, file grinders, and other workers whose occupation necessitates the inhalation of dust particles, and hence predisposes its members to consumption. The published medical opinions and vital statistics bearing upon that subject standing alone fully justify the section under review as one to protect the health of the employés in such establishments, and it is the duty of this court to assume that the section was framed not only in the light of, but also with full appreciation of the force of the medical authority bearing upon, the sub-

ject—authority which reasonably challenges the attention and stimulates the helpfulness of the philanthropist.

The conclusion necessarily follows, therefore, from an examination of the statute in the light of the authorities cited, that the purpose of article 8, and every part of it, including the provision in question, is to benefit the public; that it has a just and reasonable relation to the public welfare, and hence is within the police power possessed by the Legislature. But if, in violation of the duty of the court as stated in *Brogden's Case*, supra, which is "to adopt the construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution," we award to the title of a general law such potency as causes it to overcome both the title and the provisions of an article therein, thus making the provision a labor law, we are still required to hold that it is within the police power.

The judgment should be affirmed.

GRAY, J. I shall concur with the Chief Judge, whose opinion I regard as carefully expressed, and convincing in its reasoning. The question for us is, in the first place, whether, notwithstanding its embodiment in the labor law, we may treat the statutory provision in question as a health law; and, in the next place, if we may do so, whether its enactment is a reasonable exercise of the police power of the state, which the courts should give effect to. I am of the opinion that its being placed in the labor law furnishes no adequate reason for limiting its reading and construction by those considerations, which appertain to laws passed strictly in the interest of labor, if, from its association with other provisions in *pari materia*, a different and independent purpose is disclosed. To deprive a health law of its intended operation because it is not found in the statute book under that or a kindred title would be, in my opinion, to apply an unreasonable and an unsatisfactory test of its validity. If the court concludes that the intent of an enactment in some valid exercise of the police power is to regulate some particular trade or occupation, then, clearly, it should be quite immaterial under what heading it appears to be classified in the statutes. It would not do to nullify the will of the people upon so technical and narrow a consideration. Therefore I think we may proceed beyond that ground to the determination of the question whether, if a health law, the 110th section of this article 8 was reasonable, and therefore a valid exercise of the police power. If it stood alone, unaccompanied and unexplained by cognate provisions, I should incline to the view that the enactment was unconstitutional. It might justly be held to fall within that class of legislation, which has received judicial condemnation, because, as a regulation of the

hours of the employed, its object would appear to be for their protection against the exaction of a disproportionate amount of work for the wages paid. That would be to infringe upon the liberty of contract. But I think we must read the section in connection with those sections which immediately follow, and then it is that we find it to be made certain that the object of the legislative enactment had relation to the conservation of the public health. We perceive that the Legislature is dealing with the workings of a business conducted upon a scale calling for the employment of more or less laborers, and which is affected by a public interest, in the sense that the food product may sensibly depend for its healthfulness upon the observance of sanitary rules and precautions. Such precautionary regulations may involve as well the establishment of proper conditions to insure the maintenance of the normal vitality of the workman as the wholesomeness of the general environment. We must presume that the legislative body was animated by a reasonable intention to promote the public welfare, and if the courts can give effect to it, because tending to guard the public health they should unhesitatingly do so. Legislation will not be allowed arbitrarily to interfere with the personal liberty of the citizen under the specious guise of an exercise of the police power, and therefore it is that our courts may supervise, as a judicial question a determination of the Legislature to exercise the police power in restraint of some trade or calling. It is true that the tendency has been growing in the direction of an excess of paternalism in government, and that the courts of this and of other states have rather hastened to uphold legislative interference with the pursuits of citizens upon any plausible pretext of its being in furtherance of the general welfare. The federal Supreme Court has in the broadest terms recognized the power of the individual states to exercise a police power of internal regulation when the object is to promote by reasonable laws the public safety, health, and comfort. To the legislative body is conceded the power to govern men and the affairs of men through the establishment of such rules and regulations as may be conducive to the public betterment, because tending to the protection of the lives, health, and comfort of persons and the protection of property, and that concession has been, in my opinion, at times more broadly made in the decisions of the courts than the conservative spirit of our democratic form of government will justify. But that the Legislature has, and should have, the broadest authority to exercise a police power of internal regulation in the direction of protecting the peace, the safety, and the health of the community I fully concede. In this law, which restricts the working hours of employes in bakery and confectionery establishments, I think we may fairly perceive a statutory regulation reasonably promotive

of the public health, because compelling the master of such an establishment to conduct it in a manner the least capable of affecting his product prejudicially. We may, not unreasonably, assume that an employé may work too long for his health under the conditions, and that an impaired vitality and the possible development of organic diseases may be the result. If, to obviate the possible consequences to the consumer of the food manufactured, the Legislature determines to interfere by limiting, among other regulations, the hours of the workman, I do not think we should hold the interference to be without reason.

VANN, J. I concur in the result reached by the Chief Judge for the following reasons:

The power of the Legislature to pass what it may consider "health laws" is not unlimited, but is bounded by the duty of the courts to determine whether the act has a fair, just, and reasonable relation to the general welfare. *Matter of Jacobs*, 98 N. Y. 98, 108, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 401, 17 N. E. 343, 4 Am. St. Rep. 465; *People v. Haynor*, 149 N. Y. 195, 200, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707. As was said by the court in the *Gillson Case*: "Under an exercise of the police power the enactment must have some relation to the comfort, the safety, or the welfare of society, and it must not be in conflict with the Constitution. The law will not allow the rights of property to be invaded under the guise of a police regulation for the protection of health, when it is manifest that such is not the object and purpose of the regulation. * * * It is generally for the Legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and, if its measures are calculated, intended, convenient, or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review." We have before us simply that part of the labor law which regulates the hours of labor in bakeries and confectionery establishments by limiting them to not exceeding 60 per week and 10 per day, "unless for the purpose of making a shorter work day on the last day of the week." The draftsman of this statute apparently used as a model "The Bakehouse Regulation Act" passed by the English Parliament in 1863, but he went far beyond that pattern in limiting the hours of labor, for the New York statute applies to all employés in bakeries, while the English act makes no regulation of hours per day or week, but simply prohibits the employment of persons under 18 years of age between 9 at night and 5 in the morning. 26-27 Victoria, cap. 40. Both acts contain similar provisions to secure cleanliness and ventilation of the rooms used to carry on the business, as well as the separation of sleeping apartments therefrom; none of which are now called in question.

I do not think the regulation in question can be sustained unless we are able to say from common knowledge that working in a bakery and candy factory is an unhealthy employment. If such an occupation is unhealthy, the Legislature had the right to prohibit employers from requiring or permitting their employés to spend more than a specified number of hours per day or week in the work, because such a command would be in the interest of the public health, and would promote the general welfare. As in the *Jacobs Case* we took judicial notice of the nature and qualities of tobacco (page 113, 98 N. Y., 50 Am. Rep. 636), so in this case we may take judicial notice of the effect of very fine particles of flour and sugar when inhaled into the lungs from the heated atmosphere of manufactories of bread and candy. Necessarily, in considering the subject, we may resort to such sources of information as were open to the Legislature. Vital statistics show that those vocations which require persons to remain for long periods of time in a confined and heated atmosphere filled with some foreign substance, which is inhaled into the lungs, are injurious to health, and tend to shorten life. Bakers and confectioners, who, during working hours, constantly breathe air filled with the finest dust from flour and sugar, have a tendency to consumption, the most terrible scourge known to modern civilization, and resulting in more deaths than any other disease. 1 *People's Cyc.* 479; *Mulhall's Dict. Statistics*, 193 and 683. Thus, in the article on phthisis in volume 18 of the last edition of the *Encyclopædia Britannica* it is said: "Occupations which necessitate the inhalation of irritating particles, as in the case of stonemasons, needle grinders, workers in minerals, in cotton, flour, straw, etc., are especially hurtful, chiefly from the mechanical effects upon the delicate pulmonary tissues of the matter inhaled. No less prejudicial are occupations carried on in a heated and close atmosphere, as is often the case with compositors, goldbeaters, sempstresses," etc. So, in *Alden's Encyclopædia*, vol. 9, tit. "Consumption," the following occurs: "Often the workshops of tailors, printers, bakers, and other businesses carried on in close, ill-ventilated apartments by large numbers of working people, are nurseries of consumption." We quote from a few more out of many authorities to the same effect: "It is certain that much might be done to improve the public health in this respect by more attention on the part of employers of labor to the comfort and habits of those who are, in more senses than one, their 'hands' and the sources of their property. A certain kind of improvement has, indeed, been already effected by the improved living of the working classes during the last twenty years. Still it is well known and proved by careful inquiries that the workshops of tailors, printers, bakers, and other businesses carried on in close, ill-

ventilated apartments by large numbers of workmen are, in a very aggravated sense, nurseries of consumption. * * * The cutters and needle grinders of Sheffield appear to owe their notoriously short lives to consumption brought on by the inhalation of metallic particles in the close and stifling atmosphere of their workshops. * * * Even admitting, therefore, that the causes of consumption may be in part practically irremovable, there seems no reason to doubt that very much might be done to diminish its prevalence, as well as to arrest its course when already formed, by due attention to the comfort of the laboring population, both in their dwellings and in the pursuit of their occupations." 4 *International Cyclopædia*, 286. "Particular occupations predispose [to consumption], especially such as occasion constant inhalation of small particles." 2 *Johnson Cyclopædia*, 488. "Thus tailors, seamstresses, and similar workers are especially prone to the disease. More especially is this true of occupations whose performance necessitates the inhalation of dust particles. * * * The dust particles act as irritants of the fine structures which line the air passages and vessels, inducing chronic changes, which in turn are liable to lead to consumption." 3 *Chambers' Encyclopædia*, 438. "The bacillus of tuberculosis finds, indeed, the most favorable conditions for its existence in the squalor of congested slums, in the foul atmosphere of dusty workshops, in close courts, alleys," etc. 70 *Fortnightly Review*, 308. "A very large number of the most efficient workmen employed in quarries, metal works, cotton and wool manufactories, print trades, and many other occupations exposing them to bad air and dust, fall victims to this infection." 194 *Edinburgh Review*, 444. "Since statistics still show that the mortality from phthisis in people who follow certain trades is much greater than in others, there can be no doubt of the causal relationship between occupation and pulmonary disease and of dust being the *causa causans*. * * * In 1866 it was demonstrated that * * * two kinds of occupation had long been recognized as hurtful, viz., (1) those that give rise to mechanical or chemical irritation of the air passages by dust, grit, or fluff being diffused through the atmosphere; (2) those in which the operatives are exposed to abrupt changes of temperature." *The Lancet*, vol. 165, p. 1345. "Living in a close atmosphere and in a high temperature, bakers are subject to lung diseases, more especially phthisis." 5 *Reference Handbook of Medical Science*, 278. "Those engaged in carding of cotton and workers in flax, hemp, tobacco, and flour, and chaff cutters suffer in the same manner, but to a less degree, than such as are compelled to inhale more decidedly irritating particles." *Fowler & Godlee's Diseases of the Lungs*, 272. "Dusty occupations, as in the case of millers, bakers, knife grinders, stonemasons,

and the like, are fraught with special dangers to vulnerable persons." 5 *Allbutt's System of Medicine*, 229. "The inhalation of impure air in occupations associated with a very dusty atmosphere renders the lungs less capable of resisting infection." *Osler's Practice of Medicine*, 269. "Dusty occupations make people prone to disease. The statistics of Berlin as to street cleaners, cabmen, coal workers, and miners show this." 35 *Journal Am. Med. Assn.* 1028. "The question as to what business had best be carried on by tuberculosis patients is treated of by Ambler. * * * The butchers, he thinks, generally possess an immunity—at least that has been his experience; but bakers are particularly susceptible." 37 *Id.* 1068. "Other vegetable dusts of less potency, which are little less injurious in results than mineral dusts, are flour and starch, which seem to operate rather by obstruction than by irritation. Bakers, confectioners, and pastry cooks represent a body of tradesmen exhibiting hygienic conditions of a common character, the principal of which are exposure to heat from the ovens, dust, steam, variations of temperature, in too many instances unhealthy bakehouses, fatiguing movements necessitated where kneading is done by hand, disagreeable emanations from materials used, prolonged hours of work, more or less night work, and loss of rest. To these evils of their trade the working bakers often add intemperance and irregular living. My own senses also make me conscious of a disagreeable, sickly smell much like that of heated bones, superadded to the steam and other fumes. There are, in brief, many incidents in the occupation of baking which reduce vital energy, predispose to lung affections, and shorten life." *Arllige, Diseases of Occupations*, 255. The occupations of rope makers, carpet makers, bakers, etc., "being essentially dust-producing processes, they one and all induce among workers excessive suffering from pulmonary affections. Although the mortality of these workers from phthisis and other lung diseases is considerably below that of metal workers, nevertheless it is in every case inordinately high, exceeding the mortality of agriculturists by proportions varying from 77 to 120 per cent." *Latham's Register General's Report*, 148. According to the data presented by Dr. C. Moeller in his work on *Hygiene of the Baker Industry* (page 295), "of bakers dying between the ages of 45 and 65, twenty-five per cent. died from chronic bronchitis or related diseases." He points out "the persistency of the flour dust and starchy particles in the bronchial tubes, and even in the lungs" by quoting a medical authority to the effect "that even two and a half weeks after leaving the employment starchy particles and other evidences of flour dust had been found in the expectoration of bakers examined." According to the tables of comparative mortality in the federal census of 1900, the number of deaths among bakers and con-

fectioners was 3.2 per cent. greater than the average of general industrial occupations. These tables are somewhat favorable to bakers between the ages of 15 and 44, but are unfavorable to them between the ages of 45 and over, the average being as stated above. See, also, 1 Parke's Manual of Practical Hygiene, 133; 62 Medical Record, 334; Medical Examiner and Practitioner, Nov. 1902, tit. "Occupations"; Id. July, 1901, tit. "Occupation as Affecting the Death Rate." The heaviest death rate in England falls to cabdrivers, painters, printers, tailors, and bakers. Mulhall's Dictionary of Statistics, 195. Statistics relating to 39 trades in England and Wales show that more bakers have consumption than the average of those engaged in other vocations, and the table of male mortality in Paris shows higher death rate among bakers than in all but five out of twenty of the common callings of life. Id. 688.

While the mortality among those who breathe air filled with minute particles of flour is less than among those who work in stone, metal, or clay, still it seems to be demonstrated that it is greater than in avocations generally. The dust-laden air in a baker's or confectioner's establishment is more benign and less liable to irritate than particles of stone or metal; hence, while bakers are classified with potters, stonemasons, file grinders, etc., still they are regarded as less liable to pulmonary disease than other members of the class. The evidence, while not uniform, leads to the conclusion that the occupation of a baker or confectioner is unhealthy, and tends to result in diseases of the respiratory organs. As statutes are valid which provide that women or children shall not be employed in any manufacturing establishment more than a certain number of hours in a single day, so I think an act is valid which provides that in an employment which the Legislature deems, and which is in fact, to some extent detrimental to health, no person, regardless of age or sex, shall be permitted or required to labor more than a certain number of hours per day or week. Such legislation, under such circumstances, is a health law, and is a valid exercise of the police power.

I vote for affirmance.

O'BRIEN, J. (dissenting). The defendant was convicted of a misdemeanor under one of the subdivisions of section 384 of the Penal Code, in that he violated article 8, § 110, c. 415, p. 485, of the Laws of 1897, known as the "Labor Law." The indictment charges that on the 21st day of December, 1899, he was arrested upon the complaint of one of his employes for violating the law in permitting the employé to work in a bakery more than 60 hours in one week; that he was convicted in the City Court, and fined \$20, or in default thereof stand committed to the county jail for 20 days, and that he paid the

fine; that after such conviction the defendant "wrongfully, unlawfully, and knowingly, with intent on his part to violate the law, permitted and required" another employé named to work more than 60 hours in one week during the week commencing April 19 and ending April 26, 1901, in the defendant's biscuit, bread, and cake bakery and confectionery establishment, thereby committing a misdemeanor as a second offense; contrary to the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity. The defendant demurred to the indictment on two grounds: (1) That more than one crime was charged; and (2) that the facts stated do not constitute a crime. The local court overruled the demurrer, and, no plea having been interposed by the defendant, the allegations of the indictment were taken as true, under section 330 of the Code of Criminal Procedure, and judgment of conviction was entered, and the defendant sentenced to pay a fine of \$50, or stand committed to the county jail until the fine was paid, not to exceed 60 days. The judgment was affirmed at the Appellate Division by a divided court, and from this judgment the defendant has appealed to this court, and the appeal brings up for review all the questions raised by the demurrer to the indictment.

The statute upon which the judgment rests is to be found in the Penal Code (section 384), and reads as follows: "Any person who violates or does not comply with * * * the provisions of article eight of the labor law, relating to bakeries and confectionery establishments, the employment of labor and the manufacture of flour or meal food products therein, * * * is guilty of a misdemeanor and upon conviction shall be punished for a first offense by a fine of not less than twenty nor more than one hundred dollars; for a second offense by a fine of not less than fifty nor more than two hundred dollars, or by imprisonment for not more than thirty days, or by both such fine and imprisonment; for a third offense by a fine of not less than two hundred and fifty dollars, or by imprisonment for not more than sixty days, or by both such fine and imprisonment." It will be seen that this section of the Penal Code does not specify the acts or omissions which are made crimes, nor does it in any appropriate terms define the crime at all, but refers for that purpose to another law. When we turn to article 8 of the labor law, referred to above, we find that it contains six separate sections, commanding certain things and prohibiting certain things. The particular section which the indictment charges to have been violated by the defendant is the first section of the article, or section 110, and that reads as follows: "No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more

than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work." While this section of the labor law does forbid certain things, no penalty whatever is attached to a violation, and therefore, in order to get a definition of the particular crime charged in the indictment, we must examine two general statutes upon different subjects; that is to say, we must read the Penal Code for the penalty or the punishment, and we must read the labor law in order to ascertain the particular act or omission which constitutes the crime.

One of the grounds of the demurrer is that the indictment charges two crimes. It will be seen that two things or two acts or omissions have been forbidden by the statute. It forbids the master from either permitting or requiring the servant to work more than the time specified in the statute. Assuming for the present that the statute is valid, it makes it a crime for the master to permit the servant to work over the statutory time, and it also makes it a crime for him to require or compel the servant to so work. The two acts or omissions inhibited by the statute are essentially different in nature and character. It is one thing to permit the servant to work; it is quite another thing to compel or require it. Permitting him to work more than the 10 hours might be intentional or involuntary. Compelling or requiring him to work would be a deliberate act on the part of the master, in violation of the statute. In the one case the punishment might very well be nominal; in the other case it would necessarily have to be substantial; and hence it would seem that two acts or omissions so essentially different in nature and character, and each constituting a crime in itself, could not properly be united in the same charge, and in this view the objection that more than one crime is stated in the indictment is good.

But the objection was also made that the acts or omissions stated in the indictment do not constitute a crime, and this objection raises the question as to the validity of the statute and is of much more importance than the form or substance of the indictment. It will be seen from an examination of the law that there is no prohibition against the act of the servant himself in working longer than the statutory time. He may work as many hours as he likes during the day, and he violates no law and commits no offense whatever. So the broad question is whether a statute which makes it a crime for the master to permit his servant to do what the servant has a perfect right to do can be a valid law. No restrictions are imposed upon the servant with respect to the hours of labor or otherwise. As already remarked, he has a perfect right to work as many hours in a day

or week as he may want to, but the master must see to it, at the peril of committing a crime, that his servants are driven out of the building the moment the clock registers the requisite 10 hours, and that, too, without regard to the conditions and circumstances affecting the business or the interests of the master. It is a crime for the master to require or permit his servant to work over the statutory time, no matter how willing or even desirous the servant may be to earn extra compensation for overwork. The master is forbidden to contract with his servant for longer hours and extra pay, no matter what may be the wants or necessities of the business, or the judgment or will of the servant with respect to such a contract. It is obviously one of those paternal laws, enacted doubtless with the best intentions, but which in its operation must inevitably put enmity and strife between master and servant. They are not left free to make their own bargains in their own way, but their mutual interests are governed by statute.

The sweeping character of the legislation in question may be illustrated by a reference to the last section of the article of the labor law referred to in the indictment; that is to say, to section 115. It is there enacted as follows: "If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries, in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent or lessee of such premises, either personally or by mail, requiring such alterations to be made within sixty days after such service, and such alterations shall be made accordingly." There is no penalty for a failure to observe this law in the law itself, but when we look into the amendments of the Penal Code we find that the owner of a valuable building used as a bakery may be at the mercy of the factory inspector, since, if it happens that the rooms are less than eight feet in height, he must tear it down and rebuild it, if the factory inspector so requires it, or be subject to a criminal prosecution, fine, and imprisonment down to the third offense, and possibly so long as the orders of the inspector are not carried out. It is quite inconceivable that the Legislature understood, when enacting the amendments to the Code by reference to another law, that its action would have such a sweeping effect, or confer such arbitrary powers upon a ministerial officer that affected the liberty and the property of the individual.

It is contended in behalf of the defendant that the law under which he was convicted violates section 1 of article 14 of the Constitution of the United States, which prohibits any state from making or enforcing any law which shall deny to any person within its jurisdiction the equal protection of the law, and those provisions of the Constitution of this state which enact that no member of this state shall be disfranchised or deprived

of any of the rights or privileges secured to any citizen thereof, unless by the law of the land and the judgment of his peers, nor be deprived of life, liberty, or property without due process of law. Const. art. 1, §§ 1, 6. The words "law of the land" do not mean an act of the Legislature passed for the very purpose of working the wrong. The meaning is that no person shall be deprived of any of the rights or privileges secured to him by the Constitution, unless the matter shall be adjudged against him upon a trial had according to law. It cannot be done by mere legislation. *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *White v. White*, 5 Barb. 474; *People v. Toynbee*, 20 Barb. 168; *Wynehamer v. People*, 13 N. Y. 378; *People ex rel. Warren v. Beck*, 144 N. Y. 237, 39 N. E. 80; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605; *People v. Orange County Road Const. Co.*, 175 N. Y. 84, 67 N. E. 129. The doctrine of these cases condemns the legislation in question as an invasion of the rights, liberties, and property of the citizen. The three cases last cited grew out of the same law that is violated in the case at bar, or similar laws, and they cannot be distinguished from it in principle.

The labor law (Laws 1897, p. 462, c. 415) excludes from its regulations and restrictions all persons engaged in farm work or domestic service (article 1, § 3), and hence a very large proportion of the people of the state who labor for a living are not affected by it at all. Why this large class of wage earners who toil for a livelihood are excluded from the benefits of the statute, and those who employ them exempt from its burdens and restrictions, it is difficult to conceive. The farmers and that large class of people, both in the city and in the country, who employ domestics, may require them to work any number of hours without violating any law. They commit no crime by requiring their servants to work from daylight till after dark, or even into the night. The section of the law upon which the conviction in this case is based is aimed at a very small class of persons, namely, those who conduct "a biscuit, bread, or cake bakery or confectionery establishment." Work of the same general character is exacted from cooks and domestic servants in practically all the private houses in the land, and to a great extent in hotels, restaurants, and other public places. It would be absurd to say that all, or even the greater part, of the biscuit, bread, cake, and confectionery consumed in this state comes from what are called bakeries. The law does not even apply to bakers in the small towns and villages who do their own work. It applies only to bakers who find it necessary to employ labor, and they alone are subjected to criminal prosecution in case they permit the servant to work more than 10 hours in a day, even though the servant is willing, and is given extra compensation. The baker is forbidden,

under the penalty of fine and imprisonment, to contract or agree with his servant upon the hours of labor in such way as would be mutually beneficial, but his business is practically regulated by statute. If, for any reason, he suffers or permits his servant to work an additional half hour beyond the statutory time, his liberty and his property are put at the mercy of the servant, who may procure him to be arrested and imprisoned. It does not appear from the record in this case, or in any other way, that there is anything in the business or vocation of a baker that would authorize the Legislature to impose such criminal penalties upon him for permitting his servant to work more than 10 hours in the day, or to restrict his freedom of contract, which is a right enjoyed by all other employers of labor. The guarantees of the Constitution may be invaded without any physical interference with the person or property of the citizen. He is deprived of his property within the meaning of the Constitution when arbitrary and unnecessary restrictions are imposed upon his conduct of any lawful business, and when he is deprived of the right to make contracts for the transaction thereof. Liberty, in its broad sense, means the right, not only of freedom from actual restraint of the person, but the right of such use of his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel those rights or restrict his freedom of action, or his choice of methods in the transaction of his lawful business, are infringements upon his fundamental right of liberty, and are void. *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. They cannot and should not escape the scrutiny of the courts merely because they are made to assume, by argument or otherwise, the guise of police regulations.

The statute in question deprives the defendant of the equal protection of the law, since it enacts that certain acts or omissions on his part concerning the conduct of his business and his relations to his own servants are crimes, and punished criminally, which, as to all the rest of the community not within the terms of this law, are entirely innocent. The very small fraction of the community who happen to conduct bakeries or confectionery establishments are prohibited, under pain of fine and imprisonment, from regulating the conduct of their own business by contracts or mutual agreements with their employes, whereas all the rest of the community who find it necessary to employ labor in private business may do so. Class legislation of this character, which discriminates in favor of one person and against another, is forbidden by the Constitution of the United States, if not by the Constitution of the state; and so it has been held by the Supreme Court of the United States and by this court. *Gulf, C. & S. F. R. Co. v. Ellis*,

185 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Cotting v. Kansas City S. Y. Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; *Connolly v. U. S. P. Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *People v. Orange County Road Constr. Co.*, 175 N. Y. 87, 90, 67 N. E. 129. It is, I think, quite obvious that the legislation in question is, upon its face, in conflict with the constitutional guaranties referred to, unless it can be brought within the scope of the police power. That is the only ground upon which the statute is defended by the learned district attorney. He contends that it is a health law, passed for the purpose of protecting the public health, or at least the health of those persons employed in bakeries. The argument is that the defendant was forbidden by the statute to permit his workmen to work more than 10 hours in a day, to the end that his customers might have wholesome bread, biscuit, and confectionery; whereas, if they were permitted to work 10½ hours in the day, the product of the bakery would be unwholesome or dangerous to health. What possible relation or connection the number of hours that the workmen are permitted to work in the bakery has or can have to the healthful quality of the bread made there is quite impossible to conceive. The baker in the small towns, or even in the large towns, who does his own work, and does not employ labor, may work day or night without fear of molestation, since no one thought it necessary to protect the public against his unwholesome product. It has already been observed that the law does not impose any penalties or restrictions upon the workman himself for working too much, and, if the purpose was to protect his health against his own avarice or his own misdirected energy, it is quite remarkable that it did not at least forbid him from working more than 10 hours in a day.

The contention that the defendant was convicted for violating a health law is, at best, I think, but a mere disguise that is not sufficient to save the statute from condemnation. There is nothing on the face of the law nor in its manifest operation to show that it has any relation to the public health. It is no part of the health law, but a part of a general statute known as the "Labor Law." The execution of it was not intrusted to any of the health authorities, but to the factory inspector, which shows what its real scope and purpose was. The factory inspector is not the officer charged with the enforcement of health laws. The Legislature classified it as a labor law, and it is that, and nothing else. Laws which encroach upon the personal or property rights of the citizen as guarantied by the Constitution are generally defended upon the ground that they are police regulations; but the courts have prescribed a test by means of which their true character and purpose may be known. The rule is that the court must be able to say judicially that the statute in question is a health law,

and has some appropriate relation to the promotion or protection of health. It will not be deceived or misled by mere names or pretenses. The cases are numerous in which the courts have condemned statutes as invasions of the rights secured to the citizen by the Constitution, though enacted or sought to be upheld under the guise of health laws or other police regulations. They all arrive at the same result, and that is that the Legislature may not, under the guise of a statute to protect against some wrong, real or imaginary, arbitrarily strike down private rights, and invade personal freedom, or confiscate private property. The police power must be exercised within its appropriate sphere, and by appropriate methods. *Matter of Jacobs*, supra; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; *People v. Arensburg*, 103 N. Y. 388, 8 N. E. 736, 57 Am. Rep. 741; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605; *People v. Buffalo Fish Co.*, 164 N. Y. 101, 104, 58 N. E. 34, 52 L. R. A. 803, 79 Am. St. Rep. 622; *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736. It will not do to say that the Legislature, in enacting the statute in question, may have thought that it was a health law, or had some relation to health. The action of the Legislature, or its views or reasons for the passage of the law, does not conclude the courts, but they must determine for themselves whether in any given case the legislation which is claimed to be an exercise of the police power is really what it is claimed to be. Every labor law, however stringent and arbitrary, could just as well be upheld upon the ground that it is a health law; but in all the discussions that have been had in the courts for many years concerning the validity of legislation of this character there are to be found but very few cases where it was even claimed that the statute was enacted for the purpose of preserving or promoting health, or that it had any relation whatever to that subject. When it is manifest, as it is in this case, that the law has no relation whatever to the subject of health, and that its real object and purpose was to regulate the hours of labor between master and servant in a business which is private, and not dangerous to morals, or to health, freedom to contract with each other, defining their mutual obligations, cannot be prohibited without violating the fundamental law.

The defendant was charged in the indictment with the violation of a single independent section of article 8 of the labor law, namely, the first section, which relates solely to the hours within which the master may permit the servant to work. The validity of that section is not affected or helped out by the character of some of the other sections of the article, since part of a statute may

be perfectly valid and another part in conflict with the Constitution. It is quite possible that some parts of the other five sections can be regarded as prescribing sanitary regulations, such as ventilation, plumbing, fire escapes, and the like; but such regulations cannot save the first section, which deals exclusively with the time within which the servant is to work, and virtually makes a contract to be observed by the master alone, leaving the servant just as free as if the law had never been passed. A section or sections of a statute may be good that requires and prescribes sanitary regulations binding upon the landlord who owns and lets tenement houses in cities, but this would not save another section of the statute that prescribes the maximum rent that he may demand and receive from his tenants. It is even quite possible that a law might be held good that enjoins upon farmers or persons employing domestic help the duty of preserving their health against infectious diseases by reasonable and proper safeguards, such as ventilation of the rooms where they sleep, and the like, but this would not save a separate section of the law prescribing the compensation that the master is required to pay to the servant. So that the section of the labor law with which we are now concerned can borrow no strength from its association with other sections of the statute that may be good. The single section of the labor law that we are now dealing with must stand or fall upon its own intrinsic character, and can receive no support from the company in which it is found. If that section had also provided that every employé of a baker would be guilty of a misdemeanor if he neglected or refused to faithfully serve his master for 10 full hours in each day, no one, I apprehend, would then claim that it was a health law. And yet every argument and every authority cited in defense of the section in its present form would be just as good then as they are now. The section would then be just as much of a health law as it is now.

It cannot be repeated too often that if the single section of the law with which we are now concerned, and which is the sole basis of the criminal charge in this case, stood alone, the argument that it is a health law, and within the police power, would not have even a color of reason or authority to support it. But what the learned district attorney urges upon us is that, since the section is found in the article associated with other sections prescribing sanitary regulations, we must assume that the legislators, for some unexpressed reason sufficient to them, reached the conclusion that a baker ought not to be permitted or required to work on an average of more than 10 hours in a day. Of course, this reasoning is without force, and does not meet the difficulty. The question is not what the unexpressed reason is that moved the law-makers, so long as it is impossible for any

court to discover that reason or any reason to bring the enactment within the scope of the police power. It is always open to the courts to inquire and determine whether a statute is in fact fairly within the police power. That principle is found imbedded in all the cases on that subject. If it were otherwise, and the real view of the Legislature is made the dominant idea, then the court would be deprived of all power to declare any law void provided the Legislature called it an exercise of the police power, or some one contended that it was supposed to be such upon some theory that the public interest required its enactment. There would be no limit then to the police power, and every statute, however arbitrary and in violation of the constitutional safeguards for the protection of life, liberty, or property, could be upheld on the plea that the lawmakers called it a health law, or intended it as such, or thought it was necessary for that purpose. It is incumbent upon the courts to see to it that such laws are really what they profess to be, or, if claimed to be police regulations, that they are such within the reasonable scope of that power.

The bakers' vocation is one that has existed practically in all ages and in all countries. Wherever cereals are converted into bread, the standard food of the human race, except possibly as to those races that are considered savage or semisavage, the making of bread is one of the most common employments. The process is familiar to the domestics in every public or private house in the land, as well as in the places called bakeries, where bread is made for sale to the public. It has never been supposed that it was a trade or vocation that was or might be dangerous to health, morals, or good order, or that there was anything about it to justify legislation restricting the right of the master and servant to make their own contracts, express or implied, with respect to hours of work or the terms of employment. There is nothing in the record before us from which it can be inferred that there was any ground for the passage of the statute as a police regulation for the protection of health, morals, or good order, and hence it cannot be upheld as an exercise of the police power. It is a plain discrimination against a limited class of people who happen to be obliged to employ labor in the manufacture of bread, biscuit, or confectionery in those places called bakeries. This relatively small class are restricted by the statute to the regulations there prescribed with respect to the hours of labor by their employés, and are prohibited from agreeing with them as to the time they are to work, even though extra pay should be given for overwork—a right which the law gives to all other persons employing labor. If the Legislature can do all this, then the right to enact what wages the servant shall receive per day or per hour must necessarily follow as an inevitable conclusion. A statute

fixing the wages of the servant at such a sum as to enable him to live more comfortably could be defended as a health law by the same argument and authority adduced in support of the section of the present law, the violation of which is the only crime charged.

It is doubtless within the power of the Legislature to enact that a ton of coal or a bushel of wheat shall contain a certain number of pounds, but it cannot prohibit parties from entering into contracts to the effect that a ton of coal or a bushel of wheat shall contain more or less than the quantity prescribed by statute. When there is no contract regulating the matter, and there is a dispute between the parties as to what constitutes a ton of coal or a bushel of wheat, the statute would doubtless be available to settle the controversy. So in the case of the master and servant with respect to the number of hours that shall constitute a day's work. The Legislature may no doubt define what is or shall constitute a day's work, but it cannot prohibit the parties from making agreements for themselves, and then custom or contract, express or implied, would control the mutual obligations of the parties.

The facts stated in the indictment do not constitute a crime, and, therefore, the demurrer must be sustained, the judgment of conviction reversed, and the defendant discharged.

BARTLETT, J. (dissenting). I agree with Judge O'BRIEN for reversal. In one of the encyclopædia authorities cited for respondent it is said: "Bakers and confectioners who, during working hours, constantly breathe air filled with impalpable powder, resulting from the grinding of grain and loaf sugar into the finest dust, have a tendency to consumption," etc. There is no evidence in the record before us warranting the conclusion that bakers are subjected, in this state, to any such peril, if any there be, as might result from grinding the articles they use. It is common experience that the baker, like the cooks in hotels, restaurants, and private families, has provided for him in his business flour, sugar, and the other ingredients duly prepared for immediate use. The claim that the compounding of these constituents, so prepared, in the business of a baker, is an unhealthy occupation, will surprise the bakers and good housewives of this state. The grinding of steel, like the needle grinding of Sheffield, England, and of other similar materials and substances, causing clouds of impalpable dust, is not to be confounded with the avocation of the family baker, engaged in the necessary and highly appreciated labor of producing bread, pies, cakes, and other commodities more calculated to cause dyspepsia in the consumer than consumption in the manufacturer. The country miller of 50 years ago, who passed a long and happy life amid the hum of machinery and the grinding

process of the upper and nether stones, little dreamed of a coming day when the Legislature, in the full panoply of paternalism, would rescue his successor from the appalling dangers of the life he led until old age summoned him to retire. It has been frequently said that the limits of the police power cannot be accurately defined; that it is not desirable the Legislature should be thus trammelled. When this court held that the Legislature acted in the legitimate, undiscriminating exercise of the police power in compelling all barbers to observe strictly the first day of the week, commonly called, "Sunday," except in the village of Saratoga Springs and the city of New York, the legal profession doubtless concluded that the elasticity of the undefined had arrived at its Ultima Thule. *People v. Haynor*, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707. That this conclusion was erroneous is shown by the fact that the case is now doing duty against the baker, when men in kindred occupations are permitted to work as many hours as necessity dictates.

Another question in this case is whether section 110, contained in article 8 of the labor law (chapter 415, p. 485, Laws 1897), is within the police power. This section is contained in article 8, which consists of sections 110, 111, 112, 113, 114, and 115 (pages 485-487). I am of the opinion that all the sections of said article, excepting section 110, are within the police power, relating as they do to sanitary conditions concerning the business of a baker. Placing section 110, relating exclusively as it does to hours of labor in bakeries and confectionery establishments, in article 8, does not necessarily bring it within the police power. In a recent case this court said: "In the interest of public health, of public morals, and of public order, a state may restrain and forbid what would otherwise be the right of a private citizen. It may enact laws to regulate the extent of labor which women and children or persons of immature years shall be allowed to perform, and prohibit altogether their employment in dangerous occupations. *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *Tiedeman's Police Power*, § 85." *People v. Orange County Road Cons. Co.*, 175 N. Y. 84, 87, 88, 67 N. E. 129, 130. The state may also regulate the hours of labor in deep and unhealthy mines, and in any vocation where it is pursued at the risk of health and life. It is because I believe that the occupation of a baker does not fall within these general principles, and the array of authorities cited, I vote for reversal.

PARKER, C. J., and GRAY and VANN, JJ., read for affirmance, and **HAIGHT, J.,** concurs. **O'BRIEN and BARTLETT, JJ.,** read for reversal, and **MARTIN, J.,** concurs.

Judgment affirmed.

(177 N. Y. 199)

BINNINGER v. CITY OF NEW YORK
et al.(Court of Appeals of New York. Jan. 12,
1904.)**STREET RAILROADS—PAVING STREET—FRANCHISE—AMENDMENT—RELEASE—DEFACTS—LIABILITIES.**

1. The city of New York adopted a resolution authorizing a street railroad company to construct a surface road in certain streets on the condition that it should keep the pavement within the tracks and three feet on each side in repair with certain stone, to be designated by the common council. *Held* not a contract between the railroad and the city, but legislation which might at any time be amended, in view of the changed conditions and interests of the public, so that the city could thereafter enforce a resolution to repave a street through which the railroad ran with other material, and assess a portion of the cost on the railroad company.

2. A city, under a provision of its charter providing for the repairs and repaving of streets, contracted with a paving company to repair a street through which a surface railroad was operated—the contractor to maintain the pavement to the satisfaction of the commissioner of public works for five years from the acceptance thereof—and assessed one-fourth of the cost thereof upon the railroad company. *Held*, that the company was thereby relieved from a provision in its franchise requiring it to keep the street in repair, and from any liability under Laws 1890, p. 1112, c. 565, § 98, as amended by Laws 1892, p. 1404, c. 676, relating to the care of streets occupied by street surface railroads, so as not to be liable for injuries by an opening along the tracks in a street repaved under a resolution of the common council, and a contract made in pursuance thereof, within the five years.

Cullen and Martin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Ernest Binninger against the city of New York and others. From a judgment of the Appellate Division (81 N. Y. Supp. 226) affirming a judgment for plaintiff, defendants appeal. Affirmed as to defendant city, and reversed as to defendant railroad company.

George L. Rives, Corp. Counsel (James McKeen, of counsel), for appellant City of New York. Charles A. Collin, William F. Sheehan, John L. Wells, and Thomas L. Hughes, for appellant Brooklyn Heights R. Co. Isaac M. Kapper and Thomas E. Pearsall, for respondent.

BARTLETT, J. The main question raised on this appeal by the defendant railroad company is whether, on the undisputed evidence, it rested under any liability to keep the pavement in repair, within the statutory limits, on Court street, between Fulton and Joralemon streets, in the borough of Brooklyn, or, whether the city of New York is solely liable. The city of New York insists that the railroad company is ultimately liable to pay the judgment which the plaintiff has recovered herein.

The plaintiff was injured December 29, 1900, by reason of driving into an opening

negligently left in Court street, between Fulton and Joralemon streets, alongside the track of the defendant railroad company, whereby he was thrown to the pavement and severely injured. The jury rendered a verdict in favor of plaintiff and against both defendants for \$3,750, upon which judgment was entered, and unanimously affirmed by the Appellate Division.

The first point raised by the railroad company is that its paving obligations, as successor by lease of the Brooklyn City Railroad Company, were fixed by the franchise contract of the latter, the terms of which cannot be changed, except with the consent of the contracting railroad company, its successors or assigns; that legislation changing this agreement in any respect would be unconstitutional, as impairing the obligation of the contract.

It appears that the Brooklyn City Railroad Company constructed the railroad in question in the year 1854. The so-called franchise contract is a resolution of the common council of the city of Brooklyn, passed December 19, 1853, which recites that the various individuals named therein were the lowest bidders under the resolutions adopted by the common council on the 16th day of the last preceding September for constructing the various lines of railroads mentioned. It also recites that the persons named, and others associated with them, were duly incorporated under the railroad law of 1850 (Laws 1850, p. 211, c. 140), by the name of the Brooklyn City Railroad Company, for the purpose of constructing, maintaining, and operating said lines of railroad, with a double track, for public use in the conveyance of persons and property; also that the railroad company desired the assent of the corporation of the city of Brooklyn to the construction, maintenance, and operation of the railroad. The resolution then follows, giving the assent of the city, and the names of the various streets through which these railroad lines were to run, including the location involved in this action. This assent was given, subject to various conditions, unnecessary to refer to in detail, as to the character of the track, roadbed, cars, rate of fare, and other matters. The following was among the conditions named: "The pavement to be kept in thorough repair by said company within the tracks and three feet on each side thereof with the best water stone, under the direction of such competent authority as the common council may designate."

The articles of incorporation of the Brooklyn City Railroad Company, under the act of 1850, are not in evidence. We have only the resolution referred to, and a brief exhibit, which states that the Brooklyn City Railroad Company has leased to the defendant company, for a term of 999 years, the street railroad on Court street, in the city of Brooklyn; also all franchises, rights, and assignments of whatsoever nature then or

thereafter possessed or owned by the lessor. This lease is dated February 14, 1893.

In 1834 (Laws 1854, p. 323, c. 140) the legislature passed an act entitled "An act relative to the construction of railroads in cities," which provided, in substance, that the common council of cities should not thereafter permit to be constructed any street railroad without the consent thereto of a majority in interest of the owners of the property upon the streets in which such railroad is to be constructed being first had and obtained. It was also enacted as follows: "After such consent is obtained, it shall be lawful for the common council of the city in which such street or avenue is located to grant authority to construct and establish such railroad, upon such terms, conditions and stipulations, in relation thereto, as such common council may see fit to prescribe." It was also further enacted as follows: "This act shall not be held to prevent the construction, extension or use of any railroad, in any of the cities of this state, which have already been constructed in part; but the respective parties and companies, by whom such roads have been in part constructed, and their assigns, are hereby authorized to construct, complete, extend and use such roads, in and through the streets and avenues designated in the respective grants, licenses, resolutions or contracts under which the same have been so in part constructed, and to that end the grants, licenses and resolutions aforesaid are hereby confirmed."

This latter legislation seems to indicate that the original resolution of the common council of the city of Brooklyn, passed the previous year, needed confirmation and legislative approval. Be that as it may, we are of the opinion that the original resolution of the city of Brooklyn, in evidence, relating to keeping the pavement in repair between the tracks, and three feet on each side thereof, with the best water stone, cannot be regarded as a private contract between the Brooklyn City Railroad Company and the municipality, but is rather in the nature of charter legislation, which may be at any time amended as the Legislature deems necessary in view of changed conditions and the interests of the general public. When the Brooklyn City Railroad Company agreed to pave and keep in repair a certain portion of the street occupied by its tracks, it undertook to discharge, in part, a duty imposed upon the municipality by the Legislature. In *City of Brooklyn v. Brooklyn City Railroad Co.*, 47 N. Y. 475, 485, 7 Am. Rep. 469, the court said: "Thus a municipal corporation, by the conferring and acceptance of a charter with powers of opening and controlling streets and ways, has put upon it the correlative duty to the public of keeping those ways in repair, so that they may be safe for the passage of the public. When one contracts with that corporation to keep any portion of those streets in repair, in consideration of a license to use

them to his benefit in an especial manner, he, in effect, contracts to perform that duty to the public in the place and stead of the municipality, and the way is given over to him for that purpose, and he takes it into his care and charge therefor; and his failure to perform his contract is a failure to do that duty, and the damages which naturally and proximately result from nonperformance are all the damages which naturally and proximately fall upon the corporation from the duty not being performed."

It cannot be assumed that when the Brooklyn City Railroad Company, in the year 1853, for its own convenience in operating horse cars on its tracks, agreed to lay a pavement suitable for such purpose, the municipality released control of the street for all future time as to the character of the pavement, as it possessed no such power. It appears that after many years the motive power was changed, and the convenience and safety of the public required a different kind of pavement.

In *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314, this court decided that the powers of a municipal corporation in respect to the control and regulation of its streets are held in trust for the public benefit, and cannot be abrogated or delegated to private parties. This court has recently recognized the principle in *Village of Mechanicville v. Stillwater & Mechanicville Street Railway Co.*, decided at the St. Lawrence Special Term in July, 1901, and reported in 35 Misc. Rep. 513, 71 N. Y. Supp. 1102. This case was affirmed in the Appellate Division (67 App. Div. 628, 74 N. Y. Supp. 1149), and in this court (174 N. Y. 507, 66 N. E. 1117), without opinions. The learned judge at Special Term stated: "The defendant claims that a contract was made, and a franchise given, specifying the kind of paving, to consist of small stone between the rails and twenty inches outside, which could not be altered by the Legislature or by the requirements of the situation, and that chapter 494, p. 1229, § 1, of the Laws of 1901, ratifies pre-existing contracts with street railway companies in cities of the third class, towns, or villages." It appears that the two so-called franchises were given to the defendant, and contracts made by it with the village in pursuance of the resolution of the trustees, each providing that the space between the rails and the space of at least 20 inches outside of the said rails on both sides of the tracks should be paved with small stone, and that the same should at all times be kept in good condition. Some years thereafter a notice was served by the village requiring a 6-inch excavation, filled in with sand or gravel, and covered with vitrified paving brick. The railway company declined to conform to this notice.

This court has thus held that it was competent for the municipality, acting under delegated legislative power, to require, after a change in condition and the lapse of some

years, a different material in paving the street under the agreement of the railway company. This construction has received legislative recognition in the revision of the railroad law (Laws 1892, p. 1404, c. 676, § 98). That section provides, in substance, as follows: "Every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe."

This brings us to the consideration of the second point raised by the railroad company, which is, in substance, that if it be assumed that the resolution of the common council of the city of Brooklyn in December, 1853, was not a private contract between the city and the railroad company, and that, by reason of section 98 of the present railroad law, the defendant company would be subject to its conditions, under ordinary circumstances, nevertheless certain provisions of the charter of the city of Brooklyn, and action taken thereunder, relieved the defendant company from the obligation to pave the street between its tracks, and for a distance of two feet upon either side, and to keep the same in repair at the time and place of the accident in question.

Section 50 of the charter of the city of Brooklyn was amended by chapter 1008, p. 2057, of the Laws of 1895, and again by chapter 771, p. 1024, of the Laws of 1896. The latter amendment does not affect the section as to the question now presented. The material portions of that section, as so amended, read as follows: "The said board of estimate shall each year include in their estimate of the amount required to be raised for city purposes the amount necessary to meet, during the year, any existing contract for the cleaning of streets, and also the proper proportionate amount of the sums estimated as required to be expended under the provisions of section 46 of this title, and also such an amount as they may deem necessary and proper for the purpose of repairing and also improving the condition of the streets and avenues of the city by repaving the same, and the amount included in the annual tax levy of the city for the purpose of repaving shall be expended by the commissioner of city works, with the consent and approval of the mayor, in repaving any street or avenue of the city or portion thereof, with granite blocks or Belgian or other improved pavement. The common council may also upon the petition of a majority of the property owners, or the owners of a majority of the property to be affected, or by a three-fourths vote of the board of aldermen and the consent of the mayor without such petition, re-

pave with asphalt, granite or other improved pavement, any street already paved at the expense of the property owners. One-half of the cost of such repavement shall be borne by the city at large and the other half by the property benefited. * * * Provided, however, that in all cases where a surface railroad is laid and operated through any such street, one-fourth of the cost of such repavement shall be assessed upon such railroad, and one-fourth thereof on the other property benefited within the district of assessment."

The charter of Greater New York went into effect January 1, 1898, and the amended charter January 1, 1901. It was provided in the former (Laws 1897, p. 20, § 49, subd. 21) and in the latter (Laws 1901, p. 28, c. 466, § 49, subd. 17) as follows: "And the board of aldermen shall also fix the annual license fee, not exceeding the sum of twenty dollars, for each street or horse car daily operated or used in that portion of the city heretofore known as the city of Brooklyn. * * * The said license fees shall be taken in full satisfaction for the use of the streets or avenues, but the same shall not release said company from any obligations required by law to keep such streets and avenues, or any part thereof, in repair; which said obligations and the contracts, laws or ordinances, creating and enforcing the same, are hereby continued in full force and operation. But nothing in this subdivision contained shall be construed to release any railroad company in the city of New York, as constituted by this act, from any duty or obligation existing at the time this act takes effect by virtue of any law, ordinance or contract."

On the 20th day of January, 1896, while the former charter of the city of Brooklyn was in force, the common council passed a resolution which was read in evidence, in part as follows: "Resolved, that this common council intends to repave Court street from Joralemon street to Fulton street (through which said street a surface railroad is laid and operated) with asphalt pavement, pursuant to the provisions of chapter 1008 of the Laws of 1895. Resolved, that the district of assessment for such improvement be and the same is fixed on the property lying on and along the lines of said Court street, between Joralemon street and Fulton street, on each side of said Court street, between the points above specified, including the said railroad on said Court street, between Joralemon street and Fulton street, upon which district one-half of the cost of such improvement will be assessed pursuant to the provisions of said statute as follows: One-fourth of the cost of said pavement shall be assessed upon said railroad and one-fourth thereof on the other property benefited within the district of the assessment aforesaid."

On the 15th day of June, 1896, the report of the committee on grading and paving was made to the common council of the city of

Brooklyn, and was read in evidence. The material portion reads as follows: "The committee on grading and paving, to whom was referred the matter of repaving Court street, from Joralemon street to Fulton street, with asphalt pavement, pursuant to the provisions of chapter 1008 of the Laws of 1895, report * * *. Resolved that this common council does hereby determine and decide to repave Court street, from Joralemon street to Fulton street, with asphalt pavement, pursuant to the provisions of chapter 1008 of the Laws of 1895, and the said improvement is necessary and proper * * *."

Thereafter, and on the 4th day of September, 1896, the city of Brooklyn entered into a contract with the Brooklyn Alcatraz Asphalt Company, under said section 50 of the charter, as amended, by which the asphalt company agreed to lay the pavement in question, and to maintain the said work in good condition and to the satisfaction of the commissioner of public works for the period of five years from the final completion and acceptance thereof.

The defendant railroad company claims that by reason of these proceedings under the charter, and by virtue of other provisions contained in that instrument, unnecessary to consider in detail at this time, it is relieved from liability. There is no evidence in this record that the railroad company was assessed and paid its one-quarter of the tax to meet the expense of this repaving, but we are of opinion it must be assumed for the purposes of this case that such was the fact, as it appears that the city of Brooklyn, by its contractor, the asphalt company, proceeded to repave Court street with asphalt in pursuance of the resolution of the common council, to which reference has been made. It is argued that, while it may be admitted that the railroad company was relieved from all expense, other than the tax imposed upon it, for repaving Court street with asphalt, including the space between and alongside its tracks, nevertheless it rested under the obligation to keep that pavement in repair, when completed, under section 98 of the railroad law. This contention rests in part upon the somewhat technical point that the resolution of the common council under which the city proceeded referred only to repaving, and that the provision in the contract between the city and the asphalt company requiring the latter to maintain its work in good condition for the period of five years from its final completion and acceptance was not embraced within the municipal scheme. We are inclined to a more liberal construction, and hold that, as section 50 of the charter, as amended, contemplates raising money for repaving as well as repaving streets, the railroad company, during the five years succeeding the completion of the work by the asphalt company under its contract with the city, rested under no obligation to keep in repair the street within the statutory lim-

its referred to in section 98 of the railroad law. It must be assumed that the city discharged its duty, and exacted from the railroad company its share of the expense for repaving and keeping in repair the street for five years, and it would be inequitable to impose upon the defendant company the obligation to repair, which, under ordinary circumstances, might rest upon it. The railroad company, as a taxpayer under this special assessment, is entitled to every benefit secured by the city in its contract with the asphalt company. There is no privity between the railroad company and the asphalt company, but the former, having presumably paid its share of the tax for the expense of the work of repaving and repairing, may assume that the city will see to it that all repairs are made during the term of its contract with the asphalt company. If the asphalt company failed or refused to perform, the city would nevertheless be liable, so far as the railroad company is concerned, to keep the pavement in repair until the expiration of the contract.

As the accident to the plaintiff occurred in December, 1900, it is apparent that the contract with the asphalt company was still in force, as the period of five years had not expired.

In view of the very imperfect condition of this record concerning the transactions between the city and the railroad company in the premises, we express no opinion as to the legal situation which came into existence on the expiration of the contract with the asphalt company. The city of Brooklyn is primarily liable in this action, and must pay the judgment recovered by the plaintiff.

The judgments and orders appealed from should be reversed, and the complaint dismissed, as to the defendant the Brooklyn Heights Railroad Company, with costs against the plaintiff, and affirmed as to the city of New York, with costs to the plaintiff, to be paid by the city.

PARKER, C. J. I agree with Judge BARTLETT'S position, including his recommendation that plaintiff should pay costs to defendant railroad company. There never has been any doubt of the liability of the city for plaintiff's injuries, so plaintiff could have proceeded against it with perfect safety and with reasonable confidence that, if judgment was procured, it could be collected from defendant city. But instead plaintiff chose to take the risk of making defendant railroad company also a party to the action, and quite likely for the reason that his counsel assumed that a larger verdict could be obtained against the railroad company and the city together than against the city alone. But whether that was the reason or not, he undertook to make an unnecessary party a defendant, with some hope of benefit to plaintiff; and, it having turned out that it was improperly made a party, plaintiff should

bear such portion of the responsibility for the error as the taxable costs constitute. It is undoubtedly true, as this court holds in Conway's Case, 157 N. Y. 33, 51 N. E. 395—speaking of municipalities as to which there is no legislation to be regarded as modification of section 98 of the railroad law—that under that section “the duty of keeping such portion of the streets in permanent repair [by the railroad company] is not suggested or advised, but is commanded.” But that section must be read in connection with local statutes, where there are any bearing upon the subject, as is the case in the city of New York. It would be absurd to read section 98 as applying to the railroads of the city, and to read the charter as affording an entirely independent proceeding, placing additional burdens upon the railroad company. Section 98 of the railroad law provides that the railroad company shall keep the streets in repair between the tracks and for two feet outside, and, inasmuch as it is held in Conway's Case, *supra*, that the city authorities may determine that the entire street shall be repaved, and with asphalt, but that they may not impose upon the abutting owners the expense of repaving between the railroad tracks and for two feet outside, the burden of repaving that part of the street must be upon the railroad company under section 98. So under that authority, if that section was the governing section when the street in question was repaved with asphalt, the railroad company would have been required to bear the cost of repaving between the tracks and for two feet outside, leaving the abutting owners to bear the rest of the expense. But the local authorities did not understand that section 98 controlled. They found a provision of the charter which requires the railroad company to pay 25 per cent. of the expense of repaving the streets, and the municipal authorities followed their charter, not section 98 of the railroad law; and they were right, because the charter is inconsistent with section 98, and should be construed as a modification of the general law so far as the city of New York is concerned. Otherwise we should have the absurd result of treating the two statutes as cumulative so far as they concern the burdens of the railroad company as to street improvements, section 98 requiring the railroad to repave between the tracks and for two feet outside, and the charter requiring the railroad to pay 25 per cent. of the cost of repaving the entire street.

The general statute and the charter may be harmonized and read together so as to produce the result undoubtedly intended by the Legislature. And thus read, while the general duty to repair between the tracks and for two feet outside rests upon the railroad as between it and the city—a duty which the city may enforce—still, in case the local authorities elect to repave the whole street,

the charter provisions apply, and under them the city has full control of the matter of repaving and may impose 25 per cent. of the cost upon the railroad company, and cannot impose more or less, notwithstanding the provisions of section 98, which within the city of New York do not apply when a repavement is made by the city.

Proceedings were taken under the charter to repave the street and to keep that repavement in repair for five years. The contract was to that effect, and the assessment made to meet the expense of such repavement included the amount necessary to keep the repavement in repair for five years. Can any one deny that the city has the right to do this? Is it questioned that the extra expense of obtaining a contract that the repavement should be kept good for the period of five years is a proper expense, and one that may be collected out of those obligated to repave the street? I have heard no suggestion of doubt as to how these questions should be answered; for concededly the city has the right under its charter to make such a contract, and those charged with the expense of repaving must be bound to pay the extra cost of obtaining a contract to keep the repavement in repair for five years. The municipal authorities therefore did precisely what they had the right to do, and, having obtained a contract that the repavement should be kept in repair for five years, supported by a sufficient bond for faithful performance, the railroad company was relieved for that period from the duty of repairing in so far at least as ordinary wear and tear was concerned; for the city, having full authority in the premises, had provided for keeping the street between the tracks as well as elsewhere in repair, and had presumably collected the money needful therefor. That the railroad company and the officials connected with the highway department of the city recognized this to be the effect of what was done in connection with the repavement of the street is shown by the letter written less than five months before the accident by one of the railroad company's engineers to the city engineer of highways calling his attention to holes, one of which occasioned this accident. He said: “I believe the contractor is under guaranty to keep this pavement in repair for 5 years. Will you kindly take steps to have the pavement put in better shape before there is any cause for a suit for damages?” To this the principal assistant engineer of the highway department replied four days later, “The contractor this morning took out a permit for repairing the same, and I presume the work will be done at once.” But the repairs were not actually made, and about five months thereafter, but within the period of five years covered by the contract, this accident happened. For it the city is responsible, and I believe, under the statutes

which are referred to in detail in Judge BARTLETT'S opinion and in the dissenting opinion, it alone is responsible.

CULLEN, J. (dissenting). As I concur with Judge BARTLETT in the view that the terms and conditions of the consent given by the city of Brooklyn in 1853 to the Brooklyn City Railroad for the construction of its road did not constitute such a contract as to exempt that company and the appellant the Brooklyn Heights Railroad Company, its lessee, from the provisions of section 98 of the railroad law (chapter 676, p. 1404, Laws 1892), it is necessary for me to discuss only the question whether the repavement of the street by the city authorities relieved the appellant from the duties and obligations which concededly would otherwise rest upon it under the section of the railroad law cited. By that section it is enacted: "Every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe." This duty was imposed on street railroad companies for the safety and security of the traveling public as well as for the pecuniary benefit of the municipality, and rendered every company liable to any traveler, who might be injured by the failure of the company to discharge its obligation. *McMahon v. Second Ave. R. R. Co.*, 75 N. Y. 231. Though the city was not relieved from responsibility for the safety and security of its streets, the obligation as to the part of the street lying between and adjacent to the tracks was primarily on the railroad company. *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475, 7 Am. Rep. 469. As was said by this court in *Conway v. City of Rochester*, 157 N. Y. 33, 51 N. E. 395, "The duty of keeping such portion of the streets in permanent repair [by the railroad company] is not suggested or advised, but is commanded." Such were the rights and duties of the parties when the city repaved the street with asphalt under the provisions of section 50, tit. 15, of the charter of the city of Brooklyn (chapter 583, p. 1059, Laws 1888, as amended by chapter 1008, p. 2057, Laws 1895). The section directed the board of estimate to raise each year such amount "as they may deem necessary and proper for the purpose of repairing and also improving the condition of the streets and avenues of the city by repaving the same." It provided that the common council might, upon the petition of a majority of the property owners, or by a three-fourths vote without such petition, "repave

with asphalt, granite or other improved pavement, any street already paved at the expense of the property owners. One-half of the cost of such repavement shall be borne by the city at large and the other half by the property benefited. * * * Provided, however, that in all cases where a surface railroad is laid and operated through any such street, one-fourth of the cost of such repavement shall be assessed upon such railroad, and one-fourth thereof on the other property benefited within the district of assessment." This section does not purport to relieve in any manner the railroad company from its duties, imposed under the railroad law, to keep its portion of the street in repair. If we assume, however, that, as the charter authorized the city to do the repaving, the railroad company could not be held responsible for the laying of such pavement, this principle would have no application as to its duty to maintain the street in repair after the pavement had been laid. The resolution of the common council, which was a prerequisite to any action by the administrative officers of the city, authorizes only repaving the street. My associate is of opinion that the difference between repaving and repairing the street is technical and narrow. I, on the contrary, think that a radical distinction between the two is made both by the charter itself and by the decisions of this court. Not only does section 50 distinguish between repairing and repaving by providing that money may be raised for both purposes, while authorizing an assessment to be laid only for one (repaving), but section 48 of the same title provides in express terms: "The expense of repairing the streets of said city shall be a general city charge; and the commissioner of city works shall have exclusive power in relation to the repairing of streets, but in no one year shall such expense exceed the amount raised for that purpose in the general tax levy." Thus the expenditure of all moneys raised under section 50 for the repair of streets was under the exclusive control of the commissioner, and the common council had nothing to do with it; while, on the contrary, repaving, which was to be followed by a local assessment, could only be made on the action of the common council. Therefore, if the contract entered into by the commissioner of public works with the asphalt company, which provided for keeping the pavement in repair subsequent to the time it was laid down, purported to relieve the railroad company from its statutory obligation to the public, it was solely the unauthorized act of an administrative officer of the city, and was in that respect of no validity.

I have said that the distinction between repaving and repairing the pavement is recognized by the judicial decisions. See *People ex rel. Hall v. Maher*, 56 Hun, 81, 9 N. Y. Supp. 94; *City of Schenectady v. Union*

College, 66 Hun, 179, 21 N. Y. Supp. 147; People ex rel. North v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768. In the case last cited an award of a contract for repaving a street was assailed on the ground that the contract required the contractor to keep the street in repair a certain number of years. It was there said by this court: "It will readily be seen that the question raised is one of considerable importance to the public, especially to the cities whose charters provide for the construction of pavement in streets at the expense of the abutting owners of real property or the property benefited, and that the pavement when constructed shall be kept in repair at the expense of the city." The award of the contract was upheld on the sole ground, however, that "the repairs required by the contract have reference to making good the imperfect work done or the defective material used therein; in other words, that it is in effect a guaranty as to the quality and character of the pavement." Whether the same construction is to be given to the provisions of the contract before us it is not necessary to now determine. That question would be presented if an assessment levied for the cost of the improvement should be assailed. There is no proof in the record that the appellant railroad company has paid any such assessment. In the absence of proof no presumption to that effect arises.

The judgment should be affirmed, with costs.

GRAY and O'BRIEN, JJ., and PARKER, C. J., in opinion, concur with BARTLETT, J. CULLEN, J., reads dissenting opinion, and MARTIN, J., concurs. HAIGHT, J., absent.

Judgment accordingly.

(161 Ind. 609)

LIGHTCAP v. KONOVSOKY.

(Supreme Court of Indiana. Jan. 7, 1904.)
JUDGMENT—REVIEW—ACTION TO REVIEW—
COMPLAINT—SUFFICIENCY—WANT OF
FACTS—DEMURRER.

1. Where, in an action to review a judgment against plaintiff, the only ground alleged in the complaint was that the court erred in overruling plaintiff's motion for a new trial in the original action, but it was not alleged that the court made any ruling to which exception was taken, and which was assigned as a cause for a new trial, and neither the motion for a new trial, nor any of the grounds assigned, nor the substance thereof was set forth in the complaint, a demurrer for want of facts was properly sustained.

Appeal from Circuit Court, Starke County; George W. Beaman, Judge.

Action by Henry Lightcap against Joseph Konovosky. From a judgment sustaining a demurrer to the complaint, plaintiff appealed. Transferred from Appellate Court under section 1337u, Burns' Rev. St. 1901 (Acts 1901, p. 590). Affirmed.

H. R. Robbins, for appellant. Nichols & Foster and Simon Bybee, for appellee.

MONKS, J. Appellant brought this action to review a judgment rendered in favor of appellee against him. A demurrer for want of facts to the complaint for review was sustained, and, appellant refusing to plead further, judgment was rendered in favor of appellee. It is insisted by appellant that the court erred in sustaining said demurrer. It is the settled rule in this state in proceedings to review that all the facts necessary to constitute a cause of action must be alleged in the complaint so that the same is sufficient to withstand a demurrer for want of facts without resorting to the exhibits. Murphy v. Branaman, 156 Ind. 77, 80-82, 59 N. E. 274; Wabash R. Co. v. Young, 154 Ind. 24, 26, 55 N. E. 853, and cases cited; Travelers', etc., Co. v. Prairie School Tp., 151 Ind. 36, 38-41, 49 N. E. 1, 51 N. E. 100, and cases cited; Jamison v. Lake Erie, etc., R. Co., 149 Ind. 521, 48 N. E. 223. The only ground for review alleged in the complaint is that the court erred in overruling his motion for a new trial in the original cause. It is not averred that the court made any ruling in that case to which exception was taken and which was assigned as a cause for a new trial. Neither the motion for a new trial, nor any of the grounds assigned for a new trial in the original action, nor the substance thereof is set forth or stated in the complaint. Unless we refer to the transcript of the proceedings in the original case, it is not possible to ascertain what rulings the court made which were causes for a new trial, or whether they were assigned as causes therefor. It is clear, under the authorities cited, that the court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

(162 Ind. 329)

EDMUNDS ELECTRIC CONST. CO. v. MARIOTTE.¹

(Supreme Court of Indiana. Jan. 8, 1904.)
APPEAL—RECORD—RESERVATION OF EXCEPTIONS—TENDER OF PAYMENT—LEGAL
TENDER—WAIVER OF OBJECTION.

1. A reservation of an exception to a ruling permitting the filing of an additional answer cannot be shown by a recital in the original bill of exceptions containing the evidence and incorporated in the transcript.

2. It could not be contended that money offered was not a legal tender when it was shown to be money of the United States, and was refused on the ground that it was insufficient in amount, there being no objection to the kind of money in which the tender was made.

Appeal from Superior Court, Allen County, J. H. Aiken, Judge.

Action by the Edmunds Electric Construction Company against Horace Mariotte. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court under Burns' Rev. St. 1901, § 1337u. Affirmed.

¹ Rehearing denied.

Ellison & Keegan, for appellant. Bittinger & Hawk, for appellee.

GILLETT, C. J. Appellant commenced this suit against appellee to recover on an implied contract for furnishing and installing certain electrical work and to establish and foreclose a mechanic's lien on such account. During the reception of the evidence the trial court permitted appellee to file an additional paragraph of answer. It does not appear that a reply was filed to any of the special answers. The record shows a finding in favor of appellant in the sum of \$25, that a tender of said sum had been made, and that at the time of the finding the money tendered was in the hands of the clerk. There was a judgment in favor of appellee for costs.

Appellant urges that the court below erred in permitting appellee to file said additional paragraph of answer, and that it does not appear from the evidence that the money offered appellant was legal tender. The record proper does not show that at the time of filing said answer appellant reserved an exception to the court's ruling in permitting said answer to be filed. An attempt has been made to show the reservation of such exception by a recital in the original bill of exceptions containing the evidence, which bill has been incorporated in the transcript. This is insufficient. *Maynard v. Waidlich*, 156 Ind. 562, 60 N. E. 348; *Cooney v. Am. Mut. Life Ins. Co.* (Ind. Sup.) 67 N. E. 989; *Ewbanks Man. of Prac.* § 25. As to the tender, it is objected that it does not appear that the money offered appellant's manager was legal tender. It appears that appellee, in the presence of said manager, counted out and offered to him the amount that appellee claimed to be due. The money offered was shown to be money of the United States. The dispute between the parties was over the amount of the bill for the work and materials. Said manager refused the money offered, and did not object to the kind of money in which the tender was sought to be made. There is no merit in the contention of appellant as to the point under consideration. It is stated by Prof. Parsons that, if the amount due "be offered in bank bills which are current and good, and there is no objection to them at the time on the ground that they are not money, it will be considered so far an objection of form that it cannot afterwards be advanced." 2 Parsons on Contracts, *p. 645. See *Boyd v. Olivey*, 82 Ind. 294, 300.

Judgment affirmed.

(161 Ind. 580)

STATE ex rel. BOARD OF COM'RS OF DEARBORN COUNTY v. SHUTTS et al.

(Supreme Court of Indiana. Jan. 6, 1904.)

COUNTY OFFICERS—ALLOWANCE TO CLERK—LEGALITY—STATUTES.

1. Though the salaries of county clerks are fixed by law, and graded in proportion to the

population of the county, the allowance to a clerk of the circuit court made under the act of 1901, § 75, is an imperative duty, when necessary for other public reasons, to the custodian to transfer the same to one performing the duty in place thereof, and is not subject to the board to determine specifically required by a reasonable public necessity.

Appeal from Circuit Court, Dearborn county; N. S. Givan, Judge.

Action by the state of Indiana, of the board of commissioners of Dearborn county, against Frank B. Shutts, administrator of the estate of David Lostutter, deceased, and others. From a judgment of the Appellate Court under Burns' St. 1901, § 1337c. Affirmed.

W. N. Hauck, for appellant. McMullen & McMullen and Roberts & Johnston, for appellees.

HADLEY, J. This is an action by appellant against Frank B. Shutts, as administrator of the estate of David Lostutter, deceased, and three other persons, his sureties, on the official bond of the decedent as clerk of Dearborn county, for the recovery by the county of certain sums of money alleged to have been allowed to and retained by Lostutter, as clerk, contrary to law. The court sustained appellees' motion to strike out of the complaint three several items, to wit: "For per diem attendance on circuit court of Dearborn county, aggregating, \$688; for preparing bar dockets (from which printed copies are made) per order of court, and paid out of county treasury, aggregating \$325; for money allowed by the board of commissioners of Dearborn county under special contract for restoring complete record No. 4, court of common pleas, from 1864 to 1875 \$160."

The questions arising upon the first two of these items are directly ruled against appellant in the recent case of Board, etc., v. Flynn (Dec. 18, 1903) 69 N. E. 159; and since that case received full consideration, we deem it unprofitable to extend this opinion by repeating here the grounds upon which it rests.

With respect to the third item, enough is shown by the complaint, and motion to strike out as embraced in the bill of exceptions, to make it appear that the allowance of \$160 was under a special contract with the commissioners to restore complete record No. 4 of the court of common pleas from 1864 to 1875 for that sum, under the indispensable public necessity statute. Section 7853, Burns' Rev. St. 1901 (section 5766, Rev. St. 1881). And this brings the item squarely within the

ruling of Board v. Mitchell, 131 Ind. 370, 30 N. E. 409, 15 L. R. A. 520, and within the general principle announced in the fourth paragraph of the complaint in the Flynn Case. Section 7911, Burns' Rev. St. 1901 (section 5809, Rev. St. 1881), makes it the imperative duty of the board of commissioners, when necessary to preserve any court or other public record of the county, to direct the clerk of the county, or other custodian officer, to transcribe the same, and to make the one performing the work a reasonable allowance therefor, to be paid as other allowances are paid. It is just as clear now, under the present fee and salary law, as when the opinion in the Mitchell Case was written (1891), that the Legislature, in fixing the just and reasonable salary of the several county officers, had in mind, and based the amount of salary allowed upon, the current ordinary duties required of the officers, and such new duties as might be added during their incumbency. The salary amounts fixed by the law are declared to be graded "in proportion to the population, and the necessary services required in each of said several counties"; that is, the necessary services expected to be required from the amount of population and the performance of the duties usual to the office. In the very nature of things, the Assembly could not, and we will not assume that it attempted to, pass a fair and just salary law to cover all extraordinary and unexpected happenings that shall require the expenditure of much money and labor to save the county from serious loss, and which could not have been within the reasonable contemplation of the Legislature, nor of the officer when he accepted the office. The reproduction or recopying of a public court record, made more than 20 years before, and worn out by use, cannot, therefore, be considered official business of the clerk. It is not found in any schedule of duties required of the clerk, and may be performed by any qualified person as well as by that officer. Section 7911, supra, provides that the commissioners shall enter an order directing the officer in whose custody the impaired record may be to copy it, but the statute also directs that the commissioners shall pay him for it. It will be observed that the statute does not pretend to make it the official duty of the officer to do the work. It is manifest from the statute that the purpose of the Legislature was to provide for the preservation of public records that had become, from any cause, impaired, or spoliated; and the officer in charge was deemed the most proper and convenient person to do the work, but was not expected to do it without a fair compensation. The "indispensable public necessity" statute (section 7853, supra), "by the clearest implication," says Elliott, J., in the Mitchell Case, "implies that there are instances in which the power to make allowances to public officers may be exercised. If there were

no such instances, the statute would be meaningless." Instances in which allowances may be made to a public officer—not to him in his official, but in his private, capacity—for some extra service rendered the county. We think *Lostutter's* service in reproducing the old record comes within this class, and, as further said in the Mitchell Case, "his claim is not for official service, nor for added official duties. The claim is solely and exclusively for compensation due under a contract."

Judgment affirmed.

MONKS, J., absent during the consideration of this case.

(161 Ind. 587)
BOYD v. LOGANSFORT, R. & N. TRACTION CO., ETC., et al.

(Supreme Court of Indiana. Jan. 5, 1904.)

INJUNCTION—GROUNDS OF RELIEF—ADEQUACY OF LEGAL REMEDY—CONDEMNATION PROCEEDINGS—COLLATERAL ATTACK.

1. The right of a corporation to exercise the power of eminent domain is a question to be determined in condemnation proceedings, and a suit to enjoin a corporation from building on land for the appropriation of which right of way proceedings had been commenced by it cannot be maintained.

2. The fact that a court in condemnation proceedings may make an erroneous ruling does not entitle the aggrieved party to an injunction, but the remedy is by appeal from the ruling if authorized by statute, or, if not, by appeal from the final judgment.

Appeal from Circuit Court, Cass County; Joseph M. Rabb, Special Judge.

Action by Fred C. Boyd, agent Logansport, Rochester & Northern Traction Company, etc., and others. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court under Burns' Rev. St. 1901, § 1337u (Acts 1901, p. 590). Affirmed.

Lairy & Mahoney and Nelson & Myers, for appellant. A. W. Brady, Holman & Stephenson, and McConnell, Jenkins & Jenkins, for appellees.

MONKS, J. This action was brought by appellant to enjoin appellees from constructing the traction company's road on a strip of land belonging to appellant described in the complaint, for the appropriation of which as a right of way proceedings had been brought by said traction company in the Cass circuit court under the act of 1901 (Acts 1901, pp. 461-466, c. 207). The complaint was in two paragraphs. Appellees' separate demurrer for want of facts to each paragraph of the complaint was sustained, and, appellant refusing to plead further, judgment was rendered in favor of appellees. The errors assigned call in question the action of the court in sustaining said demurrer.

It appears from the complaint that appellee company, claiming to be a corporation under the laws of this state, for the purpose

of condemning a right of way over appellant's real estate, had filed in the Cass circuit court an instrument of appropriation, and applied for the appointment of appraisers. It was alleged in the first paragraph of complaint that, unless appellees were restrained, appraisers would be appointed, and an award made and filed, the amount of the award paid into the clerk's office, and possession of the ground taken, and the company's road built thereon; that on account of certain alleged defects in the articles of association which were filed in the office of Secretary of State on June 27, 1899, said traction company was not a de jure corporation, and therefore has no right to exercise the power of eminent domain. The second paragraph proceeds upon the theory that said traction company appellee was neither a de jure nor a de facto corporation, and had no existence. Prayer for an injunction. Each paragraph proceeds upon the theory that appellee traction company had no right to exercise the power of eminent domain. If appellee company had no such power under the statute, it could not successfully prosecute said condemnation proceedings. The right of said traction company to exercise the power of eminent domain was therefore a question to be determined in the condemnation proceeding. *Liberty, etc., Association v. Brumback*, 68 Ind. 93, 95-97; *Swinney v. Ft. Wayne, etc., R. Co.*, 59 Ind. 205; 2 *Lewis on Eminent Domain*, §§ 388, 391; *Mills on Eminent Domain* (2d Ed.) § 61. See, also, *Great Western, etc., Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765. As appellant had a complete and adequate remedy at law, injunction will not lie. *Taylor v. City of Crawfordsville*, 155 Ind. 403, 406, 58 N. E. 490, and cases cited. The fact that a court in a condemnation proceeding may make an erroneous ruling does not entitle the aggrieved party to an injunction, but the remedy is by appeal from the ruling if authorized by statute, if not, by an appeal from the final judgment in the cause, when the entire proceeding may be reviewed, and the errors, if any, corrected by a reversal.

It is strenuously argued by appellant that a de facto corporation has no right to exercise the power of eminent domain given by statute to a corporation; that only corporations de jure can exercise such right. The conclusions we have reached renders it unnecessary to decide that question. See, however, 3 *Elliott on Railroads*, § 957; 2 *Lewis on Eminent Domain*, § 391, and cases cited; *Mills on Eminent Domain*, § 61; *The Aurora, etc., R. Co. v. Miller*, 58 Ind. 88, and cases cited; *Doty v. Patterson*, 155 Ind. 60, 64, 65, 56 N. E. 668, and cases cited; *Marion Bond Co. v. Mexican, etc., Co.*, 160 Ind. 558, 65 N. E. 748; *Beach on Priv. Corp.* § 866; *Morawetz on Corp.* §§ 746, 747; 7 *Am. & Eng. Enc. of Law* (2d Ed.) 655, and notes 1 and 2. It follows that the court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

(161 Ind. 593)

INDIANA RY. CO. v. HOFFMAN.

(Supreme Court of Indiana. Jan. 6, 1904.)

STREET AND INTERURBAN RAILROADS—MUNICIPAL CORPORATIONS—TRANSFERS—ANNEXED TERRITORY—RIGHTS OF PASSENGER—PUBLIC CONTRACT—CONSTRUCTION—JURISDICTION—SUPREME COURT.

1. The Supreme Court has jurisdiction of causes in which the validity of a franchise is involved, regardless of the amount of the judgment.

2. A street railroad operating its lines in a city under a contract to issue transfer tickets free of charge to all passengers requesting the same, who might board its cars at any point on any of its lines in the city, and whose destination might be to any other point on any other line of the company's road in the limits of the city, is bound to transport a passenger tendering such transfer to his destination on the company's line, though that be in territory annexed to the city after the contract was made, and on its interurban line, on which it had a franchise entitling it to charge an additional fare outside the city as its limits were before the annexation of territory.

3. A contract between a street railroad and a city is a public contract, and should be liberally construed in favor of the public.

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Action by Ervin Hoffman against the Indiana Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. L. Brick and D. D. Bates, for appellant. Joseph G. Orr, for appellee.

JORDAN, J. Appellant is an incorporated railway company organized under the laws of this state, and is engaged in operating an electric railroad for the carriage of passengers within and without the city of South Bend, St. Joseph county, Ind. Appellee sued appellant to recover damages for being ejected by it from one of its cars within the limits of said city. The issues were joined between the parties, and the court, on request, made a special finding of facts within the issues, and stated its conclusions of law thereon favorable to appellee, and awarded him damages for \$100. The validity of a franchise being in controversy, the appeal is within the jurisdiction of this court.

In addition to the facts above stated, the following are substantially the other facts material to this question: In September, 1894, the General Power & Quick Transit Company was an incorporated company under the laws of this state, and was empowered to own, control, and operate a street railway. In said month the board of commissioners of St. Joseph county, Ind., granted to said company the right or franchise to construct and operate a street railway between the eastern limits of the city of South Bend, as said limits then existed, and the western limits or boundary of the town of Mishawaka, along a public highway south of the St. Joseph river, which highway ran between said city and town. Various conditions and provisions were embraced in said franchise,

among which was one that the fare to be paid by each passenger for being carried over said company's railroad was not to exceed five cents for a continuous passage from one point to another along said railway. The company accepted said franchise so granted by the board, and constructed its road and operated it as provided in the franchises until the 14th day of March, 1899, at which date appellant company herein succeeded to all of its rights, franchises, property, obligations, burdens, etc., and became the owner of said railway between the aforesaid mentioned points or limits. On May 3, 1894, the common council of the city of South Bend granted the right of franchise to said General Power & Quick Transit Company, appellant's predecessor, to operate a street railway within the said city, and provided as a part of the said grant that the rate of fare for each passenger for one continuous passage upon any line or route of the railroad which might be constructed and operated within said city by said company should not exceed five cents within the city limits, and further provided that transfer tickets should be issued by the company to passengers thereon free of all charge. The ordinance granting the aforesaid right or franchise, together with all of its conditions and provisions, was, by appellant's predecessor, accepted, and has never been changed or altered in respect to the fare as therein provided. On January 19, 1885, the common council of the city of South Bend, by an ordinance, granted a franchise to the South Bend Railway Company to operate a street railway within the city limits, and it was provided therein that the fare for one passenger should not exceed five cents, and that transfer tickets should be given "free of charge." Appellant also became the successor of this latter company. On June 22, 1885, said common council granted to the South Bend & Mishawaka Railway Company the right to build and construct a street railway over the following route: "Commencing at the city limits upon Vistula avenue in said city; thence to its intersection with Washington street; thence west on Washington street to Michigan street." This ordinance provided that the fare for each passenger over any route or part of said railroad should not exceed five cents between the hours of 6 o'clock a. m. and 11 o'clock p. m., after which time the company might exact 10 cents. This ordinance was silent in regard to transfer tickets. Said company, after acquiring said franchise, constructed a street railway over and along said route as provided by the grant. Appellant also became the successor of this company. On the 11th day of September, 1899, an action was pending in the circuit court of Laporte county against appellant, which at that time was the successor and assignee of all of the aforesaid railway companies, and the owner and in control of and operating a continuous line of railroad from the

center of the city of South Bend along the street known as Vistula avenue therein, and over and upon the Vistula road to the town of Mishawaka, and, in order to effect an amicable settlement, compromise, and adjustment of all differences existing between the said city and the appellant and its constituent companies involved in said action appellant submitted a proposition in writing to the common council of the city of South Bend, which proposition was duly accepted by the council, and became a part of its records. Under this proposition, for the purposes aforesaid stated, appellant proposed to pay into the treasury of the city, within 90 days of the acceptance thereof, \$12,000 and over, this sum being the amount of the claim against the South Bend Railway Company, and, in addition thereto, to pay all costs, etc., in the case. By this written proposition appellant also proposed forthwith, upon the acceptance thereof by the city of South Bend, to issue transfer tickets free of charge to all passengers requesting the same who boarded its cars at any point upon its line within the limits of the city of South Bend, and whose destination might be upon any point upon any other line of appellant within the said city limits; such transfer tickets to be valid only upon the next car leaving upon the line indicated thereon after the issuing of the same. The city of South Bend, after accepting this proposition, dismissed of record the suit pending against the South Bend Railway Company in the Laporte circuit court. On October 14, 1901, the city of South Bend, by annexing territory to the said city, extended the limits thereof eastwardly along said Vistula road to a distance of about half a mile, and by the terms of said ordinance established the east line of the city limits upon said Vistula highway, thereby taking into the city of South Bend about half a mile of the said Vistula public road, which had theretofore been outside of the city, and upon which part of said road said line of railway had been previously operated under the franchise granted by the board of commissioners as hereinbefore stated. On the 14th day of January, 1902, some time before 6 o'clock p. m., the appellee boarded one of appellant's regular east-bound passenger cars at a point on Washington street in said city of South Bend for the purpose of going to his home in Roseland Park, which park is situated in the territory which was annexed to the city by the annexation proceedings in October, 1901. He paid to the conductor of the car five cents in payment of his fare. This was the usual legal fare, and he requested and received a transfer ticket for the east-bound car on Vistula avenue in said city. When the car arrived at the point where a change should be made, he immediately transferred to the Vistula avenue car running on appellant's Vistula avenue line, and upon which car it was the custom of appellant to receive and carry

passengers on transfers whose destination was on any point along its route within the limits of the city of South Bend, as said limits existed prior to the annexation aforesaid. He gave to the conductor in charge of the Vistula avenue car his transfer ticket, and the conductor permitted him to ride on said transfer ticket until the car had gone beyond the old limits to a point on the said Vistula road. At this point the company, by its said conductor, demanded of him that he pay an extra fare. This he refused to do, and thereupon appellant, by its officers, agents, etc., ejected him from the car. The point at which he was expelled from the car was within the limits of the city of South Bend as they were fixed under the annexation proceedings in October, 1901, but was outside the limits of the city as they existed at the time said railway was built, and as they had existed up to October 14, 1901. The point where he was ejected was upon that part of said railway line which had been built and constructed under the franchise granted by the board of commissioners as hereinbefore stated.

It is contended by counsel for appellee that the franchise granted by the county commissioners to construct and operate the railroad to appellant's predecessor upon the public highway between the cities of South Bend and Mishawaka cannot in any manner be abridged or impaired without appellant's consent, either by direct or indirect proceedings on the part of the city of South Bend or any other person or corporation. This franchise, it is said, was a contract between the county and the company to which it was granted. It is insisted that the franchise granted by the board of commissioners to the General Power & Quick Transit Company, one of appellant's predecessors, to construct and operate its road along that part of the public highway in question which at that time was outside of the city limits of South Bend, and the agreement between appellant and the city under the franchise of May 3, 1894, in relation to the fare to be charged for the transportation of passengers, should be so construed as to leave both in full force and effect. While it is true that appellant, as the successor of the several other companies, as shown by the special finding, succeeded to all their rights under the grants of the several franchises in controversy, and likewise is bound by all of the conditions and stipulations composed therein, however these rights and obligations, under the facts, do not necessarily control the decision of the question as here presented. These, as to the question of transfer tickets, may be passed, as in our opinion this matter is regulated by the contract entered into between the city and appellant on September 11, 1899. It appears that on that date, after appellant had become the successor and assignee of all of the rights of the several

companies, and was the owner of and in control of a line of railway running from the center of the city of South Bend along Vistula avenue therein on to the limits of the city, and thence along and upon the Vistula highway to the town of Mishawaka, in a settlement, adjustment, and compromise of all differences existing between appellant and the city in an action pending in the Laporte circuit court, it made to the city a written proposition, as shown, whereby, among other things, it stipulated and agreed forthwith upon the acceptance of its proposition by the city to "issue transfer tickets free of charge to all passengers requesting the same" who might board the cars at any point upon any of its lines within the limits of the city, whose destination might be to any point upon any other line of the company's road within said limits. This proposition, as shown, was duly accepted by the city, and placed upon its records, and became a binding contract between it and appellant. There was no provision made therein to indicate that the parties were intending to confine the agreement to the limits of the city as they existed on the said 11th day of September, 1899, and under the circumstances it cannot, in reason, be asserted that the parties only intended to include the limits as they then were, and not as they might thereafter be extended. The right of the city of South Bend to enlarge her boundaries under the laws of this state is governmental, which it cannot bargain away, and it may be presumed that appellant under its contract whereby it agreed to issue the transfer tickets within the city limits must have contemplated that the city in the future might exercise the right of annexing territory, and thereby extend its limits. Upon no view of the case can the provision "within the limits of the city" be interpreted to have been intended under the agreement embraced in the proposition made by appellant to apply only to such limits as then fixed.

It is apparently insisted by counsel for appellant that the city of South Bend, by annexing the part of the territory in which appellant, under the grant from the board of commissioners, had previously operated its road, abrogated and destroyed its rights acquired by said grant, and therefore violated our fundamental laws. But whatever rights appellant had in said territory under its grant from the board of commissioners were not impaired or destroyed by the extension of the city boundary in question, but were changed by its agreement with the city to issue transfer tickets over its lines therein to all points within the city limits. Whatever rights it had to decline or refuse to issue transfers to persons carried over its road in said territory were merged in and controlled by the contract which it subsequently made with the city. If appellant desired to stand upon and avail itself of the rights

which it had acquired in the territory in question, it ought not to have entered into the agreement and contract with the city in regard to the rate of fare and the right of passengers to transfer. The regulation of the question of fare and the transfer tickets to be issued rests upon the contract in this case between appellant and the city of South Bend. It bound itself thereby not to exact of passengers transported over its lines within the city more than the maximum fare, and to issue, upon request, to such passengers, transfer tickets as provided. This agreement, as we have seen, cannot be held to apply only to passengers who are transported on appellant's cars within the old limits of the city, but must be held to apply to and include any and all passengers whose destination is within the limits of the city as they were extended by the annexation of the territory in controversy. This extension, as we have said, by the municipal authorities, was the exercise of governmental powers. In a legal sense the city is a unit, although its boundaries may be changed from time to time by extension, and all persons within the limits thereof as extended become bound by, and must yield obedience to, its ordinances. It certainly in reason cannot be asserted that an ordinance adopted by a city must, in its operation, forever be confined to the limits of the municipality as they were at the time it was passed, and cannot become operative in territory thereafter annexed and made a part of the corporation. And with no more force and reason can it be said in this case, under the circumstances, that the agreement of appellant in regard to issuing transfer tickets to passengers is not operative within the limits of the city as thereafter extended. In support of this proposition, see *McCallie v. The Mayor et al.*, 3 Head, 317; *St. Louis, etc., Co. v. St. Louis*, 46 Mo. 121; *Town of Toledo v. Edens*, 59 Iowa, 352, 18 N. W. 313; *Town of Milwaukee v. Milwaukee*, 12 Wis. 93; 20 Am. & Eng. Ency. of Law, p. 1152.

Conceding, arguendo, that the question as to whether appellant and the city of South Bend, under the agreement in controversy, contracted solely in respect to the limits of the city as they existed at the time of the contract, and not in reference to such limits as they might thereafter be extended, is a doubtful one, nevertheless we would be required to solve such question against appellant and in favor of the city, because public contracts, as is the one herein involved, should be liberally construed in favor of the public. See *Muncie, etc., Gas Co. v. City of Muncie* (Ind. Sup.) 66 N. E. 436, 60 L. R. A. 822, and the great line of authorities cited on page 442, 66 N. E., 60 L. R. A. 822.

Under the facts the expulsion of appellee from the car by the servants of appellant was wrongful. Therefore the court did not err in its conclusions of law.

Judgment affirmed.

(32 Ind. App. 112)

INDIANA, I. & I. RY. CO. v. TRINOSKY.

(Appellate Court of Indiana, Division No. 1.

Jan. 5, 1904.)

MASTER AND SERVANT—RAILROADS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—LOOKING AND LISTENING.

1. A railway employé riding slowly along the track on a speeder, inspecting the interlocking appliances where several roads crossed each other, looked and listened for a train when about 75 feet distant from defendant's track, and again when 35 feet distant, but did not turn to look before going on the track, though he had an unobstructed view for nearly 300 feet, and could have stopped the speeder within a distance of 1 foot. Held, that he was guilty of contributory negligence, precluding recovery for injuries from the negligence of the defendant in backing a train along its road without a brakeman in place on the rear car.

Appeal from Circuit Court, Pulaski County; George W. Beeman, Judge.

Action by John C. Trinosky against the Indiana, Illinois & Iowa Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Cary & Walker and Meyer & Drummond, for appellant. Nichols & Foster and H. A. Stels, for appellee.

BLACK, J. In the appellee's action against the appellant to recover damages for a personal injury, the jury returned a general verdict in favor of the appellee, with special findings in answer to interrogatories. The court overruled the appellant's motion for judgment on the answers to interrogatories. There were special findings to the effect that the railroad of the appellant was crossed at North Judson by the tracks of two other railroad companies, which, for brevity, we may call the Erie Company and the Pennsylvania Company. These three companies maintained there an interlocking system. The jury found that the appellee, a man 24 years of age, was an employé of the appellant, his duties being to inspect, oil, and clean and keep in repair the interlocking appliances, and to set up and take down switch lights; and his duties required him to go upon and across the appellant's track at the time of his injury. He was moving slowly westward on the Erie track, examining the wires and pipes of the interlocking appliances across the Erie track, and eastward along the appellant's tracks. He was struck by a car moving eastward on appellant's track about 17 feet from the center of the crossing, and about 3 feet from the south side of the appellant's track. He looked and listened for trains when about 30 feet from the center of the crossing. "Part of the time" his view westward on the appellant's track was obstructed by box cars standing on the scale track west of the place of injury, until he came within about 35 feet of the center of the crossing. The appellant backed its engine, with two cars behind it, over the Erie crossing, at the time of the accident, at about the speed of eight

miles an hour. No signal or warning was given by the appellant when its train so approached the crossing. The appellee looked and listened for trains when about 75 feet from the crossing, and again when about 30 or 40 feet from the crossing. He was engaged in the line of his duty. One Finch was employed by the Pennsylvania Company as superintendent of signals, and no other company had any right to give him orders or directions. The appellee was under the supervision of Finch, and was entirely subject to his orders and control; his duties being defined by the department under the supervision of Finch. The appellee was paid for his services by the paymaster of the Pennsylvania Company. He was subject to discharge at any time by Finch, acting as supervisor of signals of the Pennsylvania Company. The interlocking system was controlled by a tower situated on the Pennsylvania Company's right of way. The appellant paid a fixed monthly charge to the Pennsylvania Company for the use of the interlocking benefits. The appellee at the time of the accident was performing duty assigned to him by the Pennsylvania Company, through Finch. The appellant's locomotive was moving eastward on its main track, with a box and coal car attached, backing the cars. The engineer in charge was on the side of the locomotive, where his duties and the rules of the company required him to be. He looked ahead in the direction in which he was going from the time he passed the Pennsylvania crossing until the accident occurred. He was looking ahead toward the east, up the appellant's track, and ahead of the coal car. The cars that were being backed obstructed his view of any one east of the crossing that might be on the Erie track. He did not know that the appellee was on the Erie track, east of the crossing. The towerman, at the time the locomotive was being backed, gave the engineer the right of way crossing the Erie track on appellant's main track. The D rail of the Erie track, east of the crossing, was open. This the appellee knew. The engineer was operating the locomotive at a speed of from six to eight miles an hour. The head brakeman was not at his place on the coal car that was being shoved, where the rules of the company required him to be. He did not see the appellee as he was approaching the crossing. His failure to see was due to the fact that he did not look. If he had looked, he would have seen the appellee coming down the Erie track toward the crossing. The appellee's injury was due, "to a certain extent," to the head brakeman's failure to look, and, "to a certain extent," to his negligence in failing to look, and in failing to see the appellee as he was approaching the crossing. Neither the brakeman nor any other person gave the engineer notice that the appellee or any person was approaching on the Erie track. The engineer was moving the locomotive in the ordinary

and usual manner. The locomotive and cars, before starting to back, were in the Pennsylvania yards, near and adjoining the Pennsylvania crossing with the appellant's track. The engineer blew his whistle and made a signal to the towerman for the appellant's main track. When he did so, the locomotive was about 400 feet from the Erie crossing. The engineer called for the team track beyond the Erie crossing by whistling. On the Erie track, 75 feet east of the appellant's track, there was an unobstructed view of 75 feet toward the west on appellant's track. At that point the appellee looked for the approach of a train on the appellant's track, and did not see any train. When he was 30 feet from the south rail of the appellant's track, approaching the crossing, his view was unobstructed, looking westward on the appellant's track, for a distance of about 100 feet. There were no wires or other apparatus connected with the interlocking system between the crossing and the pipe which crossed under the Erie track next east of the crossing. The first apparatus east of the Erie crossing that required appellee's attention were "pipes, interlocking switch, and appliances." The pipes which crossed under the Erie track about 20 feet east of the crossing were the last apparatus and fixtures to examine, when coming from the east, toward the tower house, before reaching the crossing. Such apparatus was about 18 feet from the south rail of the appellant's main track. The appellee was examining, with his head down, the last apparatus nearest the appellant's track, on the Erie Road, while sitting on a speeder, when the engine approached the crossing. He had an unobstructed view, from the point where this last apparatus was, to the Pennsylvania crossing, on the appellant's main track. The locomotive and cars were approaching the crossing at the same time that the appellee was approaching it on the Erie track. The appellee and the cars came together about the same time they respectively approached the crossing. The appellee did not at any time see the locomotive and cars as they were approaching the crossing. When the appellee was at a distance of 15 feet from the south rail of the appellant's main track, he would have been able to see 239 feet west on that track, if he had looked. He was approaching the crossing on a speeder, going slowly. He could have stopped his speeder at any time before reaching the crossing—within a distance of 1 foot, if he so desired. He was coming from the east on the speeder toward the crossing. He examined apparatus to the left of him, and continued to examine apparatus until he came to where the pipe passed under the track of the Erie Road. He looked for approaching trains from the west on the appellant's track two times. The first time he was about 75 feet distant, and the last time he looked he was about 35 feet from the crossing. The pipe lines which

passed under the Erie track were the last interlocking apparatus to be examined by him as he came from the east. This apparatus, it was found, was about 18 feet from the north(?) rail, and 26 feet from the south(?) rail of the appellant's main track. At a distance of 18 feet from the crossing he had an unobstructed view of the appellant's main track as far west as the Pennsylvania crossing. When he last looked for trains approaching from the west on appellant's main track, he was about 30 feet from the south rail of that track at its crossing with the Erie track. At about 300 feet from the south rail of appellant's main track, at its crossing with the Erie track, the appellee had an unobstructed view of the appellant's main track, looking westward as far west as the Pennsylvania crossing. The appellee proceeded from a point 16 feet east in the center of the Erie track, from the south rail of the appellant's main track, by looking sideways and backward toward the apparatus, backward from him as he was approaching the crossing. If he had looked, he would have seen the appellant's locomotive and cars that were being pushed on the appellant's main track toward the crossing.

There is some confusion, with some apparent contradiction, in these special findings. Without adverting to the question as to the negligence of the appellant, or to the relation existing between it and the appellee, we observe that there is enough in the special findings to show conclusively that the appellee might have discovered the danger of collision with the train on appellant's track in time to have stopped the speeder on which he was riding, and thereby to have avoided contact with the car. His duty was not such as to deprive him, in the proper discharge thereof, of the ability or opportunity to see the danger. On the contrary, it was his duty, in approaching, to look for the approach of the train by which he was injured. The presence and condition of the crossing tracks, and his knowledge thereof, imposed upon him such caution. He had looked for trains when 75 feet distant from the crossing, and also when 30 feet distant. He apprehended the possibility of the approach of a train. Yet when injured he was advancing to the crossing without looking ahead. He was looking sideways and downward and backward while progressing forward to the crossing, where he could have seen the train, and was in such immediate nearness to it that it cannot be said that such conduct was reasonably prudent at that time and place. If he had not failed in this regard, he would not have been injured. At least, he could have stopped the speeder after seeing the approaching car in time to avoid the injury. It must be said, we think, that the special findings show negligence on the part of the appellee, without which the injury would not have occurred; that his own negligence contributed materially to the injury. Under such circumstan-

ces, there rests upon each party an obligation to exercise reasonable care and diligence. While the injury was due, "to a certain extent," to the failure of the head brakeman to look when he could have seen the appellee, it must also be regarded as due, to some material extent, to the failure of the appellee to look when, consistently with the proper performance of his own duty of inspection, he could have seen the approaching train. The fair and reasonable construction of the special findings seems to direct us to this conclusion with sufficient certainty to leave no occasion for ordering a new trial.

The judgment is reversed, and the cause is remanded, with instruction to sustain the appellant's motion for judgment.

(32 Ind. App. 139)

SPRING STEEL FENCE & WIRE CO. v. CITY OF ANDERSON et al.

(Appellate Court of Indiana. Division No. 1. Jan. 7, 1904.)

PUBLIC HIGHWAYS — MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — BENEFIT AND DAMAGES — ASSESSMENT — NOTICE TO OWNERS — REPORT OF COMMISSIONERS — APPROVAL BY COUNCIL — PROPERTY OMITTED FROM REPORT — JURISDICTION OF COUNCIL — VALIDITY OF ASSESSMENT.

1. Under Acts 1901, p. 534 (Burns' Rev. St. 1901, § 3623a et seq.), providing that within 20 days after the filing of the city commissioners' report of the assessment for a street improvement the common council shall act on such report, after the publication of a notice of their meeting therefor, setting forth the location and terminal points of the improvement and the date of the filing of the commissioners' report, and reciting the time and place at which the council will meet for the purpose of considering the assessment, and that any person interested may appear thereat, etc., the notice need not contain any mention of particular lots, tracts of land, or parcels of ground, nor state the names of any owners thereof.

2. Burns' Rev. St. 1901, § 3623a et seq. (Acts 1901, p. 534), relating to the improvement of streets, provides in brief that, after the city commissioners have viewed the property affected by the proposed improvement, they shall file with the city clerk their written report, describing such property, and giving the owners' names; that thereafter, on notice, they shall meet to assess the benefits to the property, at which time interested parties may appear and be heard; that the commissioners may, upon notice (section 3623c), include in their assessment property not included in their first report; that after the filing of the report of such assessment the city council shall, on notice, meet to confirm or modify the same, and may (section 3623d) "approve said report as filed, or may change or amend said report as to the assessment of property," and that the adoption of the report shall constitute the assessment of benefits or damages. *Held* not to contemplate the assessment by the common council of property not reported assessed by the commissioners.

3. When a property owner succeeded in having its property omitted by the commissioners from their report of assessments as not affected by the improvement, it was not bound to take further notice of the proceeding, and a notice given of a meeting of the council for the consideration of the matter of the assessment could not be regarded as a notice to such owner on which to base an assessment by the council against such property, and such assessment was made without jurisdiction.

Appeal from Circuit Court, Madison County; John F. McClure, Judge.

Action by the Spring Steel Fence & Wire Company against the city of Anderson and others to set aside an assessment for street improvements. Judgment for defendants, and plaintiff appeals. Reversed.

F. E. Holloway and E. R. Call, for appellant. B. H. Campbell and Chipman, Keltner & Hendee, for appellees.

BLACK, J. The common council of the city of Anderson, one of the appellees, having ordered an improvement of Fourteenth street from Jackson street westward to Madison avenue, in that city, and having contracted with Charles H. Daniels, the other appellee, for the making of the improvement by him, and the completion and the cost thereof having been reported to the common council, and the matter having been referred by the common council to the city commissioners, they met and viewed the real estate which they deemed to be affected by the improvement, and thereafter filed with the city clerk their written report describing therein the several parcels of real estate which they deemed affected by the improvement, and stating the names of the owners thereof. In this, their first report, the commissioners described and reported as affected by the improvement two certain lots owned in fee simple by the appellant, not adjoining the improved street, but situated about 150 feet south of it, and bounded on the north by an intervening alley, and on the west by Dolman street, and on the east by another alley, and stated the name of the appellant as that of the owner thereof. He did not own, and never owned or was interested in any real estate contiguous to Fourteenth street. Thereafter the council, having fixed November 22, 1901, 10 o'clock a. m., as the time, and the city council chamber as the place, when and where the city commissioners would again meet, gave two weeks' notice in the Anderson Herald, purported to be given by order of the common council and signed by the city clerk, as follows:

"Notice to Property Owners on Fourteenth Street.

"Notice is hereby given to the property owners on Fourteenth street, from Jackson street to Madison avenue, that the city commissioners of the city of Anderson, Madison county, Indiana, did, on the 4th day of November, 1901, file with the common council of said city their first report in the matter of the improvement of Fourteenth street, from Jackson street to Madison avenue, setting forth the names of lot owners affected by said improvement. Said report was on motion placed on file, and the city clerk ordered to give legal notice of the time and place of meeting of the said city commissioners, for the purpose of assessing the benefits against each lot or parcel of land occasioned

by said improvement. Now, therefore, you are hereby notified that the said city commissioners will meet at ten o'clock a. m. on Friday, November 22, 1901, in the city council chamber in said city, where and at which time you and each of you are required to appear and be heard thereon, or the matters and things in said improvement will be heard and determined in your absence.

"Names of Property Owners."

Here followed in the notice a long list or many names, among them that of the appellant.

At the meeting of the city commissioners so announced the appellant, by its attorney, appeared specially, and to them orally denied the sufficiency of this notice, and denied the jurisdiction of the commissioners over the appellant and its real estate under the notice, and denied their right to assess its property. Thereupon the commissioners determined and found that the lots, lands, and parcels of ground abutting immediately on each side of Fourteenth street, and no other, were benefited, and that such benefits were equal in amount to the total cost of the improvement; and pursuant to such finding and determination the commissioners thereupon assessed the entire cost of the improvement against the lots and parcels of ground immediately abutting on Fourteenth street; and they assessed no part of the costs nor any benefits against and no damages in favor of the appellant or its real estate. The commissioners made a written report of this their assessment to the common council, December 2, 1901, which contained no assessment against the appellant or its real estate, and no assessment was ever made or reported to the council by the commissioners against the appellant or its real estate.

The common council gave notice by publication in the Anderson Herald on December 5 and 12, 1901, as follows:

"Notice to Property Owners.

"For Approval of Final Report of City Commissioners.

"Notice is hereby given to property owners on Fourteenth street, from Jackson street west to Madison avenue, affected by the construction of said street from the point above named to Madison avenue, that the city commissioners of the city of Anderson, Indiana, did, on the 2nd day of December, 1901, file their final report of assessment of benefits against each lot and parcel of land liable for the payment of said improvement. The time for the approval or modification of said report was fixed by said common council for Monday, December 16, 1901, at 7:30 o'clock p. m. in the council chamber, and the city clerk was directed to file ten days' notice that all parties interested in said report and assessment appear at said time and place and be heard thereon, if they desire, or the mat-

ters and things in said improvement will be heard and determined in their absence.

"By order of the Common Council."

Signed by the city clerk.

At the meeting held pursuant to this notice the council, by resolution, without any other notice to the appellant, amended the final report of the commissioners by making an assessment of \$125 against the appellant's real estate, that sum to become a lien thereon, as a part of the cost of the improvement.

In a paragraph of complaint setting forth the foregoing facts, in substance, to which a demurrer for want of sufficient facts was sustained, the appellant sought the canceling and setting aside of the assessment and lien and the quieting of its title. The case involves a consideration of portions of an act of 1901 (Acts 1901, p. 534; section 3623a et seq., Burns' Rev. St. 1901). It is provided (section 3623c) in relation to the first action to be taken by the city commissioners that they shall meet and shall proceed to view the lots, lands, and parcels of ground affected by the improvement, and that within 15 days thereafter they shall file with the city clerk their written report, describing therein each lot, tract of land, or parcel of ground benefited or damaged by the improvement, together with the name of the owner thereof. It is then provided that the common council at its next meeting shall fix a time and place when and where the city commissioners will meet again to assess the costs of the improvement upon the property benefited thereby in proportion to the benefits derived therefrom, but not in excess of such benefits, and that the city clerk shall give notice by two weeks' publication, once a week, in a newspaper of general circulation printed and published in the city, "of the time and place of the meeting of such city commissioners, and shall state in said notice the name of each person whose property has been reported as benefited or damaged by said improvement." The city commissioners are to take notice of the time and place of this second meeting, and to meet without further notice. It is provided: "All persons shall have the right to appear before such commissioners at such time and place, and have a hearing as to the benefits or damages to their respective lots, tracts of land, or parcels of ground." Provision is made whereby the commissioners may include in their assessment of benefits or damages property not included in their report above mentioned. The commissioners, it is next provided, shall make a written report of their assessment of benefits and damages to the common council, and that all persons owning lots, tracts of land, or parcels of ground reported as benefited or damaged, shall take notice of the filing of such report, and shall have the right to appear before the common council and have a hearing thereon. In the next section (3623d) it is provided that within 20 days after the filing of the report of the assessment of benefits or damages by

the city commissioners the common council shall act upon that report at a meeting of which 10 days' notice shall be given by publication in a newspaper of general circulation in the city, setting forth the location and terminal points of the improvement and the date of the filing of the commissioners' report, and reciting the time and place at which the council will meet for the purpose of confirming or modifying the assessment made by the commissioners, and that any person interested may appear thereat and make objection to such confirmation or modification; and it is provided that at such meeting the council shall give opportunity for hearing to all parties interested "as to any objection they may have to such assessment," and may approve the report as filed, or may change or amend the report as to the assessment of property; and that the adoption of the report, as made by the city commissioners, or as changed and amended by the common council, shall constitute the assessment of benefits or damages. It is also provided that after the assessments, "as herein provided," have been made by the common council, no suit shall lie to enjoin or restrain the collection thereof, and the validity of such assessment shall not be "questioned except on appeal as hereinafter provided for." In the next section (3623e) provision is made for an appeal by any person owning any lot, tract of land, or parcel of ground, who is required to file a statement of his grievances, which are limited to the following: (1) "That the proceedings for said improvement are invalid"; (2) "that the benefits assessed to his or her property are too high, or damages too low"; (3) "that the benefits assessed to his or her property are too high in proportion to the benefits assessed against other property similarly situated." This attack is not based upon any of the grievances for which an appeal is thus prescribed. It is an attack questioning the validity of an assessment, and it therefore will not lie if the assessment was made by the common council substantially as provided in the statute. The assault is made upon the one assessment on the ground of want of jurisdiction to make it acquired as provided in the statute. The argument has been directed in part to the form of the notices above set forth in so far as they purport to be addressed to the owners of property on Fourteenth street, the property of appellant not being on that street. The notices contained, in substance, all the matters which the statute requires such notices to contain, and we would not be inclined to hold the irregularity so suggested by counsel to be so material a matter as to wholly invalidate the assessment in question, though upon this matter we are not required, for the disposal of this case, to decide. The purpose of the special appearance of the appellant before the city commissioners was substantially accomplished. The commissioners made no assessments except upon property bordering

upon Fourteenth street. In the written report to the common council made by the commissioners the property of the appellant was not reported as benefited or as damaged. The notice of the meeting of the council for the consideration of the report of the assessments must set forth the location and terminal points of the improvement and the date of the filing of the commissioners' report of assessments, and must recite the time and place of the meeting of the council for the purpose of confirming or modifying the assessment made by the commissioners, and that any person interested may appear thereat and make objection to such confirmation or modification. It was not required that this notice should contain any mention of particular lots, tracts of land, or parcels of ground, or should state the names of any owners thereof. At the meeting of the city commissioners for the purpose of making the assessments it is provided by the statute all persons have the right to appear and have a hearing as to the benefits or damages to their respective lots, tracts of land, or parcels of ground. At the meeting of the common council for the purpose of "confirming or modifying the assessment made by such commissioners" the council is required to give opportunity for hearing to all persons interested "as to any objection they may have to such assessment." Special provision is made whereby the commissioners, met for the making of assessments, may assess property not included in their first report, after service by the city marshal of a notice issued by the city clerk to the owner of such omitted property; but no similar provision is made authorizing the common council to include property not assessed by the commissioners, but all persons owning property reported as benefited or damaged are required to take notice of the filing of the assessment report of the commissioners, and are given the right to appear before the council and have a hearing thereon. The appellant was not such an owner. Considering the statute in all its provisions and comparing them with each other, we are of the opinion that it does not contemplate the assessment by the common council of property not reported assessed by the city commissioners. When the appellant succeeded in having its property omitted by the commissioners from their report of assessments, it was not bound to take further notice of the proceeding, and, looking at the statute in all its parts, the notice given of the meeting of the council for the consideration of the matter of the assessment cannot be regarded as intended by the Legislature as a notice to the appellant on which to base an assessment by the council against the appellant's property not included in the assessment report of the commissioners. If this be a correct view of the statute, the common council had not jurisdiction to make the assessment in question, and it was not made as provided in the stat-

ute. Therefore the court erred in sustaining the demurrer to the appellant's second paragraph of complaint.

Judgment reversed.

(32 Ind. App. 130)

INDIANAPOLIS ST. RY. CO. v. BROWN.

(Appellate Court of Indiana, Division No. 2.

Jan. 6, 1904.)

CARRIERS — STREET RAILWAY — INJURY TO PASSENGER WHILE ALIGHTING—INSTRUCTIONS—HARMLESS ERROR.

1. Where, in an action by a passenger for injuries in alighting from a street car, the jury find that the car was not moving, any error in refusing to instruct that, if she attempted to alight from a moving car, she could not recover, and in instructing that, if the car was so nearly stopped that an ordinarily prudent person would have deemed it safe to alight, and she was injured by its sudden starting, she could recover, was harmless.

2. In an action by a passenger against a street car company it is not error to instruct that, if she was injured while attempting, in the exercise of proper care, to alight from a car, by the motorman suddenly starting it, she can recover, though the motorman's act is not required to have been negligent; since starting a car while a passenger is alighting is *prima facie* negligence.

3. In an action by a street car passenger injured in attempting to alight it is proper to instruct that, while a common carrier of passengers is not an insurer of their safety, still the law exacts of it the exercise of the highest practicable care in the operation of its cars and stopping and starting them to enable passengers to get on and off, and for any failure to exercise such care, and for slight neglect of duty in this respect, it is liable to a passenger who is himself without fault, etc.

4. In an action by a street car passenger injured while attempting to alight, and in which the burden of showing contributory negligence is on the defendant, it is proper to instruct that, if the burden is upon either party to show any particular fact, such fact should be established by a fair preponderance of the evidence, and that, if there is no preponderance on any question—that is, if affirmative evidence is only balanced by the negative evidence—then such fact would not be proven.

Appeal from Circuit Court, Hancock County; Edward W. Felt, Judge.

Action by Ida Brown against the Indianapolis Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Winter & Winter, Marsh & Cook, and W. H. Latta, for appellant. Wymond J. Beckett, for appellee.

ROBY, J. Action for damages on account of personal injuries averred to have been negligently caused by appellant. Appellee was a passenger upon one of appellant's street cars within the city of Indianapolis, and while attempting to leave the car was thrown or fell to the pavement. Her theory, supported by the testimony of several witnesses, was that she signaled for the car to stop, that it did stop, and that she was in the act of stepping off when it suddenly

¶ 1. See Carriers, vol. 8, Cent. Dig. § 1225.

started ahead, throwing her. Appellant's theory, supported by the testimony of several witnesses, was that she did not wait for the car to stop, but stepped off while it was in motion, and was thereby thrown. That she was injured is not disputed. As to the extent of her injury there was conflicting testimony. Verdict for appellee assessing damages at \$1,200, with answers to interrogatories. Motion for new trial overruled. Judgment on verdict.

The only questions argued relate to the giving of certain instructions and the refusal to give others requested. Appellant asked that the jury be instructed that, if the accident did not happen as alleged in the complaint—i. e., by appellee starting to alight from a car that was standing still, but from one that was in motion—there could be no recovery. The answers to interrogatories show that the car was not moving. Error, if any, in refusing the instruction requested, was not, therefore, harmful. *Roush v. Roush*, 154 Ind. 562, 55 N. E. 1017.

The seventeenth instruction given was as follows: "If, however, the car was stopped to let the plaintiff alight therefrom, or so near stopped that an ordinarily prudent person using ordinary care to avoid accident would have deemed it safe to alight therefrom, and under such circumstances the plaintiff, using ordinary care to avoid any injury, attempted to get off the car, and while so doing was thrown to the ground and injured, by the motorman in charge of said car suddenly starting the same before she had alighted, then, and in such event, if shown by the evidence, the plaintiff would be entitled to recover damages for the injury, if any, received." The clause of the instruction as to appellee alighting before the car stopped is, in any view, rendered harmless by the interrogatory above referred to. The question of due care on the plaintiff's part is expressly left to the jury, as should have been done. The plaintiff's right to recover is stated, if the facts are found to be that the car was stopped to let her alight, and that she, while attempting to do so, using ordinary care, was thrown and injured by the motorman suddenly starting the car before she had alighted. Had it been stated in the instruction that the plaintiff was entitled to recover, if, in view of all the facts, the motorman "negligently" started the car, it would have been unobjectionable. It is argued with force that, in the absence of such word, the instruction took the question of fact from the jury, and declared the defendant's negligence, without taking into account the circumstances other than those detailed. To suddenly start a street car while a passenger is in the act of alighting therefrom is held to be negligence. *Railroad Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491; *Railroad Co. v. Huffer*, 26 Ind. App. 575, 60 N. E. 816. The car having been stopped for the purpose of enabling appellee to alight, ap-

pellant was bound to know that she had done so before starting the car again; and suddenly starting it while she was in the act of alighting was an act of negligence. *Anderson v. Ry. Co.*, 12 Ind. App. 194, 38 N. E. 1109; *Washington v. Tobriner*, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284. No circumstance is suggested, and none occurs, which, as between the carrier and its passenger, would make such act anything but negligence. The instruction is not a model, but there was no error in giving it.

The eighteenth instruction given was as follows: "While a common carrier of passengers is not an insurer of their safety, still, in consideration of the great danger to human life consequent upon the neglect of duty upon the part of the carrier, the law exacts of it the exercise of the highest practicable care for the safety of its passengers in the operation of its cars, and stopping and starting its cars to enable passengers to get on and off the same, and for any failure to exercise such care, and for slight neglect of its duty in this respect resulting in an accident or injury it is liable to a passenger who is herself without fault, for an injury sustained as the proximate result of such negligence." The law as stated has been declared to be "well settled." *Railroad v. Hoffbauer*, 23 Ind. App. 614-620, 56 N. E. 54.

The twenty-ninth instruction related to the answering of interrogatories submitted, and was in part as follows: "If the burden is upon either party to show any particular fact called for in any question, such fact should be established by a fair preponderance of the evidence to warrant you in so answering the question as to show the fact established. If there is no preponderance of evidence on any question—that is to say, if the evidence tending to prove the fact in question is only balanced by the evidence to the contrary—then such fact would not be proven, and your answer should be in the negative." It is argued that the instruction is bad on the authority of *Ry. Co. v. Reed*, 151 Ind. 396, 51 N. E. 477. The language of the instruction condemned in that case is practically the same as that of the last clause above quoted. The difference is that in the *Reed* Case the burden was upon the plaintiff to establish both the defendant's negligence and resulting damage and her own freedom from contributory negligence, and an instruction, therefore, which put the burden upon the defendant as to any portion of the issue was erroneous, while in the case at bar the burden is upon the defendant as to the question of contributory negligence. The instruction given discriminates between questions upon which the appellant had the burden and those upon which appellee had it, and therefore accords with the holding in the case cited.

The substance of the instructions refused, in so far as they contained correct state-

ments of the law, was fully covered by other instructions given by the court.

Judgment affirmed.

(32 Ind. App. 158)

LOGSDON v. DINGG.

(Appellate Court of Indiana, Division No. 2.
Jan. 7, 1904.)

ADVERSE POSSESSION — DIVISION LINE — MISTAKE AS TO DIVISION FENCE — SURVEYS — EFFECT — FINDINGS OF FACT — CONNECTION WITH OTHER FINDINGS.

1. Whether possession of land is hostile or adverse is not a conclusion of law, but an ultimate fact.

2. Where adverse possession is claimed, the fact that such possession originated in a mistake of the parties as to the boundary line between their respective adjoining tracts at the time a fence on such line was built does not prevent the running of the statute.

3. Where plaintiff held possession of land up to a division fence for 32 years, exercising exclusive domain over the disputed strip, claiming to be its owner, and that the fence was the true boundary, his possession was adverse.

4. Where one holds a disputed strip of land provisionally, or if holding he disclaims ownership, except to the true line, wherever that may be, his possession is not adverse.

5. A title secured by 20 years' adverse possession of a disputed strip is not divested by surveys thereafter made by agreement of the adverse claimant and the owner of the adjoining land to ascertain the correct division line.

6. A finding that an adverse claimant did not claim ownership of any portion of the adjoining land beyond the true division line must be considered in connection with his further claim that a fence constructed by him and the owner of such adjoining land was on the true line.

Appeal from Circuit Court, Clay County;
F. O. Collier, Judge.

Action by Lawrence Logsdon against Peter Dingg. Judgment for defendant and plaintiff appeals. Reversed.

S. D. Coffey and James A. McNutt, for appellant. S. M. McGregor and George A. Knight, for appellee.

ROBY, J. Action by appellant to quiet title to a strip of land hereinafter described. Answer, general denial. Special finding of facts and conclusions of law stated thereon, to which appellant excepted. Motion for new trial overruled, and judgment for appellee.

It is shown by the finding: That appellant is the owner since 1867 of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 35, Tp. 12 N., R. 7 W., in Clay county, and that appellee is the owner of the S. E. $\frac{1}{4}$ thereof. In 1868 Nicholas Miller, the then owner of the N. W. $\frac{1}{4}$, and appellant proceeded to ascertain the line dividing said tracts of land. They found a stone which they believed to be a corner stone, and sighted through to a point believed by them to be the other corner, and upon the line so established and agreed upon they built a partition fence; each believing at the time that they were building the fence

on the true line dividing the tracts of land, and each intending to so do, and each being mistaken as to the true line, and each thereafter keeping up a part of said fence until 1888. In October, 1889, a controversy having arisen relative to said boundary, an official survey was had, which resulted in locating the same 16 $\frac{1}{2}$ feet east of the fence at one end, and 9 $\frac{1}{2}$ feet east thereof at the other. Appellant denied the correctness of the survey, and continued to hold possession to the fence including the strip mentioned until 1899, cultivating and improving the same continually for more than 20 years, when the county surveyor was called by him and appellee, who holds by mesne conveyance from Nicholas Miller, to resurvey the land, which was accordingly done, resulting in confirming the correctness of the line run in 1889, which is in fact correct. Thereupon appellant expressed himself as satisfied, and stated that he was mistaken as to the true line, and immediately thereafter appellee moved the fence to such line. That the fence was located originally through a mistake as to the true line and its location, each party supposing that the fence was built thereon. That appellant claimed to be the owner of the strip in controversy, believing that the fence represented the true line, and that he at no time claimed to be the owner of any portion of the land in dispute west of the true line, wherever the true line might be. The surveys referred to were never appealed from, and are in full force. As conclusions of law, the court stated that appellant's possession was not adverse, and that appellee should have judgment.

Whether the appellant's possession was hostile or adverse is not a conclusion of law, but an ultimate fact. *Webb v. Rhoads*, 28 Ind. App. 393, 61 N. E. 735.

The facts found are as favorable to appellee as the evidence warrants, and, if they are insufficient to sustain the judgment, it would be useless to retry the cause. The evident theory of the trial court was that the mistake of the parties as to the boundary line at the time the fence was built prevented the running of the statute. In this it was mistaken. It is not necessary that the party claiming to hold adversely show something akin to felonious intent on his own part, and assert that, with full knowledge of the truth, he formed the intent to deprive the true owner of his land. In the nature of things, adverse holding usually originates in a mistake or misunderstanding. The finding shows that appellant held possession up to the fence for 32 years, exercising exclusive domain over the strip in dispute, and claiming to be its owner. He claimed that the fence was the true boundary, and his possession was therefore adverse. *Webb v. Rhoads*, supra; *Railroad v. Stickley*, 155 Ind. 313, 58 N. E. 192; *Burr v. Smith*, 152 Ind. 470, 53 N. E. 469; *Palmer v. Dasch*, 148 Ind. 13, 47 N. E. 176; *Richwine v. Pres. Church*, 135 Ind. 80, 34 N.

¶ 2. See *Adverse Possession*, vol. 1, Cent. Dig. §§ 376, 378.

E. 787. If the fact was that he held provisionally, or if holding he disclaimed ownership, except to the true line, wherever that might be, then his possession would not be adverse. *Railroad v. Stickley*, supra; *Silver Creek v. Union, etc., Co.*, 138 Ind. 297, 35 N. E. 125, 37 N. E. 721. "Every possession, then, is adverse, and entitled to the peaceful and benignant operation and protecting safeguard of the statute, which is not in subservience to the title of another, either by a direct acknowledgment of some kind, or an open or tacit disavowal of right on the part of the occupant." *Dyer v. Eldridge*, 136 Ind. 659, 36 N. E. 522. "The claim may have been a mistaken one, but it was not doubtful or uncertain." *Palmer v. Dasch*, supra. The surveys made after the expiration of 20 years did not deprive appellant of the title secured by prior possession. *Wood v. Kuper*, 150 Ind. 622, 50 N. E. 755; *Riggs v. Riley*, 113 Ind. 208, 15 N. E. 253; *Cleveland v. Obenchain*, 107 Ind. 591, 8 N. E. 624. The finding that appellant did not claim to be the owner of any portion of the land beyond or west of the true line must be considered in connection with his further claim that the fence was on the true line. *Railroad v. Stickley*, supra. Excluding statements of evidentiary character, the finding required the conclusion of law to be for appellant.

Judgment reversed, and cause remanded for further proceedings in accordance herewith.

(32 Ind. App. 169)

MORGAN et al. v. JACKSON.

(Appellate Court of Indiana. Jan. 8, 1904.)

REPLEVIN — BURDEN OF PROOF — INTERROGATORIES — ASSUMPTION OF FACT — APPEAL — REVIEW — CONFLICTING EVIDENCE.

1. A verdict on conflicting evidence is conclusive on appeal.

2. Ownership or right of possession in plaintiff in replevin and possession held by defendant do not change the burden of proof, which remains with plaintiff to establish that defendant wrongfully holds possession of the property.

3. An assumption of a fact contained in an interrogatory relating to a previous interrogatory does not amount to a finding as to such fact which was negated by the jury's answer to such preceding interrogatory.

4. When it is established in replevin that plaintiff has no title or right of possession to notes in suit, that is the end of the case.

Wiley, J., dissenting.

Appeal from Circuit Court, Marion County; Henry Clay Allen, Judge.

Action by Louis J. Morgan and others against George W. Jackson. From a judgment for defendant, plaintiffs appeal. Affirmed.

Daniel Wait Howe, Chas. E. Averill, and R. T. Byers, for appellants. Groninger & Groninger and A. N. Grant, for appellee.

ROBY, J. Appellants brought their suit in replevin to recover possession of certain promissory notes executed by divers persons

to John H. Davidson, of which they averred they were legally entitled to possession, and "of which notes defendant has possession without right, and wrongfully detains from the plaintiffs." Answer in general denial, trial by jury, verdict and judgment in favor of appellee. Errors assigned are that the court erred in overruling appellants' motion for judgment on the answers to interrogatories returned by the jury, and that the court erred in overruling their motion for a new trial.

Appellants' claim at the trial was that the notes in controversy had been pledged to them as collateral security for money loaned by them to the payee, Davidson; that they were placed in possession of such notes; that, the maker of one of the notes desiring to pay it, they handed the package to Davidson, at his request, in order that he might take out that note; that he was delayed in doing so, and left the package in his desk, from which it was taken by the appellee without right. Appellee claims that Davidson had induced him to go into the business with him, and to advance money to him, pledging the notes in controversy to secure the repayment of the sum so advanced; that his possession of such notes was rightful, under the terms of such agreement; and that the same were not pledged to appellants, who he asserted never had possession of the notes in their own right. The controversy was one of fact. It is not one where there was an absence of evidence upon either side of any material proposition involved, but one in which the evidence was conflicting and irreconcilable. The particular province of the jury is to settle such disputes, and no warrant exists for the setting aside of the verdict returned by it in the appellee's favor.

The court gave an instruction to the effect that the burden of proof rested upon the plaintiffs (appellants) to establish, among other facts, "whether the defendant wrongfully detains possession of said property from the plaintiffs." In *Krugg v. Herod*, 69 Ind. 78, the court said: "The gravamen of appellee's complaint, in so far as appellants were concerned, was the allegation therein that he had possession, without right, of the personal property sued for, and unlawfully detained the same from the appellee, in Montgomery county. This allegation was denied by the appellants, and the burthen of the issue was upon appellee." To the same effect are: *Entsminger v. Jackson*, 73 Ind. 144; *Ridenour v. Beekman*, 68 Ind. 236. It is well established that the plaintiff in replevin must show the defendant to be in possession of the goods replevied. *West v. Graft*, 23 Ind. App. 410, 413, 55 N. E. 506. In the absence of other evidence, ownership or right of possession in the plaintiff, and possession held by the defendant, would undoubtedly require the inference and finding that the defendant's possession was wrong-

ful; but such fact does not change the burden of proof, which remains with the plaintiff. But in any event there can be no reversal, for the reason that the answers to interrogatories affirmatively show that the appellants were not harmed by the instruction. Elliott, App. Proc. § 642.

Interrogatory No. 8 and its answer were as follows: "Had not the said John H. Davidson, prior to August 17, 1901, pledged the notes in controversy to the plaintiffs as collateral security for the money before that time loaned by appellants to said Davidson?" Answer: "No." The eleventh interrogatory and answer were as follows: "Did not the plaintiffs, after the notes in controversy had been pledged to them by the said John H. Davidson, keep said notes in their safe and under their control until August 17, 1901?" Answer: "Yes." This interrogatory was evidently framed with the expectation that the answer to interrogatory No. 8, preceding it, would be in the affirmative. The assumption contained in the interrogatory itself is not equivalent to a finding by the jury. The answer relates to possession of the notes, and not to the question of a pledge of them having been made. So construed, there is no conflict between the answers to Nos. 8 and 11.

The plaintiff in replevin must recover upon the strength of his own title. *Miller v. Lively*, 1 Ind. App. 6, 27 N. E. 437; *Easter v. Fleming*, 78 Ind. 116. When it was established that the appellants had no title or right of possession to the notes in suit, that was an end to the case. *Miller v. Lively*, supra.

Interrogatory No. 8 was also conclusive against appellants upon their motion for judgment notwithstanding the general verdict.

Judgment affirmed.

HENLEY, C. J., and ROBINSON and COMSTOCK, JJ., concur. BLACK, J., absent, took no part.

WILEY, J. I cannot concur in the conclusion reached in the prevailing opinion, and deem it my duty to express my views of the law in so far as they differ from those of my associates.

I concur in that part of the opinion which holds that appellants are not entitled to have judgment in their favor on the answer to interrogatories notwithstanding the general verdict, but I do not concur with the reasoning by which that conclusion is reached. It is my opinion that appellants were not entitled to have judgment pronounced in their favor on the answers to interrogatories, because such answers are inconsistent with each other. By their answer to interrogatory 8, the jury found that Davidson did not pledge the notes in controversy as collateral security, while by their answer to interrogatory 11 they found that the notes were so pledged. The construction put upon interrogatory 11 and the answer thereto, as expressed

in the opinion, is, in my judgment, not warranted. By the interrogatory the jury were asked, in substance, whether or not plaintiffs, after the notes in controversy had been pledged to them, did not keep them in their safe and under their control until August 17, 1901. To that interrogatory the jury answered, "Yes." Thus it appears, according to my views of the two interrogatories, that they are contradictory and inconsistent, for the reason that one of them is to the effect that the notes were not pledged, and the other that they were so pledged.

While the prevailing opinion states in brief the material facts disclosed by the evidence, I think it is important that I state in this dissenting opinion the facts as I have gleaned them and understand them from the record. By doing this, I feel that I can more clearly express the views that I entertain of the law questions involved. As I understand the facts, they are as follows: The property in controversy consisted of a number of promissory notes payable to one Davidson. Appellants are lawyers, and had their offices in the Lombard Block, in Indianapolis. Davidson was the state agent of an insurance company, and, by an agreement with appellants, occupied one of their rooms, in which he kept his private desk. Appellee was an employé of the company of which Davidson was the state agent, and occupied an office in the same building, on the same floor. The notes in controversy were given by divers persons as premiums for insurance, and were payable to Davidson. Appellants base their right to recover upon these facts, viz.: That Davidson became indebted to them for money loaned, and pledged to them as collateral security these notes. It is their theory that these notes were all in an envelope when delivered to them, and that, under their agreement with Davidson, they were to be kept in their safe in their private office, and that when any of the payors wanted to pay a note or notes, or make payment thereon, the same should be given to Davidson for that purpose, and no other, and thereupon the package was to be returned to them; that Davidson called for the package one day to get a certain note upon which the maker desired to make a payment; that it was delivered to him by one of the appellants opening the safe and taking out the package and handing it to him, with the express agreement that when such payment was made the note was to be again placed in the package and returned to the appellants, to be placed again in their safe; that, by the time Davidson found the note desired, appellant Louis J. Morgan, who got the package from the safe, had his attention called to some other matter, and Davidson placed the note in his own desk, in the same room where the safe was kept. Soon thereafter Davidson was taken sick and went home, and remained there for several days; appellants in the meantime supposing that the package had been returned to the safe.

During Davidson's sickness and absence from the office, appellee, without the knowledge or consent of appellants or Davidson, took the package of notes out of his desk, and into his own possession. As soon as appellants found that appellee had taken the notes, they demanded their return to them, which demand was refused. Appellee's claim to the notes rests upon the ground that, under a contract with Davidson, he loaned him various sums of money; that some, but not all, of the notes in controversy, were then on hand, and that it was agreed that they should be held as appellee's security for the payment of the amount loaned, but they were turned over to Davidson to be placed in appellants' safe for safe-keeping; that it was also agreed between Davidson and appellee that the notes subsequently received in the course of the insurance business should be turned over to appellee for collateral security, and likewise be placed in appellants' safe. There was no memorandum attached to the notes, or anything to indicate that appellee had any claim, interest, or lien in or on them, and appellants did not have any knowledge or notice that he did. It is not denied that appellee took the notes out of Davidson's desk in his absence, and without the knowledge or consent of appellants.

In their motion for a new trial, appellants allege error of the trial court in giving, in refusing to give, and in modifying certain instructions. Appellants do not aver or claim ownership of the property in controversy, but found their action upon their right to its possession. Upon the question as to the right of possession, the evidence is conflicting. In instruction No. 6 given by the court on its own motion, the court attempted to inform the jury as to the burden of the proof on the question of appellants' right of possession, and as to whether appellee's possession was wrongful. While other matters are embraced in the instruction, they need not here be mentioned. The latter part of the instruction is as follows: "It therefore becomes important for you to determine from the evidence whether in fact there was an actual delivery of the notes in question to plaintiffs * * * for the purpose of securing a debt owing from said John H. Davidson to said plaintiffs; and if you find that said John H. Davidson was indebted to plaintiffs, and you should further find that there was an actual delivery of the notes in question to said plaintiffs for the purpose of securing such a debt, then it will be your duty to determine whether said plaintiffs retained such possession of said property in themselves; and then, if you so find, it will be your duty to determine further whether the defendant wrongfully detains the possession of said property from the plaintiffs. The burden rests upon the plaintiffs to prove all of said facts by a fair preponderance of the evidence to entitle them to a verdict in this cause." It is the latter clause in the instruction that

appellants especially assail as an erroneous statement of the law. The question is fairly presented as to how far a plaintiff in a possessory action must extend his evidence to entitle him to recover. If, as in this case, the action is based on plaintiff's right to possession, alone, he must not only prove by a fair preponderance of the evidence such right, but must go farther, and assume the burden to show that the defendant's possession is wrongful, then the instruction is a correct exposition of the law. Cobbey on Replevin, at section 84, says: "Where on the trial the plaintiff shows peaceful possession prior to that taken by the defendant, he has gone far to establish his right to the property, and the burden is upon the defendant to show that his taking was rightful." The following authorities support the text: *Shomo v. Caldwell*, 21 Ala. 448; *Robinson v. Calloway*, 4 Ark. 100; *Sprague v. Clark*, 41 Vt. 6; *Dickson v. Thatcher*, 14 Ark. 141; *Warder v. Ingle*, 1 S. D. 156, 46 N. W. 181; *Anderson v. Gouldberg*, 51 Minn. 294, 53 N. W. 636. In *Abbott's Trial Evidence*, p. 869, it is said: "The quiet and peaceable possession by plaintiff of the property at the time of seizure is prima facie evidence of his title, and throws the burden on the defendant of proving the contrary. Plaintiff must prove that he had a legal or equitable right to immediate possession at the commencement of the action, and this is enough. Right to possession and dominion of the goods for the time is all that is essential." *Abbott's Trial Evidence*, p. 868; *McCurdy v. Brown*, 1 Duer, 101; *Rogers v. Arnold*, 12 Wend. 30; *Dodworth v. Jones*, 4 Duer, 201; *Rockwell v. Saunders*, 19 Barb. 473; *Frost v. Mott*, 34 N. Y. 253. In New York it has been held that a right to possession by virtue of a lien is enough. *Baker v. Hoag*, 7 N. Y. 555, 59 Am. Dec. 431. In *Schulenberg et al. v. Harriman*, 21 Wall. 44-59, 22 L. Ed. 551, it was held that the admitted quiet and peaceable possession of the property by the plaintiffs at the time of the seizure was prima facie evidence of title, and threw the burden upon the defendant of establishing the contrary. The rule is laid down in 20 *American & English Encyc. of Law*, p. 1055, that, "if the plaintiff shows a prima facie right to the possession of the property, he should obtain a verdict, unless the defendant prove a better title." The case of *Ingersoll et al. v. Emerson*, 1 Ind. 76, was an action in replevin to obtain possession of a canal boat. After reviewing the evidence on the part of the plaintiffs, the court reached the conclusion that they had made a prima facie case, and said: "Having shown a prima facie right to the possession of the boat, the verdict should have been in their favor, unless the defendant proved that he had a better title." *Morris v. Danielson*, 3 Hill, 168, was an action in replevin to recover possession of some horses. The plaintiff proved that just before the taking he was in possession, and the court

said: "Where the plaintiff had proved that the defendants were found taking the property away and disposing of his property, of which he had just before been in possession, it was enough to cast the burden on the defendants of showing how they came in possession of the property."

It would seem from the authorities that in a possessory action a plaintiff has done all that the rules of evidence require of him when he has shown that he was entitled to the possession (if, as here, he relies alone on his right to possession), and hence he is not required to go farther, and show that the taking and possession by defendant were wrongful. It is hard to conceive, in a contest between two litigants, both claiming the right to possession of property, how such right could exist in both. If plaintiff makes a *prima facie* case of his right to possession, possession in the defendant, as a legal conclusion, must be wrongful; and hence, to defeat the action, he must prove a better right, or a right in a third person. This burden is on him, and not on the plaintiff. True, the plaintiff must recover by virtue of his own title, and not on the weakness of his adversary's title, but in the first instance he is only required to make out a *prima facie* case. If the rule was otherwise, he would have to assume the burden, not only of himself, but of his adversary. It is important in this connection to determine the legality of appellants' right to possession. The theory upon which they claim a right to possession has already been stated. The notes in controversy were pledged to them as collateral security for a loan. Jones on Pledges & Collateral Securities, § 4, in making a distinction between a pledge and a chattel mortgage, says: "(1) It [a pledge] may be constituted without any contract in writing, merely by the delivery of the thing pledged. (2) It is constituted by a delivery of the thing pledged, and is continued only as long as the possession remains with the creditor. (3) It does not generally pass the title to the thing pledged, but gives only a lien to the creditor, while the debtor retains the general property." Many authorities are cited by the author, which we refer to. There can be no question, under the law, but what Davidson, the payee of the notes, could pledge them to appellants by delivery. The evidence makes a strong *prima facie* case that he did this. If such pledge was made, appellants, under their contract with Davidson, did not lose their rights as pledgees by temporarily handing him the notes, to take one out, upon which a payment was to be made, and when so made the package was to be returned to appellants, and again lodged in their safe. The instruction we have had under consideration did not correctly state the law, for it told the jury, in effect, that appellants were not only required to make out their own case, but that they must go farther, and show that appellee's possession was wrongful.

Instruction No. 7, given by the court on its own motion, is attacked. By that instruction the court told the jury that if they should find that the notes were put in appellants' safe for safe-keeping, and were not intended to pass from the control of Davidson and the defendant, or either of them, and that Davidson and the defendant, or either of them, was permitted to retain control of the notes and use them in their business by appellants, such facts would not constitute a pledge of the notes to appellants, and would not give them a right to the possession, and in such event the jury should find for the appellee. That part of the instruction complained of is where the court tells the jury that if they find that Davidson and the appellee, or either of them, were permitted by appellants to retain control of the notes and use them in their business, then it would not be a pledge, etc. It is urged that that part of the instruction is erroneous, because it was not relevant to the issues or pertinent to the facts. It is asserted that there is not a particle of evidence which tends to show that the appellants ever permitted Davidson or appellee to retain the control of the notes and use them in their business. In fact, appellants claim that they had no knowledge that appellee ever claimed or had any interest in the notes. I have searched the record in vain to discover any evidence even tending in the remotest degree to establish the fact that appellants, after the notes were pledged to them, ever permitted Davidson or appellee "to retain control of the notes and use them in their business." These notes were kept in appellants' safe, which had an outer and inner door. Neither Davidson nor appellee had access to the safe, and they could not get the notes except at the pleasure of appellants. It is the established law that instructions should be relevant to the issues and pertinent to the evidence, and, if an instruction is given concerning a fact or set of facts to which no evidence has been adduced, it will be reversible error, unless it clearly appears that the party affected was not harmed thereby. *Hanes v. State*, 155 Ind. 112, 57 N. E. 704; *Reed v. State*, 141 Ind. 116, 40 N. E. 525; *Pelley v. Wills*, 141 Ind. 688, 41 N. E. 354; *Robinson v. State*, 152 Ind. 304, 53 N. E. 223; *City of Lafayette v. Ashby*, 8 Ind. App. 214, 34 N. E. 238, 35 N. E. 516; *Chicago, etc., Co. v. Butler*, 10 Ind. App. 244, 38 N. E. 1. In this case I cannot say that appellants were not harmed. The instruction in its present form was erroneous, and should not have been given. For the same reason, instruction No. 10 was erroneous.

Appellants timely tendered and requested the court to give the following instruction: "There is no mode under the law of this state, except by chattel mortgage, duly acknowledged and recorded, by which the owner of personal property retaining possession can give another a lien upon it that can be enforced against any person except the parties thereto." It is conceded that this in-

struction correctly states the law. The court did not give it as tendered, but embodied it verbatim in instruction No. 6, which I think was erroneous. The rule that it is not error to refuse an instruction where the same, or substantially the same, proposition of law is stated in another instruction, cannot control here, because the proposition of law embraced in the instruction tendered was embodied in an erroneous instruction.

Appellants also tendered the following instruction, which the court refused to give: "If you find that the plaintiffs had the rightful possession of the notes in controversy by virtue of a prior pledge thereof to them by said Davidson, and that while so having rightful possession thereof they delivered the package containing the same to said Davidson for the purpose, and only the purpose, of taking out one of said notes, and then returning the residue of said notes to plaintiffs, and that after said Davidson had so got possession of said package he placed the same temporarily in his desk, and that while so in his desk they were taken out by the defendant Jackson during the absence of said Davidson, and without the knowledge or consent of either the said Davidson or of plaintiffs, then I instruct you to find for the plaintiffs as to all of said notes except the one which said Davidson was so authorized to take out of said package." Appellee's counsel concede this instruction to be correct, but say that appellants were not harmed by the refusal to give it, because in instruction No. 10 the court gave the same instruction in almost the identical language. This is true, but the court, as I stated above, embodied matter not pertinent to the issues, and hence it was erroneous.

It would seem that the authorities in this state, on the question of what a plaintiff is required to prove in a replevin suit, are in conflict, but, in my judgment, the weight of authority and the better reason are supportive of the views here expressed. To illustrate: As a matter of pleading, a plaintiff in a suit upon a note must aver, among other things, that the note he sues on is due and remains unpaid; but when he introduces the note in evidence, in the absence of a plea of non est factum, he has made out a prima facie case. He does not have to prove that it is due or unpaid. He is not required to even prove nonpayment, in the face of an affirmative answer averring payment. The burden is upon the defendant. So, in an action for trespass on real property, the plaintiff must allege that he was entitled to possession, and that the defendant wrongfully entered. And yet the plaintiff has made out a prima facie case, and is entitled to a verdict, when he has shown he was in rightful possession, unless the defendant overcomes such prima facie case by competent evidence. Two persons with contending interests, as here, cannot, in any legal sense, both be entitled to the possession of any specific per-

sonal property at one and the same time. True, a plaintiff in a possessory action must recover by the strength of his own title, and not upon the weakness of his adversary's. Here plaintiffs were required to recover by the strength of their right to possession. Appellants and appellee were not both entitled to possession. In my judgment, appellants were entitled to recover when they showed their right to possession, unless appellee showed a better right in himself or a third person. It must necessarily and logically follow that appellee's possession was wrongful, and appellants' possession was rightful. I do not wish to be understood as applying this argument to the conflicting evidence, but to the instructions, which, in my judgment, erroneously declared the law. In any event, under the theory of appellee, he had no interest whatever in the notes. He testified that after Davidson pledged the notes to him he turned them over to him, to be placed in appellants' safe. Under the authority above cited, this would not constitute a pledge, and would not give him any right, interest, or lien on the notes.

Counsel for appellee, in oral argument, while not conceding any error, invoked the elastic provisions of sections 401, 670, Burns' Rev. St. 1901, that any error must be disregarded which does not affect the substantial rights of the adverse party, and that a judgment shall not be reversed where it shall appear to the court that the merits of the case have been fairly tried and determined in the court below. Wide latitude is given appellate courts by these statutes, and they are often referred to for the affirmance of judgments, even where error is apparent from the record; but, considering the entire record before us, in view of the errors pointed out, I am not prepared to say that the cause was fairly tried and determined, or that the substantial rights of appellants were not affected. On the contrary, it appears to me, from the whole record, that the cause was not fairly tried, and that the substantial rights of appellants were materially affected.

The judgment should be reversed.

(32 Ind. App. 134)

CITY OF LAFAYETTE v. FITCH.

(Appellate Court of Indiana, Division No. 1.
Jan. 6, 1904.)

MUNICIPAL CORPORATIONS—NEGLIGENCE—DEFECT IN STREET—INJURIES—PLEADING—PRESUMPTIONS—QUESTION FOR JURY.

1. Where a complaint shows that plaintiff was guilty of contributory negligence, notwithstanding that defendant was guilty of negligence, it is insufficient as against a demurrer.

2. The presumption that one suing for injuries alleged to be due to defendant's negligence was free from contributory negligence is overcome by specific averments of facts showing that plaintiff knew, or might have known, of the danger, and, knowing, did not use commensurate care.

3. Where, in an action against a city for injuries from a defect in a street, the evidence

was conflicting as to whether plaintiff knew of the existence of the defect, the question was one for the jury.

Appeal from Superior Court, Tippecanoe County; H. H. Vinton, Judge.

Action by Dudley Fitch against the city of Lafayette. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Haywood & Burnett, for appellant. Everett & Everett and C. M. Bright, for appellee.

HENLEY, C. J. This was an action for damages alleged to have been sustained by appellee as a result of falling into a ditch at the time being constructed by appellant in one of its streets for sewerage purposes, and which it is alleged was negligently permitted to remain open without guards or warnings of any kind. The complaint upon which the cause was tried was in one paragraph, and the issue was made by a general denial filed thereto by appellee. There was a trial by jury, which resulted in a verdict and judgment in appellee's favor in the sum of \$300. The alleged errors relied upon for a reversal of this judgment are: (1) The overruling of appellant's demurrer to appellee's complaint; (2) the overruling of appellant's motion for a new trial.

It is contended by counsel for appellant that, while the complaint sufficiently avers facts stating negligence upon the part of appellant, it also, by its specific allegations, shows that appellee was guilty of contributing to his injury. It is the law that, where a complaint shows that the plaintiff was guilty of contributory negligence, notwithstanding the fact that it also shows the defendant was guilty of the negligence which caused the injury, such a complaint is insufficient, and that advantage may be taken of such defect by demurrer. *City of Indianapolis v. Mitchell*, 27 Ind. App. 589, 61 N. E. 947, and cases cited. It is also the law that the presumption indulged in favor of the plaintiff that he was free from negligence contributing to the injuries sued for will be overcome by specific averments of facts which show that he knew, or had opportunity to know, of the danger, and, knowing of the danger, he did not use care commensurate therewith. *Salem Stone & Lime Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411. But a careful examination of the complaint in this case shows that the allegations of negligence upon the part of appellant are clearly and sufficiently set forth, and the facts averred are not sufficient, either directly or by inference, to charge the appellee with any negligence contributing to his injury.

It is further claimed that the uncontradicted evidence shows that the appellee was guilty of contributing to his injury, and that the evidence of the appellee shows that he knew of the fact that this ditch was being constructed at the point where his injury occurred; that he had passed it often during

the time it was so being constructed; and that the exercise of ordinary care on his part would have prevented the injury. We have carefully examined the voluminous evidence presented by this record, and must conclude that the evidence upon the question of appellee's negligence is conflicting. There is evidence to the effect that the point where appellee stepped from his car into the ditch was at a place where the ditch had been constructed since the last time he had passed over that part of the street, and that he could not have known of the existence of the ditch at that point. The fact, then, that appellee knew of the existence of the ditch at the point where he received his injury was disputed, and, where the facts constituting the negligence are disputed, the question is not for the court, but for the jury. It is the law that, where the facts are found by the jury, then their legal consequence constitutes purely a question of law for the court. *Young v. Citizens' St. Ry. Co.*, 148 Ind. 54, 44 N. E. 927, 47 N. E. 142; *City of Indianapolis v. Cook*, 99 Ind. 10; *Louisville, etc., Ry. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128. But the facts in this case which would go to prove negligence upon the part of appellee are not undisputed. The question of appellee's negligence contributing to his injury was therefore a question of fact for the jury. We cannot disturb the verdict.

Judgment affirmed.

(32 Ind. App. 122)

BROADSTREET v. HALL.¹

(Appellate Court of Indiana, Division No. 2.
Jan. 6, 1904.)

APPEAL—RECORD—TORT OF AGENT—FACT OF AGENCY—HEARSAY EVIDENCE—PERSONAL INJURIES—DAMAGES—INSTRUCTIONS.

1. Where an order-book entry shows the filing of a bill of exceptions containing the evidence, and the clerk's certificate shows that the transcript contains the original bill, and the trial judge's certificate attached to the bill shows that it is the bill of exceptions and contains all the evidence, the objection that there is nothing in the record to sufficiently identify the bill is without merit.

2. A clerk's certificate showed that the transcript contained copies of all the instructions. The record showed that the instructions were signed by the judge and filed, and made a part thereof without bills of exceptions. The praecipe directed the clerk to make and certify a transcript "of all papers, bills of exceptions, instructions," etc. *Held*, that the instructions would be regarded as being in the record, though the clerk did not certify that the transcript contained copies of the bills of exceptions containing them.

3. Plaintiff sued for injuries sustained in a collision between a vehicle, in which she was riding, and a horse negligently ridden by defendant's minor son, "while performing services for him and under his direction." On the trial, to prove agency, a witness testified to a conversation had with the son on the day of the accident, in which the boy said that he had been to his grandfather's, and that his father told him to go there on an errand. *Held*, that the evidence was hearsay and inadmissible.

4. The error in admitting the evidence was prejudicial, the issue on which it bore being a vital question in the case.

¹Transferred to Supreme Court, 80 N. E. 145.

5. In an action for injuries sustained in a collision between a vehicle, in which plaintiff was riding, and a horse negligently ridden by defendant's minor son, evidence that the boy was in the habit of riding his father's horses, often rode rapidly, and that his reputation for recklessness in the management of horses was bad, was incompetent on the question of damages; and an instruction on the assessment of damages, authorizing the jury to consider "all of the facts and circumstances proven in the case," was erroneous.

Appeal from Circuit Court, Putnam County; Presley O. Colliver, Judge.

Action by Mary M. Hall against Alexander G. Broadstreet. Judgment for plaintiff, and defendant appeals. Reversed.

G. C. Moore, Thomas J. Moore, and C. O. Matson, for appellant. S. A. Hays, C. E. Akers, and N. A. Whitaker, for appellee.

WILEY, P. J. Appellee sued appellant to recover damages for injuries alleged to have been caused by the carelessness and negligence of appellant's infant son in riding a horse upon and over her. Her complaint, upon which issues were joined and the cause tried, was in two paragraphs, to each of which a demurrer was overruled. Trial by jury, verdict, and judgment for appellee. Appellant's motion for a new trial was overruled. Overruling the demurrers to the complaint and the motion for a new trial are assigned as error. The only questions discussed, however, are those arising under the motion for a new trial.

Appellee urges that the evidence and the instructions are not in the record, and hence no question is presented for decision. She admits that the order-book entry shows the filing of the bill of exceptions containing the evidence, and that the certificate of the clerk shows that the transcript contains the original bill of exceptions, but asserts that there is nothing in the record to identify it. This objection is highly technical and without substantial merit. The certificate of the trial judge, attached to the bill, shows that it is the bill of exceptions, and that it contains all the evidence. The bill is sufficiently identified.

It is urged that the instructions are not in the record, for the reason that the clerk does not certify that the transcript contains a full and complete copy of the bills of exceptions containing the instructions, but that he certified the original papers. The record was made in compliance with a *præcipe* filed with the clerk, and in such *præcipe* the clerk was directed to make and certify a transcript of all papers, bills of exceptions, instructions, etc., except the bill of exceptions containing the evidence, and to include and certify such original bill. All the instructions given and refused were, on motion, ordered filed and made a part of the record, without bills of exceptions. The certificate of the clerk shows that the transcript contains copies of all the instructions given and refused, and excep-

tions thereto. The record showing that the instructions were signed by the judge, filed, and made a part of the record, by order of the court, they will be regarded as being in the record. *Thompson v. Thompson*, 156 Ind. 276, 59 N. E. 845; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 53 N. E. 763; *Kern v. Roycroft*, 26 Ind. App. 413, 58 N. E. 854, 59 N. E. 1068; *Union City, etc., v. Jaqua*, 26 Ind. App. 160, 58 N. E. 508.

In appellee's first amended paragraph of complaint the substantial averments are that Clyde Broadstreet, a minor son of appellant, while residing with him as a member of his family, and while performing services for him and under his direction, injured her by negligently riding appellant's horse against and over her upon a public highway. The third paragraph alleges that appellee's injuries were received and caused by the negligence of appellant in permitting his minor son to have the management and control of his horse, and in permitting his said son to ride said horse on the public highway, and on account of the boy's youth, want of strength, experience, and because of his careless and negligent habits, and of his inability to control the horse, it got beyond his control and ran against and over appellee. The undisputed evidence of the manner in which appellee was injured discloses the following facts: Appellee was traveling east on a public highway. She was in an open-top buggy, drawn by one horse, and was the guest of a Miss Foster, who had invited her to ride. Appellant's son was riding a horse on the same highway, going in the opposite direction. He was riding rapidly. The driver of the buggy, as she approached the boy, turned south, which was to her right, so as to give a part of the traveled way to the boy, so they could safely pass. He did not slacken his speed, the horse collided with the buggy, and knocked appellee out. She fell backward and was severely injured. There is no evidence that the horse the boy was riding was wild, unruly, or hard to manage.

In his motion for a new trial, appellant questions the sufficiency of the evidence to support the verdict; predicates error upon the giving and refusal to give certain instructions, and in the admission of certain evidence. *Curtis Rule* was called as a witness for appellee, and was permitted to testify, over appellant's objection, to a conversation he had with Clyde Broadstreet, the son of appellant, who caused appellee's injury. The conversation took place on the day of and before the accident. After stating that he had had a conversation with Clyde, he was asked this question: "You may tell the court and jury what he said, if anything, as to where he had been and where he was going." To which he answered: "I first asked him where he had been, and he said he had been to his grandfather's; and I asked him what for, and he said his papa told him to come there to tell Tutt to come and get his

buggy that he bought." The objection to the question was that it was a conversation with a third party in the absence of appellant. Up to this point in the evidence, no effort had been made to prove that appellant had sent his son on an errand, as his servant, to convey a message. It was in evidence that Clyde was his son, and was riding his horse. Under her first paragraph of complaint, appellee seeks to fix liability upon appellant on the ground that Clyde was his servant, and in the line of duty, when he negligently caused her injury. The rule is firmly established that agency cannot be proven by the declarations of the agent or servant. *Columbus, etc., Co. v. Powell*, 40 Ind. 37; *Rowell v. Kleine*, 44 Ind. 290, 15 Am. Rep. 235; *Phenix Insurance Co. v. Pickel*, 3 Ind. App. 332, 29 N. E. 432; *Foss-Schneider Brewing Co. v. McLaughlin*, 5 Ind. App. 419, 31 N. E. 838. This court has held that admissions or statements by a contractor's son, while working for his father, that the time for filing liens for the work done by his father had expired, could not bind the father, where the statements were not made in the latter's presence and were unauthorized by him. *Alexandria, etc., Co. v. McHugh*, 12 Ind. App. 282, 39 N. E. 877, 40 N. E. 80. If the evidence under consideration was hearsay, it was inadmissible, and hence not binding on appellant. It is evident that the sole purpose of eliciting the facts stated by the witness was to establish the fact that the boy was in his father's service. If the evidence was hearsay, it should have been excluded, unless it comes within some of the exceptions, and it is clear that it does not. It was not admissible as a part of the *res gestae*, for it was before the accident and wholly disconnected with it. The statement of the boy made to Rule did not accompany the act which he stated he had performed for his father, for it was after he had delivered the message and he was a quarter of a mile away from his grandfather's. The evidence was not admissible. *American Express Co. v. Patterson*, 73 Ind. 340; *Pierce v. Goldsberry*, 35 Ind. 317; *Ohio, etc., R. Co. v. Hamersley*, 28 Ind. 371; *Meyer v. Bell*, 65 Ind. 83; *Somers v. Somers*, 85 Ind. 599. The evidence will be regarded harmful, for it goes to a vital question in the case as presented by the pleadings.

The court gave the following instruction, to which appellant reserved a proper exception: "No. 5. In the event you find for the plaintiff, it will be your duty to assess such damages in favor of plaintiff as will fully compensate her for such injuries as she received by reason of the facts alleged in the complaint. In determining the amount of such damages, it will be proper for you to consider the physical condition of plaintiff both before and since the collision, mentioned in the complaint, the physical suffering and mental anguish experienced, if any, by rea-

son of such injuries, the reduction of the power of plaintiff to perform labor by reason of such injuries, and all of the facts and circumstances proven in the case." After stating correctly to the jury what facts were proper for them to consider in determining the amount of damages they would award appellee, in case they found for her, the court added, "and all the facts and circumstances proven in the case." It is the latter clause of the instruction to which objection is made. If appellee was entitled to recover anything, it was only such damages as were occasioned by the accident resulting in her injury. She was not entitled to recover any punitive damages. Evidence went to the jury that the boy was between eight and nine years old, and lived with his father; that he was in the habit of riding his father's horses, and often rode rapidly; and that his reputation for recklessness in the management of horses was bad. The instruction under consideration, as applied to all the facts which the court permitted appellee to prove, was erroneous. It is not the province of the jury to determine the amount of recovery "from all the facts," but only from such facts as form proper elements for consideration in computing damages. The reason of this is self-evident. If evidence goes to the jury which has no bearing whatever upon the question of damages, and they are told that in the determination of that question they are to consider such evidence, or, in the language of the instruction, "all the other evidence and circumstances proven in the case," they have presented to them an incorrect basis from which to fix the amount of recovery. If there is any evidence which might lead to an incorrect assessment of damages, it is error to instruct the jury that it is their duty to consider "all the facts" in reaching a conclusion as to the amount of damages. Thus, where an action was brought by an administratrix for the death of her husband, the court allowed evidence to go to the jury that the deceased left his family in destitute circumstances, and that others had been injured at the place where the deceased met his death. Upon the question of damages recoverable, the court instructed the jury as follows: "If you find for the plaintiff, in assessing her damages, you may take into consideration the age of the deceased, his habits and occupation, and from all the facts determine what amount the plaintiff should recover," etc. The instruction was held erroneous, because it told the jury that in determining the amount of plaintiff's recovery they might consider "all the facts." This broad statement included the fact that the trial court let evidence go to the jury, over the objection of the defendant, to the effect that the deceased left his family in destitute circumstances, and the further fact that others had been injured at the place where the deceased met his death. See *City of Delphi v. Lowery*, Adm'x, 74 Ind. 520, 39 Am. Rep. 98.

In actions to recover damages for personal injuries, there are, as a rule, distinct and controverted questions for determination. Such questions are to be determined by the facts elicited by the evidence which are pertinent thereto. In determining such controverted questions, it is proper for the jury to consider all the facts bearing upon and pertinent to them. Such facts may not have any bearing upon the measure of damages recoverable, and should not be considered in connection therewith. Thus it was held, in the case last cited, that it was proper for the jury to consider the fact that others had been injured at the place where the deceased was killed, upon the question of notice to the city of the unsafe condition, but that the jury had no right to consider it in the admeasurement of damages.

The evidence to the effect that appellant's son was in the habit of riding his horses, and riding them rapidly, and that his reputation for recklessness in the management of horses was bad, was clearly incompetent upon the question of the amount of damages appellee was entitled to recover. We are not saying that it was competent for any purpose that would bind the appellant. And yet the jurors were told by the court that they might consider such facts in determining the amount of damages they would award appellee. These facts would tend strongly to inflame the passions and bias the judgment of jurors. The rule is that, where there are facts given in evidence which ought not to be considered in estimating damages, the instructions should inform the jury what facts should be considered by them in making their estimate, and not leave it to them to take into account facts which have no legitimate bearing upon the question of the amount of recovery. *City of Delphi v. Lowery*, supra; *Chicago, etc., Ry. Co. v. Becker*, 76 Ill. 25; *Steel v. Kurtz*, 28 Ohio St. 191; *Blake v. Midland R. W. Co.*, 10 Eng. L. & Eq. 437; *Telfer v. Northern R. R. Co.*, 30 N. J. Law, 188.

These considerations lead to the conclusion that the judgment must be reversed, and there is no occasion to decide other questions presented by the record, as they are not likely to arise in a subsequent trial.

Judgment reversed, and the court is directed to grant a new trial.

(185 Mass. 27)

BRIGHAM et al. v. MORGAN et al.

BRIGHAM v. SAME.

(Supreme Judicial Court of Massachusetts. Worcester. Jan. 25, 1904.)

EXECUTORS—TRUSTEES—ADMINISTRATION OF TRUST—EVIDENCE—REPORT—APPROVAL—RIGHT TO APPOINT AUDITOR—STATUTES—INVESTMENTS.

1. St. 1889, p. 1007, c. 311, § 1, provides that after any account of an executor or trustee the judge of the probate court, before approving the same, may appoint one or more auditors, etc.

Held, that the court may appoint an auditor to make an examination as preliminary to the approval of the final account of an executor, though the court has already approved accounts previously filed.

2. Part of the estate of testator consisted of a tract of land which had been laid out as an addition to a city, and for which testator had paid \$11,000. The executors procured persons to purchase lots, and advanced funds for the building of houses, the purchasers giving mortgages to secure the purchase price and advances. No payments were made on the mortgages, and in the course of two years the executors had expended over \$80,000, half of which had been lost. *Held*, that the investment was unwarranted, and the executors were chargeable with the loss.

3. The executors of an estate expended funds thereof in securing purchasers for city lots belonging to the estate and advancing money to the purchasers for building purposes. The mortgages which were taken to secure the price and advances ran to one of the executors, and it was understood between them that when the executor named as mortgagee should qualify as testamentary trustee he was to receive the mortgages as part of the trust fund. Both the executors had joined in making drafts and checks used in the transaction, and when the securities were turned over to the trustee by the executors the mortgages were treated as having been in their hands as executors. *Held*, that a contention that the investments in question were made by the executor to whom the mortgages ran, and not by both the executors as such, was of no merit.

4. Inasmuch as testator's will had contained no allusion to the land in question, and the general frame of the will showed an intention that investments should be made in the exercise of sound judgment, and the power of sale contained in the will was not confined to persons named as executors, the investments in improving the land could not be justified by evidence that testator had told one of the executors that money was to be advanced for the improvement of the land and that the other executor understood the scheme.

5. On an account by executors, evidence tending to show that investments made by them in improving a tract of land laid out as a part of a city and obtaining purchasers for lots, etc., were such as men of prudence and intelligence in the part of the country where the executors resided, were making at the time of the investment, was properly excluded.

6. The action of executors in investing \$2,500 in a land company on an agreement that the company should issue a bond therefor, there being no mortgage or other security, was unwarranted, and the executors were chargeable with the loss.

7. Executors in their reports to the probate court represented that some thousands of dollars had been received by them from the sale of city lots belonging to the estate, and that the interest on the purchase-money mortgages had been paid. No money had in fact been paid, and all the mortgages were in default, and foreclosures were going on. *Held* that, owing to the misrepresentations, the fact that beneficiaries under the will had assented to the accounts of the executors, did not exonerate them from liability for their unwarranted investment in making advances to purchasers for building purposes, etc.

8. A statement by an executor in his account as of his own knowledge, but which, as a matter of fact, he did not know to be true, was fraudulent in law.

9. On an accounting by executors it appeared that one of them owned a half interest, together

§ 8. See *Executors and Administrators*, vol. 22, Cent. Dig. § 422.

with the estate, in certain city lots, which interest was known to the other executor, and the executors sold the lots and advanced money from the funds of the estate to the purchasers for building purposes, and the reports made by the executors to the probate court, showed payments on the purchase price of lots, payment of interest, etc., when in fact none had been made. *Held*, that a finding of bad faith on the part of the executors was warranted.

10. Where an executor has maladministered the funds of the estate by investing in improper securities, and he turns them over subsequently to the testamentary trustee, who receives the securities and inventories them at the value of the fund which was invested in them, and so carries them along in his reports, both the executor and the trustee are chargeable for any loss.

11. Where the executor making such an investment becomes the trustee and receives the funds as at their undiminished value, he is chargeable for the loss in both capacities.

12. Where a testamentary trustee receives from the executor securities not worth the amount invested in them, and he inventories them at their undiminished value, and carries them through several accounts at such value, he is chargeable with the loss.

13. Executors wrongfully invested funds of the estate in securities, and caused an actual transfer of the securities to the testamentary trustee, who had agreed, when the investment was made, that he would accept them, as trustee, at the value of the investment, and who gave his receipt at full value. *Held*, that the fact as to the agreement and receipt did not relieve the executors from liability, it appearing that the executors and trustee had acted in bad faith.

14. Executors wrongfully invested \$80,000, and in an accounting before the probate court the value of the investments at that time were stated at \$40,000. None of the beneficiaries appealed or made any objection. *Held*, that on a subsequent appeal from the final account the decree would not be changed so as to charge the executors with the whole sum unwarrantably expended.

15. Where executors and testamentary trustees were guilty of bad faith relative to investments, charges of interest against them at 6 per cent. was proper.

16. On an accounting by executors and testamentary trustees, a fixing of the liability as between the executors themselves and their sureties was not within the proper scope of the proceedings.

17. Where, in an accounting by executors, it appeared that they had unlawfully invested in securities, but that they had a value of \$40,000, and the decree of the probate court charged them with the difference between \$40,000 and the amount expended, and on appeal the charge was affirmed, but the decree provided that all the investments in question were disapproved, the decree should be construed as meaning that the executors were liable merely for the loss, and not that they should not be allowed the sum which was the actual value of the securities.

Hammond, Loring, and Braley, JJ., dissenting.

Appeal from Supreme Judicial Court, Worcester County; John Lathrop, Judge.

Judicial proceedings on the settlement of the account of Frederick A. Brigham and Herbert A. Maynard, as executors of the will of Thomas Rice, deceased, and on the account of Frederick A. Brigham as testamentary trustee. From the decrees of the Supreme Judicial Court by a single justice affirming the probate court, the executors and trustee appeal. Affirmed.

T. H. Gage, Jr., and Herbert C. Joyner, for Frederick A. Brigham. John Lowell and Geo. McClure Sargent, for Brigham and another. Robt. M. Morse and C. E. Hellier, for Edith Rice Morgan and others. Webster Thayer, for Herbert A. Maynard.

BARKER, J. These cases bring to this court as the Supreme Court of Probate the statement and allowance of two sets of probate accounts rendered to the probate court in Worcester in the estate of Thomas Rice, deceased. The first set consists of the third, fourth, fifth, and sixth accounts of Frederick A. Brigham and Herbert A. Maynard as executors of the will of Rice, who died on May 29, 1888, which was admitted to probate July 3, 1888, when the executors were appointed and qualified, giving separate bonds. The third executors' account, assented to in writing by the parties interested, and sworn to by the accountants on July 29, 1891, was allowed by the probate court on September 11, 1891. The fourth executors' account, also assented to, and sworn to on August 8, 1893, was allowed by the probate court on July 6, 1894. The fifth executors' account, also assented to, and sworn to on August 4, 1896, was allowed by the probate court on August 25, 1896. The sixth executors' account seems to have been presented to the probate court on May 12, 1898. In dealing with it that court reopened the third, fourth, and fifth accounts, and its decree reforming and allowing the third, fourth, fifth, and sixth accounts was entered on October 2, 1900, and an appeal therefrom was taken and entered in the Supreme Judicial Court by each of the two executors and by the persons who are sureties on their official bonds; but no appeal was taken by the beneficiaries. The first trustee's account, assented to in writing and sworn to by the accountant on July 29, 1891, was allowed by the probate court on September 11, 1891. The second, assented to and sworn to on April 22, 1892, was allowed on October 11, 1892. The third, assented to and sworn to on June 8, 1893, was allowed on June 6, 1894. The fourth, assented to and sworn to on June 25, 1894, was allowed on August 25, 1896. The fifth account was sworn to on August 17, 1895; the sixth on August 10, 1896; and the seventh on January 14, 1897. These three seem to have been presented to the probate court on January 14, 1897. The eighth was sworn to on September 15, 1897, and presented to the probate court on September 17, 1897. There was no assent in writing by the parties interested to the fifth, sixth, seventh, or eighth accounts, and these were before the probate court pending allowance until April 13, 1900. In the meantime, on July 12, 1897, there was a petition to the probate court for the reopening of the first four trustee's accounts, which was referred by that court to the same auditor to whom the investigation of the last four trustee's accounts had been committed.

On April 10, 1898, the probate court, by its decree, reformed and allowed the eight trustee accounts, in effect reopening the first four, and an appeal to the Supreme Judicial Court was duly taken and entered from the decree of April 10, 1898, by the trustee and by the sureties on his official bond, but no appeal was taken by the beneficiaries. While the cases were pending in the probate court upon the allowance of the accounts, that court removed the original executors and appointed an administrator de bonis non with the will annexed, and also removed the original trustee and appointed a new trustee in his place. No appeal was taken by the administrator de bonis non or the new trustee from the decree allowing the accounts in the probate court. Upon the appeals the matters of the executors' accounts and of the trustee's accounts were heard together by a single justice of the Supreme Judicial Court, and on January 25, 1902, decrees were entered by him in each matter, affirming with modifications the decrees of the probate court. Bills of exceptions taken by Brigham as executor, Brigham as trustee, and by Maynard as executor at the hearing before the single justice were filed, allowed, and entered in the full court; and appeals from the decrees of the single justice were also taken and entered in the full court by Brigham as executor and also as trustee, and by Maynard as executor. The exceptions and appeals to the full court were argued on January 21, 1903, and were afterwards considered upon the briefs by all the justices.

The testator left a widow and two children, the latter being minors at the time of the testator's death, the elder being a daughter and the younger a son. His will gave to his wife his homestead and the personalty connected with it, and also gave certain minor legacies. It created two funds of \$15,000 each, one for the benefit of each child, the income of which was to be paid to the guardian of the child during the minority. The fund for the daughter was to be paid over to her when she should arrive at the age of 21, and that for the son was to be paid to him when he should arrive at the age of 30. The residue was devised and bequeathed to the executors, but in trust, namely, to pay over and transfer to his wife one-third part thereof in value, and to pay over or transfer the other two-thirds thereof to trustees to hold and manage for the benefit of the two children. It is this fund the accounts of the trustee of which are the trustee's accounts in question. The daughter became of age on February 2, 1890, and the son before July 5, 1894. The controversy between the accountants and the beneficiaries arises from investments of \$81,100, made by the executors in mortgages upon land in Kansas, and of \$2,500 in a bond or deposit in the Commonwealth Loan & Trust Company of Kansas. These investments were disapproved by the probate court and by the

Supreme Judicial Court sitting with a single justice, and the changes from the accounts as rendered by the accountants made upon the allowance of the accounts by the probate court and by the Supreme Judicial Court in the final decrees entered by the single justice come from holding that the investments mentioned were unwarranted; or, in other words, that they were a maladministration on the part of the accountants. Whether these investments should be so held is the chief question in controversy. If they should be so held, the principal remaining question is how the accounts should be reformed, stated, and allowed.

The accounts were referred to an auditor by the probate court, and the auditor's reports, although objected to, were admitted in evidence in the Supreme Judicial Court in the hearing before the single justice. The other evidence at that hearing is in the record, which also contains a memorandum made by the presiding justice, concerning the facts found by him. The probate court, while holding the investment of the funds of the estate in the Kansas mortgages and bond to the amount of \$83,600 of principal to have been unwarranted, did not charge the executors with the whole sum so maladministered. The auditor found that the Kansas mortgages, which had been turned over by the executors to the trustee at their face value of \$81,100, were in fact worth, when so turned over, \$40,000, while the Kansas bond was worth nothing. The probate court struck out from the executor's accounts all credits on account of the principal of the Kansas mortgages and bond except the sum of \$40,000 found by the auditor to have been the value of the mortgages when turned over to the trustee. The probate court also charged to the executors sums for interest at 6 per cent. per annum on the \$43,600 thus disallowed. It also rejected certain other items as a corollary of its rejection of the \$43,600; as, for instance, credits claimed by the accountants for the expense of this litigation. The trustee had voluntarily taken over into his trust the Kansas mortgages at their face value of \$81,100 and the Kansas bond at its face value of \$2,500, and had put them into his official inventory at the same figures, and had charged himself with them in his trustee's accounts at the same amount for principal. He took, and should now have, the mortgages and bond as trustee; and when he shall turn them over to the new trustee, if he has administered them properly since he received them, he will then be entitled to a credit for their amount as principal in the sum of \$40,000, found by the auditor as their actual value. The trustee was charged by the probate court with interest at the rate of 6 per cent. per annum on the amount of \$43,600 lost by the improper investment in the Kansas mortgages and bond. The theory of the action of the probate court was the same in dealing with each set of accounts,

and was to hold the executors answerable for the loss of \$43,600 of principal, and for interest upon the amount lost, and to hold the trustee answerable for the same loss of principal, he having taken over and charged himself with the unwarranted investments at their face value, and with interest upon the \$43,600 from the beginning of his work as trustee.

The question is raised by the bills of exceptions whether the reports of the auditor made to the probate court were admissible in evidence in the hearing in the Supreme Judicial Court. It is contended that the appointment of the auditor by the probate court was not authorized by law. In discussing this question we assume in favor of the accountants that the power of the probate court to appoint an auditor rested at the time of these proceedings upon St. 1889, p. 1007, c. 811, § 1, which, so far as material, reads as follows: "After any account of an executor, * * * trustee or other person required by law to render an account in any probate court, * * * the judge of said court may, before approving the same, appoint one or more auditors," etc. The auditor has reported only upon the accounts of the executors. At the time the auditor was appointed, the executors had filed six accounts, of which the first five had been consented to and allowed without a hearing. No final account had been filed. The executors' accounts were therefore still open for correction. In this state of affairs the children of the testator, each being then of age, asked that the accounts be reopened on the ground that they were incorrect. We do not understand that, under the circumstances disclosed in the auditor's report, the accountants contend that upon this request the probate court had not properly before it the question whether the accounts should be reopened, and, if so, what corrections should be made, and how they should be finally allowed. Their contention is that the statute is not applicable to an account which has once been allowed, even although the probate court has jurisdiction to reopen such an account for correction, and upon proper proceedings has that question before it for adjudication. We are not inclined to adopt this narrow construction of the statute. The statute is remedial in its nature, and should receive a construction consonant with its manifest purpose, which is to relieve the court from making a personal examination of the details of complicated accounts, and to enable it to call in the services of an auditor to assist. The reason for appointing an auditor exists whenever such an examination becomes necessary upon a question involving the final approval of the account. The statute should not be construed to forbid the appointment of an auditor whenever the judge of probate has occasion to make such an examination as a preliminary to a final approval, simply because he has once approved the account. In a general

sense, it may be said that an account is before the judge for approval whenever by a motion to reopen or otherwise he has before him the question whether he will finally approve it or not; and that is none the less so in the case where he has once approved it. Whenever the question of approval comes before him for decision, he is entitled to the services of an auditor before deciding the question. This construction is in accordance with the spirit of the statute, and not inconsistent with the fair meaning of the phrase "before approving the same." See *Longley v. Hall*, 11 Pick. 120.

Concerning the controversy as to the investment of the sum of \$81,100 in mortgages upon land in Kansas, the principal question is whether the loss which was incurred in an attempt to develop certain land in that state, which was owned in common by Brigham and the testator, should be borne by the estate or should fall upon the accountants. Upon this matter it appears from the memorandum of the presiding justice that he found the facts to be substantially as follows: A few months before the death of Rice, the testator, which occurred in May, 1888, he and the accountant, Brigham, purchased a tract of land of about 40 acres, situated upon the outskirts of the city of Topeka, in the state of Kansas, paying therefor the sum of \$22,000. They held this land as tenants in common. Rice paid the entire purchase money, and Brigham gave his note to Rice for one-half thereof, with the understanding and agreement that the note should be paid out of the money received from the first sales of lots in the tract. Rice and Brigham caused the land to be plotted and divided up into streets and building lots to the number of 384 lots, with a frontage of 25 feet each; and a plan showing the streets and lots and designating the tract as the "Brigham and Rice Addition" was duly recorded in the registry of deeds. The auditor finds that at the time of the death of Rice none of these lots had been sold, but it is stated in the exceptions that just before his death, in accordance with the plan for handling and developing this property which had been agreed upon between him and Brigham, an agreement was made which provided for the loan of money by Rice to a certain prospective purchaser for the purpose of building a house upon one of these lots. While matters were in this condition, Rice died. His will was admitted to probate July 3, 1888, and on the same day Brigham and Maynard duly qualified as executors. The inventory filed in September following showed personal estate appraised at \$326,587.75, and real estate in this commonwealth appraised at \$28,675.50. To this inventory was attached a memorandum of real estate outside of Massachusetts, including one undivided half of this land, "valued by the executors at \$12,000." After the executors were appointed, they proceeded in the following manner with the funds of the

Rice estate to develop and put upon the market this land: They employed an agent residing in Topeka to negotiate sales of lots and to arrange for mortgages back from the purchasers to secure the purchase money and additional loans to be made to them to enable them to build houses. Lots, usually three in number, of 25 feet by 125 feet each, were sold to a purchaser at a valuation of \$500, and a deed thereof was given by the executors. The purchaser at the same time gave a mortgage thereon to Brigham for an amount sufficient to cover the purchase price and the estimated cost of building a house. The purchaser then proceeded to build the house, and, as the work progressed, money belonging to the estate was advanced to pay the cost of building. The purchaser paid no money to the executors. In some instances he expended some money and labor in making improvements in addition to the amount advanced by the executors, but in general the entire cost of building and improvement was paid by the executors. The houses were of poor quality, the majority of them costing from \$1,000 to \$1,200 each. About 40 were built between July 3, 1888, the time of the appointment of the executors, and July 15, 1890. These mortgages, as before stated, were made directly to Brigham, and were so made for the purpose of enabling him conveniently to manage and deal with the same, and with the view that he would ultimately take and hold the same as trustee. At the time the executors began to advance the money and take the mortgages it was agreed and understood between them that upon the appointment of Brigham as trustee under the will he would take the mortgages at their face value as so much cash, as a part of the trust fund, and would receipt to his co-executor, Maynard, in full for the amount thereof, the same as though the mortgages were cash. When sales were made and mortgages taken back, Brigham applied one-half of the price fixed as the valuation of the lots toward the payment of his note, given as above stated to Rice. Brigham during all this time was fully conversant with the property and its surroundings, but Maynard never had seen it, knew nothing about its value, and in these matters acted wholly upon the advice and opinion of Brigham. He, however, signed, with Brigham, the drafts and checks by which the money was sent to Topeka, and was fully aware of the manner in which the investments were made. The land was situated about three miles from the center of the city, and this money was expended at a time of inflated values. The purchasers and mortgagors were, as a rule, poor and unstable, and, becoming discouraged, abandoned their properties. Under these circumstances and in this way the executors took from the estate and expended cash to the amount of \$81,100. The result was what might have been expected. With a few minor exceptions, no interest has ever been paid upon

these mortgages, and as early as October 2, 1890—the time when Brigham took them to himself as trustee and gave to his co-executor the receipt hereinafter named, in which he valued them as cash to the amount of their face value—all of the mortgagors had defaulted in the payment of principal and interest. Some had abandoned their properties. Some of the mortgages had been foreclosed, or the equity purchased by Brigham, and the value of the property represented by them was only \$40,000. In a word, the executors, in their attempt to develop, in the manner above stated, at a time of inflated values, a tract of vacant land situated upon the outskirts of a city in a distant state, and in which the estate according to the appraisal was interested only to the extent of \$12,000, and, according to the cost, only \$11,000, actually expended in two years over \$80,000 in cash, with the net result that in three months afterwards, namely, in October, 1890, there was a loss of more than half of the sum expended. Such an expenditure cannot be justified. It was the duty of the executors to collect and hold the estate. This expenditure was not required to preserve the interest of the estate in the land. Even if the money had been lying in their hands uninvested, which is not shown to have been the fact, and even if, pending the appointment of the trustee, the executors would have been justified in temporarily investing it, these transactions cannot be held to be proper investments. While it is true, as suggested by the accountants, that the propriety of an investment is to be judged of with reference to the time in which it is made, still when it is considered that the scheme in pursuance of which this money was spent belongs to a class of business operations generally of a speculative and hazardous nature, and also that in this case it was pursued under circumstances which more and more indicated that the demand for the land and houses was apparent, and not real, and that in substance the executors were building houses which no responsible persons would buy, it cannot be denied that these transactions fall far short of that prudence and sound business judgment which is required of persons acting in a fiduciary capacity. It was a hazardous investment in a hazardous class.

It is contended on behalf of the accountant Maynard that, inasmuch as the mortgages were not made to the executors, but to Brigham, and the money was lent with the intention that they should be received by him when qualified as trustee, as a part of the trust fund, and were actually subsequently so received by him, the investment was made by Brigham, and not by the executors, and that he, as trustee, and only as trustee, is liable, and that the executors are not liable. We cannot accept the view that the investment was not made by the executors. While it is true that the matter was left by Maynard largely, if not entirely, to Brigham, still

the money was in their hands as executors, and Maynard joined in making the drafts and checks sent to Kansas. Moreover, there was no person to whom, as trustee, any money could be properly paid, or by whom, as trustee, any money could be invested; and both accountants knew this. The mortgages did not run to Brigham as a trustee, but as an individual, and were held by him for the executors under the agreement heretofore named between him and Maynard that, when he qualified as trustee, he would take them from the executors as a part of the trust fund. It further appears that until October, 1890, when the securities were turned over to Brigham as trustee, the executors in their various accounts treated them as belonging to the estate, and as assets in their hands as executors. They charged themselves with the interest on the same, and although in fact the interest had not been received, Maynard supposed that it had been, and that these charges were correct. The charges, therefore, although not in fact true, show Maynard's idea of the relation of the executors to the investment. In view of these and other circumstances, it seems clear that the executors made this investment as such, and that both of them so understood it.

It is further contended by the accountants that these investments were made in pursuance of a plan settled upon by Rice before his death, and in compliance with verbal instructions which he gave to them as to what they as executors should do; and in support of this contention they introduced evidence to show that Rice, a few days before his death, while ill, told Maynard that in partnership with Brigham he had made an investment in the West; that they had bought a tract of land, which they had begun to develop; that it had been plotted into lots, streets had been constructed, and an electric road had been built through it; that the lots were to be sold, and that money was to be lent to the purchasers with which to build houses upon them; that mortgages were to be taken back to secure the loans; that Brigham was familiar with the land, and that he (Rice) had made provision in his will for carrying on the matter in case he should die while it was in progress; and that he wanted Maynard, if appointed executor, to allow Brigham to manage this property, because he was familiar with it. We do not find it necessary to decide whether, or how far, verbal directions given by the testator in his lifetime to a person who is expected to act as his executor will justify an executor, because, even if this testimony was believed by the presiding justice, it is clear that, after all, Rice expressly stated that he had made arrangements in his will, and he must be understood as referring to that instrument as the guide. Without reciting in detail the provisions of the will, it is sufficient to say that there is no express allusion in it to this property; that in its general

framework there is clearly manifested an intention that the estate shall be prudently managed, and that investments shall be made in the exercise of sound judgment, "notes properly secured by first mortgages" being expressly named. These facts, taken in connection with the further fact that the power to sell which is contained in the will is not confined to the persons named as executors, but is given to any administrator de bonis non, and is couched in the usual language of such provisions, clearly show that no inference can be drawn from the will that these executors were not to be held to the liabilities imposed upon them under the general law.

The evidence offered to show that at the time these investments were made men of prudence, discretion, and intelligence in the East, and especially in Boston, as well as conservative institutions for savings, were making just such investments in mortgages, in addition to western loans similar in all respects to the investments in question, was properly excluded. This is not a case where, as in the case of some well-known classes of securities, such as bonds or stocks, it could be shown that they had a general market value and a good reputation, so that prudent people had made investments in them. It was simply an attempted development of a piece of land in the outskirts of a certain city. It is manifest that the propriety of such an investment must depend upon the peculiar circumstances surrounding it, and evidence that prudent and conservative men had seen fit to embark in a similar undertaking in some other locality would not aid in passing upon the propriety of this. Either such evidence must be of the most vague and general character, and therefore of no practical value, or, if special, it would lead to an inquiry into special circumstances, and to comparisons in no way helpful. The presiding justice might properly exclude it in the exercise of his discretion. The executors were not prejudiced by the exclusion of the evidence offered to show that at the time these loans were made there was an agreement between Maynard and Brigham that the latter, when he should be appointed as trustee, would accept these securities as trust securities at their face value, and would accept the same as cash. The court found such to be the fact. We are therefore of opinion that the executors had no right to invest the \$81,100 in the Kansas mortgages, and that those mortgages were not securities which the trustee rightfully could receive as part of the trust estate.

We have the same view as to the deposit of \$2,500 in the Commonwealth Loan & Trust Company of Kansas. This was a land company organized under the laws of Kansas, having a branch office in Boston, where the deposit was made, upon the understanding that a debenture bond of the company should be issued for the deposit. There was no

mortgage or other security for this bond, and the company soon after failed, and nothing has been received in payment of the bond, which the auditor has found to have had no value.

The executors not having been warranted in making the investments, and the trustee not having been warranted in receiving or holding them as part of the trust fund, we are to consider how their respective accounts shall be reformed in consequence of the maladministration. The accountants contend that, even if these investments were unwarranted, they are exonerated from liability for them, because their acts with reference to the investments have been ratified by the consent given by the beneficiaries to the allowance of the early accounts in which the investments were stated. One simple reply to this, however, is that the accounts were not true. They represented that some thousands of dollars had been received from the sales of land, and that the interest upon the mortgages had all been promptly paid, whereas in fact not a dollar in cash had been paid to the estate by any purchaser for the land, and all the mortgages were in default upon the interest. Even if it be true that the beneficiaries knew in a general way that the executors were selling the land and lending money to the purchasers for building purposes, the accounts seemed to show a healthy demand for the land and a buying class of purchasers—a very different state of things from that which would have been disclosed if the facts had been truthfully stated. This misrepresentation, so far as respects Brigham, was willfully untrue, because he knew the facts, and, so far as respects Maynard, was fraudulent in law if it was a statement made by him as true of his own knowledge, when he did not know it to be true. Such a misrepresentation is sufficient, under the circumstances disclosed by the auditor, to avoid the consent given by the beneficiaries, and the case therefore stands as if such consent had not been given.

Another contention is that the executors have been relieved from their liability by the action of Brigham before and after his appointment as trustee. In this connection it is to be noticed that both Brigham and Maynard acted in bad faith. The finding to this effect of the single justice by whom the cases were heard in the Supreme Judicial Court was contrary to that of the auditor, the decrees of the probate court containing no express statement upon the matter. The finding by the single justice of the Supreme Judicial Court, the accountants having testified before him in the hearing, and other oral testimony taken, must stand. The fact that Brigham was personally interested in the development of the land, and that this interest was known to Maynard, his co-executor, and that the mortgages ran to Brigham individually, with the misrepresentations as to payment of interest on the mort-

gages, and the concealment of the fact that foreclosures of them were being made, all were circumstances tending to support the finding of bad faith on the part of both Brigham and Maynard, so that the exceptions on this branch of the case must be overruled, and the finding of bad faith must stand.

Before dealing with the question of Brigham's action as trustee, we think it best to consider whether, when an executor has maladministered a fund by investing it in improper securities, and these securities have been received improperly from the executor by a trustee, and unwarrantably placed in the trust fund, both delinquents can be held answerable in their accounts. The question should have the same answer whether the two officials are one person or different persons. Different acts of one man done in two separate capacities may make it his duty to account for the same matter in each of those capacities. A., receiving as executor money which it is his duty to turn over to himself as trustee, by putting the money into an improper investment has made it right to charge him in his executor's account with the whole fund. As trustee it is his duty to get the whole amount of the fund into his hands, and to hold it in proper securities, and apply it to the purposes of the trust. If, instead of performing this duty, he improperly accepts and takes and holds as trustee the unwarranted investments, and does nothing to get the whole amount of the fund into his hands in property which he may rightfully hold in the trust fund, he may properly be charged by the court in his accounts as trustee with the whole amount of the fund for which he has receipted, and with which he has charged himself in his inventory and his accounts as trustee, and which it was his duty to get in, put into proper securities, and hold. The liability of the executor to be charged in his executor's account with the whole amount of the money which, as executor, he has put into unwarranted investments, comes from his official relation as executor to the money. The liability of the trustee to be charged in his account as trustee comes from his official relation to the trust fund, of which it is his duty as trustee to see that the money is made a part, and from his having taken over as a part of the corpus of the trust the unwarranted investments, and his having inventoried and kept them as a part of the trust, and charged himself with them in his accounts as trustee as of full value. That he has failed to discharge his duty as executor is no sound defense when it is proposed to charge him for his default as trustee. Nor is it a sound defense, when it is proposed to charge him for his default as executor, to show that as trustee he has committed another maladministration, namely, by improperly accepting and holding as good the unwarranted investments as part of the corpus of the trust fund. The logical course is to charge him in each capacity with the sum which he has maladmin-

istered. If he or his sureties in either capacity once make restitution of the whole sum maladministered, with proper interest, the beneficiaries can require nothing more, being entitled to but one satisfaction. But until such restitution is made there is no injustice done either to the delinquent principal or his sureties in charging him in his probate accounts in each capacity with the full amount of the estate which he has maladministered. In stating each account the question is with what sums he should be charged and credited. How ultimate losses to beneficiaries are to be borne, and how sureties upon different bonds shall make or have contribution in respect of prospective payments, is not the decisive issue upon the settlement and allowance of accounts like those now under consideration.

The statement of Wilde, J., in *Conkey v. Dickinson*, 18 Metc. 51, at page 53, that it was clear that Dickinson, whose bond as guardian was in suit, and who also was the executor of the will, which gave to his ward the legacy which remained unpaid, was not liable for the payment of the legacy in both capacities, is to be taken in connection with the circumstances of that case. The subsequent statement in the same paragraph that it is "well settled that, if a legacy is given by will, and the same person is executor and trustee or guardian for the legatee, he is bound to account for the legacy as executor if he has sufficient assets, unless he has rendered an account in the probate office, charging himself as trustee or guardian, and that account has been allowed by the probate court," shows that the true test whether an executor shall be charged in his probate account is whether, having received funds, he has administered them in accordance with law. We know of no declaration in our decisions that any person who, in an official capacity, has received funds, is not liable to account for them in that capacity; and we see no reason why it may not be just to hold that he is so liable. Of course, proof that the funds have in fact gone to some extent to the benefit of those entitled to them may, as was done by the probate court in the present instance, make it just and equitable to lessen the charge to be made in stating the account.

We do not put the liability of the trustee to be charged upon his account in a case of this kind merely or chiefly upon his duty to get in all the property that is subject to the trust, but largely upon the fact that he has assumed to act officially in regard to the whole fund. He has in the present instance himself dealt as trustee with the Kansas investments. As trustee he was entitled to the rest and residue of the estate. As a part of that he took the Kansas investments. They were inventoried by him as trustee at their full face value and as so much cash. He carried them along in the same way through seven or eight accounts rendered to the probate court both before and after he had set-

tled with the widow. It is not unjust or inequitable as to him or as to the sureties on his bond as trustee to say that he shall account for the sums which he has thus treated as invested and as so constituting a part of the trust fund. He has, by his own conduct, made himself accountable for the whole fund, and liable, as for making an improper investment, for that part of it which he received in the form of improper investments. He undertook to receive, manage, and control the entire fund as if it had been paid to him in money. He took all the bad investments and inventoried them at their face value as if they had been good. He included them in a series of accounts covering nearly seven years. In schedules annexed to these accounts he treated them as good investments, and as representing, with other property, the entire fund, undiminished by losses. Under these circumstances his liability upon his account is the same as if, as trustee, he had received the fund in money, and invested it in the mortgages and the bond. In his official capacity as trustee he makes the investments his own, and must be charged for that part of the trust property which is represented by them. The executors in their official capacity, and contrary to their official duty, made improper investments, from which the beneficiaries have suffered. The trustee in his official capacity, and contrary to his official duty, has taken over the same improper investments and held them in the trust as good, from which conduct the beneficiaries have suffered. Both the trustee and the executors, in their respective official capacities, should be held accountable for the loss to the beneficiaries, until the latter have been fully compensated, in like manner as the holder of a promissory note is entitled to judgment and execution for the full amount of the note against both maker and indorser, or the obligee in a bond is entitled to judgment and execution for the full amount against the principal and the sureties. There might be found a more remote analogy, upon which we do not rely, in the right of one injured by a tort in which more than one person was a tortfeasor, to have judgment and execution for his full damages against each tortfeasor. When a probate account is up for allowance, and it appears that the accountant has made an unwarranted investment of funds, he may be charged with the full amount of the money improperly invested. *Burgess v. Keyes*, 108 Mass. 43; *Kimball v. Perkins*, 130 Mass. 141, 143; *Thayer v. Kinsey*, 162 Mass. 232, 236, 38 N. E. 360. This is "to put the whole estate not already disposed of and accounted for in a proper manner into the control of the judge of the probate court, so that he may proceed with its settlement, and direct the course of its further administration." See *Choate v. Arrington*, 116 Mass. 552, 556. We therefore assume that the maladministration of the executors, by which they unwarrantably invest-

ed the sums put by them into the Kansas mortgages and the trust company deposits, makes it right to charge them in their executors' accounts with the whole loss incurred by their maladministration, and that the maladministration of the trustee in improperly accepting the unwarranted investments and in omitting to demand and to get in the full amount of the trust fund in cash or proper securities makes it right to charge him in his trustee's account with the whole amount which it was the duty of the executors to pay over to him as trustee.

We are to inquire whether any sufficient reason is shown why such charges should not be made in each set of accounts. The contention that such charges should not be made because of the assent of the beneficiaries has already been disposed of. Another contention of the executors is that they are discharged from liability as executors because they have caused an actual transfer of the unwarranted securities to be made to the trustee, he having agreed, when the investments were made, that, when appointed trustee, he would accept them as trustee, and because he has given to the executors his receipt as trustee for the securities as of full value, and because executors' accounts and trustee's accounts showing this transfer from the executors to the trustee have been rendered to the probate court and allowed. Aside from the rendering and allowance of probate accounts, this contention seems to us to be disposed of by the fact that the executors and the trustee all acted in bad faith. Maladministration of funds so committed, whatever form it took, or however attempted to be disguised by a receipt, could not discharge the executors from their liability to account for money which had come to their hands. An actual appropriation or transfer to a trustee by an executor of funds which are to be part of a trust fund, with the rendering of a probate account containing a statement of such appropriation or transfer, and the final allowance of that account in court, works a discharge of the executor's liability as such. See *Newcomb v. Williams*, 9 Metc. 525; *Conkey v. Dickinson*, 13 Metc. 51; *Minot v. Amory*, 2 Cush. 377; *Miller v. Congdon*, 14 Gray, 114; *Choate v. Arrington*, 116 Mass. 552; *Crocker v. Dillon*, 133 Mass. 91; *Bassett v. Granger*, 140 Mass. 183, 4 N. E. 228; *Little v. Little*, 161 Mass. 188, 36 N. E. 795. The reason is that the executor stands as having performed his duty as to the funds which came to his hands, in that, whether or not at some period of his administration he had dealt improperly with the fund, he has finally accounted for it according to law, as is shown by the decree, unreversed, allowing the account. But the record shows no probate account now standing as allowed, bearing a statement of the appropriation or transfer to the trustee at their face value of the improper securities. All such accounts have been reopened by the

probate court, either expressly or by necessary implication, and in the present state of the proceedings are before us, not as allowed accounts, but for proper action. They furnish no ground for a discharge of the executors or of the trustee from liability to account respectively for the whole loss to the testator's estate or to the trust estate.

What information we have as to the present title to the assets which now represent the unwarranted investments and their present value is found in the reports of the auditor to the probate court and in the decree of that court on the executors' accounts. The first report was filed on December 14, 1897. It states that at that time the title to about all the lands covered by the Kansas mortgages stood in the name of Brigham as an individual, or in that of his son or daughter; and also that about all the lands had been sold for taxes, but that the right of redemption had not then expired. The second report, filed July 22, 1898, states that the value of the mortgages at the time when they were taken over by Brigham as trustee, August 1, 1890, was \$40,000, and that of the trust company bond nothing. The decree of October 2, 1900, entered by the probate court, reforming and allowing the executors' accounts, states that the value of the Kansas mortgages and of the trust company bond, which together cost the executors \$83,600, when the trustee received the same, was only \$40,000. The probate court increased the balance due from the executors by their third account by this difference of \$43,600 between the par value of the Kansas investments and the value of the same when they were received by the trustee, and by a further sum for interest on the improper investments. The decree of the Supreme Judicial Court entered upon appeal affirmed the allowance of the executors' accounts with these charges. The effect of this was to allow the executors credit for the sum of \$40,000 as the actual value of the Kansas investments when the same were turned over to the trustee out of the \$83,600 which they had improperly invested. Neither the beneficiaries of the trust, who are now of full age, nor the new trustee appointed in place of Brigham, removed, have appealed from the decrees of the probate court, or from those entered in the Supreme Judicial Court by the single justice. It must be assumed that the Kansas investments were made part of the trust fund, and were of the value of \$40,000 when received by Brigham as trustee, and that the beneficiaries are content to have them made a part of the trust fund at that valuation as of that time. While, therefore, those decrees might perhaps be changed so as to charge the executors in account with the whole \$83,600, under the circumstances we do not deem it incumbent on us so to do. The same consideration that the \$40,000 worth of securities was put by the executors where it was worth that amount to the fund does not require the trustee now to be credited, in the

statement of the trustee's accounts, with the value of the securities at that sum, for the reason that they are still a part of the trust in his hands, to be turned over by him at that valuation to his successor.

The finding of bad faith on the part of both Brigham and Maynard makes proper the charges of interest at the rate of 6 per cent. made in the decrees of the probate court and of the Supreme Judicial Court.

The decree of the probate court upon the executors' accounts provided that Maynard should be liable only for whatever portion of the sum of \$43,600 added to the balance against the executors in their third account as principal, and of \$13,516 added to the same balance as interest, as the beneficiaries under the trust may be unable to recover from Brigham and his sureties. This portion of the decree of the probate court was disaffirmed by the decree of the Supreme Judicial Court, and, we think, rightly disaffirmed. It is not germane to the present proceedings to attempt in such a manner to adjust in them the respective rights of Brigham and Maynard or of their respective sureties.

We see no reason to discuss further or in detail the several requests for rulings at the hearing in the Supreme Judicial Court, or the other questions raised by the different bills of exceptions and the appeals, further than we now have considered them.

The concluding sentence of the decree of the probate court upon the accounts of the trustee is this: "All investments of this trust fund in mortgages on real estate in the state of Kansas and in real estate there situated, and the loan of \$2,500 to the Commonwealth Loan & Trust Company, are hereby disapproved." Taken in connection with the whole record, we understand this to mean merely that the Kansas investments are held to have been unwarrantable investments, making the trustee liable to the loss of \$43,600 upon them as principal, and that it does not mean that the trustee cannot be allowed, in respect to them, as principal, the sum of \$40,000, found to be their value when turned over to him as trustee. So construed, we think the sentence quoted should stand as part of the decree.

The result is that the decrees of the Supreme Judicial Court upon the accounts of the executors and upon the accounts of the trustee are to be affirmed, and the exceptions are to be overruled.

So ordered.

HAMMOND, J. (dissenting). I dissent from so much of the foregoing opinion as holds Brigham answerable as trustee for the loss incurred in the attempted development of the land in Kansas. The executors expended in that matter \$81,100. The proceeds of this investment at the time they were delivered to the trustee were worth \$40,000, and no more. The loss was therefore \$41,100. I do not see upon what principle the trustee can be held answerable for this loss, or charged with the

amount of it. He cannot be held upon the ground that he received it as trustee, because he did not receive it. He cannot be held upon the ground that as trustee he made the investment, or had anything to do with making it. The money was spent and the loss incurred by the executors, and so the court holds. No trustee was then in existence. He cannot be held upon the ground that by his receipt to the executors of October 2, 1890, he released them from their liability, and so did an act inconsistent with his duty to the interests represented by him as trustee. The act is repudiated by the cestui que trust, and is declared invalid by the court. The liability of the executors stands as though the receipt had not been given. If, therefore, it be suggested that he failed in his duty to prosecute the executors, the answer is that the right of action against them and their sureties is precisely the same as before, and there is nothing to show that there has been any change in the situation to the detriment of the estate. Nor can he be held upon the ground that he has charged himself with the amount lost, because the theory upon which he has charged himself is rejected by the court. If it be suggested that this is a mere matter of accounting, the answer is that the amount found due from him as trustee is binding not only upon him, but also upon the sureties upon his bond. *Bassett v. Fidelity & Deposit Co. (Mass.)* 68 N. E. 205. In a word, the loss was made by the executors, and by no act or default of the trustee as such has the estate been damaged. And the theory upon which the trustee charged himself had been rejected.

LORING and BRALEY, JJ., concur in this opinion.

(177 N. Y. 224)

SMITH et al. v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York. Jan. 19, 1904.)

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

1. Where, in an action for injuries caused by collision at a railroad crossing, the evidence showed that it occurred in the nighttime at a concededly dangerous crossing, the rule of ordinary care in human conduct must be applied, and this rule is to be measured, not by the great caution of one or the extreme carelessness of another, but according to the standard fixed by the consensus of common sense based upon human experience; and the question of the contributory negligence of the person injured is one for the jury, and not for the court.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Chris J. Smith against the New York Central & Hudson River Railroad Company. From a judgment of the Appellate Division (78 N. Y. Supp. 1137) affirming a judgment for defendant, his administrators, as substituted plaintiffs, appeal. Reversed.

¶ 1. See *Railroads*, vol. 41, Cent. Dig. §§ 1022, 1123.

The action was originally brought by Chris J. Smith to recover damages for personal injuries sustained by him, and for the destruction of his horse, carriage, and harness. Pending the appeal to this court the original plaintiff died, and the action was revived and continued in the names of the present plaintiffs as his representatives. The only part of the action that survives is that which relates to the recovery of damages for the destruction of the personal property. After midnight on the 28th day of December, 1900, the plaintiffs' intestate collided with a west-bound passenger train of the defendant at the Palmyra crossing on its main line. He was severely injured, his horse was killed, and his carriage and harness demolished. The only eyewitnesses to the accident were the injured man and the engineer of the train. The latter was not called as a witness. The former testified that he looked both ways and listened, and that there was no warning by whistle or bell. The colliding train was running at the rate of about 48 miles an hour. The Palmyra crossing, at which the accident occurred, was conceded a dangerous one. From 7 a. m. to 7 p. m. it was guarded by a flagman and by automatic gates. At night it was left unguarded. Plaintiffs' intestate was familiar with the crossing, having passed over it many times, both day and night, during the three months immediately preceding the accident, and he knew that it was guarded by day and unguarded at night. At this crossing the highway runs substantially north and south and the railroad east and west. There are six tracks. The four main tracks are numbered from 1 to 4, inclusive, counting from south to north. North of these main tracks are two side tracks or branches. The colliding train was westward bound on main track No. 2. Thirty-four feet to the north of the northerly main track and 126 feet to the east of the crossing (or 145 feet from its center) there is a building known as the "Bennett Warehouse," about 30 feet in height and about 94 feet in length from east to west. Further to the east, and about 86 feet from the Bennett warehouse, is a coal shed about 73 feet in length and about 20 feet in height. Still further to the east, and 116 feet from the coal shed, there is a "dryhouse," about 80 feet long and 40 feet high. Yet further to the east, and about 30 feet from the dryhouse, is the defendant's engine house, which is about 70 feet long and about 20 feet high. Beyond the engine house are a number of small dwellings; the most easterly of which is about 840 feet easterly of the crossing. On the north these buildings face a highway which is practically parallel with the railroad and about 100 feet northerly therefrom. To the west of the crossing and on the north side of the tracks the only building to obstruct the view is the defendant's freight house, which is 400 feet from the crossing. On the night of the accident plaintiffs' intestate had been at the house of Kate Cook, who lives

about 800 feet north of the crossing. He started for home soon after midnight. It was cold and cloudy, with a light wind blowing from the west. He was driving a gentle horse hitched to a light top buggy, with the top let down. He drove at a walk, and when he got within 10 or 15 feet of the north track he stopped his horse and listened and looked. He looked first to the west and then to the east. Hearing nothing and seeing nothing, he continued at a walk, and when he reached the first or north track he looked west and then east. He heard nothing and saw nothing but a number of switchlights to the east of the crossing. He continued to walk his horse, and again looked west, "and," to use his own words, "when I turned my head back to look east there was a train right on me. That was all I knew until afterwards." Owing to the location of the buildings above referred to east of the crossing and north of the railroad, a continuous view of the railroad to the east of the highway is impossible to the traveler approaching from the north until he reaches a point at or near the north rail of the north switch track. The distance from the north gates at the crossing to the north rail of track No. 2 is 53 feet, and from the north rail of the north switch track to the north rail of track No. 2 is 45 feet. From the north rail of main track No. 4 to the north rail of track No. 2 is 25 feet. On the night of the accident there were three box cars on the northerly switch track, the west end of the most westerly of these cars being about 33 feet west of the Bennett warehouse. Several witnesses for the plaintiff testified that, in order to see a train coming from the east, one must get close to the north switch track, which runs along the south face of the Bennett warehouse, but curves to the south as it approaches the crossing, so that a person standing on the north switch track gets a straight and unobstructed view to the east for a distance of about 2,000 feet before the tracks curve to the north and disappear from view. This evidence was supplemented in detail by defendant's engineer, who testified that standing 58 feet north of track No. 2 with a car on the north branch track and projecting 33 feet westerly from the Bennett warehouse a man can see track No. 2 to the east for a distance of 452 feet; under the same conditions, and 45 feet north of track No. 2, a man can see track No. 2 and all the tracks to the east for a distance of 1,500 feet. To the east of the crossing and 126 feet distant there are two switch lamps. At a point 300 feet east there is another, and at 1,150 feet there are 11 others. These are on standards 3 or 4 feet high, red, white, or green in color, and are the usual "bull's-eye" lights.

John Gillette, for appellants. Albert H. Harris, for respondent.

WERNER, J. For the purposes of this discussion the defendant's negligence must be deemed to have been established, since it is

practically conceded that the evidence as to the speed of the train and the failure to give warning signals of its approach was sufficient to put the defendant to its proof upon that subject. It is obvious, therefore, that the nonsuit herein was granted by the trial court and sustained by the Appellate Division upon the ground that the plaintiffs' intestate was conclusively shown to have been guilty of contributory negligence, and thus the question presented on this appeal is whether the evidence under this head was so clear and definite as not only to permit, but require, the legal conclusion that plaintiffs' intestate could not have been injured but for his own lack of care. This question must be considered in the light of the inferences most favorable to the plaintiffs, deducible from all the evidence. *McDonald v. Metr. S. R. Co.*, 167 N. Y. 68, 60 N. E. 282, and cases cited. The so-called "Crossing Cases" are proverbially troublesome, for there are comparatively few instances in which the facts and circumstances, considered in connection with the oral testimony, lead so unerringly to a single conclusion as to permit the courts to hold, as matter of law, that contributory negligence has been established. The difficulty in such cases is not with the law, for that is too well settled for discussion, but with the application of the law to a given state of facts. The case at bar is not free from embarrassment in this respect, and that is really the best argument for the plaintiffs that can be made, because it presents the precise case in which the court cannot assume to decide the question of contributory negligence without usurping the functions of the jury. The facts of this case, fairly stated, and considered in the light of the inferences most favorable to the plaintiffs, do not so clearly establish the contributory negligence of plaintiffs' intestate as to remove the question from the domain of doubt into the realm of undebatable fact. In support of this suggestion we have but to refer to the persuasive, if not conclusive, circumstances that learned judges have differed as to the effect of the evidence in this record.

Without referring in detail to the facts, which are fully set forth in the foregoing statement, it is enough to say that this accident occurred in the nighttime, at a conceded dangerous crossing, under conditions and surroundings to which must be applied the rule of ordinary care in human conduct. This rule is to be measured, not by the great caution of one or the extreme carelessness of another, but according to the standard fixed by the consensus of common sense based upon human experience. Was the plaintiffs' intestate reasonably and ordinarily careful of his own safety in the circumstances? It cannot be said that intelligent and reasonable men, applying the rule of ordinary care to the facts of this case, could not fairly differ in their answers to this question, and therefore it is one for the arbitration of a jury,

and not for the decision of a court. This is the rule of the cases *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 366, 54 N. E. 785; *Judson v. Central Vermont R. R. Co.*, 158 N. Y. 605, 53 N. E. 514; *Henavle v. N. Y. O. & H. R. R. Co.*, 166 N. Y. 280, 59 N. E. 901; *Thompson v. N. Y. O. & H. R. R. Co.*, 110 N. Y. 636, 17 N. E. 690; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 72; and *Shaw v. Jewett*, 86 N. Y. 616. We shall not indulge in a dissertation upon the authorities cited, because, as has been stated, the question is primarily one of applying the particular facts to a well-settled rule of law. There are, however, expressions in several of these cases which so thoroughly fit the facts of the case at bar that we quote them simply to emphasize our conclusions. In the *Kellogg* Case, *supra*, this court said: "There is considerable evidence in this case of measurements and experiments to show how a train approaching this crossing from the south could be seen from various points on this highway. Such evidence is frequently very reliable and satisfactory, but it is not necessarily conclusive. Such experiments are made when witnesses are calm, and their whole minds free from any distractions, much intent upon the matter in hand. There may be a slight change in the intervening obstacles, and the speed of the approaching train is not there." In the *Shaw* Case, *supra*, error was assigned on the judge's refusal to charge the jury: "That if they believe that the plaintiff could have seen the train at distance enough from the track to have stopped his horse before reaching the track, his failure to see the train was negligence on his part, and he was not entitled to recover." This court held that the refusal to so charge was not error, and said: "That is not the rule." The plaintiff is not bound to see. He is bound to make all reasonable efforts to see that a careful and prudent man would make under like circumstances. He is not to provide against any certain result. He is to make an effort for a result that will give safety; such effort as caution, care and prudence will dictate."

The judgment of the court below should be reversed, and a new trial granted, with costs to abide the event.

PARKER, C. J., and BARTLETT, MARTIN, and VANN, JJ., concur. GRAY, J., not sitting. HAIGHT, J., absent.

Judgment reversed, etc.

(177 N. Y. 231)

PEOPLE v. AMERICAN LOAN & TRUST CO.

(Court of Appeals of New York. Jan. 19, 1904.)
CORPORATION—ACTION FOR DISSOLUTION—DISTRIBUTION OF ASSETS.

1. Code Civ. Proc. § 1793, providing for the distribution of the property of a corporation, in an action for dissolution, among its "fair and honest creditors," includes both those whose diligence has brought about the proceeding, and

also those who are within the descriptive terms of the statute.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the people against the American Loan & Trust Company in the matter of proofs of claims on accounting of J. Edward Simmons, receiver of the American Loan & Trust Company. Euphemia E. Hawes, Louis Bauer, and others appeal from an order of the Appellate Division (84 N. Y. Supp. 114) modifying and affirming an order of the Special Term. Modified.

Barclay E. V. McCarty and James Anderson Hawes, for Euphemia E. Hawes. O. P. Metcalf, for Manufacturers' & Traders' Bank and others. H. B. Closson and William E. Carnochan, for Thomas G. Ritch and others. Clarence B. Thornall, for Edward F. Browning and others. James Dunne, for Louis Bauer and others. Alfred Opdyke and William S. Opdyke, for receiver.

PER CURIAM. So much has been written in the various phases of the proceeding now before us for final review that we need do no more than state our conclusion in the light of a single prefatory observation as to the nature and purpose of the proceeding. Its object is to secure "a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors." Section 1793, Code Civ. Proc. The parties now before the court are all "fair and honest" creditors in the same class. Justice and equity, therefore, no less than the express command of the statute, require that there shall be a "just and fair" distribution of the fund among them—not a distribution among those whose diligence has given direction to the conduct of the proceeding, but among all who are within the descriptive terms of the statute. The statute is our sole guide, and to its peremptory direction rules of courts and conflicting views of counsel must yield. Our conclusion is that all the unpreferred creditors before the court on this appeal stand upon an equal footing, and are entitled to a ratable division among them of the fund in dispute.

The order of the Appellate Division should be modified accordingly, and, as thus modified, affirmed, without costs to any of the parties.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

Ordered accordingly.

(69 Ohio St. 273)

BOUGHMAN et al. v. BOUGHMAN et al.
(Supreme Court of Ohio. Dec. 8, 1903.)

EXPRESS TRUST—PAROL EVIDENCE—SUFFICIENCY.

1. Equity requires that parol evidence to ingraft an express trust in lands upon a deed

absolute shall clearly and convincingly show that contemporaneously with the execution of the deed the terms of the trust were declared, and the beneficiaries designated.

(Syllabus by the Court.)

Error to Circuit Court, Stark County.

Action by Boughman and others against Malcolm Boughman and others. Decree for plaintiffs, and defendants bring error. Reversed.

The defendants in error brought suit in the court of common pleas to establish a trust in certain described lands which had been conveyed to Malcolm Boughman by a deed absolute. In their petition they alleged that Edward Boughman, by a last will and testament, had devised to Elizabeth, his widow, a life estate in his interest in said lands, and the remainder to Bertha May Boughman, who is an only child. The allegations of their petition with respect to the trust in favor of Edward, which they sought to charge upon the land, are as follows:

"That on the ——— day of February, 1893, said decedent, Edward Boughman, together with the defendant Malcolm Boughman and one Marquis L. Boughman, purchased from one Christian J. Harrold, as administrator of the estate of Wesley Harrold, deceased, the following described premises: Situated in the township of Sugar Creek, Stark county, and state of Ohio, and described as follows: Being the southeast quarter of section number five, township number eleven, and range number ten, containing 160 acres, more or less.

"That by agreement between said Edward Boughman, Malcolm Boughman, and Marquis Boughman (they being brothers) the title to said premises, and the deed therefor, was executed and delivered to the defendant Malcolm Boughman to hold in trust for the said Edward Boughman, Malcolm Boughman, and Marquis L. Boughman. That the said Edward Boughman and the defendant Malcolm Boughman own the south half of the above-described premises, and the said Marquis L. Boughman the north half thereof. That Edward Boughman in his lifetime paid his part of the purchase money therefor, and ever since the purchase thereof was the owner of the undivided one-half of the south half of said premises, and that the defendant Malcolm Boughman held the title thereto as trustee for the said Edward Boughman. That Edward Boughman died on or about March 29, 1900, leaving the plaintiffs his only heirs, who are the owners of said south half of said premises as aforesaid.

"That said Malcolm Boughman, in accordance with said agreement as such trustee, has, since the execution of said deed as aforesaid, conveyed to said Marquis L. Boughman the north half of said premises, less ten acres theretofore sold out of the north half by said Marquis L. Boughman. That ever since the purchasing of said premises, and from that time during the entire lifetime of Ed-

ward Boughman, he, the said Edward Boughman, received his share of the rents and profits of said south half of said premises, and he paid his one-half of the repairs, taxes, and improvements thereon."

The answer of Malcolm denies all the allegations of the petition with respect to a trust in favor of Edward. In the court of common pleas the cause was tried upon these issues, and a judgment was rendered in favor of Malcolm. On appeal the cause was tried *de novo* in the circuit court, and a decree was entered charging the lands with a trust according to the allegations and prayer of the petition. In the latter court the facts were separately found, the material findings being:

"Third. That on or about February 15, A. D. 1893, the said defendant Malcolm Boughman, the said decedent, Edward Boughman, and one Marquis L. Boughman, who were brothers, entered into a contract and agreement with each other for the purchase together of the lands described in the plaintiffs' petition, and that the title to said premises was to be taken by said defendant Malcolm Boughman in trust for himself, the said Edward Boughman, and Marquis L. Boughman. That, in pursuance of said agreement, the said Malcolm Boughman, Edward Boughman, and Marquis L. Boughman did purchase the lands set forth and described in the petition, and in pursuance of their said agreement the deed for said premises was executed to the said Malcolm Boughman. That said deed was absolute upon its face, but that the same was taken by the said Malcolm Boughman, in pursuance of said agreement between said brothers, to be held by the said Malcolm Boughman in trust for the benefit and use of himself, the said Edward Boughman, and the said Marquis L. Boughman, and that the said Malcolm Boughman, Edward Boughman, and Marquis L. Boughman each paid the one equal third part of the purchase price of said premises.

"Fourth. That the said Malcolm Boughman accepted said deed absolute on its face for and on behalf of himself, Edward Boughman, and the said Marquis L. Boughman, but in trust and for the use and benefit of himself, Edward Boughman, and Marquis L. Boughman.

"Fifth. That, after the purchase of the said real estate as hereinbefore set forth, the said defendant Malcolm Boughman, Edward Boughman, and Marquis L. Boughman agreed with each other upon a division of the said lands so purchased by them, the deed to which was held by the said Malcolm Boughman in trust for himself and the said Edward Boughman and Marquis L. Boughman, in the following manner, to wit: (1) That the said Marquis L. Boughman was to have the north half of said premises. (2) The said defendant Malcolm Boughman and the said decedent, Edward Boughman, were to have the south half of said premises; each

to own the undivided one-half thereof as tenants in common.

"Sixth. That, in pursuance of said agreement for the division of said premises between the said Marquis L. Boughman and the said Edward Boughman and Malcolm Boughman, the said line of division was ascertained and fixed by a survey, and the said defendant Malcolm Boughman, in pursuance of said agreement, and with the consent and agreement of all the said parties interested, made, executed, and delivered to said Marquis L. Boughman—his said wife joining him in said deed of conveyance—a deed conveying to him, the said Marquis L. Boughman, all of said north half of said premises, excepting that which had been sold to other parties by him before the execution and delivery of said deed.

"Seventh. That before the execution and delivery of said deed, and after said division of said premises had been agreed upon as aforesaid, said Marquis L. Boughman sold two tracts of said land included in the premises purchased by them as aforesaid, and received the entire consideration therefor—one containing ten (10) acres, more or less, and the other containing two (2) acres, more or less—and that in pursuance of said sales by the said Marquis L. Boughman, and upon his request and demand, the said Malcolm Boughman, in pursuance of said agreement of said division of said premises, executed to the purchasers of said tracts deeds for such parts of said north half as were sold by the said Marquis L. Boughman.

"Eighth. That the said defendant Malcolm Boughman entered into the possession of the said south half of said premises in his own right as the owner of the one-half thereof in common with the said Edward Boughman, and as the tenant of the said Edward Boughman, who was the owner of the other said undivided one-half of said south half of said premises, and from that time until the death of the said Edward Boughman the said defendant Malcolm Boughman accounted for and delivered to the said Edward Boughman the full one-half of the rents, profits, and products of the said south half of said premises.

"Ninth. That the said Edward Boughman, deceased, during his lifetime, paid for the one-half of all the repairs, taxes, and improvements of every kind and character which were put upon said south half of said premises.

"Tenth. That the said Edward Boughman died on March 29, 1900, and that his last will and testament was duly admitted to probate in the probate court of Stark county, Ohio.

"Eleventh. That since the death of the said Edward Boughman the said Malcolm Boughman has failed and refused to account to the legal representatives of the said Edward Boughman, deceased, or to his heirs or devisees, for the rents, profits, and products of said undivided one-half of said south half of said premises, and since the death of the said Edward Boughman the said defendant Mal-

colm Boughman has denied said trust, and has refused to convey, upon demand having been duly made, the undivided one-half of said premises which belonged to the said Edward Boughman in his lifetime, and which now belongs to his said widow, Elizabeth Boughman, and his said daughter Bertha May Boughman, and has denied that the said Edward Boughman, in his lifetime, or his heirs, widow, or devisees, have any interest in said premises whatever.

"And as conclusions of law the court finds as follows:

"First. Said deed so executed and delivered to the said Malcolm Boughman, absolute on its face, for the premises set forth and described in the plaintiff's petition, was and is a trust deed, and is held by the said Malcolm Boughman in trust for the use and benefit of the said defendant Malcolm Boughman, Edward Boughman, and Marquis L. Boughman.

"Second. That said amicable partition between said Marquis L. Boughman, on the one part, and said Edward Boughman and Malcolm Boughman, on the other part, as tenants in common in said premises, divested the said Marquis L. Boughman of all the interest of every kind and character which he had in the said south half of said premises described in the petition, and divested said Edward Boughman and Malcolm Boughman of all the interest of every kind and character which they had in the north half of said premises.

"Third. That the said defendant Malcolm Boughman and Edward Boughman during the lifetime of the said Edward Boughman, after said partition of said premises, were tenants in common in said south half of said premises, each owning the undivided one-half thereof."

The controversy here is with respect to the sufficiency of the evidence upon which these findings were made in the circuit court. Sufficient statement of the evidence will be found in the opinion.

D. W. Shetler, Crane & Snyder, and M. L. Smyser, for plaintiffs in error. Welty & Albaugh, for defendants in error.

SHAUCK, J. (after stating the facts). It has long been established in this state, and counsel for the plaintiffs in error concede, that a parol trust may be ingrafted upon a deed absolute. But wherever this doctrine prevails it is required that the parol evidence by which it is sought to establish the trust must be clear and convincing. This is conformable to the general rule of equity that it will not, by any form of decree, upon mere suspicion or conjecture, abate the legal conclusiveness of a written instrument. Not only does the doctrine which plaintiffs below invoked make this requirement as to the probative character of the evidence to be by them produced, but it dispenses with none of the elements of a valid trust. To the creation of an express trust in lands in any mode,

it is indispensable that contemporaneously with the execution of the deed the beneficiary be designated, and the terms and conditions of the trust declared. These doctrines are elementary, and they have been frequently explained and applied by this court. *Fleming v. Donahoe*, 5 Ohio, 255; *Miller v. Stokely*, 5 Ohio St. 194; *Stall v. Cincinnati*, 16 Ohio St. 169; *Russell et al. v. Bruer et al.*, 64 Ohio St. 1, 59 N. E. 740. In order that we may determine whether the judgment of the circuit court is in conformity with these views, it is necessary to analyze, though not to state at length, the evidence which was presented for its consideration. It was admitted that the property was purchased about the time alleged in the petition, and a deed absolute executed by the vendor to Malcolm; that the cash payment was made by Malcolm, his mother, and his brother Marquis; and that a mortgage for the unpaid balance was executed by Malcolm. It was both admitted, and overwhelmingly proved, that Malcolm afterward conveyed to Marquis a portion of the land, in recognition of an obligation arising out of the circumstances of its purchase and the payment therefor, and that, until he died, Edward had received a portion of the proceeds of the land, and had contributed to the payment of taxes and making of repairs, and had delivered to the holder of the mortgage given on the purchase some small sums of money toward its discharge, including the ultimate payment. Numerous witnesses testified to admission by Malcolm; some of them being distinct as to Edward's interest in the proceeds of the land, and some of them vague as to his interest in the land itself. But of the numerous persons who were present when the purchase of the land was arranged for, none was called by the plaintiffs below. There was no evidence tending to show that Edward had contributed to the payment of the purchase money, except by delivering the concluding payments upon the mortgage. In short, the evidence offered in support of the claim of the plaintiffs below left an express trust to mere conjecture. It wholly failed to show a resulting trust, for it did not tend to show any payment by Edward of purchase money at the time of the transaction, nor the assumption by him of any obligation with respect thereto.

The several persons who were present when the purchase was agreed upon were called by the defendants. Their testimony clearly established the purchase by Malcolm, his mother, and his brother Marquis, the payment by them of the entire purchase price, and that the money which Edward had delivered to the holder of the mortgage was furnished by the mother, and delivered by him as her messenger. After the purchase the mother had consented that Edward should have her share of the proceeds of the land, and, with her consent, he continued to receive them while he lived. In view of this fact, the testimony with respect to the ad-

missions of Malcolm, which occupied so much of the time of the trial court, and exercised so much influence upon its decision, loses its significance, for it is quite immaterial whether Malcolm misunderstood the arrangement between his mother and Edward, or the witnesses misunderstood the import of Malcolm's alleged admissions.

It is urged by counsel for defendants in error that, it being admitted that Malcolm held an undivided two-thirds of the land in trust, only a preponderance of the evidence was required to establish the right of Edward as a beneficiary, and that this requirement was met by the evidence offered upon the trial, or, at least, that it cannot be said here that it was not. Obviously this position ignores both the rule and the evidence. There can be no express trust without the contemporaneous designation of the beneficiary; that is, of the person who claims as beneficiary. Nor could there be the claimed preponderance of the evidence, since all the clear and convincing evidence with respect to the contemporaneous arrangement, the designation of the beneficiaries and the declaration of the terms of the trust, showed affirmatively that Edward was not a beneficiary.

It seems clear that the circuit court did not properly apply the rules which govern in cases of this character.

Judgment reversed, and judgment for plaintiff in error.

BURKET, C. J., and SPEAR, DAVIS, PRICE and CREW, JJ., concur.

(69 Ohio St. 247)

STATE v. McMILLEN.

(Supreme Court of Ohio. Dec. 8, 1903.)

CRIMINAL LAW—DISAGREEMENT OF JURY—DISCHARGE—EFFECT.

1. In a criminal case, the trial of which was begun at 9 o'clock in the morning and the case finally submitted to the jury at 4:20 o'clock p. m. of the same day, the jury, after deliberating thereon until 7 o'clock the same evening, returned into open court, and informed the court that they were unable to agree upon a verdict, whereupon the court, without the consent of the defendant, discharged said jury from the further consideration of said case, and entered upon the journal of the court the reason therefor "that it satisfactorily appears to the court that there is no probability of the jury agreeing upon a verdict in this case, and for this reason said jury is discharged from the further consideration of this case"; there being nothing in the record to impeach such finding and entry, or to show that the court acted arbitrarily or in abuse of sound legal discretion, except only the length of time the jury were kept together for deliberation. *Held*, that under section 7313, Rev. St., such entry shows the existence of legal ground for the discharge of said jury, and for that reason there was no error in the action of the court, and such discharge did not operate as a discharge of defendant from further prosecution, and it cannot, therefore, avail defendant for that purpose by way of plea in bar.

(Syllabus by the Court.)

¶ 1. See Criminal Law, vol. 14, Cent. Dig. §§ 335, 344, 2073, 2075.

Error to Circuit Court, Jackson County.

Charles L. McMillen was convicted of embezzlement. From a judgment of the circuit court reversing the judgment of conviction the state brings error under favor of section 7306a, Rev. St. Reversed.

A. E. Jacobs, Pros. Atty., and R. H. Jones, for the State. Hogan & McFarland, for defendant in error.

CREW, J. At the May term, 1901, of the court of common pleas of Jackson county, Ohio, the defendant in error, Charles L. McMillen, was indicted and put upon trial for the crime of embezzlement. It appears from the record that the trial of said cause was begun on June 11, 1901, at about the hour of 9 o'clock a. m., and that the cause was finally submitted to the jury, and they retired to deliberate upon their verdict, at about 4:20 o'clock p. m. of the same day. It further appears that the jury impaneled and sworn to try said cause, after having deliberated thereon from 4:20 o'clock until 7 o'clock the same evening, returned into open court, and reported to the court their inability to agree upon a verdict, whereupon the court, without the consent of the defendant, discharged said jury from the further consideration of said case, and continued said cause until the next term of said court. At the October term in the same year—being the term to which said cause had been continued—said cause was again called and assigned for trial, but before the trial and before the impaneling of a jury therein counsel for defendant filed and presented to the court, on behalf of defendant, the following plea in bar, to wit:

"State of Ohio, Plaintiff, v. Charles L. McMillen, Defendant. Indictment for Embezzlement.

"The said Charles L. McMillen in his own proper person comes into court here, and, having heard the said indictment read, says that said state of Ohio ought not further to prosecute the said indictment against him, the said Charles L. McMillen, because he says that heretofore, to wit, at the May term of the court of common pleas holden at Jackson in said Jackson county, in the state of Ohio, of the May term, 1901, the grand jurors of said county duly impaneled and sworn presented their indictment against him for the offense charged in the indictment herein; that said defendant was duly arraigned in said court on said indictment, and pleaded not guilty thereto; that thereupon a jury was duly impaneled and sworn in said cause in said court, and the evidence heard in said case; that said jury retired for deliberation at 4:20 o'clock in the afternoon of June 11, A. D. 1901, and at 7 o'clock in the afternoon of the same day said jury, not having agreed upon a verdict, was discharged by said court, without the consent of this defendant, to which action of said court this defendant at the time excepted—all of which will more

fully appear from the records of this court. A true and duly certified copy of said indictment, a transcript of all the testimony in said case, and a true and duly certified copy of the journal entries of said court in said case are attached hereto and made part hereof. The defendant avers that by reason of the facts above stated he was placed in jeopardy for the same offense charged in the same indictment upon which now an attempt is made to try him again. The said Charles L. McMillen therefore prays that by the court here he may be dismissed and discharged from the said premises in the indictment specified. Charles L. McMillen,

"By Hogan & McFarland,
"His Attorneys."

To this plea in bar a demurrer was interposed by the state, and this demurrer was sustained by the court. Thereupon a jury was impaneled in said cause, and the defendant was again put upon trial on said indictment, and was, by the verdict of the jury, found to be guilty in manner and form as he stood charged in and by said indictment. A motion for new trial was made and overruled, and judgment was entered on said verdict. On petition in error to the circuit court that court reversed and set aside the judgment and verdict of the common pleas, overruled the demurrer to said plea in bar, and discharged the defendant from further prosecution, assigning for cause "that the plea in bar of plaintiff in error interposed at the trial of this cause in the court of common pleas of Jackson county, Ohio, at the October term thereof for the year 1901, should have been sustained, and the demurrer interposed to said plea in bar should have been overruled." To reverse this judgment and order of the circuit court this proceeding is prosecuted.

Whether the judgment and action of the circuit court in reversing this judgment of conviction and discharging the defendant was erroneous, depends entirely upon the legal sufficiency of defendant's plea in bar. So that the sole question here presented for our consideration is, were the facts alleged and pleaded by defendant in his plea in bar such, in law, as entitled him to be discharged from custody without again being put upon trial on said indictment? In view of numerous holdings of this court and the positive provisions of section 7313, Rev. St., it must now be taken and held as the settled law of this state that a jury impaneled and sworn in a criminal case may, without the consent of the defendant, after the case has been finally submitted to them, and before verdict, rightfully be discharged by the court without prejudice to the prosecution, when it shall satisfactorily and sufficiently be made to appear to the court that such jury is, or probably will be, unable to agree upon a verdict. Section 7313, Rev. St., provides as follows: "The court may discharge a jury, without prejudice to the prosecution, for the sickness of a juror, the corruption of a juror, or other accident or calamity,

or because there is no probability of the jurors agreeing, and the reason for the discharge shall be entered on the journal." While counsel for defendant in error concede that this statute in express terms confers upon the court the power and authority and gives to the court the right to discharge a jury without prejudice to the prosecution, because there is no probability of the jurors agreeing, yet they contend that in this case, inasmuch as the record shows that the first jury was discharged by the court for failure to agree, after having deliberated only 2 hours and 40 minutes, that therefore no sufficient necessity was shown to warrant their discharge on that ground; that their discharge by the court was, in consequence, a clear abuse of legal discretion, and was in law the equivalent of an acquittal. As supporting their contention in this behalf, and, as they claim, conclusively determining the same in their favor, counsel for defendant in error cite and rely upon the second clause of the syllabus in *Mitchell v. State*, 42 Ohio St. 383, which is as follows: "While a jury in a criminal case may, in certain circumstances, be discharged, and the accused lawfully subjected to another trial, this can only be done where he has consented to the discharge, or been guilty of such fraud in respect to the conduct of the trial as that he was in no real peril, or where there is urgent necessity for the discharge, such as the death or serious illness of the presiding judge or a juror, the serious illness of the prisoner, the ending of term before verdict, or the inability of the jury to agree, after spending such length of time in deliberation as, in the opinion of the judge, sustained by the facts disclosed in the record, renders it unreasonable and improbable that there can be an agreement." The facts of this case were these: Mitchell was indicted under section 6820, Rev. St., for shooting with intent to kill. On the trial it was developed that Elgensee, the person against whom the offense was alleged to have been committed, had not been hit by the bullet fired by Mitchell. Thereupon, after the evidence was all in, and the cause had been argued before the jury by the prosecuting attorney, and while the counsel of Mitchell was addressing the jury in his behalf, the judge presiding at the trial, sua sponte, and against the objection of Mitchell and his counsel, made and caused to be entered on the journal the following order: "It appearing to the court that a mistake has been made in charging the proper offense in the indictment, the court doth discharge the jury without prejudice to the prosecution; to all which the defendant Mitchell then and there excepted." Mitchell having at a subsequent term been indicted because of the same transaction, for shooting at Elgensee with intent to kill, pleaded in bar the former indictment and the proceedings thereon. To this plea a demurrer was filed, which was sustained by the court. Mitchell then entered a plea of not guilty, was put upon trial, and convicted. He prose-

cuted error to this court, where the judgment of the court of common pleas sustaining the demurrer was reversed, the plea in bar was held to be sufficient, and Mitchell was discharged. It will be observed from the foregoing statement of facts that in this Mitchell Case neither the construction of section 7318, Rev. St., nor the question of when or under what circumstances a jury may be discharged by the trial court because of their failure to agree was before the court, or in any way or manner involved in the case. In that case the jury did not deliberate at all; the case was never submitted to them. The question of time or length of time, the probability or improbability of agreement, were not questions in any manner involved in, nor was their consideration necessary to, the proper determination of the case then before the court. Hence we think that this case was so essentially different in its facts and the questions presented that it cannot be held to be an authority governing the case at bar. But, even if it were, the fact remains that in the case at bar the record does show that the jury were kept together and required to deliberate until such time as, in the opinion of the court, an obstacle which the statute recognizes as sufficient to justify their discharge did in fact exist, namely, until such time as the court was satisfied, and so found and adjudged, that further deliberation on their part would not probably result in their agreeing upon a verdict.

In *Dobbins v. The State*, 14 Ohio St. 493 (a case decided before the enactment of section 7318), Ranney, J., in discussing the question of when a jury in a criminal case may rightfully be discharged before verdict, uses this language: "But while a case of urgent necessity must exist, and must be found to be such by the court, before a jury once sworn in a criminal case can be discharged without having rendered a verdict, we do not concur in the position that all the facts and circumstances upon which this finding is predicated must appear in the record. Nor do we intend to imply that this necessity must be found upon evidence, in the ordinary sense of that term. What transpires in or before a court may be legitimately noticed and acted upon without further inquiry. * * * So all communications between the court and the jury are strictly official, and are to be treated and regarded as made under the oath which binds them to an honest, faithful, and truthful discharge of their duties. For wise reasons no investigation is ordinarily permitted of what transpires in the consultations of the jury, and when they unanimously return their inability to agree it is conclusive of the fact that they have not agreed, and may rightfully have its just weight in determining the question whether they are likely to do so. But as this must be mere matter of opinion, in which they are very often found mistaken, it ought never to be permitted to take the place of the actual fact that

they have deliberated so long as, under all the circumstances attending it, to convince the court that no agreement can be expected. When the court is so convinced, and the facts are such as to justify the conviction, the order discharging the jury may be made." It is, we think, undoubtedly true that the power conferred upon the court to discharge a jury in a criminal case before verdict for inability to agree is not a power that rests merely upon the arbitrary or uncontrollable discretion of the trial judge. But, being a power the exercise of which may most vitally affect the legal rights of a defendant, it should be employed only in the exercise of a sound legal discretion, for obvious cause, and after the fullest consideration of the facts and circumstances upon which its exercise is predicated in the particular case. But the court, having been invested with the power to discharge, must itself be the judge of the necessity and propriety of its exercise in each particular case; and it must in each particular case, under all the attending circumstances, and upon the facts presented, be left to determine for itself, in the exercise of a sound legal discretion, whether the jury has deliberated for such length of time as to make it probable that further deliberation on their part will not result in their agreeing upon a verdict. As said by Savage, J., in *The People v. Green*, 13 Wend. 56: "Either the court must determine when it is requisite to discharge, or the rule must be inflexible that, after the jury are once sworn and charged, no other jury can in any event be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity, and to determine what combination of circumstances will create one."

To the plea in bar in this case filed by the defendant in error, Charles L. McMillen, in the court of common pleas, there was attached, and by adoption made part thereof, the following journal entry of said court, to wit: "Now comes the prosecuting attorney on behalf of the state of Ohio, and the defendant being brought into court in custody of the sheriff; also came the following named jurors [naming them], who were duly impaneled and sworn according to law, and the said jury, having heard the testimony adduced by the parties, the argument of counsel, and the charge of the court, retired to their room in charge of the sheriff for deliberation, and afterward said jury returned into court and informed the court that they are unable to agree upon a verdict; and upon due consideration the court states that it satisfactorily appears that there is no probability of the jury agreeing upon a verdict in this case, and for this reason said jury are discharged from the further consideration of this case. And the court further find that the said jury in the above cause retired for deliberation at 4:20 o'clock on the afternoon of June 11,

1901. At 7 o'clock p. m. of the same day said jury was discharged without the consent of this defendant in discharging said jury. To which action of the court the defendant at the time excepted, and his exceptions are here noted of record, and said cause is continued." It therefore affirmatively appeared on the face of said plea in bar, from the facts therein alleged, that the question of whether the jury would probably be able to agree upon a verdict engaged the attention of the court, was duly considered, and upon such consideration the court found, adjudged, and so recorded, "that it satisfactorily appears to the court that there is no probability of the jury agreeing upon a verdict in this case, and for this reason said jury is discharged from the further consideration of this case." There is nothing in the record in this case to impeach this finding, or tending to show an abuse of discretion on the part of the court in making the same, except the naked fact that the jury were only kept together and required to deliberate for 2 hours and 40 minutes; and when we consider that the trial of this case was begun at 9 a. m., that the jury was selected and impaneled, the evidence all introduced, the case argued, the jury charged, and the cause finally submitted before 4:30 in the afternoon of the same day, with probably an intermission of at least one hour at noon, this fact alone does not, we think, so far, or sufficiently, contradict and disprove this finding as to overthrow it. It follows, therefore, that in reversing the judgment of the court of common pleas and in overruling the demurrer to defendant's plea in bar, and in discharging the defendant, Charles L. McMillen, the circuit court erred.

The judgment of the circuit court is therefore reversed, and the judgment of the court of common pleas is affirmed, and this cause is remanded to the court of common pleas of Jackson county, Ohio, for further proceedings according to law. Reversed.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

(69 Ohio St. 259)

CIRCLEVILLE LIGHT & POWER CO. v. BUCKEYE GAS CO. et al.

(Supreme Court of Ohio. Dec. 8, 1903.)

ARTIFICIAL GAS COMPANY—CONTRACT WITH MUNICIPALITY—INJUNCTION.

1. An artificial gas company, whose contract with the municipal authorities of a city or village for the furnishing of gas for illuminating purposes to the corporation and its inhabitants has expired by the lapse of time, is not entitled to an injunction against a natural gas company furnishing natural gas to said corporation and its inhabitants for the same purpose.

2. A natural gas company having a right by franchise to furnish natural gas for fuel may go into operation in a city or village, under contract with the municipal authorities thereof, for the furnishing of natural gas for illuminating purposes to the municipality and its inhabitants, although there is already formed within

such municipality a company which manufactures and furnishes artificial gas for the same purpose; and the right to so go into operation does not require a vote of the qualified voters of the municipality, as provided in section 3551, Rev. St. 1892.

(Syllabus by the Court.)

Error to Circuit Court, Pickaway County.

Action by the Circleville Light & Power Company against the Buckeye Gas Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

On October 4, 1901, the plaintiff in error filed its petition in the lower court against the defendants in error, the Buckeye Gas Company and its general manager and secretary, asking an injunction to prevent them from furnishing, for a money consideration, to the city of Circleville and its inhabitants, natural gas for lighting purposes, and also to prevent them from inducing the plaintiff's customers to use natural gas for said purpose. The plaintiff claims the exclusive right to supply the city and its inhabitants with manufactured or artificial gas for illuminating purposes, under an ordinance of said city passed August 12, 1891. The plaintiff is the successor of the Circleville Gaslight & Coke Company, which in 1859 obtained a franchise for using the streets and other public ways in laying pipes to convey gas for lighting said city, and thereunder erected its gasworks and established its plant. The franchise was renewed and extended September 2, 1891, and a contract was entered into between the city and the gaslight and coke company for the furnishing of gas for lighting purposes for the term of five years, or until March 2, 1896. The price for gas agreed upon in the latter franchise is \$1.50 per 1,000 cubic feet for light for all amounts less than 10,000 cubic feet per month, and for all amounts greater than 10,000 cubic feet per month shall make a lower rate. Gas for heat and power shall be furnished at \$1 per 1,000 cubic feet per month. On or about September 2, 1891, the plaintiff, the Circleville Light & Power Company, obtained from said city a franchise to erect posts and wires for the purpose of furnishing electricity for light, heat, and power to the city and its inhabitants; and on the same day, by ordinance, obtained the right to use the streets, alleys, and public grounds for such pipes as might be necessary to convey gas to the city and its inhabitants. On or about September 14, 1891, the plaintiff in error, plaintiff below, purchased of the said the Circleville Gaslight & Coke Company its gasworks, plant, pipes, and all its property, franchises, rights, and privileges, and, as the petition alleges, became the successor of and succeeded to all its franchises, property, rights and privileges. The petition proceeds to aver that the "plaintiff thereupon undertook to perform and has performed and carried out the said contract, duties, and obligations of said the Circleville Gaslight & Coke Company, and since the expiration of the

term fixed by said ordinance of August 12, 1891, within which the said the Circleville Gaslight & Coke Company was to furnish gas at the prices therein named, the said plaintiff has in good faith continued, and is continuing, to furnish gas to said city and its inhabitants, and said city and its inhabitants have continued and are continuing to receive gas so furnished by plaintiff, under and for the price named and fixed by said ordinance of August 12, 1891, and said plaintiff intends to so furnish gas to said city and its inhabitants at said price fixed by said ordinance of August 12, 1891, until said city shall again fix said price or some other reasonable price for another term to be accepted by said plaintiff." It is also alleged that plaintiff accepted the terms of the aforesaid electric lighting ordinance passed September 2, 1891, and constructed, and has maintained, a large electric light and power plant, at great expense, and is furnishing electric light under said ordinance to said city and its inhabitants. The plaintiff complains of the defendant in error, the Buckeye Gas Company, a corporation under Ohio laws since December 31, 1894, in this: that on or about March 20, 1895, the said city, by ordinance, gave the defendant the right and privilege to use the streets, commons, alleys, avenues, sidewalks, public grounds, and bridges for the purpose of laying and maintaining pipes to be used for carrying natural gas for public and private use for fuel in buildings, manufacturing establishments, "and otherwise" in the city, together with the right to lay pipes and erect necessary regulators and appliances required to convey said gas to consumers thereof in the city. Section 2 of this ordinance provides that "the Buckeye Gas Co. [defendant] shall, for a period of ten years from August 1, 1895, be entitled to charge for such natural gas furnished to the citizens and public buildings, not to exceed the sum of twenty-five cents per 1,000 cubic feet net, to consumers, and fixes the rental of meters, and that the mayor's office, city prison, council chamber, city engine house, memorial hall, and public library building shall be supplied without charge." It is further complained that, while the plaintiff has the exclusive right to furnish gas and electric light to said city and its inhabitants for illuminating purposes, the defendant has wrongfully, and without authority, begun to furnish, and is still so furnishing, natural gas to the city and its inhabitants for illuminating purposes, and is advising and inducing the city and its inhabitants to use said natural gas for illuminating purposes, in violation of the rights of the plaintiff under its franchises, and without complying with the provisions of section 3551, Rev. St. 1892. To the petition containing the foregoing and other averments, the defendants demurred. The court overruled the demurrer, and the defendant answered, setting up its right to furnish natural gas for illuminating purposes, and contesting the

right of plaintiff to an injunction. The plaintiff replied, and, on the issues joined, the cause was heard by the court. The court found for the defendant, and dismissed the petition. The plaintiff appealed to the circuit court, where the answer and reply were withdrawn, and a demurrer filed to the petition, which the circuit court sustained. No amendment being desired, the petition was dismissed. Error is prosecuted in this court to reverse the judgment of the circuit court.

De Witt & Hubbard and Percy A. Walling, for plaintiff in error. Lawrence T. Neal, for defendants in error.

PRICE, J. (after stating the facts). The plaintiff in error claims the exclusive right to furnish the city of Circleville and its inhabitants with gas for illuminating purposes, and pleads an ordinance passed by the council of said city, and the plaintiff's acceptance thereof, as the contract upon which it rests the claim. This ordinance was passed on August 12, 1891, and was to be in force as a contract until March 2, 1896. It also pleads, for some purpose no doubt, that by another ordinance, passed about the same time, it obtained the right and privilege of furnishing the said city and its inhabitants with electric light for public and private buildings, the streets, and other public ways. The petition is silent as to the price to be charged for such light, and also as to the duration of the contract. But it is plainly disclosed in the petition that its contract with the city for the furnishing of gas is the accepted ordinance of August 12, 1891, which fixed the charges for light at \$1.50 per 1,000 cubic feet per month for all amounts less than 10,000 cubic feet, and for heat and power at \$1 per 1,000 cubic feet per month. It is expressly provided in this ordinance so pleaded that its obligation extends to March 2, 1896. The second section provides, "that upon the filing by the said gas company in the office of the clerk of the corporation, of its written acceptance of the terms of this ordinance within ten days of the taking effect of this ordinance, the same shall then be and become a binding contract between the said gas company and the said city for the period aforesaid, and said company shall not be required to furnish gas at a less price during said period of time so agreed upon." It seems, therefore, that while the plaintiff had a franchise ordinance authorizing it to use the streets and other public ways and places for the laying and maintaining pipes for the purpose of supplying the city and its inhabitants with gas for light and heat, the contract as to the terms upon which it could operate the plant and furnish the gas expired on March 2, 1896, over five years prior to the filing of plaintiff's petition in this case. As found in the statement of the case, the petition discloses this fact, but it alleges that the plaintiff company complied with the terms of said ordinance during the term prescribed, and has

ever since continued to furnish gas according to the same charges, and that the city and its inhabitants have continued to use and pay for the gas according to the terms of said ordinance. There has been no renewal or extension of the ordinance of August 12, 1891, in the manner and under the form prescribed by law, or at all, and, while the city and the citizens may be liable to pay for what it receives from the plaintiff, its right to enjoin another company from furnishing even the same kind of gas is a very different question. To entitle it to this extraordinary remedy, the standing of the plaintiff should be unequivocal, and disclose vested rights of contract about to be invaded to its special injury, and upon which it can appeal to a court of equity for protection. Under what obligation is either the city or its inhabitants to continue taking and paying for plaintiff's gas? May not either cease to patronize the plaintiff at the end of any month? And if there is not a continuing obligation or contract between the parties, why may not some other company or person solicit the former customers of the plaintiff, and furnish them with gas for illuminating purposes? Will a court of equity forbid it? The plaintiff has no contract with the city. Its rights are at best but transitory, and yet it seeks a perpetual injunction against the defendant to exclude it from lighting the city. These are threshold questions, and closely involve the plaintiff's standing in court. The demurrer challenges the petition in which the foregoing facts clearly appear, and where is the subsisting contract with the plaintiff that should be protected by the provisions of section 3551, Rev. St. 1892? There is none, and the plaintiff in error fails to show a right to the relief prayed for.

We now come to the controversy presented in the briefs. The plaintiff furnishes manufactured gas, and the defendant company obtained, by ordinance duly accepted, the right to pipe streets and other public ways of the city of Circleville for the purpose of supplying natural gas for fuel to the city and its inhabitants. This ordinance was passed on March 20, 1895, and the term of its operation is fixed at 10 years from the taking effect of the ordinance. In addition to furnishing natural gas for fuel, it is alleged that the defendant is furnishing that gas for illuminating purposes to the city and its inhabitants, without having obtained the right to do so by a vote of the qualified voters of the city, as required by section 3551, Rev. St. 1892. That section provides: "The municipal authority of any city or village, or the trustees of any township, in which any gas or water company is organized, may contract with any such company for lighting or supplying with water the streets, lands, lanes, squares, and public places in such city, village, town, or township; but no such company shall go into operation in any city or village where such a corporation has been already formed, or is hereafter formed, until after the question of

authorizing such operation has been submitted to the qualified voters of such city or village, and authorized by ordinance." It is alleged that defendant company did not obtain the right to go into operation for furnishing natural gas for lighting purposes by a vote of the people, and therefore its proceedings in that respect are in violation of the above statute, because there is an established existing company—the plaintiff—already formed in the city for the purpose of supplying it and its people with gas lighting. Does the word "gas," as used in the section, embrace natural gas? Or does it mean the artificial or manufactured gas which alone was then in use for illuminating purposes? The plaintiff asserts that the word, as there used, is generic, and not confined to any species of gas, but includes any gas. Therefore it maintains that a natural gas company cannot go into operation as a competitor with plaintiff without being authorized by a vote of the citizens. On the contrary, the defendant contends that the Legislature, when it made the provision involved, had in mind and intent the gas which was then known and in commercial use. The original section, as found in 1 Swan & C. St. p. 300, § 54, contained no provision requiring a vote of the people to authorize a second gas or water company to go into operation. The section was amended April 13, 1874, and the present restriction was thereby made. See 71 Ohio Laws, p. 93. The original section was adopted more than a half century ago, when natural gas for commercial use was unknown in this state. As a matter of common knowledge, it was not known as an article of commercial use in Ohio when the above amendment was adopted in 1874, and could not have been in contemplation when the legislation now found in section 3551, Rev. St. 1892, was enacted. The existing subject-matter of a statute is as important and proper in its construction as it is in construing contracts between parties. This view is strengthened by reference to section 2491, Rev. St., as found in the Revision of 1880. It is there provided that "a municipal corporation in which any incorporated gas company is properly organized under the laws of the state, shall have power to contract with such company [a gas company] for supplying with gas the streets, squares, and other public places in the corporate limits; but this section shall be subject to the proviso in section seventy-five hundred and fifty-one" (3551). Examination demonstrates that in making the revision the word "seventy" is a clerical mistake, and that "thirty"-five hundred and fifty-one was clearly intended.

In the year 1887, after the discovery and production of natural gas for commercial purposes within this state, our Legislature amended section 2491, so that it read: "A municipal corporation may contract with such company for supplying with natural or artificial gas for the purpose of lighting

or heating, the streets, squares and other public places and buildings in the corporate limits; but this section shall be subject to the restrictions in the last clause of section thirty-five hundred and fifty-one." 84 Ohio Laws, p. 39. In 1889 (86 Ohio Laws, p. 62) the section was again amended to include electric light companies. Hence we think that "gas," as mentioned in section 3551, means artificial, and not natural, gas, and that the defendant, being a natural gas company, may go into operation, as against the contract of the plaintiff, without being authorized to do so by a vote of the people. The rule would be otherwise if the plaintiff were a natural gas company, the purpose being to restrain a second company from going into operation, in the use of the same kind of gas that is being used by an already established company, without obtaining popular consent. We find a well-considered case on that subject in *Warren Gas Light Co. v. Pennsylvania Gas Co. et al.*, 161 Pa. 510, 29 Atl. 101, where the court held the following proposition: "A company organized under the special act of March 8, 1869 (P. L. 1872, p. 1217), with the exclusive right to furnish manufactured gas for light to the citizens of Warren by the terms of its charter, has no exclusive right as against a corporation delivering natural gas to the citizens of Warren for illuminating or lighting purposes, under the act of May 29, 1885 (P. L. 29)." The question we are considering is fully discussed in that case. While the word "gas" may be in one sense a generic term, it is quite plain that, as used in the statute, it does not embrace every species of gas discovered or manufactured in modern times. There are numerous gases, manufactured or generated, which are used in art and manufacturing, none of which was contemplated in the enactment of section 3551. The manufactured gas then in use and now furnished by the plaintiff is a substance produced by human skill and art. Natural gas comes from the great laboratory of nature, all ready for the immediate use of man when let to the surface of the earth.

If we were in doubt about our construction of section 3551, there is another rule or canon of construction which may well be employed here. The plaintiff claims the exclusive right to furnish gas for lighting the city and its people. In other phrase, it claims a monopoly in supplying that article, unless it shall be qualified by a vote of the people. This may be true as to supplying manufactured gas, if it has a subsisting contract for that purpose. But we think not so as to natural gas. If there is doubt about the extent of plaintiff's monopoly, it must be resolved against the monopoly. As said by Justice Gordon in the case of the Appeal of the *Scranton Electric Light & Heat Co.*, 122 Pa. 154, 15 Atl. 446, 1 L. R. A. 285, 9 Am. St. Rep. 79: "Monopolies operate in restraint of competition, and are detrimental to the public welfare, and are not to be allowed at all ex-

cept where the resultant advantage is in favor of the public. Public grants are to be so strictly construed as to operate as a surrender by them of the sovereignty no further than expressly declared by the language employed. The grantee takes nothing by inference, and, except so far as the exclusive privilege can be found from the grant itself, it is not conferred. * * * The doctrine is tersely stated by Justice Brewer in *Omaha Horse Ry. Co. v. Cable Tramway Co.* (C. C.) 30 Fed. 324-323, as follows: "He who says that the state has given him a franchise, a right to do that which without that franchise he could not do, will be compelled to show that the franchise, the right claimed, is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the franchise, the right to do, but also the right to exclude all others of the public from exercising the same right, and the state, as the representative of the public, from according the same right to another." For other authorities on the subject, see cases cited by Justice Brewer in his opinion.

Here we have the plaintiff holding a contract, by ordinance which seems to be in full force, whereby it is authorized to furnish electric light to the city of Circleville and its citizens; and by its side, and on which the plaintiff stands, is an expired contract for furnishing manufactured gas to the same takers for the same purpose. It cannot complain of the lighting by electricity, because that is its own enterprise. Nor can it complain that the furnishing of natural gas for lighting trespasses upon the plaintiff's right to furnish electric light, because that is not within the provision in section 3551. The asserted monopoly of furnishing gas—manufactured gas—for illuminating purposes is at a price fixed by the expired contract, while the price charged by the defendant for light by natural gas is much cheaper to the city and its people. The people are not complaining of defendant's operations, for they are greatly benefited and relieved by them, and in their interest the exclusive privilege of plaintiff must be denied. It is our opinion that the demurrer was properly sustained by the circuit court, and its judgment is affirmed.

Judgment affirmed.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, and CREW, JJ., concur.

(60 Ohio St. 283)

STATE ex rel. BARKER v. PHILBRICK,
Director of Public Safety.

(Supreme Court of Ohio. Dec. 8, 1903.)

MANDAMUS—RIGHT OF APPEAL.

1. From the final judgment rendered by the court of common pleas in mandamus, an appeal may be taken to the circuit court.

(Syllabus by the Court.)

¶ 1. See *Mandamus*, vol. 22, Cent. Dig. § 429.

Error to Circuit Court, Franklin County.

Application by the state, on the relation of one Barker, for writ of mandamus against one Philbrick, director of public safety. From an order dismissing an appeal of relator from the court of common pleas, relator brings error. Reversed.

Suit in mandamus was brought in the court of common pleas by plaintiff in error for a peremptory writ to compel the defendant in error to approve a voucher for money alleged to be due the relator as compensation for his services as a sanitary policeman in the city of Columbus. The defendant having answered, and the relator having replied to the answer, the cause was tried in the court of common pleas, and a judgment rendered in favor of the defendant. The relator thereupon took an appeal to the circuit court, where a motion to dismiss the appeal was interposed, and the motion was sustained upon the sole ground that the cause is not appealable. To reverse the order of dismissal, this petition in error is prosecuted.

James M. Butler and W. L. Merwine, for plaintiff in error. Jones, Addison & Williams, for defendant in error.

PER CURIAM. Section 5226, Rev. St. 1892, fixes the traits of an action which may be appealed to the circuit court after a final judgment in the court of common pleas. It must be a civil action, an action of which the common pleas court had original jurisdiction, and an action in which the right to demand a jury did not exist. It is not questioned that the court of common pleas had original jurisdiction of this action, nor that the right to demand a jury upon the trial of the issues of fact did not exist. The circuit court appears to have been of the opinion that the action was not appealable because it is not a civil action. In *Chinn v. Trustees*, 82 Ohio St. 236, it was determined that there was no statutory limitation as to the time within which a writ of mandamus might be obtained, because it is not a civil action, within the contemplation of the Code of Civil Procedure. In *Dutton v. Village of Hanover*, 42 Ohio St. 215, the right to appeal in a case of this character appears to have been denied by counsel upon the ground that either party might demand a jury upon the trial of the issues of fact. The conclusion which the court reached with reference to that question was that neither party could demand a jury, and it thereupon decided comprehensively that either party might appeal from the judgment of the court of common pleas. It is quite true that the report of the case pays no attention to the previous decision, nor does it appear that any consideration was given to the particular question whether mandamus has become, by virtue of subsequent legislation, a civil action. In the later case of *State v. Crites*, 48 Ohio St. 143, 26 N. E. 1060, this particular subject was considered by the

court in the light of the changes in legislation—particularly that made by the revision of 1878; the conclusion being that, "in view of these express provisions of the statute, it is difficult to say wherein a proceeding in mandamus differs in any material respect from a civil action, or even in any respect except in name." The reports of the circuit court and of this court show that the case of *Dutton v. Hanover* has been generally accepted as conclusive in favor of the right of appeal in cases of this character. Indeed, we are not aware that since the decision in that case the appealability of a mandamus case has been denied anywhere in the state, except in the Second Circuit, and in that circuit the case cited was for a time accepted as conclusive in favor of the right of appeal. In view of the expressions of this court upon the subject, its express holding in *Dutton v. Hanover*, and the general acceptance of that conclusion throughout the state, we think the question should be regarded as settled.

Judgment reversed.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(163 Ind. 240)

TOBIN et al. v. TOBIN et al.¹

(Supreme Court of Indiana. Jan. 12, 1904.)

WILLS—UNCERTAINTY—DESCRIPTION OF REALTY.

1. A will which by item 1 gives to G. the east half of a certain quarter section, "being the 80 acres on which I now live," by item 2 gives to S. for life land described as the same half of said quarter section and a certain quarter of another quarter section, "being the balance of my real estate," and by item 3 on the death of S. gives the others "said 120 acres described in item 2," is not void for uncertainty, as it may be made certain by extraneous evidence.

Appeal from Circuit Court, Tipton County; J. F. Elliott, Judge.

Action by John Tobin and others against Sabrina Tobin and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

Oglebay & Oglebay, for appellants. M. T. Shell and Gifford & Gifford, for appellees.

MONKS, J. Appellants commenced this action by filing a verified complaint and bond asking to have the last will of William Tobin adjudged void and the probate thereof set aside. A demurrer for want of facts was sustained to the complaint, and, appellants failing to plead further, judgment was rendered in favor of appellees. The will reads as follows: "In the name of the Benevolent Father of All. I, William Tobin, of Tipton County, Indiana, being of sound and disposing mind and memory, and realizing the uncertainty of human life, do make publish and declare this to be my last will and testament. Item 1.—I give and devise to my son George Tobin the east half of the south-west quarter of section

¹ Rehearing denied.

33, Township 22, Range 5, east, in Tipton county, State of Indiana, being the eighty acres on which I now live subject to the following conditions namely;—That my said son George shall maintain and support in comfort, my wife Sabrina Tobin, in the home where she now resides, on said real estate, and at the death of my said wife said real estate shall vest in fee simple in my said son. Item 2.—I give and bequeath to my wife Sabrina Tobin, the use rents and profits during her natural life time, of the following described real estate in Tipton County, State of Indiana, to-wit:—The East half of the South-west quarter and the North-west quarter of the South-east quarter all of Section 33, Township 22, North Range 5, East, being the balance of my real estate. I also bequeath to my said wife all my personal property owned by me at my death. My said wife shall pay all my debts and shall pay all taxes and assessment against said 120 acres. Item 3.—At the death of my said wife I give and devise said 120 acres described in Item 2, of this Will, to my children and grand-children as follows:—To each of my children, Mary O'Malley, Bridget Parr, Emanuel Tobin, Christopher Tobin and William Tobin I give and devise the undivided one-seventh of said 120 acres in fee simple. To my two grand-children Edmund Caldwell and Gertrude Caldwell, children of my daughter Marcella Caldwell, I give and devise the undivided one-seventh of said 120 acres. To the children of my son John Tobin, I give and devise the undivided one-seventh of said 120 acres."

It is insisted by appellants that the provisions of said will are so uncertain and inconsistent that it is impossible to carry out and enforce the terms thereof, and that said will is void for that reason. It is a well-settled rule that the intention of a testator must in all cases govern the construction of a will unless in violation of some rule of law. To ascertain the testator's intention the court may hear evidence of the situation, circumstances, and surroundings of the testator when the will was made, and the state and description of his property. Although a will may, on the face thereof, appear to be uncertain, and to contain repugnancies, or inconsistent statements, yet if the court, by putting itself in the position of the testator, is able to understand and apply the language of the will, and determine the intention of the testator, the same will be given effect with such uncertainties and repugnancies removed. *Pate v. Bushong* (No. 20,254, this term) 69 N. E. 291, and cases cited. As was said in *Pate v. Bushong*, supra: "It is well established that, however many errors there may be in a description, either of the devisee or the subject of the devise, it will not avoid the bequest if, after rejecting the errors or false words, enough remains to show with reasonable certainty what was intended when considered from the position of the testator." When a person makes a will the presumption is that he in-

tends to dispose of all of his property, unless it is rebutted by the terms of the will or other evidence to the contrary. *Pate v. Bushong* (No. 20,254, this term) 69 N. E. 291, and cases cited. There is nothing in the will to rebut this presumption. It is clear from the language of the will that the testator intended to dispose of 200 acres of land. If we take only the specific description of the real estate without looking to the general description or seeking to ascertain the intention of the testator, he only devised 120 acres. The alleged uncertainty is caused by the description in the second item of the same 80 acres devised in the first item to George Tobin in fee simple. The second item declares that the land devised thereby is "the balance of my real estate," meaning that all of his real estate not devised in the first item to George Tobin in fee simple is devised by the second item to his wife for life. The land devised to George Tobin in the first item is described by the general description of "being the eighty acres upon which I now live," and "in the home in which she (my wife) now resides, on said real estate." It is evident from the will that the specific description of the 80 acres is erroneous in either the first or second item thereof. If we omit the specific description of said 80 acres in said first and second items, the will reads: "Item 1. I give and devise to my son, George Tobin, the eighty acres on which I now live, subject to the following conditions, etc. * * * Item 2. I give and bequeath to my wife, Sabrina Tobin, during her natural life time the use, rents and profits of the balance of my real estate, etc. * * * Item 3. At the death of my wife I give and devise said 120 acres devised in item 2 of this will to my children and grandchildren, as follows," etc. Evidence to identify the 80 acres of land on which the testator lived when the will was made and the "balance of his real estate" not devised by the first item of the will is clearly admissible. *Pate v. Bushong*, supra. Even if the intention of the testator cannot be clearly determined from reading the will on account of its uncertainty or repugnancies, evidence of the situation, surroundings, and circumstances of the testator when the will was made, and the state and description of his property at that time, may enable a court to understand and apply the language of the will so as to carry out said intention. *Pate v. Bushong*, supra, and cases cited. When this can be done, the will cannot be adjudged void for uncertainty or repugnancy. It is only where, after the admission of all evidence which law allows to be admitted, the court is unable from the face of the will and the consideration of such evidence to determine the testator's intention, that it will adjudge that the will in whole or in part is void and unenforceable for uncertainty. Page on Wills, §§ 48, 822.

It follows that the court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

(161 Ind. 629)

GOODMAN v. STATE.

(Supreme Court of Indiana. Jan. 8, 1904.)

CRIMINAL LAW—TRIAL—LOSS OF INFORMATION—SUBSTITUTED INFORMATION.

1. Under Burns' Rev. St. 1901, § 1746, providing that, in case of the loss of an information, the prosecuting attorney may file another, and the prosecution shall proceed, and trial be had without any delay from that cause, it is not necessary that an information filed in place of one lost shall be a copy of the first information.

2. Under Burns' Rev. St. 1901, § 1746, authorizing the filing of a new information in place of one lost, it is not necessary that accused be again arraigned, or plead to the substituted information.

Appeal from Circuit Court, Spencer County; E. M. Swan, Judge.

George Goodman was convicted of an assault and battery with intent to commit manslaughter, and appeals. **Affirmed.**

W. Z. Bennett and E. J. Crenshaw, for appellant. C. W. Miller, Atty. Gen., U. W. Youngblood, W. O. Geake, C. C. Hadley, and L. G. Rothschild, for the State.

DOWLING, J. An information, founded upon an affidavit, charging the appellant with an assault and battery with the felonious intent to commit murder, was filed by the prosecuting attorney in the Spencer circuit court. The appellant, who was already in custody under a commitment by a justice of the peace, waived arraignment, and pleaded "Not guilty" to the felony charged. The cause was called for trial April 11, 1903, and at this point the record shows that the following proceedings took place: "Comes now the plaintiff, by Union W. Youngblood, prosecuting attorney; comes the defendant in person and by his attorney, Louis N. Savage; and this cause being called for trial at the time assigned therefor, on the suggestion of the parties herein that the affidavit and information are not present in court, the defendant's attorney, for him, waives the presence of the same, and agrees to hold the trial of this cause and proceed therewith as if said affidavit and information were present in court; and plaintiff thereupon files a substitute information and affidavit as for lost affidavit and information herein, which affidavit and information are in the words and figures as follows." These pleadings are then fully set out in the record. The cause was thereupon submitted to the jury, and the trial resulted in a verdict of guilty of an assault and battery with the intent to commit manslaughter. Over motions for a new trial and in arrest, judgment was rendered upon the verdict.

The reasons for which a new trial was demanded were "(1) that there was no written charge against the said defendant, the original papers having been lost, and no copy of same filed; (2) that the said defendant was

never arrested or arraigned, or plea entered to the affidavit and information filed on the 11th day of April, 1903, and under which he was tried and found guilty on the 13th day of April, 1903." The grounds of the motion in arrest of the judgment were the same, in substance, as the reasons assigned for a new trial. The errors relied upon for a reversal of the judgment on this appeal are the decisions of the court overruling these motions.

The effect of the express stipulation of the appellant, by his attorney, in his presence, in open court, that he waived the production of the affidavit and information, and agreed to be tried as if they were present, need not be considered. The information having been lost, the prosecuting attorney, notwithstanding the waiver by the appellant, filed another. This was all that the statute required. Section 1746, Burns' Rev. St. 1901. The trial then proceeded without objection on the part of the appellant. No question concerning the new information was made by motion or by plea in abatement, and none is made now, except that it is said that the second information was not a copy of the first. The law says nothing about a copy. But if it did, the substituted information would have been unobjectionable. The record shows that it was a copy. The new information took the place of the original, which was lost. No second arraignment or plea was necessary. The appellant was tried upon the same charge to which he had already pleaded. *Schultz v. State*, 15 Tex. App. 266, 49 Am. Rep. 194; *Ganaway v. State*, 22 Ala. 772; *People v. McElvalne*, 125 N. Y. 596, 604, 605, 26 N. E. 929. The motions for a new trial and in arrest of judgment were properly overruled.

We find no error. Judgment affirmed.

(161 Ind. 616)

BOARD OF COM'RS OF NEWTON COUNTY v. STATE ex rel. BRINGHAM.

(Supreme Court of Indiana. Jan. 8, 1904.)

CONSTITUTIONAL LAW—SPECIAL LAWS—"COUNTY BUSINESS"—CONSTRUCTION OF COURTHOUSE—RELOCATION OF COUNTY SEAT—IMPLIED POWERS.

1. The building of a county courthouse is "county business," within the meaning of Const. art. 4, § 22, forbidding the passage of local or special laws regulating county business.

2. The building of a county courthouse does not lose the character of county business, within the meaning of Const. art. 4, § 22, prohibiting local or special laws regulating county business, merely because the provision for the construction of a courthouse is made a part of a legislative enactment for the relocation of a county seat.

3. The power of the General Assembly to legislate in reference to the location of county seats does not include an implied power to provide for and regulate the building of a county courthouse.

4. Act March 2, 1899 (Acts 1899, p. 210, c. 130), relative to the relocation of the county seat of Newton county, provides by sections 2 and 10 (pages 210, 213) that the successful petitioners for relocation shall pay all costs of

¶ 1. See Indictment and Information, vol. 27, Cent. Dig. § 155.

appraisement of the public property at the old site, shall present the county with not less than two acres of ground at the new site, cause plans and specifications for a new courthouse to be prepared and pay all costs thereof, whereupon the board of commissioners shall order the new buildings erected according to such plans and specifications. Section 12 (page 213) declares that a special tax shall be assessed and collected of the successful township and paid into the county treasury in an amount equal to the appraised value of the county's property at the old site, and shall order the sale of a sufficient number of bonds to pay for the construction of the new buildings. Section 17 (page 214) declares that, if the election provided for is not carried for relocation, or if an election be not held within two years (section 18, p. 215), it shall be the duty of the commissioners to grant a petition for the construction of new buildings at the old site within two days after its filing, and within the next two days to take steps to procure plans and specifications for the new buildings, etc. *Held* to regulate the building of the courthouse, so as to be in contravention of Const. art. 4, § 22, declaring that the General Assembly shall not pass local or special laws regulating county business.

5. The invalid portion of the act, regulating the building of the courthouse, is so intimately connected with the portion relative to the relocation of the county seat that the latter provision cannot be sustained.

Appeal from Circuit Court, White County; T. F. Palmer, Judge.

Mandate proceedings by the state of Indiana, on the relation of Elmer R. Bringham, against the board of commissioners of Newton county. From a judgment granting the writ, respondents appeal. Reversed.

A. C. Harris, William Darroch, and F. C. Cutter, for appellants. E. B. Sellers and Davidson & Boulds, for appellee.

HADLEY, J. This is a mandate proceeding to compel the board of commissioners of Newton county to let a contract and build a courthouse at Goodland, in said county. The complaint and alternative writ state the same facts which the circuit court held sufficient on demurrer. The appellant answered in four special paragraphs, each of which the court held insufficient on demurrer, and ordered appellant "to let the contract for and cause a courthouse to be constructed at the town of Goodland without delay." The action is grounded on a proceeding to relocate the county seat under the provisions of an act of the General Assembly approved March 2, 1899 (Acts 1899, p. 210, c. 130). The complaint shows a compliance with all the requirements of the act, and a successful vote on a petition for a relocation at the town of Goodland. The chief questions involved, and which arise upon the pleadings, rest upon the constitutional validity of the act of 1899, *supra*, and the construction to be given certain provisions of the act "concerning county business," known as the "County Reform Law," approved March 3, 1899 (Acts 1899, p. 343, c. 154). Appellant affirms that the act is unconstitutional for several reasons, but under the view of the case we have tak-

en it is necessary to consider only one; namely, is the act invalid under section 22 of article 4, Const., which declares that "the General Assembly shall not pass local or special laws * * * regulating county or township business"? A decision of this question involves the inquiry (1) is the building of a county courthouse for county purposes with county revenue, county business? and (2) does the act under review undertake to regulate the building of the courthouse in Newton county, within the constitutional inhibition?

1. In approaching the consideration of the subject we give such respectful heed as duty warrants to the influences alleged by counsel for appellee to have induced the General Assembly to adopt the special legislation in question. They say: "The Legislature had before it the disturbed condition of the county; the 40 years of unrest and distraction over the removal question; and it would seem clear that the great desideratum was the termination of the strife, and the pacification of the county. To accomplish this, legislation coercive, decisive, and inclusive was necessary. This is apparent from the mandatory character of the act. In case of an insufficient vote in favor of removal the board is required by the seventeenth section to act upon a petition for the building of a courthouse at Kentland within two days after its presentation. If the act had provided for nothing more than the removal of the county seat, and a successful vote had been taken, the skirmish line only of the contestants would have been passed, leaving the building of a courthouse still undetermined, with possibly a majority of both board and county council disposed to baffle or defeat the consummation of the removal project." Going, in some particulars, somewhat beyond the limit of judicial knowledge, and giving effect to undenied statements of counsel, we find in verification of the suggestion above noted that Newton county is 30 miles north and south, and 13 miles east and west. Kentland, the present county seat is located two miles north of the southern boundary, and three miles east of the western boundary, and has no railroad facilities except such as are afforded by a single road running practically east and west. The original courthouse, built in 1860, and which is still in use, and contains all the court and public records of the county, is a plain, cheap wooden structure, so advanced in decay and dilapidation that the entire edifice is said to shake when the court bell is rung over it. In the last 20 years the board of commissioners has entered an order for the construction of a new and adequate courthouse at Kentland, and has ordered and held three elections—two unsuccessful and one successful—for the removal of the county seat to another place, but all plans and efforts have been frustrated by disagreements and contentions, and to this date nothing has approached a perma-

nent location and permanent public buildings, nearer than an order-book entry. This unfortunate situation appeals for an earnest effort to find some sufficient ground upon which the act of 1890 may be sustained. But in indulging a desire to serve the inhabitants of Newton county we must not let our zeal lead us from the plain duty of giving effect to the Constitution. The people of Newton county, as much as of any other part of the state, were parties to the solemn compact that the provisions of the Constitution should be held to be the paramount law of the state; and, among other things, that the rights, duties, and powers of the legislative branch of the state government, as defined and determined by that instrument, should be thereby conclusively fixed. Therefore, as interpreters of the Constitution, we have no right or power to yield to sentiment or expediency, and bestow upon it a meaning not intended by the framers. If, when the Constitution was adopted, the building of a county courthouse with county means, upon county grounds, for county purposes, was generally considered and treated over the state as county business, and was intended by the convention to be embraced within the classification of county business, as contained in section 22, art. 4, then it must be held that the Legislature had no power to pass a local or special law regulating the same. To regulate is to direct by rule or restriction. Bouvier, Law Dict. The phrase "county business" has no prescribed or technical meaning, and the definition must be sought in the previous history and practices of the state. *State v. Holliday*, 150 Ind. 216, 233, 49 N. E. 14, 42 L. R. A. 326; *State v. Roby*, 142 Ind. 168, 182, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. Rep. 174; *Insurance Co. v. Talbot*, 118 Ind. 373, 379, 14 N. E. 586, 3 Am. St. Rep. 655; *Stout v. Board*, 107 Ind. 343, 348, 8 N. E. 222. If we can ascertain the popular sense in which the term was employed in the laws and institutions of the state prior to the constitutional convention of 1850, we may safely accept that as the sense in which the constitution makers intended it should have in that instrument.

Preliminary to the historical inquiry, we call attention to the fact that in the organization of the state government the territory of the state was subdivided into counties, townships, cities, and towns as governmental agencies, and each subdivision had conferred upon it certain powers, rights, and duties of a local character; that is, to be exercised and enjoyed within the particular district for local benefit, and in which other parts of the state had no direct interest or concern. Among these were the care of the poor, the construction and maintenance of highways, of schoolhouses, asylum for the poor, jail, courthouse, and such other public buildings as became necessary in supplying adequate accommodations for the discharge of the duties required of the county or township.

These and other like matters, which the municipality is required to provide with its own revenues, and according to the discretion and judgment of its own officers, and which affect neither the personal nor property rights of citizens outside the district, are naturally, accurately, and logically termed "county business," or "township business," as the case may be. How was it termed in the early history of the state? At the first session of the General Assembly, held at Corydon in 1816, our present system of boards of county commissioners was adopted, it being declared in the opening lines "that there shall be, and hereby is organized in each county of this state a board of commissioners for transacting county business," and by section 4 it was provided that the board, when elected and qualified, shall constitute a body politic and corporate, and shall "do and transact, on behalf of the county, all business that shall be assigned to them by law." Acts 1816, p. 115. In 1831 an act was passed "to regulate the mode of doing county business in the several counties of this state," in which sections 1 and 4 of the act of 1816 were readopted under their old numbers, and in prescribing certain duties required of the commissioners section 24 enacts "The circuit courts in counties where court houses shall not have been erected, shall be holden for the time being at the place designated by law, or selected by the court; and the boards of commissioners in such counties shall, with all convenient speed, proceed to the completion of a court house, jail, and other public buildings for the same, and keep the same in repair." Rev. St. 1831, p. 129, c. 20. Again, in 1838, an act was passed "regulating the mode of doing county business in the several counties of this state," in which it was provided that county boards of commissioners should do whatever should be by law assigned to them, and in which act section 24 of the act of 1831 was re-enacted. Rev. St. 1838, p. 150, c. 21. In the revision of 1843 the same provisions were continued, and section 21 was made to read as follows: "The board of county commissioners shall proceed to cause a court house, jail, and public offices for the clerk, recorder and auditor to be erected and furnished, where the same has not been done; and shall keep all the public buildings in repair." Rev. St. 1843, pp. 181, 184, c. 7. The act of 1843 was the law when the Constitution was adopted, and continued the law (Constitutional Schedule, item 1) until 1852, when another act of the same general tenor was passed, entitled "An act for the organization of county boards, and prescribing some of their powers and duties"; section 16 of which act reads thus: "Such commissioners shall cause a court house, jail, and public offices to be erected and furnished, where the same has not been done; and shall keep all public buildings in repair, and such offices, if practicable, shall be made fireproof and shall be occupied by such officers respectively." Rev. St. 1852, p. 227, c. 20.

This section is still in force. Section 7833, Burns' Rev. St. 1901. The history of state legislation discloses that, while the people were not agreed as to the most expedient method of doing county business, they were always united in the view that the building of county courthouses was a part of it. While the commissioners' act of 1816 was in full force and effect, the Legislature, in 1824 (Rev. St. 1824, p. 86, c. 15), passed another general law authorizing the several justices of the peace of each county to organize themselves into a board to do the county business, and providing that, upon such organization being perfected, the existing board of commissioners of the county should thereby be dissolved, and all the powers and duties imposed upon such commissioners by law should be transferred to the board of justices of the peace. Subsequently certain counties were authorized by special acts to select three trustees to do their county business, and others to organize boards of supervisors for the same purpose. At least four agencies were legalized to do county business, and this plurality accounts for the language used in many contemporary special acts for the relocation of county seats. In these latter acts it is also plainly apparent that the construction of public buildings for the use of the county was regarded by the people as county business prior to the adoption of the Constitution. From 1816 to 1851 39 counties were granted special enactments for the removal of county seats, and in every instance save one (Switzerland county—1849) proceedings under the removal act ended with the definite fixing of the new place; of the 38, in 23 counties, by special provision in the act, the building of the courthouse at the new site was left to the "board doing county business," "the board of commissioners," "the board of justices of the peace," or "board of supervisors," according, as the board doing the county business of the particular county was called, to be accomplished under the general laws in force at the time; and in the remaining 15 counties the act concluded without any mention of who should construct, or how the public buildings should be provided. The confusion in the administration of county and township affairs, which had resulted from the general rule of legislation that "any member could have what his own people wanted" had grown so inconvenient and unsatisfactory as to create a popular demand for a remedy. This is shown by the debates in the constitutional convention. Mr. Pettit, having called attention to the deplorable state of affairs, that made it important for the citizen when he stepped over the boundary line from one county to another to first inform himself as to the laws he was under, made a strong appeal for a single system of laws that should be uniform in their operation throughout the state. "If this is not done," said he, "you are leaving undone the very thing which most of all we are sent here to do." "The whole op-

pression of our laws," he continues, "and almost the whole necessity of calling this convention, was to do away with local legislation." Const. Deb. vol. 2, pp. 1765-1771. At the time of these assertions, county business, including the building of courthouses, was being conducted in some counties by boards of commissioners composed of three members selected from different parts of the county, in others by an indefinite number of justices of the peace, in others by three trustees, and in others by boards of supervisors; and is it to be believed that these various laws, and these various modes of performing the duties required of the inhabitants of a county or township, and which affected more of the immediate and direct concerns of the citizen than any other subject of legislation, did not contribute largely to the unfortunate state of affairs denounced by Mr. Pettit? From these considerations, and others that might be brought, we come unhesitatingly to the conclusion that the building of courthouses in the several counties of the state was understood by the people and framers of the Constitution as being county business, and was intended by the latter to be embraced within the term as employed in section 22, art. 4. See Board v. State, 155 Ind. 604, 608, 58 N. E. 1037; Kitchel v. Board, 123 Ind. 540, 24 N. E. 866; Mount v. State, 90 Ind. 30, 46 Am. Rep. 192.

The question, then, arises, does the building of a courthouse lose the character of county business when made a part of a legislative scheme for the relocation of a county seat? The law will not permit a thing to be done by indirection that cannot be done directly. The General Assembly is as much bound by the limitations fixed by the Constitution as individuals. Section 22, art. 4, is an unequivocal denial of the right to pass a special or local law regulating county or township business; and such an act, passed in defiance of the constitutional mandate, can have no more force as law than if passed by a board of aldermen. We must presume in favor of legislative freedom, but when it is so clear as to exclude all reasonable doubt that forbidden grounds have been entered it becomes our imperative duty to uphold the Constitution. State v. Gerhardt, 145 Ind. 451, 44 N. E. 469, 33 L. R. A. 313, and cases cited. It would seem unreasonable and indefensible to hold that the General Assembly, while legislating upon a proper subject, may assume and exercise a power expressly denied it by the Constitution, and from design or oversight, by uniting with other subjects, pass a law which the Constitution says it shall not pass. Under such a ruling every subject interdicted by section 22 may be swallowed up in other subjects, and the section nullified. See Board v. Shields, 155 Ind. 604, 608, 58 N. E. 1037. The rule contended for that an express power carries with it all implied powers necessary to make that which is expressed effective is not applicable here: (1) Because there is no expressed

power in the Constitution for legislative location of county seats. It is recognized to exist by implication, as it was the common usage before the adoption of the present Constitution, and not denied in that instrument. (2) Because authority to build the courthouse for a county is not necessary to the full exercise of the power to provide the procedure for the relocation of the county seat. The procedure for the determination of the place for the seat of county government is one thing, and the equipment of the place with the necessary facilities for the county's purposes is quite a different thing.

2. Does the act undertake to regulate the building of the courthouse in Newton county? It is provided (Acts 1899, pp. 210, 213, c. 130, §§ 2, 10) that the successful petitioners shall pay all costs of appraisal of the public property at the old site, shall provide and present the county with not less than two acres of ground at the new site upon which to erect the courthouse and jail, shall cause plans and specifications for a new courthouse to be prepared and filed with the county auditor, and shall pay all the costs thereof (section 2), and when the foregoing conditions are complied with the board of commissioners shall order the new buildings erected according to such plans and specifications, and (section 12, p. 213) shall cause a special tax to be assessed and collected of the successful townships, and paid into the county treasury, in an amount equal to the appraised value of the county's property at the old site, and shall order the sale of a sufficient number of bonds to pay for the construction of the new buildings. It is also provided (section 17, p. 214) that, if the election provided for, is not carried for relocation, or if an election be not held within two years (section 18, p. 215), in either case, upon a petition being filed by 500 voters for the erection of new buildings at the old site it then is the imperative duty of the commissioners to grant said petition within two days after its filing, and within the next two days to take steps to procure plans and specifications for the new buildings; and further enacts that "all the duties herein imposed upon or required of the board of commissioners and the auditor shall be imperative, and the provisions hereof shall in all respects be mandatory." Here we find language in the most positive terms that a particular class of taxpayers shall provide and present the county with a site, and pay all costs of the plans and specifications of new buildings, and language just as imperative that the board of commissioners shall construct for the county the class and kind of courthouse these particular citizens shall decide upon; and shall, upon the happening of an event, not only act upon a petition to build a courthouse at Kentland, but shall grant it within two days of its filing, and within the next two days begin proceedings to build. The manner in which the county shall acquire the necessary grounds at the new site, how and by whom the plans and specifica-

tions for the new building shall be provided, who shall pay for them, the particular kind and class of courthouse (that determined by the petitioners) that shall be constructed by the commissioners, the exact way in which they shall raise the money, the definite time in which they shall act upon a petition to build, and just how they shall act and just when they shall begin, are all matters fixed in definite terms described in the law to be in all respects mandatory. It is difficult to conceive of a more arbitrary mode of constructing a county building; a mode in which the commissioners, legally charged with that duty, have not the slightest discretion; and by which the Legislature assumes to provide by inexorable rule the time, the means, and manner of performance of every detail. This seems to us to be a drastic regulation of the building of a courthouse, and hence an attempt to regulate county business. We must therefore hold that these provisions must fail for want of constitutional authority to enact them.

We are asked to sustain the relocation branch of the statute if it is found that the other branch must fail. We recognize our right to do so if the two subjects may be separated so as to leave the provisions concerning relocation a complete act within itself, and of a character to warrant the belief that the Legislature would have passed it with the knowledge that the provisions concerning the building of a courthouse would be held invalid. But if the provisions of the act are so mutually connected with and dependent upon each other as conditions and considerations for each other as to induce the belief that the Legislature intended them as a whole, and would not have passed one part without the other, then the whole must fail. *State v. Fox*, 158 Ind. 126, 140, 63 N. E. 19, 56 L. R. A. 896; *State v. Denny*, 118 Ind. 449, 479, 21 N. E. 274, 4 L. R. A. 65, and cases cited. It is perfectly plain that two principal objects go hand in hand throughout the entire act, and appear in almost every section, namely, the final settlement of the location controversy and the construction of good, substantial public buildings as a means of assuring permanency. It will be observed on the one hand that, to encourage and influence votes for removal, the petitioners shall relieve the other taxpayers of the county from the cost of new grounds, plans, and specifications for the new buildings, and the successful township is to contribute to the county treasury, over and above its share of the general tax, a sum equal to the appraised value of the county's property at Kentland; that is to say, if the other voting taxpayers of the county will join the petitioners in voting a relocation, the petitioners will assume as their own not only all the costs of establishing the county seat at the new place over what new buildings would cost at the old seat, but will buy for cash all the county's property at Kentland, and authorize the commissioners to thereafter present such property to the latter town (section 13, p. 214) as compensa-

tion for its loss. On the other hand, to induce the petitioners to assume extra burdens, they are to have the exclusive right to determine for the county the kind and class of courthouse that shall be constructed, not to exceed in cost eight-tenths of 1 per cent. of the taxable property of the county, and the board of commissioners are required to construct such new buildings in accordance with said plans. Remove from the act all these conditions and mutual considerations for favorable votes on one side and for the assumption of increased burdens on the other, and we perceive not a single thing left in the act that is not supplied by the general law for the relocation of county seats. See section 5588a et seq., Burns' Rev. St. 1901. It does not, therefore, seem probable, because there is no reason for it, that the Legislature would have passed a relocation statute without special provisions regulating the mode of acquiring new grounds, disposing of the old, and promoting the construction of new public buildings. The entire act must therefore be held unconstitutional.

Judgment reversed, with instructions to sustain the demurrer to the complaint and alternative writ.

(161 Ind. 602)

NATIONAL SUPPLY CO. v. STRANAHAN.

(Supreme Court of Indiana. Jan. 7, 1904.)

MECHANIC'S LIEN—MATERIALMAN—NOTICE OF LIEN—NECESSITY.

1. Acts 1883, p. 140, c. 115, as amended by Acts 1889, p. 257, c. 123, and by Acts 1899, p. 569, c. 255 (Burns' Rev. St. 1901, § 7255), provides that persons furnishing materials for erecting or repairing any building, etc., may have a lien on the building, and that "all claims for wages for mechanics and laborers" employed in any shop, etc., shall be a first lien on all the machinery, stock, etc., and, "should the person, firm, or corporation be in failing circumstances the above mentioned claims shall be preferred debts, whether notice of lien be filed or not." *Held*, that the phrase "above mentioned claims," in the clause dispensing with notice of lien, refers to the last class of claims only.

Appeal from Superior Court, Grant County; Hiram Brownlee, Judge.

Petition by the National Supply Company for an order requiring Benjamin J. Stranahan, as receiver of the South Marion Co-operative Gas & Oil Company and the Harmony Gas & Oil Company, to pay petitioner's claim against the corporations as a preferred one. From a judgment denying petitioner's motion for a new trial after judgment against petitioner, it appeals. Transferred from Appellate Court, under section 1337u, Burns' Rev. St. 1901. Affirmed.

Ira C. Taber and Manley & Strickler, for appellant. Elliott & Elliott, for appellee.

JORDAN, J. Appellee is the receiver of two domestic incorporated companies, known as the South Marion Co-operative Gas & Oil Company and the Harmony Gas & Oil Company, each of which, prior to the appoint-

ment of the receiver, had its principal office and place of business at the city of Marion, Grant county, Ind. After the appointment of the receiver herein, appellant filed with him, as such receiver, a claim for \$1,214.13, which on June 6, 1902, he allowed as a general claim against the assets of the said companies in his hands. Subsequently appellant petitioned the lower court to order and adjudge that this claim be considered and paid by the receiver as preferred indebtedness against said companies, under section 7255, Burns' Rev. St. 1901. The court, upon hearing the evidence, denied the prayer of the petition, and, over appellant's motion for a new trial, adjudged against it the costs of the proceedings under said petition. From this judgment it appeals, and relies for a reversal upon the ground that the court erred in overruling its motion for a new trial.

The facts which the parties in the lower court agreed the evidence in the case would establish, and upon which the case was submitted for trial, are as follows: On March 31, 1902, on the application of one Schaumliefel, appellee was by the lower court appointed the receiver of the two companies herein-before named, and duly qualified as such receiver. The claim filed by appellant and allowed by the receiver was for tools, machinery, and material furnished and sold by it to said companies, when they were going concerns, for the purpose of, and was so used by them in, the repairing, constructing, and operating of certain oil and gas wells situated on leasehold estates owned and held by said companies in Grant county, Ind. At the time of the sale of the said tools, material, and machinery by appellant, each of said companies was, and continued to be until the appointment of the receiver, engaged in the business of operating and constructing oil and gas wells on the said leased premises. At the time the receiver was appointed, and for more than seven months prior thereto, both of the companies were in failing circumstances, insolvent, and unable to pay their debts. They, so far as the claim of appellant is concerned, are to be considered as one and the same company. Appellant's claim is an open account, which commenced to run or accrue on August 30, 1901, and closed on March 19, 1902; and there was due and unpaid thereon on June 6, 1902, \$1,214.13, which was the amount allowed by the receiver. The money now in his hands accrued from and was received by him, as receiver, from the sale of certain leases and oil wells, and from machinery, tools, and materials attached thereto and connected therewith. It is conceded that no notice of the lien, as prescribed by our mechanic's lien law, was in any manner given.

Counsel for appellant contend that, under the facts herein, it is entitled to have its claim allowed and paid by the receiver as preferred indebtedness, by virtue of section 7255, Burns' Rev. St. 1901, without giving

the notice as required by section 7257, Burns' Rev. St. 1901. Or in other words, counsel for appellant propound this question: "Does a person who furnishes material to another who is insolvent or in failing circumstances, or who thereafter becomes insolvent or in failing circumstances, which material is bought and sold to be used in, and which is in fact used in, the erection, construction, and repairing of his oil or gas wells, thereby acquire a preferred claim, under section 7255, Burns' Rev. St. 1901, whether notice of lien has been filed or not?" This question must be answered in the negative. Sulzer-Vogt, etc., Co. v. Rushville Water Co., 160 Ind. 202, 65 N. E. 583. Section 7255, supra, embraces section 1 of an act "concerning liens of mechanics, laborers, and material men," enacted in 1883 (Acts 1883, p. 140, c. 115), as amended in 1889 and 1899 (Acts 1889, p. 257, c. 123; Acts 1899, p. 569, c. 255). The section, as amended by the above amendatory acts, reads as follows: "That contractors, sub-contractors, mechanics, journey-men, laborers and all persons performing labor or furnishing material or machinery for the erection, altering, repairing or removing any house, mill, manufactory, or other building, bridge, reservoir, system of waterworks or other structure, or for constructing, altering or repairing or removing any sidewalk, walk, stile, well, drain, sewer or cistern, may have a lien separately or jointly upon the house, mill, manufactory or other building, bridge, reservoir, system of waterworks or other structure, side-walk, walk, stile, well, drain, sewer or cistern which they may have erected, altered, repaired or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or parcel of land on which it stands or with which it is connected to the extent of the value of any labor done, material furnished or either; and all claims for wages for mechanics and laborers employed in or about any shop, mill, wareroom, storeroom, manufactory or structure, bridge, reservoir, system of water works or other structure, sidewalk, walk, stile, well, drain, sewer or cistern, shall be a first lien upon all the machinery, tools, stock of material, work finished or unfinished located in or about such shop, mill, wareroom, storeroom, manufactory or other building; bridge, reservoir, system of waterworks or other structures, side-walk, walk, stile, well, drain, sewer or cistern or used in the business thereof; and should the person, firm or corporation be in failing circumstances, the above mentioned claims shall be preferred debts, whether claim or notice of lien has been filed or not." (Our Italics.) The part of the section which we have embraced in italics was not contained therein as originally enacted in 1883, but was first inserted by the amendment of 1889. The changes made by the amendatory act of 1899 in that part of the section which we have italicized were to extend the right of the lien awarded by the amendment of 1889 to "mechanics and la-

borers employed in or about any shop," etc., to other enumerated places, and to add the words "claim" and "or," thereby making the closing clause of the section read "whether claim or notice of lien has been filed or not." (Our italics.) Previous to the decision of the case of Sulzer-Vogt, etc., Co. v. Rushville, etc., Co., supra, the holdings of this court in respect to the proper construction to be placed upon that portion of the section embraced in italics were not uniform, but were conflicting. In Goodbub v. Estate of Hornung, 127 Ind. 181, 26 N. E. 770, it was held that all of the persons awarded liens as provided by the section as amended in 1889 were, in the event the debtor was in failing circumstances, exempted from giving the notice of lien prescribed by section 7257, Burns' Rev. St. 1901; the same being section 3 of the original act as amended in 1889. Or in other words, it was held in that appeal that under such circumstances all claims contemplated by the statute including those of contractors, materialmen, etc., as well as mechanics and laborers employed in or about any shop, etc., were made preferred debts, "whether notice of lien had been filed or not." In McElwaine v. Hosey, 135 Ind. 481, 35 N. E. 272, a construction or interpretation in regard to the statute was reached which was wholly irreconcilable with that given in Goodbub v. Hornung Estate, supra. It was held in the McElwaine appeal that the exemption from giving the required notice in case of the debtor's insolvency did not extend to materialmen, but was confined alone to the claim for wages for mechanics and laborers employed in or about any shop, mill, storeroom, etc. In Jenckes v. Jenckes, 145 Ind. 624, 44 N. E. 632, this court, by Howard, J., without either overruling McElwaine v. Hosey in express terms, or attempting to reconcile any conflict between the two cases, expressed views in respect to the construction of the statute which were entirely at variance with those announced in the McElwaine Case. By the decision of this court in Sulzer-Vogt, etc., Co. v. Rushville, etc., Co., supra, the construction placed upon the provision of the statute in controversy by the holding in the McElwaine Case was followed and declared to be a correct interpretation; and the cases of Goodbub v. Hornung Estate and Jenckes v. Jenckes, supra, were expressly overruled, to the extent of the respective conflict with the holding in that appeal.

It will be observed that the part of the section in question other than the provision herein involved provides for a lien, in favor of the persons designated, upon the buildings and other structures therein mentioned, and also fastens the lien upon the interest of the owner in the land upon which they stand, or with which they are connected, while the provision in controversy awards a first lien upon personal property only for "all claims for wages for mechanics and laborers em-

ployed in or about any shop," etc. It is then declared, in effect, that, should the debtor "be in failing circumstances, the above mentioned claims shall be preferred debts whether claim or notice of lien has been filed or not." It is too evident to admit of serious controversy that the phrase "the above mentioned claims" relates to or has for its antecedent the claims previously designated as the "claims for wages for mechanics and laborers employed," etc. The term "claims," as found in the clause "claims for wages," is the first express mention made in the section of that word. These are the class of claims which the statute intended should be made preferred debts in case the debtor was in failing circumstances, although no notice of lien had been filed as provided by section 7257, Burns' Rev. St. 1901. *Raynes v. Kokomo, etc., Co.*, 153 Ind. 315, 54 N. E. 1061; *Sulzer-Vogt, etc., Co. v. Rushville, etc., Co.*, supra. All other persons, viz., contractors, subcontractors, mechanics, etc., and all persons performing labor or furnishing material or machinery for the erection of any house, building, etc., to whom the right of a lien is awarded by the other provisions of section 7255, supra, are required to give the prescribed notice, whether the debtor be in failing circumstances or not, in order to successfully avail themselves of the lien provided. It will be observed that section 7258 declares that "all liens so created shall relate to the time when the mechanic or other person began to perform the work or furnish the material or machinery and shall have priority over all other liens suffered or created therefor, except," etc. As to what consideration should be given to the fact that the amendatory act of 1899 was passed after the decision of this court in *Jenckes v. Jenckes*, supra, is left an open question in the case of *Sulzer-Vogt, etc., v. Rushville, etc., Co.*, supra. We recognize the rule that where the language or terms of a statute have received a judicial construction, and such language or terms have been adopted into an amendatory act by the Legislature, in the absence of anything to show an intention to the contrary upon the part of that body, the presumption is that it adopted such judicial construction. *Board v. Conner*, 155 Ind. 484, 58 N. E. 828, and authorities cited. But this canon or rule relative to the construction of statutes is not, as the authorities affirm, entitled to be accorded much, if any, weight, where the particular act, prior to its amendment, had not received a uniform and settled construction by the higher courts of the state. The force of the rule in its application in the case at bar is very much weakened by reason of the fact, as we have previously shown, that the decisions of this court in regard to the proper construction upon the provision herein involved were not uniform, but were conflicting and virtually unsettled. Consequently, under these circumstances, the rule in question exerts little, if any, influence over

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the question in respect to the correct interpretation of the statute in controversy. Especially is this true where, as in this case, it is clearly disclosed by the plain language of the act that it would be unreasonable to accord to it any other construction or interpretation than that given to it in the appeal of *Sulzer-Vogt, etc., Co. v. Rushville, etc., Co.*, supra, and that which, after further consideration, we have reached in this appeal.

Without considering the fact that a part of appellant's claim was for tools sold and furnished by it to the companies in question, the facts establish that it was a materialman, and had filed no notice of its intention to hold a lien, as required by section 7257, supra. Therefore, if for no other reason, it was not entitled to have a lien declared in its favor.

Judgment affirmed.

(161 Ind. 610)

CLOSSON v. BILLMAN et al.

(Supreme Court of Indiana. Jan. 7, 1904.)

BUILDING CONTRACT—BOND—CONSTRUCTION—LIABILITY OF GUARANTOR—NOTICE OF DEFAULT—ACCEPTANCE OF GUARANTY—AVOIDING CIRCUITY OF ACTION.

1. A building contract required the contractor to furnish all materials, and it was provided that a portion of the contract price should be paid on presentation of receipted bills for materials furnished, and the balance after completion of the work. The contract called for a bond conditioned on the construction and completion of the work according to the contract. *Held*, that the guarantor on the bond was liable for a failure of the contractor to pay for materials, whereby a lien was filed on the building.

2. One who joined with a building contractor in signing a bond to the owner, conditioned that the contractor would perform his contract, was not a surety but a guarantor.

3. Where, in a suit to establish and foreclose a materialman's lien on a building, the answer stated facts showing that plaintiff had been a guarantor on the building contractor's bond, and that the filing of the lien had raised a liability on the bond, such facts should be treated as a sufficient defense in order to avoid circuity of action.

4. Where a contract of a guarantor on a building contractor's bond was executed contemporaneously with and as a part of the consideration of the transaction guaranteed, notice of acceptance was not required.

5. On an issue as to the liability of the guarantor on a building contractor's bond, the burden was on the guarantor to show omission to give notice of default, and that he was damaged by the omission.

6. Where, in an action to establish a materialman's lien, the answer alleged that plaintiff had been a guarantor on the contractor's bond, and that a liability thereon had accrued, any defense on behalf of the guarantor should have been set up by way of reply.

Appeal from Circuit Court, Cass County.

Suit by Edgar D. Closson against Marie E. Billman and others. From a judgment in favor of defendants, plaintiff appeals. Transferred from Appellate Court under section 1837u, Burns' Rev. St. 1901. Affirmed.

¶ 4. See Guaranty, vol. 25, Cent. Dig. § 9.

McConnell, Jenkins, Jenkins & Stuart, for appellant. Lairy & Mahoney, for appellees.

GILLETT, C. J. Appellant, by his complaint, sought to establish and foreclose a materialman's lien against a lot owned by appellee Marie E. Billman for lumber furnished by him and used in the construction of a dwelling house on said lot. It appears from said complaint that appellee Charles D. Billman, the husband of his co-appellee, with the knowledge and consent of his said wife, entered into a contract, in his own name, with one Levi A. Worley, to construct and complete said building, and that as her agent he conducted and superintended the construction of said house. It is further shown by the allegations of said pleading that said Worley purchased lumber of appellant to the amount of \$863.35, and that such lumber was used in the carrying out of said contract. It is unnecessary to set out the remaining allegations of said complaint. Appellees answered in five paragraphs, but all of said paragraphs were withdrawn except the fifth. Appellant demurred to said paragraph. His demurrer was overruled, and he excepted, and, as he elected to abide his exception, final judgment was rendered against him. By a proper assignment of error, appellant challenges the sufficiency of said paragraph.

It is charged in said paragraph of answer that defendant Charles D. Billman, acting for his wife, entered into a written contract with said Worley, whereby the latter agreed to furnish and pay for certain materials to be used in the erection of said dwelling, and to construct and complete the same; that as a part of said transaction said Worley, as principal, and plaintiff, as surety, executed and delivered to said defendant Charles D. Billman a bond in the sum of \$1,500, for the use of his codefendant, conditioned to build, construct, and complete the residence mentioned in said contract; that the material furnished by plaintiff was material which it was the duty of said Worley under said contract to furnish in the construction of said building, and that said Worley, instead of paying for said material, had permitted the plaintiff to file a lien against said real estate, and thereby violated the terms of said contract, and that, by reason of the breach of said contract, plaintiff, as surety, had become liable on said bond for whatever amount was unpaid on account of the purchase price of said material. Copies of the contract and bond are made exhibits to said answer. The contract, which is dated July 19, 1900, provides that, in consideration of \$1,185, said Worley is to furnish for said Charles D. Billman all lumber, doors, frames, sash, and all other materials for the erection of said house, except for the foundation thereof and certain plate and art glass, and that, upon the completion of the foundation, said Worley is to build and construct said residence in accordance with certain

plans and specifications. It is further provided in said contract that said Worley is to furnish to said Charles D. Billman a good and sufficient bond, with approved security, in the sum of \$1,500, for the faithful performance of his (said Worley's) obligation in said contract in the construction and completion of said residence. It is also stipulated in said writing that the contract price is to be paid by said Billman as follows: \$44 by furnishing a monument, \$250 on the presentation of receipted bills for materials furnished and delivered upon said lot, and the balance within 30 days after the completion of said residence. The bond, which is signed by said Worley and appellant, recites that on the 19th day of July, 1900, said Billman and Worley entered into a contract that the latter, in consideration of \$1,185, would construct and complete a residence on the lot above mentioned, in accordance with the plans and specifications described in said contract, within a certain time. The bond is conditioned as follows: "Now, if the said Worley shall build, construct, and complete the said residence according to his contract with said C. D. Billman, and according to the plans and specifications herein referred to, and within the limit of time above provided, then this bond shall be null and void, otherwise in full force and effect."

On behalf of appellant it is contended that no breach of the bond is shown, as it is not alleged that said Worley did not construct and complete said house in accordance with said plans and specifications.

Although sureties and guarantors are favorites of the law, and are not to be held beyond the limits of their engagements, yet the meaning of language must be the same in construing their contracts as if they were executed by the principals alone. Mr. Brandt, in his work on Suretyship & Guaranty (section 94), says: "The rules for construing the contract of a surety or a guarantor should by no means be confounded with the rule that sureties and guarantors are favorites of the law, and have a right to stand upon the strict terms of their obligations. There is no legal prohibition against entering into a contract of suretyship or guaranty. For any contract which it is legal to make, it is legal that a surety or a guarantor shall become responsible. In the construction of the contract of a surety or guarantor, as well as of every other contract, the true question is: What was the intention of the parties, as disclosed by the instrument read in the light of the surrounding circumstances? The contract of the surety or guarantor being just as legal as that of the principal, there is no good reason for holding that, in arriving at the intention of the parties, one set of rules shall govern when the principal, and another when the surety or guarantor, is concerned. To say that a certain set of words in a contract mean one thing when the principal is defendant, and that the same words in the same

contract mean another thing, simply because the defendant is a surety or guarantor, is absurd. The meaning of the words is not affected by the fact that the party sought to be charged is principal, surety, or guarantor." See, also, *Fink v. Farmers' Bank*, 178 Pa. 154, 35 Atl. 636, 56 Am. St. Rep. 746; *Belloni v. Freeborn*, 63 N. Y. 383; *Wills v. Rose*, 77 Ind. 1, 40 Am. Rep. 279. The doctrine that the same canons of construction are to be applied to the contracts of sureties as in like contracts executed by principals alone has been carried so far as to construe the contracts of sureties *contra proferentem* in cases of ambiguity or obscurity. *Bailey v. Larchar*, 5 R. I. 530; *Hoey v. Jarman*, 39 N. J. Law, 523; *Burge on Suretyship*, 46.

As the bond in question refers to the contract, the two instruments are to be construed together. *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334, 9 N. E. 372; *Wright v. Griffith*, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639. The provision of the bond that Worley shall "build, construct, and complete the said residence" would alone seem sufficient to require him to furnish and pay for the necessary materials, so as to deliver them free of lien. *Mackenzie v. Board*, 72 Ind. 189. When we look to the contract, however, it is plainly provided that he is to furnish the lumber, and the provision concerning the payment of \$250 on presentation of receipted bills for materials furnished and delivered upon the lot makes it clear that it was contemplated that said Worley should pay for the materials he was to furnish. The bond provides that Worley is to build, construct, and complete the residence "according to his contract," and it was as much his duty to deliver the house free of liens on account of materials as it was to use materials which belonged to him. To hold, in the face of the bond and contract, that the construction and completion of the building in accordance with the plans and specifications was a compliance with the bond, although the owner would be compelled to pay out large sums, in excess of the amount stipulated in the contract, to discharge liens for the purchase price of materials, would be to keep the word of promise to the ear but break it to the hope.

Construing the contract as requiring Worley to pay for the lumber used, the case of *McHenry v. Knickerbacker*, 128 Ind. 77, 27 N. E. 430, is a precedent directly upholding the conclusion reached by the court below. Appellant was not a surety, although he joined with the principal obligor in the signing of the bond, because his undertaking was that his principal would perform the contract which was collateral to the bond. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805; *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504. Appellant was a guarantor, and as such covenanted that his principal would perform the main engagement, or that he (the guarantor) would answer in damages for the default. *La Rose*

v. Logansport Nat. Bank, supra. It is clear that the principal, Worley, has failed to perform the building contract in manner and form as appellant contracted should be done, and we are of the opinion that, if the answer stated facts sufficient to constitute a good complaint against appellant, it should be treated as a sufficient defense to this suit, in order to avoid circuity of action.

We think that the answer disclosed *prima facie* a cause of action against appellant for the failure of his principal to deliver the materials sued for free of lien. The contract of guaranty was executed contemporaneously with, and as a part of the consideration of, the transaction guarantied, and notice of acceptance was not required. *Wright v. Griffith*, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639. The burden was on the guarantor to plead and prove an omission to give notice of default, and that he was damaged by reason of such omission. *Ward v. Wilson*, 100 Ind. 52, 50 Am. Rep. 763; *Stanley v. Stanley*, 112 Ind. 143, 13 N. E. 261. So any further matter which would have been a defense to an action on the guaranty should, if it existed, have been set up in this case by way of reply.

We find no error in the record. Judgment affirmed.

(162 Ind. 399.)

PITTSBURGH, C. C. & ST. L. RY. CO. v. TOWN OF WOLCOTT.¹

(Supreme Court of Indiana. Jan. 6, 1904.)

MUNICIPAL CORPORATIONS — OPENING OF STREET — PROCEEDINGS — STATUTORY REQUIREMENTS — VALIDITY — CONSTITUTIONAL LAW.

1. On appeal in proceedings for the opening of a street, questions as to the unconstitutionality of the statute and proceedings cannot be presented by way of independent assignments of error, but only by assignments of errors in sustaining demurrers, overruling motions for a new trial, etc.

2. Burns' Rev. St. 1901, § 4405, provides that if, on petition, the board of trustees of any town are of opinion that public convenience requires the opening of a new street, the board shall appoint commissioners who shall appraise the damage and benefits. *Held*, that a formal resolution that public convenience required the opening of a street was not necessary.

3. It was not essential to the validity of the proceedings that a preliminary order should be made declaring that the prayer of the petitioner was granted.

4. The failure of the report of the commissioners on the opening of a street to comply with the statutory requirement that the report shall contain the value of the land appropriated was a mere irregularity, not constituting ground for dismissing or vacating the proceedings.

5. The failure of the report of commissioners on the opening of a street to comply with the statute requiring the report to state what real estate would be benefited was a mere irregularity, not constituting ground for dismissing or vacating the proceedings.

6. Where one whose land is taken for the opening of a street makes no motion before the board of trustees or in the circuit court on appeal to set aside or vacate the report of the commissioners, the only question to be determined is the amount of damages sustained.

¹ Rehearing denied.

7. The fact that a proposed street crosses railroad tracks is not of itself sufficient to enable the railroad company to defeat the opening of the street and appropriation of its land therefor.

8. Burns' Rev. St. 1901, §§ 4404-4410, relative to the opening of streets requiring notice to the owner of property to be appropriated, providing a hearing at which evidence may be received, requiring a report to be made to a tribunal designated, as well as the assessment and tender of damages to the owner, and providing an appeal to the circuit court, is not unconstitutional.

9. On condemnation of land for the opening of a street, only a portion of a certain landowner's property having been taken, the jury had a right to consider the amount of benefit to that which remained.

10. Where, on condemnation of land for street purposes, it appeared that a landowner was benefited instead of damaged by the appropriation, no damages should have been allowed him.

11. On condemnation proceedings on the opening of a street witnesses for the city testified as to the land taken, the structures on it, and as to all its surroundings. *Held*, that it was proper to refuse to instruct that the measure of damages was the difference in value of that part of the land before the street was opened and afterwards, since the jury might have found what effect the improvements would have on the property from the testimony of the city's witnesses, and had a right to consider not only the opinions of the witnesses, but the facts on which such opinions were based.

Appeal from Circuit Court, White County;
T. F. Palmer, Judge.

Petition for the opening of a street in the town of Wolcott. From a judgment in favor of the city of Wolcott on appeal to the circuit court, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company appeals. Affirmed.

G. E. Ross, for appellant. Hanly & Wood, for appellee.

DOWLING, J. A petition for the opening of a street in the town of Wolcott, signed by more than 12 resident freeholders, was presented to the board of trustees of that town. The board thereupon appointed three commissioners having the statutory qualifications to appraise and assess the damages and benefits accruing to the owner of any land or lot through which the proposed street was to be opened. Such commissioners, before they proceeded to perform their duties, took and subscribed the oath prescribed by the statute, which oath was indorsed on the certificate of their appointment and filed with the clerk of the board. The requisite notice of the appraisalment to be made, a complete description of the premises to be viewed, and the time and place of the examination and hearing, was given to the commissioners and to the appellant as the owner of land to be appropriated. The commissioners met at the time and place designated in the notice, and proceeded to examine the real estate proposed to be appropriated, and to receive evidence

touching the questions before them. They made their report to the board in writing, and within the time fixed by law filed the same with the clerk of the board of trustees. The total amount of damages sustained by the appellant by reason of the appropriation of the land taken, the removal of a depot building, the construction and maintenance of crossings, and by all other causes, was estimated by the commissioners at \$250, and this sum was tendered to the appellant by the appellee, but the appellant refused to accept the same. An appeal to the White circuit court was taken by the railroad company, exceptions raising questions of law and fact were filed by it, the issues formed were submitted to a jury for trial, and a general verdict was returned in favor of the appellee. Over motions for a new trial and in arrest of judgment the court rendered judgment against the railroad company that the land described be appropriated for the purposes of a public street, that the street be opened upon and over the land so appropriated, and that the railroad company sustained no damages by such appropriation. Error is assigned upon the sufficiency of the facts stated in the transcript of the proceedings of the board of trustees to constitute a complaint, the rulings of the court upon demurrers, the refusal of the court to grant appellant a new trial, and the denial of the motion in arrest of judgment.

The fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, and twenty-second assignments of error present no question. All of them allege the unconstitutionality of the statute and proceedings by virtue of which the appropriation of appellant's land was effected. Such infirmities, if they exist, cannot be presented by way of independent assignments of error. *Standish v. Bridgewater*, 159 Ind. 386, 65 N. E. 189. The question of the validity of the statute, proceedings, and judgment, however, is properly raised by the assignment of the alleged errors of the court in sustaining certain demurrers and overruling others and in overruling the motions for a new trial and in arrest. The transcript of the proceedings of the board of trustees shows that all the steps required by the statute, with perhaps one exception, were regularly and properly taken. No formal resolution that the public convenience required the opening of the street was necessary. Nor was it essential that a preliminary order should be made declaring that the prayer of the petition was granted. Neither of these formalities is prescribed by the statute. The act provides that if, upon petition, the board of trustees of any town may be of opinion that public convenience requires the opening of a new street or alley, the board shall appoint three commissioners, residents of such town, who shall be disinterested freeholders, to appraise and assess the damages and benefits accruing to the owner of any land or lot through which

¶ 9. See *Eminent Domain*, vol. 12, Cent. Dig. §§ 376, 380.

the street or alley is proposed to be constructed, or any structure thereon appropriated for such street or alley. Section 4405, Burns' Rev. St. 1901. The order appointing the commissioners was a sufficient indication of the opinion of the board that the public convenience required the opening of the street and that the petition was granted. As is said in *Dillon on Municipal Corporations* (4th Ed.) § 601 (466): "In exercising the power of eminent domain the city council need not preface their action—as, for example, laying out of a highway or street—by declaring that they find the same to be necessary or expedient. This necessity is sufficiently implied in their action on this subject, inasmuch as they can act only in such a case." The statute requires that the report of the commissioners shall contain the following particulars: (1) The value of the land appropriated. (2) What real estate, if any, would be benefited (specifying the same in parcels, with the name of the owner, if known), and the proportion of benefits each owner receives, and the proportion of damages each would sustain. The report in the present case did not state the value of the land appropriated, nor what real estate would be benefited. It contained only an assessment of the damages sustained by the appellant by reason of the appropriation of the land. These omissions, however, were irregularities only, and did not constitute ground for dismissing or vacating the proceedings. *Elliott, Roads and Streets*, § 351; *Brown v. Stewart*, 86 Ind. 377; *State v. Parker*, 53 N. J. Law. 183, 20 Atl. 1074; *Gillett v. McGonigal*, 80 Wis. 158, 49 N. W. 914; *Rout v. Montjoy*, 3 B. Mon. 300; *Connecticut River Co. v. Clapp*, 1 Cush. 559; *Town of Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761. No motion was made by the appellant before the board of trustees or in the circuit court to set aside or vacate the report of the commissioners, and, in the absence of such motion, the only question to be determined in the circuit court was the amount of damages sustained. *Swinney v. The Ft. Wayne R. Co.*, 59 Ind. 205; *Werley v. The Huntington Water Works Co.*, 138 Ind. 148, 37 N. E. 582; *The Chicago, etc., Ry. Co. v. Jones*, 103 Ind. 386, 6 N. E. 8. No motion having been made to set aside the report and for a new assessment and appraisal, we think that the transcript of the proceedings filed in the circuit court contained a sufficient statement of facts to authorize the appropriation of the land and an inquiry as to the amount of damages sustained by the appellant. The circumstance that the proposed street was to be laid out across the appellant's railroad was not of itself sufficient to defeat such appropriation. *Elliott, Roads and Streets*, § 451, note 4. We have no hesitation in pronouncing the act authorizing the opening of streets under which these proceedings were taken (sections 4404-4410, Burns' Rev. St. 1901) constitutional. The purpose for which private property may

be taken under this statute is strictly public. Notice to the owner is required. A hearing before commissioners duly appointed according to law is provided for, at which hearing evidence may be received touching any of the questions before such commissioners. A report is to be made by the commissioners to a permanent tribunal designated by the statute. Before the property can be taken, the damages assessed must be tendered to its owner. An appeal to the circuit court may be taken by the owner of the real estate from the order of the board accepting such report.

The hearing secured by the statute must be understood to be one affording to the owner of the real estate proposed to be taken a sufficient legal opportunity to establish by evidence the amount of his damages or benefits. The statute seems to meet every requirement of the federal and state Constitutions. Statutes of this character have been enacted by nearly every state of the Union, and their validity has been sustained by numerous decisions. "A municipal corporation may be constitutionally invested with the power to open and establish by compulsory acquisition or by purchase such streets or parks as its council may judge to be expedient or necessary." *Dillon, Munic. Cor.* (4th Ed.) § 602 (467). "Every species of property which the public needs may require, and which government cannot lawfully appropriate under any other right, is subject to be seized and appropriated under the right of eminent domain. Lands for the public ways; timber, stone, and gravel with which to make or improve the public ways; buildings standing in the way of contemplated improvements, or which for any other reason it becomes necessary to take, remove, or destroy for the public good; streams of water; corporate franchises; and generally, it may be said, legal and equitable rights of every description—are liable to be thus appropriated." *Cooley's Const. Lim.* (3d Ed.) § 526; *Rubottom v. McClure*, 4 Blackf. 505; *McCormick v. The President, etc., of the Town of Lafayette*, 1 Ind. 48; *Snyder v. The President, etc., of the Town of Rockport*, 6 Ind. 237; *Rassler v. Grimmer*, 130 Ind. 219, 28 N. E. 866, 29 N. E. 918; *Forsyth v. Wilcox*, 143 Ind. 144, 41 N. E. 371; *Elliott on Roads & Streets*, § 351; *People v. Smith*, 21 N. Y. 595; *Willson v. Marsh County*, 2 Pet. 251, 7 L. Ed. 412; *Bloodgood v. Railroad Company*, 18 Wend. 9, 31 Am. Dec. 313; *West River Bridge Company v. Dix*, 6 How. 183, 12 L. Ed. 535; *Mercer v. Railroad Company*, 36 Pa. 99; *Commonwealth v. Charlestown*, 1 Pick. 180, 11 Am. Dec. 161; *Scudder v. Trenton, etc., Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Harbeck v. Toledo*, 11 Ohio St. 219; *Shaffner v. St. Louis*, 31 Mo. 264; *Swan v. Williams*, 2 Mich. 427; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Alexander v. Baltimore*, 5 Gill, 383, 46 Am. Dec. 630; *Curry v. Mt. Sterling*, 15 Ill. 320. Only a portion of the land owned by the appellant having been taken, the jury had a right to consider the amount of benefit

to that portion which remained. If it found that the appellant was benefited instead of damaged by the appropriation, no damages should have been allowed. *Cooley's Const. Lim.* (3d Ed.) § 565; *Rassier v. Grimmer*, 130 Ind. 219, 28 N. E. 866, 29 N. E. 918; *Forsyth v. Wilcox*, 143 Ind. 144, 41 N. E. 371. The question whether the appellant did or did not sustain damages by the appropriation of a portion of its land was properly presented to the jury by the pleadings and evidence in the cause, and, the fact having been determined by them, we can discover no substantial ground for disturbing their verdict.

The court did not err in refusing to give instructions numbered 1, 2, and 3 tendered by the appellant. The first was a peremptory direction to the jury to return a verdict for the appellant. The second and third declared that the measure of damages resulting to the appellant by reason of the opening of the street across its right of way and tracks was the difference in value of that part of its railroad before the street was opened and afterwards, and that the evidence upon that question was undisputed. None of these instructions was authorized by the evidence. Witnesses for the appellee had testified fully as to the strip of land to be taken, the structures on it, and as to all its surroundings. From this evidence alone the jury might have decided what effect the improvement would have upon the property of the appellant. The jury had a right to consider not only the opinions expressed by witnesses touching the value of the property of the appellant before and after the opening of the street, but they had the right to consider also the facts upon which these opinions rested as stated by the witnesses.

Some minor questions are discussed by counsel for appellant, but we find in none of them a sufficient reason for a reversal of the judgment.

We find no error in the record. Judgment affirmed.

(162 Ind. 22)

LONG & ALLSTATTER CO. v. BARNES
et al.

(Supreme Court of Indiana. Jan. 15, 1904.)

**NOTE—GUARANTY—ORDER OF TRIAL—
INSTRUCTION.**

1. In an action on a written guaranty of a note and for \$25 attorney's fees, where the answers admitted the execution of the note and that \$25 would be a reasonable attorney's fee if plaintiff should recover, and set up affirmative defenses which were denied, the defendants were entitled to open and close the evidence and argument to the jury.

2. In an action on a written guaranty of a note, where the answer of the maker of the note pleaded an individual set-off, it was not the duty of the court, in a charge on the right to recover on the set-off, to charge that the defendant pleading it must prove that he was the principal and his codefendant surety on the guaranteed note, where he charged that all the material averments of the set-off must be proved, and the complaint alleged that the contract

in suit was security for the separate note of the defendant pleading the set-off.

Appeal from Circuit Court, Boone County; B. S. Higgins, Judge.

Action by the Long & Allstatter Company against Edward Barnes and another. From a judgment in favor of defendants, plaintiff appeals. Transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901. Affirmed.

O. P. Mahan, for appellant. S. M. Ralston, for appellees.

HADLEY, J. On April 26, 1898, appellee Edward Barnes executed to appellant his individual note for \$198, due November 1, 1898, and on the same day both appellees executed a written guaranty that Edward's said note should be paid. This action is brought on said guaranty. It is alleged in the complaint that the note guaranteed was the separate note and undertaking of Edward Barnes, and that the note provided for the payment of attorney's fees; that this stipulation was embraced within the guaranty, and that \$25 was a reasonable fee for plaintiff's attorney. Four several and separate answers were filed by the appellees, each admitting the execution of the guaranty sued on, and that \$25 would be a reasonable fee for plaintiff's attorney if it should be found that the plaintiff was entitled to recover, and setting up no consideration and failure of consideration, in various forms, as a defense. Edward Barnes also filed a further separate answer of set-off, in which he averred that the contract sued on was executed as a surety for the payment of his individual note, and that appellant was indebted to him in the sum of \$462 for cash paid on account, and for which he had not received credit. A denial and one paragraph of affirmative matter in reply put the case at issue. Trial by jury, and verdict and judgment for Edward Barnes on his set-off. Appellant's motion for a new trial was overruled.

The court sustained appellees' motion for the right to open and close the evidence and argument to the jury, which presents the first question argued. It will be recalled that in each of their answers appellees admitted the execution of the contract sued on, and that appellant's claim of \$25 for attorney's fees was just and reasonable if it was found that it was entitled to recover at all. As the issue stood at the opening of the trial, the plaintiff was entitled to judgment for everything it asked unless the defendants succeeded in proving by a fair preponderance of the evidence the affirmative matter set up in avoidance. The party having the burden of proof is entitled to the open and close, and when it is not necessary for the plaintiff to introduce any evidence to entitle him to recover the burden of proof is upon the defendant to prove his affirmative defense. *Lindley v. Sullivan*, 133 Ind. 588, 591, 32 N.

El. 738, 33 N. E. 361; *State Board v. Gray*, 54 Ind. 91. *Meikel v. State*, etc., *Institution*, 36 Ind. 353. There was no error in awarding appellees the open and close.

The correctness of the eighth instruction to the jury is challenged. It relates to the set-off pleaded by Edward Barnes, and in substance informed the jury that the defendant Edward Barnes had filed his separate plea of set-off, in which he had alleged that the plaintiff was indebted to him individually on account, as set forth on the plea, in the sum of \$462; that the burden was upon this defendant to establish by a fair preponderance of the evidence all the material averments of his said plea, and, if he had proved by such preponderance that the plaintiff was indebted to him on account of the matters set out in the plea, then the amount found due him from the plaintiff, if any, should be set off against any amount found due the plaintiff from the defendants. If there should be more due said defendant from the plaintiff than found due the plaintiff from the defendants, then he is entitled to a verdict against the plaintiff for the excess. And if the defendants are not indebted to the plaintiff at all, and the plaintiff is indebted to the defendant Edward Barnes on his said matters of set-off, they should return their verdict in his favor for whatever sum they found due him by a fair preponderance of the evidence. The objection urged against this instruction is that it failed to charge the jury that as a fundamental right to a set-off against the plaintiff's demand against the two defendants, it was incumbent upon Edward Barnes to prove that he was the principal and his codefendant his surety on the guaranteed note described in the complaint. It would have been proper for the court to have gone to the extent contended for by appellant, but we are not prepared to say it was the court's duty to do it.

In his plea of set-off Edward Barnes averred that the contract sued on was executed as a security for the payment of his individual note. This was equivalent to saying that his brother's relation to the contract sued on was that of a surety for him. In the instruction complained of the jury was told that to recover upon his plea of set-off it was incumbent upon Edward Barnes to prove by a fair preponderance of the evidence all the material averments thereof. As expressed in general terms, this was correct. Because the court did not specify what constituted the material averments; did not make the instruction bad. *Hinshaw v. The State*, 147 Ind. 334, 381, 47 N. E. 157; *Railway Co. v. Conoyer*, 149 Ind. 524, 528, 48 N. E. 352, 49 N. E. 452.

Another view: It is not claimed for the contract in suit that it is anything else than a collateral undertaking as a security for the payment of the separate note of Edward Barnes, and it is so alleged in the complaint. In the very nature of the transaction, the

obligors of the collateral agreement must necessarily sustain the relation of sureties to the obligor in the note secured. We cannot, therefore, perceive how the appellant can be injured by the failure of the court to instruct the jury that they should find as a fact that which it not only admitted, but asserted in its complaint to be a fact. The evidence is conflicting, but it was the exclusive province of the jury to weigh it, and we have no power to disturb the result reached by them.

Judgment affirmed.

(162 Ind. 6)

CANNON v. CASTLEMAN.¹

(Supreme Court of Indiana. Jan. 14, 1904.)

CONTRACTS—ACTIONS—FRAUD—RES JUDICATA—PLEADINGS—CONSTRUCTION.

1. If one sued on a contract purposely omits to assert the defense of fraud of the plaintiff in the obtaining of the contract, and judgment is rendered against him, it is res judicata in an action by him seeking relief against such judgment on the ground of fraud in the contract.

2. Where plaintiff alleged that he was induced to enter into a contract with defendant through fraud, and that defendant afterwards sued plaintiff on said contract, and recovered thereon from which judgment plaintiff seeks relief, it will be inferred, in the absence of an averment to the contrary, that plaintiff, with the full knowledge of the existence of the defense of fraud, purposely omitted to assert it.

Appeal from Circuit Court, Starke County; George W. Beeman, Judge.

Action by Jacob A. Cannon against Andrew O. Castleman. Judgment for defendant and plaintiff appealed. Transferred from Appellate Court under section 1337u, Burns' Rev. St. 1901. Affirmed.

J. A. Cannon, in pro. per. Nichols & Foster, for appellee.

GILLETT, C. J. Appellant's complaint in this action charges, in effect, that he was induced to enter into a contract with appellee through the fraud of the latter; that suit was afterward brought by appellee against appellant on said contract in a court of competent jurisdiction; that the cause was tried upon the complaint and a general denial, and resulted in a judgment for appellee, which was affirmed on appeal to the Appellate Court of this state; that appellant has been compelled to pay the sum of \$1,700 in the satisfaction of said judgment, and for expenses in and about his defense. A demurrer was sustained to appellant's complaint, and from the final judgment which followed said ruling he prosecutes this appeal.

It would be difficult to determine the theory of the complaint in question, were it not for the statement of appellant, who appears in his own behalf, that he relies upon the proposition that the question of fraud could not have been litigated in the former action under the issues as they were actually framed. We infer, as against the pleader, since the complaint does not contain an averment

¹See 73 N. E. 689.

to the contrary, that appellant, with a full knowledge of the existence of the defense of fraud at the time he was sued on the contract, purposely omitted to assert such defense. The doctrine of *res adjudicata* is broader than appellant apprehends. A party against whom a cause of action is alleged cannot deliberately withhold a direct defense thereto, and afterwards recover in an action which involves an inquiry into the correctness of the original judgment. *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251; *Crosby v. Jerolman*, 37 Ind. 264; *Bates v. Spooner*, 45 Ind. 489; *Richardson v. Jones*, 58 Ind. 240; *Craighead v. Dalton*, 105 Ind. 72, 4 N. E. 425; *Lieb v. Lichtenstein*, 121 Ind. 483, 23 N. E. 284; *Kingman v. Paulson*, 126 Ind. 507, 26 N. E. 893, 22 Am. St. Rep. 611; *Cohee v. Baer*, 134 Ind. 875, 32 N. E. 920, 39 Am. St. Rep. 270; *Maynard v. Waldlich*, 156 Ind. 562, 60 N. E. 348; *State ex rel. Moore v. Board* (at last term) 68 N. E. 295; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Marlotte v. Hampton*, 7 Durn. & East, 265; *Henderson v. Henderson*, 3 Hare, 100, 115; *Thatcher v. Gammon*, 12 Mass. 268; *Bishop v. Baldwin*, 14 Vt. 145; *Tilton v. Gordon*, 1 N. H. 33; *Holden v. Curtis*, 2 N. H. 61; *Bruen v. Hone*, 2 Barb. 586; *White v. Ward*, 9 Johns. 232; *Loomis v. Pulver*, Id. 244; *Carnfield v. Monger*, 12 Johns. 347; *Battery v. Button*, 13 Johns. 187; *Heath v. Frackleton*, 20 Wis. 320, 91 Am. Dec. 405; *Ryan v. Southern, etc., Ass'n*, 50 S. C. 185, 27 S. E. 618, 62 Am. St. Rep. 831; *Jones v. Merrill*, 69 Miss. 747, 11 South. 23; *Peet v. Hatcher*, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45. Although not clearer in principle than most of the above authorities, especial attention is called to the following cases: *Gilmore v. McClure*, 133 Ind. 571, 33 N. E. 351; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, 1 Am. Dec. 121; *Homer v. Fish*, 1 Pick. 435, 11 Am. Dec. 218; *Livermore v. Herschell*, 3 Pick. 33; *New York Life Ins. Co. v. Weaver's Adm'r* (Ky.) 70 S. W. 628. Especially as applied to a case like this, where the gravamen of the action is the wrongful obtaining of a judgment in a suit in which the complaining party neglected his opportunity to set up such wrong as a defense, does the observation found in the case last cited seem applicable—that a "litigant is entitled to one day in court, but not to two days."

Judgment affirmed.

(162 Ind. 1.)

GRAY v. SEITZ.

(Supreme Court of Indiana. Jan. 14, 1904.)

OFFICER — DISQUALIFICATION — BRIBERY AT PRIMARY ELECTION—NECESSITY OF CONVICTION.

1. Const. art. 2, § 8, providing that every person shall be disqualified for holding office for the term for which he may have been elected, who shall have given or offered a bribe, etc., to secure his election, does not apply to bribery by a candidate at a primary election to secure a nomination.

2. An agreement by a candidate at a primary election for nomination as county auditor, whereby he gives his note for \$300 to the opposing candidate in consideration of the latter's withdrawal, and of his promise and that of two of his supporters to aid in securing the first candidate's nomination and to discourage other candidacies, is within Burns' Rev. St. 1901, § 2327, providing that any person, being a candidate for nomination to any office of profit or trust, who loans, pays, or gives, or promises to do so, any money to any person to secure his vote or influence, or whoever hires any person to work for the nomination of any person to office, shall, upon conviction, be fined and disfranchised, and rendered incapable of holding any office of trust or profit, and, if nominated, shall be ineligible to hold such office.

3. Ineligibility to hold the office for which the candidate receives a primary nomination, imposed by Burns' Rev. St. 1901, § 2327, punishing bribery at primary elections by declaring that the briber "shall, upon conviction thereof, be fined * * * and disfranchised and rendered incapable of holding any office * * * and though nominated shall be ineligible to hold such office," can only be taken advantage of by the opposing candidate after a conviction for the crime has been had.

Appeal from Circuit Court, Brown County; W. J. Buckingham, Judge.

Election contest by Arthur L. Gray against John B. Seitz. From a judgment of the circuit court sustaining a motion to dismiss the proceeding after an appeal by contestant from the board of county commissioners, contestant appeals. Affirmed.

Anderson Percifield, W. O. Duncan, and Marshall Hacker, for appellant. Miers, Con & Miers, Duncan & Batman, and W. W. Waltman, for appellee.

DOWLING, J. Appellant and appellee were opposing candidates for the office of county auditor of Brown county at the general election held in November, 1902. The appellee received 1,019 of the legal votes cast at that election, and the appellant 615 of such votes. The appellant, within the time fixed by law, gave notice of his intention to contest the election of the appellee, and filed his statement of the grounds of such contest in the office of the clerk of said Brown county. The board of commissioners of said county was thereupon convened to try said cause, and the appellee appeared to the action. On the motion of the appellee, the proceeding was dismissed by the board on account of the insufficiency of the facts stated to constitute a cause of action. An appeal from this judgment was taken to the Brown circuit court, where the motion to dismiss was renewed. The court sustained the motion, and rendered judgment for the appellee. The error assigned is upon the ruling on the motion to dismiss.

The ground of contest was the alleged ineligibility of the appellee to the office at the time of the election, and at the time of the commencement of the term thereof, for reasons which are thus stated in the complaint: "That on the 15th day of November, 1901, the Democratic party of Brown county, Indiana, held a primary election in said coun-

ty for the purpose of nominating county candidates for the offices of said county to be voted for on the 4th day of November, 1902, and the contestee and one John C. Ross were, and had been for more than three months theretofore, opposing candidates for the nomination of county auditor of said county; that said Ross was a qualified elector of said county, and was eligible to said office; that on the 15th day of October, 1901, the said Ross and the said Seitz were the sole candidates for said nomination; that Commodore P. Hanna and Isaac Tabor were qualified voters of said county, and supporters of said Ross for said nomination, and had been for more than three months theretofore; that theretofore, on the 15th day of October, 1901, the said contestee entered into an agreement with said Hanna and Tabor, acting for themselves and for said Ross, that, in consideration of the withdrawal of John C. Ross as an opposing candidate for the nomination of county auditor at said primary election, and that the said Hanna and Tabor would use their influence with the electors of said county for said John B. Seitz as a candidate for said office, and would discourage and dissuade any other elector of said county from becoming a candidate for said nomination for said office in opposition to said John B. Seitz at said primary election, the said contestee would pay to said Ross the sum of three hundred dollars ninety days after date; that on the said 15th day of October, 1901, the said contestee, pursuant to said agreement, did execute to said Ross his certain promissory note of that date, with William H. Seitz as surety thereon, in the sum of three hundred dollars, payable ninety days from the date thereof, of which the following is a copy: '\$300.00. Ninety days after date, we promise to pay to the order of John C. Ross at Nashville, Ind., three hundred dollars. Value received without any relief from valuation or appraisement laws, with interest at 8 per cent. per annum from date until paid, and attorney's fees. The drawers and endorsers severally waive presentment for payment, protest and notice of protest, and nonpayment of this note. [Signed] John B. Seitz. William H. Seitz.'" The supposed acts of bribery consisted in procuring the withdrawal of Ross as an opposing candidate for the nomination for county auditor at a Democratic primary election held November 15, 1901, and in entering into an agreement with Hanna and Tabor, electors of said county, by which they undertook to use their influence with the other electors of said county for the said John B. Seitz as a candidate for the office of county auditor, and to discourage and dissuade any other elector of said county from becoming a candidate at said primary election for nomination to said office in opposition to said Seitz, in consideration of which withdrawal of said Ross, and the said services of the said Hanna and Tabor, the appellee on October 15, 1901, exe-

cuted his promissory note for \$300, payable to said Ross 90 days after its date.

It is insisted by appellant that these proceedings rendered the appellee ineligible to the office of county auditor, to which he was elected, under section 6, art. 2, of the Constitution of this state, and also under section 2327, Burns' Rev. St. 1901, defining and punishing the offense of bribery at primary elections. The provision of the Constitution, supra, is as follows: "Every person shall be disqualified for holding office for the term for which he may have been elected, who shall have given or offered a bribe, threat, or reward, to secure his election." And section 2327, supra, declares that: "Any person being a candidate for nomination to any office of profit or trust under the Constitution or laws of this state, or of the United States, before any convention held by any political party, or at any primary election, who loans, pays or gives, or promises to loan, pay or give, any money or other thing of value to any delegate or elector, or any other person, for the purpose of securing the vote or influence of such delegate, elector, or person, for his nomination, and whoever hires, or otherwise employs, for consideration any person to work for the nomination of any person to any office, or to work for the selection of any delegate to be chosen at any party convention, or primary election, shall, upon conviction thereof, be fined in any sum not more than five hundred dollars, and disfranchised and rendered incapable of holding any office of trust or profit within this state for any determinate period, and, if nominated, shall be ineligible to hold such office." Section 6, art. 2, of the Constitution, and section 2327, supra, are highly penal, and must be strictly construed as against the persons who are sought to be subjected to the penalties and forfeitures imposed. It seems perfectly clear that section 6, art. 2, of the Constitution, applies only to bribes, threats, or rewards given or offered to secure the election of a candidate at a final or popular election. No mention is made of a primary election, and the language used refers exclusively to the election by virtue of which title to the office is claimed. Section 2327, supra, renders any person ineligible to any office, for the nomination for which he is a candidate at any primary election, who loans, pays, or gives, or promises to loan, pay, or give, any money or other thing of value to any delegate or elector, or any other person, for the purpose of securing the vote or influence of such delegate, elector, or person for his nomination, or who hires or employs for a consideration any person to work for the nomination of any candidate for any office to be chosen at a primary election. The complaint charges that in consideration of the withdrawal of Ross, the opposing candidate for the nomination for county auditor at the primary election, and the agreement of Hanna and Tabor, on behalf of themselves and Ross, to use their

influence with the electors of the county for the appellee, and to discourage and dissuade any other elector of the county from becoming a candidate for the nomination for county auditor at said primary election in opposition to the appellee, the latter agreed to pay to Ross \$300 and execute his note, with surety, for said sum. The agreement alleged to have been entered into by the appellee with Hanna, Tabor, and Ross fell under the prohibition of section 2327 of the statute. It included an express promise, in writing, by the appellee, who was a candidate for nomination to an office of trust and profit at a primary election, to pay \$300 in money to Ross, an opposing candidate, for the purpose of securing his withdrawal from the race, and the influence and services of Hanna and Tabor for the nomination of the appellee. But the unlawful agreement did not of itself render the appellee ineligible to the office to which he was afterwards elected. It is true that ineligibility to hold the office to which the person violating section 2327, *supra*, is chosen, is declared to be one of the penalties for the violation of the section. These penalties, however, attach only to one who has been duly charged with, and convicted of, the misdemeanor created by the statute. It is expressly declared that "upon conviction thereof" the defendant, " * * * if nominated, shall be ineligible to hold such office." The provision of the statute differs materially from section 6, art. 2, of the Constitution. The latter makes the fact that the candidate at a popular election has given or offered a bribe, threat, or reward to secure his election an absolute disqualification for holding the office for the term for which he may have been elected. It has been said to be "self-executing." *Carroll v. Green*, 148 Ind. 362, 364, 47 N. E. 224. The penalty of the statute becomes effective only after trial, conviction, and judgment.

We express no opinion as to any objections which may be taken to section 2327, but hold that the complaint was insufficient because it failed to allege that the appellee had been adjudged guilty of a violation of its provisions. The pleading was not good under any other section of the statute.

The court did not err in sustaining the motion to dismiss the action. Judgment affirmed.

(162 Ind. 26)

WINTERS v. COONS.

(Supreme Court of Indiana. Jan. 15, 1904.)

SPECIAL FINDING—JUDGMENT OVER VERDICT—BILL OF EXCEPTIONS—SETTLEMENT.

1. A special finding that one purchased a note in the usual course of business is a mere conclusion, and not a finding of a particular question of fact within *Burns' Rev. St. 1901, § 555*, requiring such findings on interrogatories submitted to them.

2. A court would not be warranted in awarding a judgment in favor of the indorsee of a note over a general verdict, in the face of a

special finding that he knew that it had been procured by fraud pleaded in the answer.

3. Where one who had been an attorney of an appellant in the trial of the cause afterwards became judge, a bill of exceptions settled and signed by him without the knowledge or consent of the appellee is not a part of the record.

Appeal from Circuit Court, Randolph County; J. W. Macy, Judge.

Action by Charles A. Winters against Joseph M. Coons. From a judgment in favor of defendant, plaintiff appeals. Transferred from the Appellate Court under section 1337u, *Burns' Rev. St. 1901*. Affirmed.

Bingham & Long, for appellant. Engle, Caldwell & Parry, for appellee.

JORDAN, J. This action was prosecuted in the lower court by appellant to recover against appellee upon a promissory note executed by the latter on November 3, 1898, to Joseph E. Smith, for the sum of \$166.66, negotiable and payable at a bank in this state. The complaint alleges that the note in suit was for a valuable consideration assigned by an indorsement to the plaintiff. The answer of the defendant (appellee herein) consisted of three paragraphs, the first being the general denial, which was subsequently withdrawn. The second paragraph alleges substantially the following facts: In August, 1898, Joseph E. Smith, the payee and indorser of the note in question, represented to the defendant, Coons, that he had for sale certain imported and valuable winter grape vines; that these vines were worth \$1 each in the usual course of sales. He agreed to deliver 4,200 of them to the defendant, and represented to him that large profits could be made if he would purchase, plant, and cultivate the vines upon his lands. Smith further represented and agreed that, if the defendant would take 4,200 of the vines, he would sell them to him at one-half of the cost price, and would pay the other half himself, and become the defendant's partner in the cultivation of the vines. He further represented that he was a man who had much experience in the culture of winter grape vines, and he agreed, if the appellee would take the vines, that he would plant, prune, and otherwise attend to the culture thereof, and that, after they were planted on appellee's premises, he, from year to year, would market the products, and pay to the defendant one-half of the proceeds realized from the sale of the grapes, and at the end of five years he agreed that the vineyard should become the property of the defendant. It is charged that the latter believed these representations, made by Smith, to be true, and relied thereon, and was induced thereby to purchase and agree to pay for 4,200 of these grape vines, and executed the note in suit, among others, for the purchase money of said vines. It is averred, among other facts, that Smith delivered one lot of these vines to the defendant, but that they were of an inferior variety, nothing more than mere

"culls," etc. After obtaining the note in question, Smith neglected and refused to plant or cultivate the vines, and refused to comply with his agreement, but left the vines which he had delivered to wither and die at the place where he had delivered them, etc. It is charged that the plaintiff (appellant herein) became the holder of the note with full knowledge and notice of all the facts as alleged, and that he paid no consideration therefor. The third paragraph of the answer alleges facts showing that said Smith, together with others, entered into a conspiracy to defraud the defendant, and thereafter, through fraud and false representations, obtained the execution of the note in suit from the defendant, who, as alleged, was at the time an old and ignorant man. The plaintiff filed a reply to the answers in two paragraphs, the first of which was the general denial. In the second he averred facts to show that he was a broker, engaged in the purchase of commercial paper, and had purchased the note in suit in due course of business, for a valuable consideration, before the maturity thereof, and without any knowledge or notice that the consideration thereof had failed, or that the note was procured by fraud, and without any knowledge or notice of any of the matters and things alleged in either paragraph of the answer. Upon the issues joined between the parties, there was a trial by jury, which resulted in the return of a general verdict in favor of the defendant. Along with their verdict, the jury also returned their findings upon a series of interrogatories propounded to them. Appellant unsuccessfully moved for judgment in his favor on these special findings or answers to the interrogatories, and thereafter filed his motion for a new trial, assigning therein as reasons that the verdict was not sustained by sufficient evidence, and was contrary to law. This motion was overruled, and judgment was rendered on the verdict of the jury in favor of the defendant for costs. The errors assigned relate to the court's ruling in denying these respective motions, and for these alleged errors counsel for appellant earnestly contend that the judgment should be reversed.

Some of the special findings made by the jury by their answers to the interrogatories are in some respects indefinite, while others are open to the objection that they are mere conclusions, and others are but a statement of the evidence, upon which the jury based their findings. It may be said, however, that the findings, so far as they pertained to the issues tendered by the second paragraph of the answer are, to an extent at least, favorable to appellant. Interrogatory No. 10, by which the jury found that appellant purchased the note in suit in the usual course of business, is nothing more than a conclusion, and is not a finding of a particular question of fact, as contemplated and provided by section 555, Burns' Rev. St. 1901. The jurors, by

their answers to interrogatories Nos. 16 and 19, expressly find that the plaintiff, at the time he purchased the note, "had notice and knew" that it was procured by fraud, as alleged in the third paragraph of the answer. Appellant, under the facts alleged in his reply, claimed to be a bona fide holder of the note in suit. In order to avoid or break down the defense alleged in the third paragraph of the answer, the burden upon the trial was upon him to establish, *inter alia*, that he purchased the note before its maturity, without having any notice that the execution thereof had been procured by fraud, as alleged in the said paragraph of answer. *Shirk v. Neible*, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150, and cases there cited. From aught appearing in the general verdict, the jury may have found in favor of appellee upon the issues tendered by both paragraphs of his answer, or they may have found in favor of appellant upon the second paragraph and against him on the third. It is certainly evident that under the circumstances the trial court would not have been warranted in awarding appellant a judgment on the answers to the interrogatories, over the general verdict, when the special findings of the jury in answer to interrogatories 16 and 19 disclose that at the time he purchased the note he had notice and knew that it had been procured by the fraud alleged and set out in the third paragraph of the answer. If the verdict was in favor of appellee on the third paragraph of the answer, as it may have been, these particular special findings would certainly be in harmony therewith. Upon no view of the question, under the circumstances, would appellant be entitled to a judgment over the general verdict, with these two special findings disclosing that at the time he purchased the note he had knowledge that its execution had been procured by the fraud set out in the third paragraph of the answer. *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143.

It is disclosed by the record, together with an affidavit filed therein, that the regular judge of the lower court who presided at the trial until after the overruling of the motion for a new trial and the rendition of the judgment, but before the bill of exceptions containing the evidence was settled and signed, resigned the office of judge, and thereupon one of appellant's attorneys, who had actively participated as such attorney in the trial of this case in the lower court, was, by the Governor of the state, appointed to fill the vacancy occasioned by the resignation. Said appointee duly qualified as the regular judge of the lower court, and after assuming the duties of the office he settled and signed the bill of exceptions in this case without the knowledge or consent of appellee or his attorneys. It expressly appears that neither appellee nor any one of his attorneys had any knowledge of the settling and signing of the bill in question until the transcript came

into the hands of appellee's attorneys for the purpose of preparing a brief in the appeal. There is no attempt made on the part of appellee to controvert these facts, or to parry the force of appellee's contention that under the circumstances the bill of exceptions cannot be legitimately regarded as part of the record. That the settling and signing of a bill of exceptions is a judicial act is an uncontroverted proposition. The point in question, as here presented, is directly ruled by the decision of this court in *Waterman v. Morgan*, 114 Ind. 237, 18 N. E. 590. In that case one of the attorneys for appellant, who assisted in the trial of the case in the lower court, succeeded, by election, the regular judge before whom the case had been tried. After becoming judge of the court, he settled and signed the bill of exceptions containing the evidence. This court in that appeal held that under the circumstances the bill could not be regarded as a part of the record, for the reason that it had been signed by the judge in violation of the ancient maxim of the common law, which declares, "*Nemo debet esse iudex in propria sua causa.*" (No one ought to be a judge in his own cause.) *Broom's Legal Maxims*, p. 116; *Trayner's Latin Maxims and Phrases*, p. 376; *Wharton's Legal Maxims*, p. 101. The principle affirmed by this maxim is not confined alone to a case in which the judge is directly a party, but extends to and applies to a cause in which he can be said to have a personal interest. In the application of the principle asserted by the maxim in controversy in respect to the point herein involved, the question to be determined is not whether the judge who settled and signed the bill of exceptions was influenced in any manner by reason of his having been of counsel in the case (and we do not wish to be understood as intimating that he was in any manner unfairly or otherwise influenced in his action), but the purpose of the principle as affirmed is that a judge in the discharge of his judicial functions shall not be placed in a position where he may be subjected to imputation that he labored under the influence of his own interest in the matter. We conclude that under the circumstances the evidence cannot be regarded as properly before us, hence no question depending thereon can be reviewed.

Judgment affirmed.

MONKS, J., did not participate in the decision of this case.

(161 Ind. 673)

AMERICAN ROLLING MILL CO. v. HULLINGER.

(Supreme Court of Indiana. Jan. 13, 1904.)

On petition for rehearing. Petition overruled.

For former opinion, see 67 N. E. 986.

GILLET, C. J. In the brief on behalf of appellee in support of his petition for a rehearing his counsel earnestly insists that we erred in adjudging the complaint insufficient because of the omission to allege facts showing that the risk which eventuated in appellee's injury had not been assumed by him. Counsel for appellee omits to state whether the complaint attempts to show a common-law liability, or whether it is based on the employers' liability act, but he now contends for the sufficiency of said pleading on both grounds. We shall briefly consider the points made, and shall first examine the question as to a common-law liability.

The complaint shows that appellant was engaged in the construction of a large building; that the work was being done under one Krick, whom we held in the original opinion was shown to be a vice principal, according to the averments of said complaint. It is further alleged therein that appellee was working under said Krick; that it became necessary to raise a heavy bent or truss, of a triangular shape, into position on the plates of said building; that said work was being prosecuted by the aid of a mechanical appliance known as a "gin pole"; that pursuant to the direction of said Krick appellee and a number of his co-employees raised said bent so that it rested on its base, with its apex slightly leaning against said gin pole; that thereupon said Krick carelessly and negligently directed the plaintiff to tie a rope on the base of said bent, and carelessly and negligently omitted to cause said bent to be supported by guy lines or other means while appellee was tying said rope, but carelessly and negligently ordered and directed one Edwards to untie said guy lines and distribute them equally on each side of said bent, which order he obeyed; that appellee did conform to and obey said order given to him, and, while he was in a stooping position, having just tied said rope and undertaken to fasten a hook attached to a block and tackle in the loop of said rope, as he was directed to do by said Krick, said bent, owing to the swaying of the heavy ropes of said block and tackle, or the swaying of the gin pole, or both, or some other cause unknown to appellee, fell, and that appellee was injured in his effort to escape. It will be observed that it is not shown whether appellee or Edwards first performed the particular task assigned him, and it does not appear that appellee did not hear the order given to Edwards, and have an opportunity to escape before it was executed. We have, then, a case where it is made to appear that it was negligent to leave the bent leaning against the gin pole without other support, and yet there is no suggestion that appellee did not know of the situation, and of the extent of the danger, or that he relied on the direction of said Krick as amounting to an implied representation of safety. It is true that there is a disjunctive statement suggesting that the bent might have fallen

from a cause unknown to appellee, but, if it fell from either of the causes expressly stated, we may infer that, so far as knowledge was concerned, he was as well advised of the danger as the master's representative could have been expected to be. This is not a case where the direction of the vice principal can be said to have taken the servant out of the course of his employment, for the silence of the complaint upon the point permits us to infer that the details of his work only varied to the extent that the work of construction progressed. At least, as applied to cases where it may be inferred that the danger had become one of the assumed risks of the employment, it has been many times held that the complaint of the servant must aver facts showing that the risk was not one which he had assumed. *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Indiana, etc., Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Wabash, etc., R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; *Big Creek, etc., Co. v. Wolf*, 138 Ind. 496, 38 N. E. 52; *Peerless Stone Co. v. Wray*, 143 Ind. 574, 42 N. E. 927; *Potter v. Knox, etc., Co.*, 146 Ind. 114, 44 N. E. 1000; *Cleveland, etc., R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86, and cases cited; *Chicago, etc., R. Co. v. Glover*, 154 Ind. 584, 57 N. E. 244; *Indiana, etc., Co. v. O'Brien*, 160 Ind. 266, 65 N. E. 918, 66 N. E. 742; *Williams v. Clough*, 3 Hurl. & Nor. 258; *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113, 77 Am. Dec. 212; *Coal & Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Missouri Pacific R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044. In *Williams v. Clough*, supra, a servant sued his master, alleging that the defendant had an unsafe ladder, and that, well knowing that said ladder was unsafe, he wrongfully and deceitfully ordered and directed the plaintiff, as such servant, to carry corn up said ladder, and that the plaintiff, in obedience to said order, and believing said ladder to be fit and proper for use for the purpose aforesaid, and not knowing the contrary, did carry said corn up said ladder, and that while so doing, and by reason of such ladder being unsafe and defective, he fell, etc. It was objected that the declaration should have shown that the servant did not have the means of knowing that the ladder was unsafe, but the majority of the court were of the opinion that the declaration was sufficient. *Bramwell, B.*, however, said: "I abide by the opinion I expressed in the case referred to that a master cannot be held liable for an accident to his servant while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master. I should be inclined to say that the declaration is good or bad as it does or does not negative the servant's means of knowledge. That,

however, is a mere question of special pleading. And, as the Lord Chief Baron and my Brothers Martin and Channell are of the opinion that the declaration is good, it is not necessary that I should further inquire whether it ought to contain, or does contain, such an averment." In this state an allegation of a want of knowledge negatives imputed knowledge. *Pennsylvania Co. v. Witte*, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377, and cases cited; *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235.

Mr. Wood, in his work on Master and Servant (section 382), after stating some of the elements required to be made out by the servant in a suit against the master for negligence, says: "When this is established, he [the servant] is met by another presumption, and that is that he assumed all the usual and ordinary hazards of the business. To overcome the force of this presumption, he must show that the injury did not arise from an obvious defect in the instrumentalities of the business, or from a hazard incident to the business, but from causes that were previously unknown by him to exist, or from extraordinary causes, and not from causes that he ought to have foreseen, and can be fairly said to have assumed, or some legal excuse for taking the risk, if known to him, which strips his act of the imputation of negligence and overcomes the presumption that he voluntarily took the risk upon himself." While it is true that the servant is not bound to anticipate that his master will, without warning, direct him to do an act that will expose him to serious peril, yet even such peril, if of obvious character, may become a part of the risks of the employment, if, with a knowledge of its nature and extent, the servant voluntarily undertakes it. As stated in one of the leading text-books on the law of negligence: "If, however, the servant knows what the new dangers are, or if they are obvious to persons thus suddenly called to do such work, and he is able to appreciate the peril involved, and is not acting under such coercion as would in other cases excuse him, he assumes the risk of this new work, to the same extent as he did those of his regular employment." *Shear. & Red. Law of Negligence*, § 186.

It is required that a complaint should state facts showing the existence of a duty in order to predicate a charge of negligence upon it. *Faris v. Hoberg*, 124 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; *Louisville, etc., R. Co. v. Sandford*, supra. In the latter case it was said that, where the servant has assumed the risk, the master "is exonerated, because the employé himself assumes the danger as increased, and, as he voluntarily assumes it, the master is relieved. The parties change positions. The employé assumes the risk that, if it were not for his knowledge, the employer would be compelled to assume. The duty which the employer is under is materially affected by the element

of knowledge, and, unless a duty is shown, there can be no actionable negligence, since a duty lies at the foundation of every right of action grounded on the negligence of a defendant." It is true that, if the facts of the case had been shown in evidence under a sufficient complaint, the jury, having to deal with a mixed question of law and fact, might have been authorized to conclude that appellee had not assumed the risk under the particular circumstances; but appellee cannot successfully invoke authorities upholding the right of recovery upon the part of a servant, decided as questions as to the effect of evidence, to save a bad complaint. In *Louisville, etc., R. Co. v. Sandford*, supra, it was said: "The question comes to us as one of pleading, and not one of evidence. Material facts must be directly stated in a pleading, but they may be inferred from testimony and from circumstances when the question is as to the measure and sufficiency of proof. Inferences are admissible and controlling where the question is one of proof, but not so where the question is one of pleading. It is not enough to plead evidence from which the facts may be inferred, but the facts themselves must be stated in an issuable form." In *Louisville, etc., R. Co. v. Corps*, 124 Ind. 427, 24 N. E. 1046, 8 L. R. A. 636, this court stated: "We are here dealing with a question of pleading, and not of evidence. There is, as is well known, an essential difference between matters of pleading and matters of evidence. In pleading, facts must be directly and positively averred, while as matter of evidence conclusions may be inferred, without positive statements, from facts and circumstances. In pleading it is incumbent upon the plaintiff to state all the facts essential to a cause of action, and, if any material fact is lacking, the complaint will go down before a demurrer. A material fact is here absent, and that is the fact that the danger was not an incident of the service in which the plaintiff voluntarily engaged. This fact must be averred, as the rules of pleading require, although, if the question were one of evidence, it might be inferred." To these statements we may appropriately add the following from the case of *Wabash, etc., R. Co. v. Morgan*, supra: "The general rule is that negligence or breach of duty is not presumed, and this rule must benefit the employé as well as the employer. It cannot be a sword to the one and a shield to the other. But the rule to which we have referred does not authorize an employé to act without care. He must, notwithstanding the presumption, use reasonable care; but reasonable care, as we have seen, does not cast upon him the duty of making an inspection to discover latent defects." We deem it clear, in the light of the above authorities, that the complaint was insufficient as a common-law statement of liability.

As to the sufficiency of the complaint under the employers' liability act, the general

rule is that, if a person seeks to maintain an action under a statute, he must state specially every fact requisite to enable the court to judge whether he has a cause of action under the statute. *Ezra v. Manlove*, 7 Blackf. 389; *Montgomery v. State ex rel. Southard*, 53 Ind. 108; *Weir v. State ex rel. Worl. (Ind. Sup.)* 68 N. E. 1023; *Bartlett v. Crozier*, 17 Johns. 439, 8 Am. Dec. 428, and cases there cited; *Austin v. Goodrich*, 49 N. Y. 266. In the leading case of *Spiers v. Parker*, 1 Durn. & East, 141, which was an action to recover a penalty provided for by statute, the plaintiff, in his declaration, negatived an exception found in the section providing for the penalty, pursuing the words of the exception. It was held that, as the plaintiff had not brought himself within the exception as construed by the court, his declaration was bad, even after verdict. We have a number of cases in this state in which it is held that if, by judicial construction, the meaning of an act has been narrowed, so that the provisions thereof do not, without some other element, constitute a crime, it is necessary to charge the offense so as to show that a crime has been committed. *Bates v. State*, 31 Ind. 72; *Manheim v. State*, 66 Ind. 65; *Schmidt v. State*, 78 Ind. 41; *State v. Welsh*, 88 Ind. 308; *Stropes v. State*, 120 Ind. 562, 22 N. E. 773. It was held by the Supreme Court of Massachusetts, in *Williams v. Hingham, etc., Turnpike Corp.*, 5 Pick. 341, after a consideration of the English authorities, that the rule of pleading relative to negating exceptions is applicable to cases of a civil nature. In *3 Elliott on Railroads*, § 1349, in speaking of employers' liability acts, it is said: "There can, of course, be no doubt that the general rules of pleading and evidence apply to actions against employers under the statute, except where they are changed by the statute."

Under section 2 of the act under consideration (section 7084, Burns' Rev. St. 1894) it was expressly provided that neither an employé nor his legal representative should be entitled to recover under the act in any case "where the injury results from obedience to any order which subjects the employé to palpable danger." This clearly shows one of the intended limitations upon the language of section 1, and with the repeal of said section 2 the liability in a given case must rest on the section containing the enacting clause. Not only do the rules of construction render it proper for us to construe the enactment in the light of the common law, but by the creation of a liability based on "negligence" we are required to look to common-law principles in determining the meaning of the General Assembly in the use of the term. As observed by Lord Cranworth in *Patterson v. Wallace*, 28 Eng. Law & Eq. 48: "In England, in Scotland, and in every civilized country a party who rushes into danger himself cannot say, 'That is owing to your negligence.'" The common law and statute be-

ing the very warp and woof of the law on which a claim of liability is asserted, we deem it clear that the exception must be implied in the very section which extends the responsibility of the master, and that the exception should be negative.

If the allegation that the appellee was "in the exercise of due care and diligence" can be said to amount to an averment of a want of contributory negligence, yet this does not show that the risk was not assumed. As said in *Indiana, etc., Co. v. O'Brien*, 160 Ind. 286, 65 N. E. 918, 66 N. E. 742: "Where a person has knowledge of and fully appreciates a danger, and under such circumstances, without any special exigency compelling him, he exposes himself to such danger or peril, his act in the premises may be deemed to have been voluntary. Contributory negligence in such a case cannot properly be said to be an element therein, for certainly the voluntary act of a party in exposing himself to a known and appreciated danger is wholly incompatible with an act of negligence or carelessness, for it must be manifest that carelessness in regard to a matter is not the same as the exercise of a deliberate choice in respect thereto. Freedom of the will, in fact, is the thing emphasized by the principle asserted in the maxim, 'Volenti non fit injuria.' It certainly must be true that in an act where design is shown the imprudence or negligence of the actor is wholly immaterial as a feature therein."

After a careful re-examination of the questions discussed in the brief of appellee on petition for a rehearing, our views upon such points, as expressed in the original opinion, have been confirmed, rather than shaken. We therefore overrule said petition.

(161 Ind. 667)

SELBY v. STATE.

(Supreme Court of Indiana. Jan. 12, 1904.)

FORGERY—UTTERING FORGED INSTRUMENT— INFORMATION—IDEM SONANS.

1. The names "John H. Veike" and "John H. Vieke" are idem sonans; so that two counts of an information, one charging the forgery of one name and the other the forgery of the other name, are not improperly joined.

2. An information for uttering a forged instrument, which alleges that defendant passed it to M., is sufficient without showing how it was passed.

3. An information is not bad because in one count, charging that defendant passed the forged note to M., with intent to defraud "one" M., and in another count charging that the forged note purported to be signed by V. and was passed to M. with intent to defraud "one" V.

4. An information under Burns' Rev. St. § 2354, making forgery and knowingly uttering a forged instrument with intent to defraud offenses of the same class, punishable in the same way, which avers that defendant did feloniously and knowingly make, forge, counterfeit, utter, publish, and pass to M. as true and genuine a certain false, forged, and counterfeit note, with intent to defraud, in effect charges defendant

with both the forging and uttering of the note to M. as one single and continuous transaction, and as such is sufficient; and its language is not repugnant or inconsistent.

Appeal from Circuit Court, Knox County; O. H. Cobb, Judge.

John Selby appeals from a conviction. Affirmed.

James S. Pritchett, W. A. Cullop, and Geo. W. Shaw, for appellant. S. M. Emison, Pros. Atty., O. W. Miller, Atty. Gen., O. C. Hadley, W. C. Geake, and L. G. Rothschild, for the State.

HADLEY, J. Appellant was convicted of forging and uttering a false instrument by a jury upon affidavit and information in two counts, both of which were held good on motion to quash and on motion in arrest of judgment. The appeal questions the ruling of the court on these motions.

Each count of the affidavit alleges that the forged note was one purporting to have been executed by one John H. Veike to John Selby, and the copy set out in *hæc verba* shows a note signed by John H. Veike, payable to the order of John Selby. The first count of the information alleges that the forged note was one purporting to have been executed by one John H. Veike to John Selby, and the copy set out shows a note signed by John H. Vieke, payable to the order of John Selby. The second count of the information alleges that the forged note was one purporting to have been executed by one John H. Veike, without stating to whom, and the copy set out shows a note signed by John H. Veike, payable to the order of John Selby. In each count of both affidavit and information the person to whom the note was passed is alleged to be Louis A. Meyer. In the first count of both affidavit and information the person intended to be defrauded is alleged to be Louis A. Meyer, and in the second John H. Veike. In each count of both affidavit and information it is alleged that the defendant "did then and there unlawfully, feloniously, falsely, fraudulently, and knowingly make, forge, counterfeit, utter, publish, and pass to Louis A. Meyer, as true and genuine, a certain false, forged, and counterfeit promissory note." The principal question hinges on whether or not "John H. Veike" and "John H. Vieke" are idem sonans. Appellant contends for the negative, and insists that in sound and signification they are two distinct names, and that, as the forgery of the name of "John H. Veike" is alleged in one count, and the forgery of the name of "John H. Vieke" is alleged in the other, two distinct felonies growing out of two distinct transactions are charged, and improperly joined in the same action, for which the information should have been quashed.

We concede it to be well established in criminal prosecutions for forgery that the name charged to be forged must be proved

¶ 2. See *Forgery*, vol. 23, Cent. Dig. § 64.

as alleged in the indictment or information, and, when based on an affidavit and information, that the name alleged in the information as forged should accord with and be the same as that charged in the affidavit. It is not essential, however, that the names be spelled in the same way, or that they be correctly spelled. If substantially the same sound is preserved, a variant orthography will make no difference. The test always is, are the names as spelled *idem sonans*—have the same sound? "If the name is spelled differently," says the court in *Pinney v. State*, 156 Ind. 168, 59 N. E. 383, "from that of the accurate spelling, but nevertheless conveys to the ear, when pronounced according to the usual recognized rule of acoustics, a sound which is practically the same as the sound of the true name, * * * this is a sufficient designation of the person, and no advantage can be taken of the clerical error or variance." See this case for a collection of cases and illustrations. See, also, "*Tonges for Toenges*," *Selbert v. State*, 95 Ind. 477; "*Horick for Horrick*," *Evans v. State*, 150 Ind. 653, 50 N. E. 820. We are asked under these rules to say as a matter of law that "*Veike*" and "*Vieke*" are not *idem sonans*. To do this we must judicially know in some way that a transposition of the vowels "*ei*" in proper names changes the fixed pronunciation of the name. We have no such knowledge, either judicial or personal. The spelling and pronunciation of proper names is usually arbitrary, and it is a matter of common notoriety that many families spell their names differently, but pronounce them the same. We see much less reason for assuming, in considering the motion to quash, that when these particular letters are combined in a proper name, the correct and arbitrary pronunciation places the accent on the first vowel without reference to which one it is, than we have for assuming that the diphthong in popular usage often has the same sound without reference to which is the initial or which the final vowel, as in receive, believe, perceive, achieve, deceive, retrieve, and so on. In the full name of John H. Veike, alleged to have been forged, the only difference in spelling complained of is the transposition of the two vowels, and this seems so trifling as to make it very clear that a conviction or acquittal on the information would bar another prosecution for the offense charged in both counts, and that is all that should concern the appellant. We therefore hold that the names are *idem sonans*, and the same, and the counts not improperly joined.

2. It is alleged in each count of the information that the defendant "did feloniously, falsely, fraudulently, and knowingly make, forge, counterfeit, utter, publish, and pass to Louis A. Meyer, as true and genuine, a certain false, forged, and counterfeit promissory note purporting to have been made and executed by one John H. Veike to him,

the said John Selby, for the payment of \$35." The copy of the note set out shows that the note was payable to the order of John Selby. It is argued that, since it is averred that the false note was payable to John Selby, and the copy set out showed it was payable to the order of John Selby, the information is bad for ambiguity and uncertainty for failure to disclose how the note was passed to Meyer, whether by delivery, indorsement, or in any sufficient way to defraud Meyer. The essence of the crime of forgery and of uttering a forged instrument is the intent to defraud (*State v. Fidler*, 148 Ind. 222, 47 N. E. 464), and the precise manner of uttering or passing of a forged instrument is immaterial if accompanied with the felonious intent. The allegation that the note was passed to Meyer is the averment of a fact, and implies a passing or a transfer of title to the note, and is therefore sufficient.

3. In one count of the information it is charged that the forged note was passed "to Louis A. Meyer" with intent to defraud "one Louis A. Meyer," and in the other count it is alleged that the forged note purported to be signed by "John H. Veike," and was passed to Meyer with intent to defraud "one John H. Veike." It is contended that these averments fail to identify the persons alleged as intended to be defrauded as being the same persons whose names were connected with the forgery, and the information therefore insufficient. *Shinn v. State*, 57 Ind. 144, and *Yount v. State*, 64 Ind. 443, are relied upon as supporting the position taken. We cannot accept these cases as authority here. In neither of them was it shown by averment or copy of the forged instrument that the persons against whom the fraudulent intent was directed had any connection or relation with the forged note, and this is given as the reason for holding the indictment bad. The reason does not exist in this case. It would have been better pleading to have used the word "said" for the word "one" in the intent clause, but we cannot hold the information bad for failure to do so.

4. The last point made against the information is that it is void because it charges no offense. Counsel for appellant say in their fifth point: "To charge one with forging a forged note is like charging one with murdering a dead man. The expression is a solecism, and makes the whole charge bad for repugnancy." Repugnancy does not make a criminal charge bad when there is sufficient matter alleged to indicate the crime and person charged. Section 1825, Burns' Rev. St. 1901; *State v. Sarila*, 135 Ind. 195, 200, 34 N. E. 1129. Neither will an indictment or information be condemned for surplusage or informality when the language used charges a public offense with reasonable certainty. *Musgrave v. State*, 133 Ind. 297, 304, 32 N. E. 885, and cases cited. Another

well-established rule is admirably stated by Mr. Bishop in his *Crim. Proc.* vol. 1, p. 436, thus: "It is common for a statute to declare that if a person does this, or this, or this, he shall be punished in a way pointed out. Now if, in a single transaction, he does all the things, he violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore an indictment upon a statute of this kind may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of any one of them." *Rosenbarger v. State*, 154 Ind. 425, 56 N. E. 914. See, also, *Hobbs v. State*, 133 Ind. 406, 32 N. E. 1019, 18 L. R. A. 774, and cases cited. The statute upon which this prosecution rests (section 2354) makes forgery and knowingly uttering a forged instrument with intent to defraud offenses of the same class, and punishable in the same way, and it is manifest that the pleader availed himself of the license afforded by the rule thus stated, and conjunctively united both offenses in the same charge as constituting a single transaction, and for which but a single penalty can be exacted. This he had the right to do. The averment that the defendant did feloniously and knowingly make, forge, counterfeit, utter, publish, and pass to Meyer, as true and genuine, a certain false, forged, and counterfeit note, etc., with intent, etc., in effect charges the defendant with both the forging and uttering of the note to Meyer as one single and continuous transaction, and as such a charge it is sufficient, and as charging both acts the language employed is neither repugnant nor inconsistent.

Judgment affirmed.

(32 Ind. App. 161)

WEST v. STATE.

(Appellate Court of Indiana, Division No. 2.
Jan. 7, 1904.)

INTOXICATING LIQUOR—SALE WITHOUT LICENSE—INFORMATION—PLEA IN ABATEMENT—EVIDENCE.

1. An information for the sale of intoxicating liquor without a license (a misdemeanor not within the exclusive jurisdiction of a justice of the peace) was founded on an affidavit made before a justice by the prosecuting witness, who had appeared in response to a subpoena not authorized by Burns' Rev. St. 1901, § 7811. The affidavit was filed with the clerk of the circuit court, and an information based thereon, without the knowledge or consent of the witness. *Held*, that the affidavit having been made before a person authorized to administer oaths in accordance with section 1748, subd. 5, in such a prosecution, the accused was not deprived of any right, of which he could complain, and there was no ground for a plea in abatement.

2. In a prosecution for the sale of intoxicating liquors without a license, testimony of the prosecuting witness that he was in defendant's place of business "along in June and April" of the year 1903, and, on calling for

showing that he was in the place of business of the defendant at the time the liquor was sold, is sufficient to sustain the information.

Appeal from Circuit Court,
ty; I. H. Kasper, Judge.

Edward West was indicted for
intoxicating liquor without license,
peals. Affirmed.

C. D. Hunt, S. R. Hunt, J. W. Hunt,
and Bays & Bays, Attorneys,
ler, Atty. Gen., C. C. Hunt, J. W. Hunt,
schild, and W. C. Genke, for the State.

COMSTOCK, J. Appeal from the
in the court below of selling liquor
uor without a license. The charges
are: First, the action of the State in
ing the demurrer of the appellant;
abatement of appellant; second, in
appellant's motion to quash the
information; third, in granting the
prosecuting attorney to sign his
information pending the consideration of
plea in abatement, and upon pleading
charge herein; fourth, in overruling
lant's motion for a new trial. We will
sider only the specification discussed by
pellant's counsel.

The plea in abatement alleges that the prosecuting attorney caused a subpoena to issue for the prosecuting witness, William H. Patton, from the court of David P. Cummins, commanding Patton to appear before said justice and answer questions concerning violations of the criminal laws of the state of Indiana, as provided by section 7811, Burns' Rev. St. 1901; that such evidence was reduced to writing and sworn to by Patton, after which the prosecuting attorney took the affidavit to the office of the clerk of the circuit court, and planted an information on the same, without the knowledge or consent of the witness William H. Patton. By this plea in abatement appellant challenges the jurisdiction of the Sullivan circuit court, because section 7811, supra, does not authorize the steps that were taken by the prosecutor and his deputy in this case. *Ellison v. State*, 125 Ind. 492, 24 N. E. 739, is cited. In the opinion the court say at page 496, 125 Ind., page 741, 24 N. E.: "The inquiry provided for by this statute is simply a preliminary step by which the court may acquire jurisdiction. It was a mode of procedure by the common pleas court by which it sought to charge and apprehend the offender. In the circuit court the mode of procedure has always been quite different. In that court the mode, in such cases, was to inquire by the grand jury into violations of the criminal laws of the state." In that case, at the request of the prosecuting

attorney, the clerk of the circuit court issued a subpoena for the appearance of the appellant before the judge of the circuit court at a certain hour to answer such questions as might be propounded to him by said prosecuting attorney touching his knowledge of any violation of the criminal laws of the state. He appeared in obedience to the command of this subpoena, and, when questioned as to his knowledge of certain violations of the law, he refused to answer, and was fined for contempt. The court held that the power conferred upon the common pleas court by section 3, Acts 1852 (2 Gav. & H. Rev. St. pt. 3, p. 430, c. 3), being section 7811, *supra*, and under which the examination was conducted, was not vested, upon the abolition of such court, in the circuit court, and that therefore appellant was not in contempt. In the case before us the witness appeared in obedience to the subpoena, and made the affidavit in question. Had he refused to appear, or, having appeared, refused to answer questions or make the affidavit, he would not have been in contempt of court, under the foregoing decision. Subdivision 5 of section 1748, Burns' Rev. St. 1901, is pertinent to the question: "Whenever, either in term or vacation, any competent or reputable person has knowledge of the commission of any misdemeanor not within the exclusive jurisdiction of the justice of the peace, he may make an affidavit before any person authorized to administer oaths, setting forth the offense and the person charged in plain and concise language together with the names of the witnesses, and file the same with the clerk, who shall thereupon notify the prosecuting attorney thereof. The prosecuting attorney shall at once prepare and file an information, in term or vacation, in every case against the person charged in the said affidavit." The record discloses that the prosecuting witness, having knowledge of the commission of a misdemeanor not within the exclusive jurisdiction of a justice of the peace, made the affidavit before a person authorized to administer oaths. The fact that the witness did not voluntarily appear before the justice would not destroy the validity of the affidavit upon which the information was founded; nor would an irregularity upon the part of the prosecuting attorney—one which did not prejudice the rights of the defendant—deprive the trial court of jurisdiction. It is manifest that section 7811, *supra*, was intended only to assist the district prosecutor in his efforts to discover violations of the law, for no grand jury was provided for the common pleas court, but the common pleas prosecutor was not limited to affidavits procured in the way prescribed.

It is alleged that the prosecuting attorney took the affidavit to the office of the clerk of the circuit court, and founded an information upon it, without the knowledge or consent of the witness. The knowledge or consent of the prosecuting witness to these acts

of the prosecuting attorney was not material. Defendant was deprived of no right by the acts of which he complains. It does not appear that the prosecuting witness made any objections to these proceedings. The statement in said plea that the affidavit was not filed with the clerk of the circuit court is contradicted by the record, which shows that the same was filed June 10, 1903.

In support of one of the reasons for a new trial, it is claimed that the evidence is not sufficient to support the verdict, for the reason that it does not show when the sale of the liquor charged took place. The prosecuting witness testified that he was in defendant's place of business along in June and April of this year 1903; that he went into the defendant's place of business and got a drink (asked for hop ale); was waited upon by appellant; got what he called for, and drank it; paid for it; and that it was intoxicating. This fixes the time with sufficient definiteness.

The court permitted one Virgil Stark, a witness for the state, to testify that he had bought and drank hop ale at other places than at defendant's; that it was intoxicating. He testified that he did not see prosecuting witness drink, and did not know what he drank. It is claimed that this was error. It was competent for the purpose of showing that hop ale was intoxicating liquor.

This opinion is not in conflict with the authorities cited by appellant's counsel in support of the proposition that the criminal procedure of the State is statutory, and that the method prescribed must be strictly followed. Under section 1748, *supra*, an information must be based upon an affidavit by a reputable person before an officer authorized to administer oaths. That the prosecuting witness could not have been punished for contempt, had he refused to make it, furnishes no ground for abating the action. In that event there would have been only a lack of jurisdiction to punish for contempt.

We find no error for which the judgment should be reversed. Judgment affirmed.

WILEY, P. J., concurs in the conclusion.

(32 Ind. App. 119)

JONES v. PEOPLE'S STATE BANK OF BROWNSTOWN.

(Appellate Court of Indiana, Division No. 2.
Jan. 5, 1904.)

PATENTS—SALE—REGISTRATION—APPEAL—BILLS AND NOTES—CONSIDERATION—FRAUDULENT REPRESENTATION—TRIAL—QUESTION FOR JURY.

1. Rev. St. 1881, §§ 6054-6056, provide that a patent right cannot be sold unless registered in the county where sale is sought to be made, and requires that a note taken for the price must state that it was given for a patent right. Held that, in an action on a note, an answer that it was given for the exclusive right and privilege of using and selling for use a certain portable pantry in W. county, and the right to assign and transfer and transmit by descent to others his exclusive right, was insufficient to

show a sale of a patent right, as distinguished from an exclusive right to sell a patented article.

2. The law declared on an appeal is the law of the case on a second appeal.

3. In an action on a note, the answer alleged that it was obtained by fraudulent representations, in that the payee made a pretended canvass of the county, and represented to defendant that he had procured a certain number of bona fide purchasers of a certain article at a certain price, and that the articles would readily retail at said price, and that he would furnish them at a much lower price to defendant, whereby he was induced to purchase the exclusive privilege to sell in that county, and gave the note sued on for such privilege. *Held*, that the representations as to the number of orders taken were representations of facts, and not opinion as to value, and the question as to whether they would deceive a man of ordinary business prudence was for the jury, and therefore the answer was not demurrable.

Appeal from Circuit Court, Bartholomew County; F. T. Hord, Judge.

Action by the People's State Bank of Brownstown against Halleck Jones. From a judgment for plaintiff, defendant appeals. Reversed.

A. H. Montgomery, D. A. Kochenour, and Marshall Hacker, for appellant. W. T. Branaman, for appellee.

COMSTOCK, J. Action was upon two promissory notes, payable in a bank of this state, each for the sum of \$150, executed by appellant to one Ed Wheeler, and by him indorsed to appellee before maturity. The action was commenced in the Jackson circuit court. The venue was changed to the Washington circuit court, and, upon a second change, was tried in the Bartholomew circuit court, resulting in a judgment in favor of appellee for \$400, including attorney's fee of \$100. The errors assigned question the rulings of the court on the separate demurrers, for want of facts, of appellee to the amended first, second, and third paragraphs, respectively, of appellant's amended answer. This is the second appeal of the cause. Upon the former appeal the judgment of the lower court was reversed because of defects in the answer (which consisted of two paragraphs) pointed out in *People's State Bank v. Jones*, 26 Ind. App. 583, 58 N. E. 852, 84 Am. St. Rep. 810. Upon the return of the cause to the lower court, defendant filed an amended answer of three paragraphs. The theory of the original answer was that the notes in suit were executed for an illegal consideration, in this: that they were executed for the sale and transfer of a patent right, or a right claimed to be a patent right, in violation of law. They were based upon sections 6054-6056, Rev. St. 1881. The paragraphs of the amended answer are drawn on the same theory, as to consideration, as were those held insufficient upon the former appeal. The answer, to be good, must aver facts showing that the consideration, in whole or in part, for which said notes were given, was a patent right, or a right claimed to be a patent right. The

averments of consideration in each paragraph are "that said notes were executed in consideration for the sale and transfer to him by one W. J. Gooch and the Portable Pantry Company of the *intangible* and exclusive right and privilege of *using* and selling for use a certain portable pantry in Warren county, Indiana, until the 1st day of July, 1903, *and the right, authority, and power to assign and transfer and transmitting by descent to others his exclusive right and privilege.*" The only amendments made in the first and second paragraphs since the reversal of the former judgment appear in the above underlined words. They do not materially change these paragraphs. The law declared upon the first appeal remains the law of the case. There was no error in sustaining the demurrer to the first and second paragraphs of the amended answers.

The third paragraph, after alleging the consideration for which the notes were executed, avers that they were obtained by and through fraudulent misrepresentations. That appellee purchased them with a knowledge of that fact, and cannot be regarded as an innocent holder, and cannot recover the consideration which the notes purport to represent. The fraudulent misrepresentations relied upon are that on the — day of September, 1897, the payee of the notes, one Edward Wheeler, and three or four other parties, began a pretended canvass of Jackson county, Ind., and procured the names of a large number of well-known citizens of said county for such portable pantries, for the pretended consideration of \$14.50 each; and, after procuring such orders, they, for the purpose of defrauding and deceiving appellant and other citizens of the county, at the time of the execution of said notes, falsely and fraudulently represented to appellant that they had procured orders from bona fide purchasers in said county, at the invariable price of \$14.50 each, for 1,500 pantries, and for less than three months' time, having canvassed only a small part of the county, and that they would furnish said pantries at \$8 each, and the same could be readily and generally sold at retail in said county, and elsewhere throughout the state, at the price of \$14.50 each, and that said exclusive right and privilege was a valuable right, and the owner thereof could easily make from \$8 to \$40 per day by canvassing and selling said pantries at said prices; and that he relied on the representations, and was deceived and induced thereby to execute the notes. The representations as to the number of orders taken from bona fide purchasers in Jackson county within the time stated are representations of fact, and not of opinion, as to value. Whether the representations considered in their entirety were such as would mislead or deceive a man of ordinary business prudence is a fact to be submitted to the jury under proper instructions of the court. See *Rauh v. Waterman*, 29 Ind. App. 350, 61 N. E. 743, 63 N. E. 42.

The judgment is reversed, with instruction to overrule the demurrer to the third paragraph of the amended answer.

(32 Ind. App. 166)

ZELLER v. ZELLER.

(Appellate Court of Indiana, Division No. 1.
Jan. 8, 1904.)

**ADMINISTRATRIX—SETTING ASIDE REPORT—
REPLY—DEMURRER.**

1. A sole legatee of an estate sued to set aside the report of the administratrix for want of notice of final settlement, and alleged failure to account for the assets. The answer alleged that the assets consisted of a mortgaged stock of merchandise; that, under a written contract between the parties, defendant bought the mortgage, and plaintiff gave a second mortgage for the amount due defendant on a claim against the estate; that the mortgage was foreclosed; that plaintiff thereafter sued, and, in settlement under a written agreement, defendant was to have credit on the purchase of the stock for the amount of her judgment, and pay the excess to plaintiff in consideration of a dismissal, and alleged full performance. The reply in avoidance alleged fraudulent representations by defendant as to her claim against the estate; that plaintiff entered into the contract relying upon the same; that defendant had made false entries in decedent's books; and that plaintiff had no access to them. *Held*, that the reply was demurrable, as it showed no rescission of the contract or offer by plaintiff to restore the consideration received, nor did it plead facts sufficient to constitute fraud, nor show that these matters were not known at time of dismissal of other suit.

Appeal from Circuit Court, Huntington County; C. W. Watkins, Judge.

Action by Franziska Zeller against Anna B. Zeller, executrix of William A. Zeller, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Watkins & Morgan, for appellant. Lesh & Lesh, for appellee.

ROBINSON, J. In September, 1899, appellee's final report as executrix of the will of William A. Zeller, deceased, was approved, and she was discharged. In June, 1902, appellant filed a petition to set aside the report and reopen the estate, alleging that she is the sole legatee of William A. Zeller, that she was not personally notified of the final settlement and did not appear, that the executrix had failed to account for all the property belonging to the estate, had converted assets to her own use, and had wrongfully taken credit for certain expenditures in connection with a stock of goods owned by decedent. The second paragraph of appellee's answer alleges that the assets of the estate consisted largely of a stock of boots and shoes, upon which was a mortgage executed by decedent to Carnahan & Co. to secure a note for \$1,038.59; that appellant, being desirous of a speedy settlement of the estate and the transfer to her of the stock of goods, entered into a written agreement with appellee, by the terms of which appellee was to and did become the owner of the Carnahan mortgage,

for which she paid \$1,081; that appellant was to and did give her note, secured by second mortgage on the stock, for \$1,419.81, which was the amount due appellee on a claim against the estate; that in consummation of this agreement, and pursuant to its terms, appellee was to and did make the final report now assailed; that appellee carried out the provisions of the contract, advanced the money, and took an assignment of the Carnahan mortgage and note, and took a note and mortgage for her individual claim, and made the final report; that afterwards, appellant having failed to pay the Carnahan note, appellee brought suit and recovered a decree foreclosing the mortgage; that appellant at such time was fully apprised of the matter set up in her petition; that thereafter appellant filed her petition to set aside the final report of appellee as executrix, alleging the same matters alleged in the petition herein; that the same issues were formed that are formed herein, and the parties were the same as the parties herein; that during the progress of the trial appellant and appellee made a full and complete adjustment of all the differences between them, and by an agreement in writing appellee was to and did purchase the stock of goods, and was to have credit on the purchase price for the amount of the above judgment, and pay the excess of the purchase price to appellant, in consideration that appellant was to, and did in fact, dismiss her petition; that appellee has fully performed all the provisions of the contract imposed upon her, and has taken possession of the stock under the appraisement as therein provided. The two contracts are made exhibits.

In appellant's second paragraph of reply—and the sufficiency of this reply against a demurrer is the only question argued—the execution of the contracts set out in the answer is admitted, and certain facts are averred by which it is sought to avoid the force and effect of these contracts. These averments are to the effect that appellee fraudulently represented that she had a valid claim against the estate; that appellant did not have access to the books of decedent until after she had dismissed her exceptions to the final report; that, believing these representations, she entered into the contracts; that all that was due appellee had been paid her by decedent; that, at the time appellant filed her former exceptions, appellee, to mislead the court and defraud appellant, had made false entries, erasures, and interlineations in the books of decedent at a time when decedent had no access to the books, in order that it might appear that decedent owed her a large sum of money; and that the estate is not indebted in any way to appellee. We think the demurrer to this reply was properly sustained. Aside from the fact that it is not shown that appellant had ever rescinded the contracts and offered to restore whatever consideration she may have

received, the reply does not plead sufficient facts to constitute fraud. The fact that appellant did not have access to the books of decedent may have been no fault of appellee's. It is not sufficiently shown that appellee made any representations that were false and were made with intent to defraud, that they were such as were likely to deceive a reasonably prudent person, that she acted upon such representations and was injured thereby, and that upon the discovery of the fraud she repudiated the transaction and offered to return whatever of value she may have received under the contract. The answers show that the contracts were executed and carried out by both parties. See *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Jones v. Mayne*, 154 Ind. 400, 55 N. E. 956. It is a well settled rule that fraud cannot be pleaded generally, but that the facts constituting the fraud must be pleaded. It is not sought in the petition to set aside the final report because of any wrongdoing on the part of the executrix in allowing an individual claim against the estate. It is not sufficiently shown that appellant did not know, or might not have known, all the facts when she voluntarily dismissed her former petition to set aside the report.

Judgment affirmed.

(32 Ind. App. 242)

ASHLEY et al. v. HENDERSON.*

(Appellate Court of Indiana. Jan. 14, 1904.)

APPEAL AFTER TERM—NOTICE TO APPELLEE—RULE OF COURT—DISMISSAL.

1. Where judgment was rendered at one term of court, an appeal prayed and granted and bond fixed at the same term, but no time was named within which the bond should be filed, the approval of the bond after the close of the term constitutes the proceeding an appeal after term.

2. Where an appeal after term is taken, notice to appellee is indispensable to the effectiveness of the appeal.

3. Where appellants in an appeal after term fail for more than 90 days to give appellee notice of the appeal, it will be dismissed, under rule 35 of the Appellate Court (27 N. E. vii).

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by William E. Henderson against Thomas Ashley and others. From a judgment for plaintiff, defendants appeal. Appeal dismissed.

J. A. Bryant, for appellants. Clarke & Clarke, for appellee.

PER CURIAM. Appellee files motion to dismiss the appeal for various reasons. It is only necessary to consider the following. No notice of the appeal has been served upon the appellee.

To perfect a term-time appeal, the following steps must be taken: "(1) An appeal must be prayed during the term at which the

judgment was rendered, and it must be granted during that term. (2) The penalty of the bond must be fixed and the surety named during the term at which the judgment was rendered. (3) The bond must be filed during that term and approved by the court, or the court must during that term fix a time within which the bond shall be filed, and it must be filed and approved by the court within the time designated. (4) The transcript must be filed in the office of the clerk of the Supreme Court within sixty days after the filing of the bond." Elliott's App. Proc. § 246. In the case before us, judgment was rendered at the May term of the lower court May 16, 1903. May 23, 1903, an appeal was prayed and granted to appellants to the Appellate Court. The appeal bond was fixed at \$300, but no time was named within which the bond should be filed. June 22, 1903, after the close of the May term of said court, a bond was approved. The transcript was filed in this court August 18, 1903. If the time of the filing of the bond governs, without reference to the date of its approval, the transcript was not filed in time. If the date of the approval of the bond governs, such approval was not within the May term, or within any time fixed by the court. The facts therefore fail to show a term-time appeal. It must be held to be an appeal after term. To constitute an appeal after term, while no bond is required, notice to the appellee is indispensable to the effectiveness of the appeal. No notice has been given.

Appellants having failed for more than 90 days to take any steps to bring appellees into court, the appeal is dismissed, under rule 35 of this court (27 N. E. vii). *O'Mara, Adm'r. v. Wabash Ry. Co.*, 150 Ind. 648, 50 N. E. 821; *Doak v. Root & McBride Co.*, 26 Ind. App. 138, 58 N. E. 444; *Holloran v. Midland Ry. Co.*, 129 Ind. 274, 28 N. E. 549.

(33 Ind. App. 270)

WILLIAMS v. MANLEY et al.†

(Appellate Court of Indiana, Division No. 1. Jan. 6, 1904.)

JUDGMENT—VOID JUDGMENT—ERRORS—ACTION TO REVIEW—TRIAL—PRESUMPTIONS.

1. A proceeding to review a judgment for error of law appearing in the proceedings and judgment is in the nature of an appeal, and is to be tried by the record alone; and it cannot be sustained unless the error be such as would reverse the judgment on an appeal.

2. Where, in a suit to quiet title, defendant sought to have title quieted in him subject to a life estate in plaintiff, but the court erroneously quieted title in defendant in fee, the judgment was not void, but merely erroneous.

3. Where, in a suit to quiet title, the court had jurisdiction of the subject-matter and the parties, but the judgment was erroneous because it granted greater relief to defendant than was authorized by the pleadings, but no motion was made to modify the judgment, and no objection and exception reserved in the

*2. See *Appeal and Error*, vol. 2, Cent. Dig. §§ 209, 2101.

*Transferred to Supreme Court, 76 N. E. 985.

†1. See *Judgment*, vol. 30, Cent. Dig. § 642.

†Rehearing denied. Transfer to Supreme Court denied.

trial court, the error could not be corrected in an action to review the judgment.

4. Where, in an action to review a judgment for defendant on his cross-complaint, the complaint alleged that the judgment was erroneous as not authorized by the pleadings, and that defendant had surreptitiously attached to his cross-complaint a paragraph which was foreign to the issues and formed no part of the pleadings, the allegation was not sufficient to overcome the presumption that it was attached before trial and considered by the court as a part of the pleadings.

Appeal from Circuit Court, Jay County; H. C. Fox, Special Judge.

Suit by Isabelle Williams against Peter B. Manley and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Frank H. Snyder and Dalley, Simmons & Dalley, for appellant. Elliott, Elliott & Littleton and Adair & La Follette, for appellees.

ROBINSON, J. A demurrer to an answer was carried back and sustained to appellant's complaint seeking to review a judgment. The action, resulting in the judgment sought to be reviewed, was brought by appellant against Manley and others to quiet title in the east half of the northwest quarter of section 14, in township 24 north, range 13 east, also the southwest quarter of same section, also 5 acres out of the northwest corner of the east half of the southwest quarter of the same section. Appellee Manley answered in denial, and also that he owned the land subject to the life estate of appellant in the undivided five-sixths part thereof. Manley also filed a cross-complaint, in the first paragraph of which he alleged he was the owner of the land in fee, subject to a life estate of appellant in the undivided five-sixths; and in the second paragraph he alleged that he was the owner in fee of the undivided seven-twelfths of the land, subject to the life estate of appellant "in and to the undivided five-twelfths of said real estate so owned by said cross-complainant"; each paragraph asking that he be declared the owner of the land "in fee simple, subject to said life estate as aforesaid." Appellant answered the cross-complaint, and replied to the answer by general denial. Upon a trial the court adjudged, among other things, that Manley owned in fee the east half of the northwest quarter, and the southwest quarter of the northwest quarter, of section 14, and that he owned the 5 acres subject to the life estate of appellant in five-sixths thereof. Appellant's motion for a new trial on the ground that the decision was not sustained by sufficient evidence, and was contrary to law, was overruled, and an exception reserved. It is further averred, in the complaint to review, that a paper purporting to be a third paragraph of cross-complaint by Manley is attached to the first and second paragraphs of cross-complaint, in which third paragraph

he avers that he owns in fee, and asks that his title be quieted to, the east half of the northwest quarter, and the southwest quarter of the northwest quarter, of section 14. but it is averred that "said pretended and feigned third paragraph of cross-complaint was not filed in said cause, and that there is no order-book entry of the filing of said pretended and feigned third paragraph, either in the said Jay circuit court or the said Adams circuit court; and plaintiff avers that said paper and said pretended and feigned third paragraph of cross-complaint is extraneous and foreign to the issues in said cause, and was surreptitiously attached to the said cross-complaint in two paragraphs in said cause, and for that reason is no pleading in said cause, and no issue was presented to said Adams circuit court upon said extraneous, feigned, and foreign third paragraph of cross-complaint, and the same is insufficient to support any judgment thereon in said cause." It is further averred that in that case the court erred in overruling appellant's demurrers to Manley's second paragraph of answer and his second paragraph of cross-complaint, in granting affirmative relief to Manley in the absence of any legitimate pleadings to support the same, in overruling appellant's motion for a new trial, and that the judgment is coram non iudice and void.

The only question presented by appellant is that the judgment quieting title against her was not within the issues submitted to the court in the action sought to be reviewed, and is therefore ineffective as against her. A proceeding to review a judgment for error of law appearing in the proceedings and judgment is in the nature of an appeal, and is to be tried by the record alone. Such a proceeding cannot be sustained unless the error be such as would reverse the judgment on an appeal. *State Bldg., etc., Ass'n v. Brackin*, 27 Ind. App. 677, 62 N. E. 91; *Traders' Ins. Co. v. Carpenter*, 85 Ind. 350; *Tachau v. Fiedeldey*, 81 Ind. 54; *Clark v. Hillis*, 134 Ind. 421, 34 N. E. 18; *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Richardson v. Howk*, 45 Ind. 451. The judgment of a court having jurisdiction of the parties and of the subject-matter may be erroneous, but it is not void. In the case at bar, the court had jurisdiction of the parties and of the subject-matter. All of the particular subject-matter embraced in the judgment was within the jurisdiction of the court. One of the issues presented was whether appellant owned this particular real estate. Appellee in his cross-complaint did ask affirmative relief. The prayer of his cross-complaint was that his title to a part of the real estate embraced in the judgment be quieted. So that the court not only had jurisdiction of the subject-matter embraced in the judgment, but, as to a part of the subject-matter, the judgment was clearly

within the issues made by the pleadings. The fact that a judgment gives a party more than his pleading shows he is entitled to does not make the judgment void. See *Barnes v. Bell*, 39 Ind. 328; *Bayless v. Glenn*, 72 Ind. 5; *McCormick v. Spencer*, 53 Ind. 550; *Stalcup v. Dixon*, 136 Ind. 9, 35 N. E. 987. We think the most that can be said is that the court awarded to appellee greater relief as to the particular subject-matter before it than he asked for in his cross-complaint. This objection goes to the form and substance of the judgment. But it does not appear that appellant made any objection to the judgment, or made any motion to modify the same in the trial court. It is well settled that upon appeal "the form or substance of a judgment cannot be first questioned in this court, but the question must be first presented to the court below by a motion to modify, which must specify wherein it should be corrected and modified, and the objection must particularly point out the defect or mistake complained of, and ask that the same be corrected. If the court rules against the party asking such correction, such ruling of the court below must be assigned as error in this court. Unless this is done, no objection can be made available for reversal here, however erroneous in form or substance such judgment may appear to be." *Evans v. The State*, 150 Ind. 651, 50 N. E. 820, and cases there cited. In *American Insurance Co. v. Gibson*, 104 Ind. 336, 3 N. E. 892, the court said: "It has uniformly been held that if no objection be made to the judgment, and no motion made to modify it in the trial court, no objection can be made available upon appeal, nor in an action to review, however erroneous the judgment may be. This rule has been applied even where judgment was rendered by default." See *Barnes v. Bell*, 39 Ind. 328; *Searle v. Whipperman*, 79 Ind. 424; *Baker v. Allen*, 92 Ind. 101; *McCormick v. Spencer*, 53 Ind. 550. From these authorities it follows that as the judgment is in part valid and in part erroneous, because granting greater relief than authorized by the pleadings, and as no motion was made to modify, and no proper objection and exception were made and reserved, in the trial court, the objection sought to be made to the judgment is not available in an action to review. Moreover, if the third paragraph of cross-complaint was before the court when the trial was had, the judgment was clearly within the issues. It is true that proceedings or motions in a cause, during its progress in term time, must be presented to the court, and its attention called thereto. But even if the third paragraph was simply attached to the other paragraphs as averred, the pleading does not show when this was done with reference to the trial. It may have been treated by the court as in the record, although no order-book entry showed its filing. The facts averred do not sufficiently show that it was

not considered a part of the cross-complaint by the court and also by appellant. If it was in fact attached to the other paragraphs before the trial, the presumption is that it was considered by the court as a part of the pleadings. The facts averred are not sufficient to overcome this presumption. We find no error in the record.

Judgment affirmed.

(34 Ind. App. 310)

PITTSBURGH, C., C. & ST. L. RY. CO. v. McNEIL.*

(Appellate Court of Indiana, Division No. 2.
Jan. 12, 1904.)

RAILROADS—NEGLIGENCE—MUNICIPAL CORPORATION—BACKING TRAINS—ORDINANCE—CONSTRUCTION—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—EVIDENCE—REJECTION—ERROR—CURE.

1. A city ordinance requiring the engine bell to be ringing when a train is running backwards within the city limits, and a "lookout" to be stationed at the rear end of such train to avoid accidents, is violated by those in charge of a freight train, which is cut in two at a street crossing, pushing a portion of the train backward over the crossing without warning, in order to couple it with the section on the opposite side of the crossing.

2. Where there is a conflict in the evidence, the finding of the jury controls.

3. In an action against a railroad for injuries caused to a boy about seven years old by backing a train of cars on him as he was crossing a street, the question whether he was guilty of contributory negligence in walking too close to the train is for the jury.

4. Where a city ordinance makes it unlawful for persons managing a train of cars to cause it to be run backwards in or through the city without providing a watchman on the rear end thereof in order to avoid accidents, neither the speed nor distance can be regarded as the essence of the act.

5. Where a city ordinance makes it unlawful for persons managing a train of cars to cause it to be run backwards in or through the city without providing a watchman on the rear end thereof, one traveling on a street in the city has a right, in the absence of some warning or evidence to the contrary, to assume that the railroad will obey the ordinance and cause the bell to be rung to give warning of the movement of the train.

6. Where evidence is refused but subsequently admitted, its subsequent admission cures any error committed by the first ruling.

Appeal from Superior Court, Marion County; James M. Leathers, Judge.

Action by George R. McNeil, by his next friend, against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 66 N. E. 777.

S. O. Pickens, for appellant. L. P. Harlan and Harding, Hovey & Wiltsie, for appellee.

WILEY, P. J. Action by appellee against appellant to recover damages for personal injuries claimed to have been inflicted by one

* 5. See *Railroads*, vol. 41, Cent. Dig. §§ 1072, 1187.

*Rehearing denied. Transfer denied.

of appellant's trains while running on the Belt Railroad in the corporate limits of the city of Indianapolis. The amended complaint was in a single paragraph, to which a demurrer was overruled. Overruling the demurrer to the complaint and the motion for a new trial are assigned as errors.

The negligence relied upon is backing a train within the corporate limits of the city of Indianapolis, in violation of a city ordinance, which is set out in the complaint. This ordinance requires the engine bell to be ringing when a train is running backwards within the city limits, and that a "lookout" be stationed at the rear end of such train to avoid accidents. The complaint avers that appellant was running one of its trains over and along the Belt Railroad; that at Fountain street said train stopped, and was divided; that the rear car of the front section stood across the sidewalk on the east side of said street, and obstructed said sidewalk; that appellee was traveling on said street, going to his home, and in so doing had to cross the railroad track; that when he was crossing said track the front section of the train was "carelessly and negligently, suddenly and violently, pushed backward without the ringing of any bell, and without any notice or signal or warning, and without any one at the rear of the train to give warning to travelers, whereby he was knocked down," etc. It is argued by counsel for appellant that it is not a violation of the ordinance for those in charge of a freight train, which is cut in two at a street crossing, to push a portion of the train backward over the crossing without warning, in order to couple it with the section of the train on the opposite side of the crossing. In support of the position assumed by appellant's counsel we are cited to the case of the Lake Shore, etc., Co. v. Pinchin, 112 Ind. 592, 13 N. E. 677. That case is so unlike the one at bar that it does not lend any aid to appellant. There the appellee undertook to pass between two cars of a through freight train while they were coupled together and the train had been temporarily stopped, but was moving slowly when he attempted to pass between the cars. The complaint before us was sufficient to withstand a demurrer. Louisville, etc., R. Co. v. Bates, Admr., 146 Ind. 564, 45 N. E. 108; Rodgers v. Baltimore, etc., R. Co., 150 Ind. 397, 49 N. E. 453.

A brief statement of the material facts exhibited by the evidence is important before taking up the questions presented by the motion for a new trial. Appellee was a little over seven years old. On the day he was injured he had been away from home, playing with his cousins, and when injured was on his way home. To reach home he had to cross Fountain street, and when he reached said street appellant's train was standing on the track, cut in two. From Fountain street for nearly a mile to the east or northeast there is a steep grade which

heavy trains are unable to ascend. It was customary for trainmen to divide their trains into two sections at the foot of the grade, and to take each section separately over the hill. This had been done in this instance, and while the forward section was in motion appellee in some manner fell or was knocked under the train, whereby his left foot was crushed, and the leg had to be amputated between the ankle and knee. There is a sharp conflict in the evidence as to how the injury occurred. Appellee testified that he was returning home from a neighbor's house; that when he came to the railroad tracks there was a train standing on the crossing; that the train had been divided so that there was room for wagons to pass between the two sections; that as he was passing across the track the forward section of the train "kind of gave a slack" and backed down upon him. A boy 13 years old, who lived near where the accident occurred, and who was wholly disinterested, testified that appellee was trying to jump on the side of the freight car while the train was in motion, when he slipped, and was thrown under the wheels. This witness was the only one, beside the appellee himself, who saw the accident. He was standing in the door of his home, and testified that he saw appellee jump on the car twice before he was injured. The statements of this witness, however, are somewhat weakened by proof of the fact that on other occasions he made statements which were contradictory of his sworn evidence. The jury evidently accepted appellee's statement of the manner in which he was injured, and in face of the conflict in the evidence we are bound by it.

The appellee introduced an ordinance of the common council of Indianapolis, making it the duty of those in charge of a locomotive to ring the bell when the same shall be running in or through said city, and providing that it shall be unlawful for persons managing a train of cars to cause the same to be run backwards in or through the city without providing a watchman on the rear end of such train in order to avoid accidents. There was no watchman on the rear of the forward section of the train, and it is not clear from the evidence as to whether the bell attached to the locomotive was ringing. None of the employes saw the accident, and did not know of it for some time after it occurred.

Several questions are presented by the motion for a new trial based upon alleged errors of the court in giving and refusing to give certain instructions and in refusing to admit certain evidence offered by appellant. Appellee's account of the manner in which he was injured is best told in his own words. He was asked the following question: "Just tell the jury, as you were crossing the tracks, what happened to you;" to which he answered: "Why, the train kind of gave a slack, and backed back, and knocked me so

when I turned around, one foot—my left foot—was on the track, and I kind of fell back, and the other foot was back of me, and I leaned back kind of, and it came back, struck it, and knocked me over.” On cross-examination he was asked and answered the following questions: “When you got there, and started to walk around the end of the car, after you got behind it, it moved? A. It gave a slack and backed back. Q. It gave a slack and backed back? A. Yes, sir. Q. What do you mean by slack? A. Well, it just moved back a little.” Appellant insists that, assuming appellee was injured in the manner stated by him, and by a movement of the cars as indicated by his own evidence, still it is not shown by the evidence that it was guilty of any actionable negligence. Under the averments of the complaint the negligence charged was in moving the train backward within the corporate limits of the city of Indianapolis without ringing the bell, and without having a man on the rear car to give warning, in violation of the city ordinance. Either the omission to ring the bell or the failure to have a watchman on the rear of the train would be a violation of the ordinance, if in fact the train was moved backward in the city, within the meaning of the ordinance. Appellant’s insistence is that the mere moving of the train back to give the slack so as to start it forward was not running a train of cars backwards in or through the city, within the meaning of the ordinance. If it was not, then no negligence was shown.

It is hardly necessary to remark that the purpose of the ordinance is for the better protection of life and limb of travelers, and a guard for their safety in passing over railroad tracks. The object to be attained by the municipal authorities in the passage of such an ordinance cannot be too highly commended. By cutting the train in two at the street crossing, leaving one section of it west of the street and the other section east, with a wide passageway between, was an invitation to the public to pass through. Under such facts passengers upon the street had a right to assume that they could safely cross appellant’s track. The evident purpose of appellant in cutting the train in two at that point was to make a safe way for travelers to pass to and fro. In the language of the appellee, the train gave a “slack and backed back.” The evidence does not show how far it backed. It is clear, however, that it had to be backed from seven to eight feet at least to have inflicted appellee’s injury. It having moved that distance, was it run “backwards” in the city, within the meaning of the ordinance? This inquiry must be answered in harmony with the purpose of the ordinance and in relation to the place. We do not believe that it is within the power or province of the court to lay down any fixed rule, and we must decide the question in the light of the facts in

this particular case. The front end of appellant’s train was standing on a steep ascending grade, with its south end obstructing the north sidewalk of the street. Appellee was on that side of the street. The place was dangerous, and yet he, with other travelers, had a right to pass. A slight movement of the train might imperil the life and limb of one who was rightfully crossing, as evidenced by appellee’s injury. If appellant had backed its train entirely across the street, which was 60 feet wide, so as to couple to the rear section, it could not be contended with any degree of reason that that would not have been running in backward in the city in violation of the ordinance. This being true, how can we say that the distance it was run back was not also violative of the ordinance, in the absence of some one on the rear car to give warning? The fact, as shown by the record, that no one connected with the train saw or knew of the accident at the time, is proper to consider in determining appellant’s negligence, in that the train was moved backward without any attempt being made by appellant to give necessary warning. In the oral argument of this case counsel for appellant conceded that the language of appellee in describing the movement of the train might bear the construction not only that the train gave a slack, but also that it moved back. The language of the boy is certainly susceptible of that construction, and, being so, it is fatal to appellant’s position. In *Lake Shore, etc., R. R. Co. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812, it was held that backing a train of cars across a street at the rate of eight miles per hour, without sounding the whistles or ringing the bell on the locomotive, and with no one on the car to give warning, was negligence. *Stoy v. Louisville, etc., R. R. Co.* (Ind. Sup.) 66 N. E. 615-617; *McWilliams v. Detroit, etc., Co.*, 31 Mich. 274; *Robinson v. Western, etc., Ry. Co.*, 48 Cal. 409. If it is negligence to back a train of cars across a public street at eight miles an hour without any warning or watchman on the rear, it would be negligence to thus back it part way across. In the case before us it is not disclosed by the evidence the rate of speed, nor the exact distance the train moved, yet, under the facts showing that it moved backward far and fast enough to inflict the injury complained of, the speed and distance cannot be regarded as the essence of the act.

We have examined the authorities cited by appellant in support of its position that the evidence does not show any negligence on its part, but they do not give support to it, not being applicable to the facts before us. On this branch of the case our conclusion is that the evidence establishes appellant’s negligence.

Appellant insists that appellee ought not to recover, because the evidence shows he was guilty of contributory negligence, in that

he undertook to pass the rear end of the train in such close proximity. The evidence shows that he was within about three feet of it. The question of appellee's negligence was properly submitted to the jury, and under the authority of *Cleveland, etc., R. R. Co. v. Penketh*, 27 Ind. App. 210, 60 N. E. 1095, we must hold that appellee was not guilty of contributory negligence.

Appellant complains of instruction 8 given by the court on its own motion, and its refusal to give instructions Nos. 2, 3, and 4, tendered by it. All these instructions relate to the question of appellant's negligence as applied to the facts disclosed by the evidence. The instruction given is in harmony with the views above expressed, and is a correct exposition of the law. Those refused are in direct conflict with what we have said on the question of appellant's negligence, and we must hold that they were properly refused.

The court gave the following instruction: "(10) In the absence of some warning or evidence to the contrary, the plaintiff had the right to assume that defendant would obey said ordinance, and cause the bell attached to said locomotive to be rung to give warning of the movement of its train. Whether or not the bell was so rung in compliance with said ordinance is a question of fact for you to determine from all the facts and circumstances shown by the evidence. If you find from the evidence that the bell was not rung, then I instruct you that, in determining the question, the plaintiff was or was not guilty of contributory negligence, you may, in connection with all other facts and circumstances shown by the evidence, consider that plaintiff had a right to assume that, if said train should be moved backward, some warning of such movement would be given him by the ringing of the bell, as required by said ordinance." Appellant insists that this instruction does not correctly state the law, and relies on the case of *Louisville, etc., R. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863, as supporting that insistence. The instruction which appellant requested be given in that case is so radically different from the one under consideration that it cannot be regarded as authority here. Under the authority of *Louisville, etc., Ry. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128, the instruction as given correctly stated the law. The particular objection urged to the instruction is that it told the jury that appellee, in the absence of some warning or evidence to the contrary, had the right to assume that appellant would obey the city ordinance, etc. In *Cleveland, etc., Ry. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37, it was said: "In the absence of some evidence to the contrary, we think the appellee had the right to presume that the appellant would obey the city ordinance," etc. "And while the wrongful conduct of the appellant in this regard would not ex-

cuse her from the exercise of reasonable care, yet in determining whether she did use such care her conduct is to be judged in the light of such presumption." That case is in harmony with the instruction here given. See, also, *Indianapolis, etc., R. R. Co. v. McLin*, 82 Ind. 435; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136. In *Chicago, etc., R. R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761, it was held that a traveler at a railroad crossing had a right to presume that the railroad company would obey the law. See, also, *Stoy v. Louisville, etc., R. R. Co.* (Ind. Sup.) 66 N. E. 618; *Malott (Receiver) v. Hawkins*, 159 Ind. 127, 63 N. E. 308. True, the failure to ring the bell or to have a man on the rear car when the train backed did not relieve appellee from the exercise of ordinary care. It was the province of the jury to determine the question of appellee's negligence in the light of all the facts pertinent thereto, and by its verdict determined it in his favor.

Considering the instructions as a whole, as we must, they were as favorable to the appellant as the facts and law warranted, and, so considered, they substantially stated the law. If there was any error in the refusal to allow certain evidence to go to the jury, it was subsequently cured by permitting appellant to introduce the very evidence that had been rejected.

Judgment affirmed.

(32 Ind. App. 183)

GRAHAM v. LOH et al.

(Appellate Court of Indiana. Jan. 12, 1904.)

JUDGMENT—FALSE RETURN—VACATION— FRAUD IN PROCURING JURISDICTION.

1. An action to vacate a judgment for fraud, predicated on a false return of the officer serving the summons, but in no way charging the holder of the judgment with fraud in obtaining it, cannot be maintained.

2. In an action to vacate a judgment for fraud, predicated on a false return of the officer serving the summons, neither an averment in the complaint that plaintiff's name was forged to the note on which the judgment was rendered, nor a long, unexplained delay in taking steps to enforce the judgment, is equivalent to a charge of fraud in procuring jurisdiction.

Wiley, J., dissenting.

Appeal from Circuit Court, Jennings County; Willard New, Judge.

Action by Elbridge G. Graham against Sarah A. Loh and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lawrence & Son, for appellant. Burt New, for appellees.

ROBY, J. To each of the three paragraphs of the appellant's complaint a demurrer for want of facts was sustained, and he appeals from the judgment rendered upon his refusal to further plead.

The appellee insists that the proceeding is

based upon the statute providing that the court "shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect and supply an omission in any proceeding or complaint on motion filed within two years." Section 399, Burns' Rev. St. 1901. In proceedings under this statute, it may be shown that no service of process was made upon the applicant. *Nietert v. Trentman*, 104 Ind. 390, 4 N. E. 306. The complaint herein was filed February 10, 1902. The judgment complained of was rendered October 10, 1895. The evident purpose of the pleader was to obtain the vacation of the judgment on account of fraud. Construed according to its general tenor, it is not a proceeding to review or correct the judgment, but one in which the absolute lack of jurisdiction is claimed. *Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626; *Willman v. Willman*, 57 Ind. 500; *Cully v. Shirk*, 131 Ind. 76, 30 N. E. 882, 31 Am. St. Rep. 414. When a judgment has been procured by fraud, a proceeding to vacate it upon that ground is a direct, and not a collateral, attack. *Cotterell v. Koon*, 151 Ind. 182, 51 N. E. 235; *Adams School Tp. v. Irwin*, 150 Ind. 12, 16, 49 N. E. 806; *Asbury v. Frisz*, 148 Ind. 513, 47 N. E. 328; *Kirby v. Kirby*, 142 Ind. 419, 41 N. E. 809; *Brake v. Payne*, 137 Ind. 479, 37 N. E. 140; *Wilhite v. Wilhite*, 124 Ind. 226, 24 N. E. 1039; *Brown v. Grove*, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823; *Earle v. Earle*, 91 Ind. 27; *Hogg v. Link*, 90 Ind. 349; *Nealis v. Dicks*, 72 Ind. 374. A judgment cannot be collaterally attacked for lack of jurisdiction when the infirmity does not appear upon the face of the record. *Thompson v. Harlow*, 150 Ind. 450, 50 N. E. 474; *Bank v. Hanna*, 12 Ind. App. 240, 39 N. E. 1054; *Denton v. Arnold*, 151 Ind. 188, 51 N. E. 240; *Freeman on Judg.* § 131.

It is averred in the first paragraph of complaint, in substance, that the judgment sought to be vacated was based upon a promissory note payable to appellee, and purporting to have been executed by appellant and William A. Graham and Samuel A. Tatem. Summons for defendant William A. Graham was issued upon complaint filed July 23, 1895, and placed in the hands of the sheriff; it being averred in the complaint that Tatem was dead, leaving no estate. Such summons was duly returned by said sheriff as served upon William A. Graham by reading, and upon appellant by leaving a copy at his last and usual place of residence, and judgment was thereafter rendered against both of said parties by default. Appellant further averred, and the facts relied on are, substantially, that he had not signed said note, nor authorized any person to do so for him; that he had not ratified its execution, and did not know that such note was in existence, or that suit had been instituted thereon, and a judgment rendered, until he received a letter, dated January 11, 1902, from the attor-

ney who appeared for appellee in said suit; that immediately upon receipt of such letter he called upon William A. Graham, who was his father, and was for the first time informed that said Tatem had forged his name to said note; that, when said William A. had been served with summons in said case, the sheriff had left a copy of said summons for appellant with said William A., and had not left the same at the last and usual place of residence of appellant, but that said copy was handed to said William A. not nearer than 20 or 30 yards from his house, and that said William A. then destroyed said copy, and purposely, willfully, and intentionally concealed from appellant the forgery of said note, and that a suit had been instituted thereon, and a copy of said summons had been left with him, to be given to appellant; that on July 26, 1895, and for three or four days thereafter, appellant and his wife were away from home, and he did not know that the sheriff had been at or near his home at any time with a summons in any action wherein he had been named as defendant until he was so informed by said William A.; that appellant was living in the same house with said William A. during the month of July, 1895. The record, therefore, upon its face, shows jurisdiction; and the sufficiency of the pleading depends upon whether its further averments show that such jurisdiction was procured by fraud, vitiating the judgment thereafter rendered. Other averments are intended to show appellant's ignorance of the whole matter, and that he would have defended himself in said action, had he had any notice thereof. It is averred in the third paragraph that appellee, at the time she received said note, and at the time judgment was rendered thereon, by the exercise of diligence, could have known that the same was a forgery. Various evidentiary facts are also set up, the statement of which is not necessary to the decision.

The judgment cannot be vacated for fraud in the cause of action, but only for fraud in obtaining it. *Brake v. Payne*, supra; *Spencer v. Spencer* (Ind. App.) 67 N. E. 1018; *State v. Holmes*, 69 Ind. 589. The pleading does not charge fraud against appellee, and the question is whether the fraud of others is sufficient, as against her, to invalidate a judgment regular on its face. The unblemished equity of appellant is confronted by the public policy which requires that judgments shall be judged by the record, and judicial decrees be as they purport to be—final. Such policy is not controverted by attacks made on account of fraud practiced by the parties, whereby an appearance of jurisdiction is secured, for fraud vitiates everything that it touches—judgments as well as contracts. *Freeman, Judgments*, § 99. But when the fraud is that of others than the plaintiff, who has proceeded in due course of law, relying upon the return made by the officer showing service of process, relief extended

to a defendant, as here demanded, would destroy the finality of the record to such an extent and for such causes as to seriously impair the ends for which courts are organized and litigation prosecuted. In *Adams School Township v. Irwin*, supra—a proceeding brought to vacate a judgment for fraud—it was held that a judgment against a township fraudulently permitted by its trustee could not be set aside; it not appearing that the plaintiff had been guilty of any fraud or misconduct in obtaining it. *Cicero Township v. Picken*, 122 Ind. 280, 23 N. E. 763, cited and followed in the *Adams Case*, is to the same effect. In both these cases the person, because of whose fraud the judgments were attacked, had authority to act for the township, and the question of its own concurring negligence therefore entered into the discussions. In *State v. Holmes*, supra, it was said that "fraud between codefendants will not affect the plaintiff, however gross it may be. * * * A fraud that is all on one side cannot injure the other side." In *Nealls v. Dicks*, supra, it is said that the question in such cases is, "Was the prevailing party guilty of fraud in obtaining the judgment?" Handing a copy of the summons to the codefendant, 20 or 30 yards away from the house, did not authorize the sheriff to make return of service by leaving a copy of the summons at the last and usual place of residence. *Kibbe v. Benson*, 21 L. Ed. 741, 17 Wall. 625. The United States Supreme Court doctrine is expressed as follows: "Assuming the fact that Walker was not served with process, can the bill, in this event, be maintained? The respondents did no act that can connect them with the false return. It was the sole act of the marshal, through his deputy, for which he was responsible to the complainant, Walker, for any damages that were sustained by him in consequence of the false return. This is free from controversy. Still the marshal's responsibility does not settle the question made by the bill, which is, in general terms, whether a court of equity has jurisdiction to regulate proceedings, and to afford relief at law where there has been abuse in the various details arising on execution of process—original, mesne, and final. If a court of chancery can be called on to correct one abuse, so it may be to correct another, and, in effect, to vacate judgments where the tribunal rendering the same would refuse relief either on motion or on proceeding *audita querela*, where this mode of redress is in use. In cases of false returns affecting the defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made. If the relief cannot be had there, the party must seek his remedy against the marshal." *Walker v. Robbins*, 55 U. S. 584, 14 L. Ed. 552; *Knox v. Harshman*, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. Ed. 586; *Taylor v. Lewis* (Ky.) 19 Am. Dec. 135; *Preston v. Kindrick* (Va.) 27 S. E. 588, 64 Am. St.

Rep. 779. The averment in the complaint that the appellant's name was forged to the note upon which the judgment against him was rendered is not equivalent to a charge of fraud in procuring jurisdiction. *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. Neither is the long, unexplained delay of appellee in taking steps to enforce her judgment, equivalent thereto. It might very well be, had the averment been made that jurisdiction was procured by reason of fraud upon her part, that the circumstances existing would have justified the trial court in finding for appellant upon that issue. Such allegation was not made. In its absence the matter is not precluded by the judgment herein. Appellant's argument based upon the circumstances connected with the transaction lacks persuasive force when addressed to a matter of pleading. Addressed to the weight of evidence, its weight would be for the trial court. Judgments are designed to end controversies. They ought not to be more easily vacated for fraud than contracts are. That a party is benefited by a contract obtained by fraud to which he was not a party does not necessarily result in rendering it invalid as to him. *Morris v. Whitmore*, 27 Ind. 418; *Horshman v. Paxon*, 16 Ind. 512; *Jones v. Swift*, 94 Ind. 520; *Lepper v. Nuttman*, 35 Ind. 384; *Bank v. Cockrum*, 64 Ind. 595; *Jenners v. Howard*, 6 Blackf. 240; *Craig v. Hobbs*, 44 Ind. 363.

Judgment affirmed.

HENLEY, C. J., and ROBINSON, COM-STOCK, and BLACK, JJ., concur. WILEY, J., dissents.

(32 Ind. App. 229)

CHICAGO & E. I. R. CO. v. SYSTER.

(Appellate Court of Indiana, Division No. 2.
Jan. 14, 1904.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—STATUTE.

1. Under Burns' Rev. St. 1901, § 568, providing that a new trial may be granted for material newly discovered evidence which the party applying for could not, with reasonable diligence, have discovered, an affidavit of a person who had denied knowledge of the case until after the trial, from which it appears that, had affiant testified, a different result might have followed, entitles the party applying therefor to a new trial.

Appeal from Circuit Court, Clay County; P. O. Colliver, Judge.

Action by John F. Syster against the Chicago & Eastern Illinois Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

George A. Knight, for appellant. Coffey & McGregor, for appellee.

ROBY, J. This action was brought by appellee to recover damages averred to have been sustained by him in leaving a train of

¶ 1. See New Trial, vol. 27, Cent. Dig. §§ 212, 228.

cars about to collide with another train. It was conceded at the trial that, if appellee was then injured, appellant was liable. This issue of fact was litigated. Appellee was suffering at the time of the trial from a rupture. The collision occurred March 5, 1901. In September, 1900, he got the employment of mine boss in which he was engaged at the time of the collision, and in July, 1901, took service on a street car, which continued until September, 1901, when he secured employment as a brakeman at Mattoon, Ill. He testified that he jumped from a car and felt a burning sensation in his groin; that he immediately thereafter went out to flag a train; that about three weeks or a month later he discovered a knot in his groin. In May, 1901, he went to see a doctor, who told him he was ruptured, and prescribed a truss. His complaint was filed May 17, 1901. There was testimony to the effect that he made complaint to various persons at various times. There was also testimony to the effect that he had stated to a number of persons that he was not hurt at the collision. On his direct examination he testified that he had never received any other injury in the region named than the one designated. There was much other testimony, but enough has been stated to indicate that the fact in dispute was involved in uncertainty. A verdict was returned for \$1,100. Motion for a new trial overruled, and judgment on verdict. The only error assigned is that the court erred in overruling such motion.

The ground for a new trial, stated, was on account of newly discovered evidence, to wit, that of one William Ball, whose affidavit is brought into the record, with others, by a bill of exceptions. The substance of Ball's affidavit is that for three years before the collision heretofore referred to, and for about a year thereafter, he worked with appellee, and was brought into continuous association with him each working day; that plaintiff prided himself on his skill in wrestling, and about three months prior to the date of said collision "engaged in a friendly trial of skill" with affiant occupying three or four minutes; that affiant threw plaintiff, and fell upon him "very hard"; that his knee struck the abdomen just above plaintiff's groin, rendering him unable to regain control of himself for some moments, and causing great pain, of which, and its continuance, he thereafter complained; that about $2\frac{1}{2}$ to 3 months after said collision plaintiff attempted to start a bank car of coal with an iron hook used for that purpose, but was unable to do so, laid down the hook he was using, and said, "Bill, I believe I have broken something loose in my bowels; it feels just like it did that day in the engine room." Appellee's learned counsel in argument say: "If it can be said that the testimony of William Ball is something more than cumulative, then it was shown by counter affidavits that he was such a monumental liar that no one could be-

lieve him." The weight of evidence is for the jury. When the testimony on both sides is delivered in court and subjected to the scrutiny there possible, the truth is more likely attained than when only part of the testimony is presented. It might be that, if Ball had testified on the prior trial, a different result would have followed. *Jackson v. Swope*, 134 Ind. 111-114, 33 N. E. 909. The affidavits show that he denied knowledge of the case until after the trial, when he says for the first time he spoke about it in the presence of persons not connected with the appellant company. The courts are slow to grant new trials on account of newly discovered evidence for reasons that have been fully stated. *Hines v. Driver*, 100 Ind. 315; *Morrison v. Carey*, 129 Ind. 277, 28 N. E. 697; *Elliot*, App. Prac. § 857. The statute is, however, that a new trial may be granted in the following cases: "Seventh, newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial." *Burns' Rev. St. 1901*, § 568. The evidence referred to relates to an independent, distinct, and material fact. Counsel has not suggested anything appellant should have done to secure the evidence that it did not do, and nothing occurs to the court. *Blackburn v. Crowder*, 110 Ind. 127, 10 N. E. 933.

Judgment reversed, and cause remanded, with instructions to sustain motion for new trial, and for further proceedings.

(32 Ind. App. 193)

CHANEY v. OHIO & I. OIL CO.

(Appellate Court of Indiana, Division No. 1.
Jan. 12, 1904.)

~~GAS-LEASES-CONSTRUCTION-TERM-ASSIGNMENT BY LESSEE-ACTION AGAINST ASSIGNEE-PRIVITY OF ESTATE.~~

1. Where a gas and oil lease provides that the lessee shall hold the premises for one year, and so long thereafter as oil and gas shall be produced in paying quantities, the lease expires at the expiration of one year, unless gas has been found in paying quantities.

2. An oil and gas lease was for one year, and so long thereafter as oil and gas could be produced in paying quantities; and it was provided that the lessee should drill a well within a certain time, and additional wells within a specified time, or be liable for a certain penalty. One well was drilled, but gas was not found in a paying quantity, and after the expiration of the year the lessee assigned the lease. *Held*, that the assignee of the lessee was not liable to the lessor for the penalties, there being no privity of estate.

Appeal from Circuit Court, Wells County; S. W. Cantwell, Special Judge.

Action by David Chaney against the Ohio & Indiana Oil Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

S. A. M. Butcher and Mock & Sons, for appellant. Dailey, Simmons & Dailey, for appellee.

¶ 1. See *Mines and Minerals*, vol. 24, Cent. Dig. § 200.

HENLEY, C. J. This action was to recover rental alleged to be due under a certain oil and gas lease. The amended complaint is in two paragraphs, which are substantially alike. It is averred: That appellant is the owner of the fee-simple title to certain described real estate in Jay county, Ind., and that he leased the same to one J. A. Graves for oil and gas purposes, and that the said Graves entered into and took possession of the leased premises at the date of the execution of the lease, to wit, the 14th day of April, 1896, and remained in the possession of the same until the 26th day of June, 1897, on which last-mentioned day the said Graves sold, assigned, and transferred all his right and interest in said leasehold estate to the appellee; and that on said last-mentioned day appellee entered into and took full possession of said leasehold estate, and has ever since been, and now is, the owner of, and in the possession of, said leasehold estate. That one of the conditions of said lease was the following: "If there is no well drilled on the southwest corner of the A. J. Bone farm within 60 days, this lease is null and void between both the parties." That pursuant to this condition the said Graves caused a well to be drilled in the southwest corner of the Bone farm. That it was further provided in said lease that: "Parties of the second part agree to complete a well in 30 days after the completion of the A. J. Bone well or this lease shall be null and void, unless the second party pay to the first party \$2.00 per day, in advance, until said well is completed, and one well every 60 days until there is eight wells completed, or second parties pay to first parties \$1.00 per day for each undrilled well until such wells are drilled, or forfeit this lease, except the land drilled on at the rate of ten acres to the well." That the said Graves caused a well to be completed on appellant's land, so leased as aforesaid, within 30 days after the completion of the Bone well. That said Graves and the appellee have wholly failed and refused to drill one well every 60 days thereafter until eight wells were drilled on said land, and the appellee has failed and refused to drill and complete the remaining seven wells as in said lease provided, and the said Graves and the appellee have wholly failed and refused to pay appellant the penalties and rentals stipulated in said lease for such failure to drill. In the light of what we will say hereafter in disposing of this case, it is unnecessary to further state the pleadings or to discuss any questions arising thereon. The cause was tried by the court without a jury, and the facts were found specially, and conclusions of law stated thereon. The special finding was as follows:

"The court, at the request of the plaintiff, makes the following special findings of facts and states conclusions of law thereon:

"(1) That on and prior to the 8th day of

April, 1896, the plaintiff, David Chaney, was the owner of and in possession of the south half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section 9, township twenty-four (24) north, range fourteen (14) east, in Jay county, Indiana, containing eighty (80) acres, more or less. (2) That on the said 8th day of April, 1896, the said plaintiff, David Chaney, executed to one J. A. Graves a certain oil and gas lease on and for the said real estate described in finding No. 1. (3) That said oil and gas lease mentioned in finding No. 2 was in words and figures as follows: [H. I. Exhibit A.] (4) That prior to the 15th day of June, 1896, the said J. A. Graves fully constructed and completed a well for the production of oil on the real estate belonging to one A. J. Bone, which well was the well mentioned in the lease described in the complaint. (5) That on or about the 15th day of June, 1896, the said J. A. Graves took actual possession of the real estate described in finding No. 1 by virtue of the lease described in finding No. 3, and before the last day of June, 1896, fully constructed and completed a well on said real estate for the production of oil, which well was completed within 30 days from the completion of the A. J. Bone well mentioned in finding No. 4. (6) That no other well except the well mentioned in finding No. 5 was ever constructed on said real estate described in said lease by J. A. Graves, or by any assignee of the said J. A. Graves, or by any one else by virtue of said lease mentioned in finding No. 3, and no rental or penalty paid to the plaintiff by the defendant or any one else on account of the failure to drill additional wells. (7) That said well mentioned in finding No. 5 never produced any gas, and never produced any oil after the 14th day of September, 1896, and no oil was ever produced on the real estate described in said lease after the said 14th day of September, 1896. (8) That between the 14th day of September, 1896, and the 1st day of December, 1896, the said J. A. Graves took all of his property of every kind whatever out of and from said well and off of the real estate described in said lease, and wholly abandoned said leasehold premises, and never had actual possession of said real estate for any purpose whatever after the 1st day of December, 1896. (9) That the defendant, the Ohio & Indiana Oil Company, never at any time had any possession whatever of the real estate described in finding No. 1, and mentioned in the lease described in finding No. 3, for the production of oil or gas, or for any other purpose whatever. (10) That said lease described in finding No. 3 by its own terms expired on the 8th day of April, 1897. (11) That on the 26th day of June, 1897, the said J. A. Graves attempted to assign by written assignment to the defendant, the Ohio & Indiana Oil Company, the lease mentioned in finding No. 3, which pretended written assignment was in words and figures as follows, to wit: "I, J. A.

Graves, of Chicago, Ills., in consideration of one dollar to me in hand paid by the Ohio & Indiana Oil Company, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and transfer all my right, title and interest in the foregoing lease, to the Ohio & Indiana Oil Company. Witness my hand and seal this 26th day of June, 1897. J. A. Graves.'

"Conclusion of Law: And as conclusion of law upon the above and foregoing facts the court finds the law to be: (1) That the plaintiff ought not to recover in this action, and that the defendant should have judgment for costs. S. W. Cantwell, Special Judge."

This lease provides: "The party of the second part, his heirs or assigns, to have and to hold the said premises for and during the term of one year from the date hereof, and so long thereafter as oil and gas can be produced in paying quantities." It has been decided that this clause means that the lease is for a definite term of one year from its date, and that this term, if enlarged, must be the result of the production of gas or oil in paying quantities within the year specified in the lease itself. If such a contingency does not happen, then the lease expires, and is of no avail between the parties at the end of the year. *Western Pennsylvania Gas Co. v. George*, 161 Pa. 47, 23 Atl. 1004; *Brown v. Fowler* (Ohio) 63 N. E. 76; *Cassell v. Crothers* (Pa.) 44 Atl. 446. In the case of *Brown v. Fowler*, supra, the habendum clause of the lease was as follows: "To have and to hold the same unto the lessee, his heirs and assigns, for the term of two years from the date hereof, and as long thereafter as oil or gas is found in paying quantities thereon." In construing this lease the court said: "This clause means that the term of the lease is limited to two years, but that if, within the two years, oil and gas shall be found, then the lease shall run as much longer thereafter as oil and gas shall be found in paying quantities; but, if no oil or gas shall be found within the two years, the lease shall, at the end of the two years, terminate, not by forfeiture, but by expiration of term, and after the expiration of said two years no further drilling can be done under the lease." It was found by the court that the lease here in question was executed on the 8th day of April, 1896, and that the lease, by its own terms, expired on the 8th day of April, 1897; that pursuant to one of the provisions of the lease said Graves drilled and completed a well for the production of oil on the real estate belonging to one A. J. Bone, and that on the 15th day of June, 1896, the said Graves took actual possession of the real estate described in the lease executed by appellant, and prior to the 1st day of June, 1896, fully completed a well on said premises for the production of oil, and that no other well was ever drilled on said premises by the said Graves, or by any

assignee of said Graves; and that no rental or penalty was ever paid by Graves or his assignee to appellant on account of the failure to drill additional wells. The finding further shows that the said Graves, before the end of the term, as provided in the lease, took all of his property of every kind and description off said premises, and wholly abandoned said premises, and never had any possession of the leasehold estate for any purpose whatever after the expiration of one year from the date of the execution of the lease. The finding further shows that the assignment and sale to appellee was made after the expiration of the term of the lease, and that appellee never had any possession of the land described in the lease for any purpose whatever. The appellee, not being a party to the lease, cannot be held by privity of contract, and, if liable at all, could only be liable by privity of estate. *Edmonds v. Mounsey*, 15 Ind. App. 399, 44 N. E. 196; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151. The appellee could not, therefore, become liable to appellant by privity of estate, because the lessee, Graves, at the time of the assignment to appellee, had no lease on the premises, and no interest of any kind whatever therein, and owned nothing under the lease capable of transfer.

Conceding, without deciding, that the complaint states a cause of action, appellant could not recover, for the reason that the special finding of facts shows that he has wholly failed by his evidence to sustain the material averments of his complaint. This being true, the other alleged errors assigned are not material.

Judgment affirmed.

(32 Ind. App. 199)

BERTRAM et al. v. STATE ex rel. LOWELL DREDGE CO. et al.

(Appellate Court of Indiana, Division No. 1. Jan. 12, 1904.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE—SUFFICIENCY OF SHOWING.

1. An application for a new trial on the ground of newly discovered evidence is not to be regarded favorably, but with distrust.

2. In order to obtain a new trial for newly discovered evidence, it is not enough to generally allege diligence in procuring the evidence at the original trial, but the facts constituting the pretended diligence must be set forth with such particularity, definiteness, and clearness that the court may itself see, on the face of the pleading, that there was, in fact, proper diligence.

3. A new trial for newly discovered evidence was properly denied where the application therefor merely showed that the newly discovered evidence was not known to one of the applicants at the time of the trial, and failed to show that it, or any part of it, was not known to the others, joint parties with him.

4. Facts held not to show sufficient diligence to entitle a party to a new trial for newly discovered evidence.

Appeal from Circuit Court, Fulton County; A. C. Capron, Judge.

¶ 2. See New Trial, vol. 37, Cent. Dig. § 210.

Independent action for a new trial by Sylvester Bertram and others against the state, on the relation of the Lowell Dredge Company and others. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

I. Conner and H. R. Robbins, for appellants. Holman & Stephenson and Nichols & Pentecost, for appellees.

BLACK, J. In an action in the court below brought by the state, on the relation of the Lowell Dredge Company, one of the appellees, on the bond of Sylvester Bertram, one of the appellants, as commissioner for the construction of a certain ditch, to recover for the construction of the ditch pursuant to a contract therefor between the commissioner and the relator—the other appellants being the sureties upon the bond—the issues tried being upon an answer of payment filed by all the appellants, and a counterclaim of the principal obligor alleging overpayment, the plaintiff obtained a finding and judgment against the appellants for the full amount of the bond. The case at bar was an independent action brought by the appellants to obtain a new trial for newly discovered evidence which it was claimed supported the answer of payment. The other appellees were made defendants to this proceeding, apparently because one of them was the president and the other the secretary and treasurer of the dredge company. The court sustained a demurrer for want of sufficient facts to the complaint for a new trial, and this ruling is questioned here.

In this complaint it is not stated when the action on the bond was commenced, but it is shown that an amended complaint was filed therein April 22, 1901, and it appears that the trial was had October 9, 1901. The purpose of the evidence which it was claimed had been discovered was to prove certain payments made by the appellant Bertram. It is shown that he was himself a witness on the trial of the original action, and it does not appear that he did not himself know of the facts to which the newly discovered evidence related; but it was alleged that he did not know at the time of the trial, or until after the term at which it was held, that the persons whose affidavits were exhibited with the complaint knew of or remembered the facts, or that he could prove the same, except that, as to one of the persons whose affidavits were so produced, it was alleged that the person so furnishing an affidavit had learned the facts relating to a certain alleged payment since the term of the trial. It was alleged that the principal obligor had used due diligence to procure the testimony which it was claimed he could produce on another trial, and, by way of showing such diligence, it was averred that he was an invalid, and part of the time confined

to his bed, and dangerously ill most of the time from the commencement to the trial of the suit, but he made inquiry of every one he could find who had any knowledge of the cause; that he had filed vouchers which showed an overpayment of the relator's claim, and he went to the clerk's office of the Starke circuit court, with whom they had been left and filed, but they had been taken from his custody by some unknown person; that he hired two persons named and other parties to make search for the missing vouchers, and spent several days hunting for them, but all to no purpose; that whenever he was able to ride he drove to different parts of the county of Starke and made diligent inquiry from every one whom he met that knew anything about his transactions with the relator; that he employed attorneys to help prepare his defense, but was too infirm and ill to properly acquaint them with all the circumstances surrounding the case; that he believes the vouchers and receipts filed by him in court have been clandestinely taken against his interests; that, despite all the diligence and effort he could make, he could not discover either of the causes set forth in the complaint for a new trial.

It is well settled that such an application for a new trial on the ground of newly discovered evidence is not to be regarded favorably, but, on the contrary, is to be viewed by the court with distrust. It is not enough to allege diligence to procure the evidence at the original trial, or to seek to show proper diligence by loose and general allegations of facts. The facts constituting the pretended diligence must be set forth with such particularity, definiteness, and clearness that the court may itself see on the face of the pleading that there was in fact proper diligence. If it can be said that the complaint under consideration showed that the alleged newly discovered evidence was not known to the principal obligor at the time of the trial, it is not in any manner sought to show that it, or any part of it, was not known to the other appellants, the sureties. This alone renders the complaint insufficient. *Berry v. Dally*, 30 Ind. 183. There is no attempt to show any diligence on the part of the sureties, and the averments by which it is sought to show that the principal obligor was sufficiently diligent fall short of the requirements of good pleading in such a case. If the principal obligor was too ill to consult with his attorney concerning the defense, it does not appear that he was forced into a trial over a proper showing to the court of such disability. The averments, while showing that he was able to go about and make inquiries, are not such as to furnish the court satisfactory assurance that proper inquiries were made of the right persons. The alleged newly discovered evidence related wholly to payments said to have been made by the principal obligor, a ditch commissioner. He knew be-

fore the trial, as appeared in evidence then given, as well as in this complaint, that the vouchers referred to were not on file in the clerk's office and could not be procured, and he must have known of the payments at the time he personally made them. Considering the character of the facts to which the alleged newly discovered evidence related, it would seem to be placing a premium upon negligence to grant a new trial upon such a showing. See *Hines v. Driver*, 100 Ind. 315; *Chicago, etc., R. Co. v. McKeehan*, 5 Ind. App. 124, 31 N. E. 831; *East v. McKee*, 14 Ind. App. 45, 42 N. E. 368.

Judgment affirmed.

(33 Ind. App. 233)

CITY OF MISHAWAKA v. KIRBY.

(Appellate Court of Indiana, Division No. 1.
Jan. 14, 1904.)

MUNICIPAL CORPORATIONS—NEGLIGENCE—DEFECTIVE SIDEWALK—CARE REQUIRED—VERDICT—INTERROGATORIES—INCONSISTENCY.

1. In an action against a city for injuries sustained by a pedestrian while walking over a cross-walk, the fact that the jury found specially that the walk was a "temporary" one did not warrant a conclusive inference that it was the duty of plaintiff to anticipate that injury would be liable to occur from walking over it.

2. No intendments will be indulged in aid of special findings, and if, taken in connection with other facts which might have been shown in evidence, they are not irreconcilably in conflict with the general verdict, they will not control it.

3. The fact that a pedestrian injured while walking over a temporary cross-walk by striking her foot against the rail of a street railway had known for several weeks that the cross-walk was a temporary one, and that there were street railway tracks at the place, did not impose on her a requirement to anticipate liability of injury from the projection of the rail.

4. The jury having found a general verdict in favor of plaintiff in an action for injuries sustained by her owing to her foot striking a street railway rail while walking over a temporary cross-walk, answers to interrogatories to the effect that there was a descent of two or three inches at the place where plaintiff took the step which resulted in her injury did not show her guilty of negligence, so as to control the general verdict; it not being found whether the descent was abrupt or gradual, but it being found that she did not know of it, and it not appearing that the rail was not obscured by the darkness of night.

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Action by Augusta Kirby against the city of Mishawaka. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Edward A. Howard and T. E. Howard, for appellant. McInerney & Wurzer, for appellee.

BLACK, J. In an action against the appellant, there was a recovery by the appellee, Augusta Kirby, of a judgment for damages for a personal injury suffered by the appellee while walking across Second street, at its intersection with Main street, in that

city, upon a wooden cross-walk, placed there because the street had been excavated in preparation for paving it; the appellee's injury being occasioned by her falling by reason of her striking her foot against an iron rail which projected upward from the surface, being one of the rails of a street railroad track which ran east and west, while she, in the nighttime, was walking northward upon the board walk; the crossing being in a central and populous portion of the city, and much used by pedestrians at all times.

With a general verdict for the appellee, the jury returned answers to interrogatories, and the action of the court in overruling the appellant's motion for judgment on the answers to the interrogatories is presented for our consideration. By their answers to interrogatories, of which there were 18, the jury specially found that the cross-walk upon which the appellee fell was a temporary crossing, and she knew at the time of the injury that it was a temporary walk; that she knew, and for several weeks prior to the injury she had known, that Second street, at the place of the injury, was torn up and excavated for the purpose of constructing a new pavement thereon; that at the time of the injury she knew that the cross-walk was made of planks, and there were two street railway tracks running across the cross-walk, on Second street; that, as she approached the cross-walk at the time of her injury, she was walking in the street, between the curb and the street railway tracks; that the south side of the cross-walk leading from the curb on the south side of Second street to the south rail of the street railway track was on a level with that rail; that, in order to reach the cross-walk, she had to step up from the bed of the street upon the south side of the cross-walk. "(9) Where plaintiff stepped over the south rail of the street railway track, was there a descent of two or three inches? Answer. Yes. (10) If you answer question 9 'Yes,' did plaintiff know of said descent as she took such step? Answer. No. (11) Where plaintiff took the second step, after crossing the south rail of the track, was there still a greater descent than that of passing over the south rail? Answer. Yes. (12) If you answer question 11 'Yes,' did plaintiff know of this fact as she took such step? Answer. No." It was further found specially that the north rail of the south track of the street railway track was above the plank walk between the rails as much as two to four inches; that, as she attempted to step over the north rail of the south track, she did not look to see where that rail was; that at the time of the accident she was walking at an ordinary, brisk walk; that, at the time she attempted to step over the north rail of the south track, she did not make any effort to feel her position as to that rail; that the injury in question occurred at a point where the north rail

¶ 2. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1577.

of the south track of the street railway company crossed the east walk on Main street, at the crossing of Second street, in the city of Mishawaka, Ind., and the injury to the appellee occurred by reason of a fall caused by her tripping her foot on the north rail of the south street railway track at that crossing, as she was attempting to step over that rail.

It is argued on behalf of the appellant that these special findings show contributory negligence so conclusively that they cannot be reconciled with the general verdict. In support of this position, it is suggested by counsel that greater care is required in the performance of acts at a place where injury is liable to occur than where no injury is to be anticipated, and that greater precaution is required of a person who has knowledge of danger and is familiar with the surroundings than of one who is ignorant of them. Though the crossing over which the appellee was walking is called "temporary" by the insertion of that word in interrogatories answered in the affirmative, it is not to be inferred conclusively that it was the duty of pedestrians to anticipate that injury would be liable to occur from walking over it. It is scarcely necessary to repeat the often-stated rule that no intendments will be indulged in aid of the special findings, but that if, taken in connection with other facts which might have been shown in evidence, they are not irreconcilably in conflict with the general verdict, they will not control it. It does not appear how long the wooden crossing had been in existence, or for what period it was intended to serve, though it is shown the appellee knew for several weeks that the street at the place of the injury was torn up and excavated for the purpose of making a new pavement. She also knew that there was a cross-walk there, made of planks, and that there were two street railway tracks there. It cannot be said that knowledge of these facts would necessarily impose a requirement to anticipate liability to injury from the cause by which the appellee was injured. In the absence of knowledge or notice of the danger which she actually encountered, she had the right to walk upon the crossing prepared for that use, exercising the care to be reasonably expected of an ordinarily prudent person under the circumstances. There was a descent of two or three inches where the appellee stepped over the south rail, but she did not know of this descent as she took the step, and where she took the second step after crossing that rail there was some greater descent—how much was not found—but she did not know of this descent as she took this step; and she did not look to see where the north rail was, or make any effort to feel her position as to it. It is not found whether these descents were abrupt or gradual. They, however, were such that she in fact did not know of their existence as she walked on in an ordinary, brisk walk. It does not appear from the special findings that she

could have seen the rail, or that it was not obscured or hidden by the darkness. Nor does it appear that there was not a good and sufficient reason why she walked in an ordinary, brisk walk, or that there was not some sufficient reason why she did not look for the unlawful obstruction, or feel her position with reference to it. Notwithstanding the particular facts specially found, we cannot say that it was not within the province of the jury to find, as they did in the general verdict, from all the evidence before them, which is not before us, that it was not sufficiently proved that the appellee did not exercise such care as might reasonably be expected of an ordinarily prudent person under the circumstances of the case; the burden of such proof being upon the appellant.

Judgment affirmed.

(32 Ind. App. 243)

RUSSELL et al. v. STATE.

(Appellate Court of Indiana, Division No. 2.
Jan. 14, 1904.)

ERECTION OF HIGH FENCE—PUBLIC NUISANCE —STATUTES—CONSTRUCTION.

1. Under Burns' Rev. St. 1901, § 2153 (Horner's Rev. St. 1901, § 2065), imposing a penalty on any person who maintains an obstruction to the free use of property so as to injure the property of another or essentially interfere with the comfortable enjoyment of life, and section 290, defining a nuisance as whatever is injurious to health or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, the erection of a fence 10 or 12 feet high on one's own property, shutting off the view of the public, and the view, light, and air of a neighbor, does not constitute a public nuisance or an infraction of the statute, though the fence was erected through motives of malice.

Appeal from Criminal Court, Marion County; Fremont Alford, Judge.

James A. Russell and another were convicted of maintaining a nuisance, and appeal. Transferred from Supreme Court. Reversed.

For opinion in Supreme Court, see 68 N. E. 1019.

Herod & Herod, for appellants. C. W. Miller, Atty. Gen., C. C. Hadley, W. C. Geake, and L. G. Rothschild, for the State.

COMSTOCK, J. The action was commenced by the state of Indiana against appellants, upon the affidavit of one August Haug, for erecting and maintaining a common nuisance, under section 2153, Burns' Rev. St. 1901 (section 2065, Horner's Rev. St. 1901). The cause was first tried before a justice of the peace. From the justice's court an appeal was taken to the Marion criminal court, in which court appellants were found guilty, and fined \$10 and costs. Appellants separately assign errors—Mary, that the affidavit does not state facts sufficient to constitute a

cause of action against her; James, that it does not state facts sufficient to constitute a cause of action against him; each, that it does not state facts to constitute an offense against the state of Indiana, and that the court erred in overruling their separate motions for a new trial. The affiant, Haug, owned a residence property facing Dugdale street, in Indianapolis, occupied by one Kintz and family as tenants. Appellants owned the vacant lot immediately adjoining on the south facing the same street, and the residence in which they lived, immediately adjoining on the north of affiant's property, facing said Dugdale street. Appellants caused to be erected a fence from 10 to 12 feet high wholly on their own land, beginning at the corner of their residence and running along a line from 6 to 12 inches from the line fence to the street; a like fence on their vacant lot, running from the corner of Haug's house to the street; and two screens of the same height, made of dressed pine boards, opposite two windows in Haug's house looking out upon appellant's vacant lot. These screens were about 4 feet wide, and placed about 5 feet from the windows. The fences and screens were erected because of ill feeling between appellants and the Kintzes. The evidence as to the reasons of their ill feeling is conflicting. The affidavit charges a common nuisance. So much of the statute as is material reads as follows: "Whoever * * * erects, continues or maintains any obstruction to the free use of property so as to injure the property of another or essentially to interfere with the comfortable enjoyment of life shall be fined," etc. By section 290, Burns' Rev. St. 1901, "nuisance" is defined "as whatever is injurious to health or indecent or offensive to the senses or an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property." It has been held that the injury referred to, whether to property or the occupants thereof, is physical. "Acts which do not reach the adjoining property in a physical sense, yet diminish its value and desirability for a particular use, as for dwelling-house purposes, do not, as a rule, constitute actionable nuisance." *Metzger v. Hochrein* (Wis.) 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841. Smoke, noise, and noisome smells may, from the property of an annoying neighbor, enter the premises of another, and thereby invade the legal right of him whose premises it reaches. Such right will be protected. In the case of *Metzger v. Hochrein* (by the Supreme Court of Wisconsin) 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841, it was held that to maliciously erect an unsightly, high, board fence on one's own property in such a way as to obstruct the passage of light and air and obstruct the view to and from a neighbor's dwelling, by reason of which its value is injured, and the use of the house as a dwelling house will have to be abandoned, is not an actionable

wrong. *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177, was a case in which L. and K. owned adjoining lots, and L. erected on his own lot a board fence reaching to the roof of K.'s house, which set upon the line of the lots, which fence shut off the light and air from the windows of the house of K., to his injury, which fence was so erected by L. for no useful or ornamental motives, but from motives of unmixed malice toward K. In the action by K. against L. to compel the removal of the fence, it was held that L. had a legal right to erect and maintain such fence, and that neither law nor equity could compel its removal. In *Glendon Iron Co. v. Uhler*, 75 Pa. 471, 11 Am. Rep. 599, *Jenkins v. Fowler*, 24 Pa. 308, and *Fowler v. Jenkins*, 28 Pa. 178, it is said that a lawful act is not actionable, although it proceeds from malicious motives. These decisions are upon the ground that malicious motives cannot make that wrong which in its own essence is lawful. In *Knabe v. Leveille* (Super. N. Y.) 23 N. Y. Supp. 818-824, it is held that the mere fact that a structure built by one upon his own land obstructs the view and shuts off the light and air from his neighbor's premises affords no ground for action, and the doctrine of prescription has no application. There is a conflict of opinion upon the question presented in *Letts v. Kessler*, supra. Many cases support the doctrine established therein, and hold that an act legal in itself, and violating no legal right, cannot be made actionable, even though it is prompted by malice and is prejudicial to others. Other courts of equal ability have, however, held that if one does an act wholly upon his own land, legal, but prejudicial to his neighbor, not for his own ornament or profit, but through unmixed malice to his neighbor, then he has done his neighbor an injury that is actionable. But in our opinion the correct rule is laid down in *Letts v. Kessler*, supra. See, also, *Triplet v. Jackson*, 5 Kan. App. 779, 48 Pac. 931; *Kelper v. Klein*, 51 Ind. 316; *Stein v. Hauck*, 56 Ind. 65, 26 Am. Rep. 10; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570. The maxim, "So use your own as not to injure another's property," has been held to mean, "So use your own property as not to injure the rights of another." *Jefferies v. Williams*, 50 Exch. 797; *Ry. Co. v. Bingham*, 29 Ohio St. 369. The affiant alleges that the fence shut off the view, light, and air from his said house. "Said structure being a constant annoyance, to the great damage and the common annoyance of all the neighbors in said street, then and there being, and residing and going and returning and passing through the street and highway in front of said property, and the obstruction of the full use of the property of the affiant so as to injure said property and interfere with the full enjoyment of life," etc. The affidavit charges appellants with erecting and maintaining a public nuisance. A public nul-

sance is that which annoys such part of the public as necessarily come in contact with it—such as result from the violation of public rights, and producing no especial injury to one more than another of the public. Private nuisances are injuries that result from the violation of private rights, and produce damages to but one or few persons. "For illustration, belonging to this class, is the building of a house with eaves projecting over the land of another, or the erection of a building so as to hide the ancient lights of several persons, or a tinsmith's shop, the noise of which annoys the occupants of but three or four tenements." Wood on Nuisance, § 15. By the testimony for the state it appears that many people live in the vicinity of the premises in question—five houses on the east side, and six on the west side, of Dugdale street, on the same square. The witness testified that she had seen crowds of people congregate there many evenings, some in the yard, some on the sidewalk; that they remained late at night; heard singing and loud talk. Another witness testified that upon two occasions she saw a crowd near the fence, and heard them singing. One Sunday she saw five or six couples, going up and down the sidewalk, stop and look at the fence. Mrs. Kintz testified that the fence attracted crowds night and day, especially on Sunday. It is proper to say in this connection that Mr. Kintz played the guitar; that there were social gatherings at his house, and upon these occasions there was both vocal and instrumental music; that these parties lasted late in the night, and upon one occasion until 2 o'clock Sunday morning. That pedestrians should notice a fence of more than usual height, and remark upon it, does not indicate that they were annoyed thereby. That people collected on the outside of the yard and by the fence, and talked and sang, does not show that such gatherings were occasioned by this fence. The public had no right of prospect upon either of the premises. There is evidence that the obstructions prevented the free admission of light and air on the north and south sides of the house of affiant, but there is no evidence that it injured his property, or interfered with the comfortable enjoyment of life of any one except the occupants of the house. No right of the public has been invaded, and that is the charge of the affidavit before us. The evidence does not show that defendants neglected any duty to the public with which they were charged. It is not sufficient to sustain the charge.

The state was permitted to introduce testimony tending to show that appellants erected the structure from motives of malice. Whatever the rule may be in civil actions, motives of malice in a criminal prosecution for common nuisance are immaterial. See Wharton's Crim. Law, § 1420.

Judgment reversed, with instructions to sustain appellants' motion for a new trial.

*Rehearing denied. Transfer to Supreme Court denied.

(33 Ind. App. 291)

CHICAGO, I. & L. RY. CO. v. TURNER.*

(Appellate Court of Indiana, Division No. 2
Jan. 13, 1904.)

RAILWAYS — DEATH — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS — JUDGMENT OVER VERDICT.

1. That a collision occurred at a railway crossing between a train and a traveler on the highway does not conclusively show that he did not take sufficient precaution.

2. In a railway crossing accident case the railway company is entitled to have the jury instructed specifically as to the decedent's duty to exercise reasonable care when approaching the track.

3. The precise number of feet from a railway crossing a traveler on the highway should stop in the exercise of reasonable care cannot be stated as a matter of law, but is for the jury to determine.

4. A jury found that one driving along a highway toward a railway crossing could have heard the train whistle 2 to 4 miles away when he was 326 feet from the crossing; that he stopped 30 feet from the crossing; that, if he had got out of his wagon and gone to the track, he could have heard the train in time to avoid a collision; and that the noise of his wagon did not prevent him from hearing the train. *Held*, under the rule that, before a general verdict is overturned, findings must exclude other possible controlling facts which might be found, and, under Burns' Rev. St. 1901, § 359a (Laws 1899, p. 58), placing on defendant the burden of establishing contributory negligence, that these findings do not require judgment in favor of the railway company over a general verdict against it for death resulting from the collision.

5. An instruction, in an action for death in a railway crossing collision, that, if the fog was so dense as to prevent the decedent from seeing or hearing the train from his place on the wagon in time to avoid injury, it was his duty to get off, and go in advance of his team, and if he failed to do so there could be no recovery, was properly refused.

Appeal from Circuit Court, Harrison County; C. W. Cook, Judge.

Action by Mary E. Turner, administratrix, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

E. C. Field and H. R. Kurrie, for appellant. E. B. Stotsenburg, J. H. Weathers, and A. C. Harris, for appellee.

ROBY, J. The appellee administratrix sued appellant for damages on account of the death of her husband. The averment in her complaint is that decedent was crossing appellant's railroad at a highway crossing; that the crossing was enveloped in a dense fog; that before going on the track decedent stopped, looked, and listened, and neither saw nor heard a train; that while he was on the crossing a train was run over it at 50 miles an hour, without warning of its approach, and decedent was thereby killed. Answer in general denial. Trial; verdict for \$6,000, with answers to interrogatories. Motion by appellant for judgment thereon notwithstanding the general verdict,

¶ 5. See Railroads, vol. 41, Cent. Dig. §§ 1059, 1179.

or motion for new trial, or judgment on the verdict.

The facts found are that decedent was killed by collision between the wagon in which he was riding and one of appellant's engines, about 7:20 a. m., September 16, 1901, at a public crossing of the Grant Line Road, near New Albany, the direction of the highway at that point being north and south and of the railway northwest and southeast. At the time of the collision decedent was riding in an ordinary farm wagon drawn by two horses, making little noise, and driven south by him. The horses were gentle, and not afraid of cars. Decedent was alone; had lived near the railroad track, three miles distant from the crossing, for 11 years; was familiar with the crossing and vicinity, having used it about three times a week. He left home about 6:30 or 7 o'clock, and drove to the point where he was killed. Had driven two miles on the Grant Line Road, and had crossed the track two miles north, driving thence south along said road to the place of accident. The train was a through passenger, running southeast, at from 40 to 50 miles an hour. The whistle was not sounded nor the bell rung between 80 and 100 rods from the crossing. The whistle was last sounded two to four miles away. Decedent did not hear it. When he was 326 feet north of the point of collision, if he had attentively listened, he could have heard the whistle. While approaching said crossing he continuously looked and listened for the approach of trains from a point 240 feet from the crossing. He drove in a walk at two to three miles an hour. He stopped, looked, and listened both ways 30 feet from the track. He looked and listened from such point in both directions until he reached the track. He could not have heard the noise made by the train by attentively listening while 326 feet from the crossing, while approaching it, or just before driving on the track. When he was 30 to 34 feet from the track the train was 80 yards from the crossing. When he was 15 to 17 feet from the track the train was 40 yards away. He had good eyesight and hearing, and knew that a train was due to pass over the track at about 9 o'clock each morning. His three children followed immediately after him in a buggy, about five feet behind him. The noise of the buggy and wagon did not prevent him from hearing the train. The highway and railroad were practically level. It was very foggy at the time of the collision. The fog was so dense that decedent was unable to see the train. It extended more than one-half a mile each way from the crossing, and prevented him seeing the train until it was too late to prevent the accident. He could not have seen the train or headlight just before driving on the track by looking in its direction. The crossing was in a farming neighborhood. The train was regularly run at a high rate of speed. There were no

noises to hinder hearing the train, except the noise of the wagon and buggy. If decedent had got out of his wagon, and gone to appellant's track, and carefully listened, he could have heard the approaching train in time to have avoided the accident. The train was from 15 to 20 minutes late. Decedent was riding in the front seat of an open wagon. The train made very little noise. It was running down grade on wet rails. No warning was given of its approach. The heavy fog, the absence of noise and signal prevented decedent from seeing or hearing it until it was within 50 feet of him. He continuously looked and listened up to the crossing.

The appellant asserts the following proposition: "The fact that a collision did occur shows that sufficient precaution was not taken" (by decedent). It is said—and the following cases are cited to the point; "The law presumes, in case of injury of a traveler at a crossing, that if, by looking he could have seen, or by attentively listening he could have heard, the approaching train in time to escape, either that he did not look and listen, or that he did not heed what he saw or heard; that he saw what he could have seen had he looked, and heard what he could have heard had he listened." *Railway Co. v. Griffin*, 26 Ind. App. 368-370, 58 N. E. 503; *Railway Co. v. Stick*, 143 Ind. 449, 41 N. E. 365; *Aurelius v. Ry. Co.*, 19 Ind. App. 584, 49 N. E. 857; *Railway Co. v. Frazee*, 150 Ind. 576, 50 N. E. 576, 65 Am. St. Rep. 377; *Towers v. Ry. Co.*, 18 Ind. App. 684, 48 N. E. 1046; *Railway Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Smith v. Ry. Co.*, 141 Ind. 92, 40 N. E. 270; *Railway Co. v. Butler*, 103 Ind. 31, 2 N. E. 138. The logic of appellant's position, in connection with the legal proposition stated, is that, inasmuch as no case can be conceived in which the traveler cannot see and hear an approaching train if he stops long enough and listens sharply enough, therefore the fact that he is struck by such train establishes his contributory negligence. The correctness of the conclusion cannot be conceded. The appellant was entitled to have the jury instructed not only generally, but specifically, as to the exercise of reasonable care by decedent. *Malott v. Hawkins* (Ind. Sup.) 63 N. E. 308. The precise number of feet from the crossing at which he should have stopped cannot be stated as a matter of law. To do so would be to "trench upon the province of the jury." *Railroad v. Anthony*, 12 Ind. App. 126, 38 N. E. 831; *Railroad v. Williams*, 20 Ind. App. 576, 51 N. E. 128; *Railroad v. McIntosh*, 140 Ind. 261, 280, 38 N. E. 476; *Malott v. Hawkins*, supra. The answers to interrogatories show that he looked and listened for 240 feet before he reached the track. That 30 feet from the track he stopped still, and looked and listened both ways. That while he was so doing the approaching train was 80 rods dis-

tant, running downgrade on wet rails, and without signals, at from 40 to 50 miles an hour, enveloped in a dense fog. (The engineer testified that he could not see 60 feet ahead of his engine on account of the density of the fog.) That decedent continued on to the track, looking and listening both ways, and did not discover the approaching train until it was within 50 feet of him, which was too late to avoid it. The jury, by their general verdict, say that in so proceeding he exercised the prudence of an ordinarily prudent man under the circumstances. This includes the finding that he used ordinary care to select a place at which to stop, and that he used ordinary care in looking and listening 240 feet away from and up to the track. *Railroad v. McIntosh*, supra; *Railroad v. Spliker*, 134 Ind. 380-408, 33 N. E. 280, 34 N. E. 218; *Railroad v. Butler*, 10 Ind. App. 244-254, 38 N. E. 1.

Prior to the act of February 17, 1899 (Laws 1899, p. 58; section 359a, Burns' Rev. St. 1901), the burden was on the plaintiff to establish his own freedom from contributory negligence. By that act the burden of establishing contributory negligence is placed upon the defendant. The measure of care to be used is in no wise changed. *Railroad v. Peyton*, 157 Ind. 690, 61 N. E. 722; *Railroad v. Keister*, 87 N. E. 521. That rule is that, before the general verdict is overthrown, the facts shown by the answers to interrogatories must exclude the possible existence of other controlling facts, relating to the same subject, which, under the issues, might have been proven. *South Bend v. Turner*, 156 Ind. 418-423, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; *Railroad v. Peyton*, supra. While the measure of care necessary on the part of one seeking to recover damages on account of the negligence of another is no wise changed by the act of 1899, it is no longer incumbent upon him, to affirmatively establish the exercise of such care. Contributory negligence is made matter of defense. Although the answers to interrogatories in a given case might, if unexplained, be sufficient to establish contributory negligence, yet if, under the issues, proof might have been made of explanatory or qualifying facts destroying their effect, there can now be no judgment on such answers unless the existence of such explanatory or qualifying facts is negatived by the findings. In the case at bar facts are not shown by the answers from which it can be declared that the decedent was negligent, and the motion for judgment thereon was correctly overruled. *Malott v. Hawkins*, supra.

Appellant asked the court to instruct the jury that, if it was found from the evidence that the fog was so dense as to prevent the decedent from seeing or hearing the train in time to avoid injury, from his place on the wagon seat, it was his duty to get off his wagon, and go in advance of his team,

and, if he failed to use this precaution, there could be no recovery. This instruction was correctly refused. *Railroad v. Wright*, 80 Ind. 236. Instruction No. 6, given, is a copy of instruction No. 27 set out and approved in *Railroad v. Penketh* (Ind. App.) 60 N. E. 1095. Instruction No. 7, given, is based upon, and follows the language, so far as shown by the opinion, of the instruction considered and approved in *Railroad v. Conoyer*, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452. See particularly: pages 528, 529, 149 Ind., pages 353, 354, 48 N. E. There was no error in the instructions given or refused.

Judgment affirmed.

(32 Ind. App. 621)

UNION TRACTION CO. OF INDIANA v. VANDERCOOK.*

(Appellate Court of Indiana, Division No. 1. Jan. 15, 1904.)

STREET RAILROADS—DRIVING ACROSS TRACKS—CONTRIBUTORY NEGLIGENCE—JURY—ANSWERS TO INTERROGATORIES—GENERAL VERDICT—EVIDENCE—ADMISSIBILITY.

1. In an action against a street railroad for personal injuries, it appeared that plaintiff attempted to drive across defendant's tracks; that, before going on the crossing, he looked and listened, but did not stop; that no car was within 250 feet when he started over; that he did not know a car was approaching; that no gong was sounded, or warning given of the approach of the car; that the motorman saw plaintiff's horse on the crossing when the car was over 200 feet away, and could have stopped the car within 75 feet at any time after the horse entered the crossing; and that the car approached the crossing at a high and dangerous rate of speed. *Held*, that plaintiff's failure to stop was not contributory negligence, as matter of law.

2. The general verdict determines all material issues in its favor.

3. All reasonable presumptions will be indulged in favor of the general verdict.

4. No presumptions will be indulged in favor of the jury's answers to interrogatories.

5. The answers of the jury to interrogatories will not control the general verdict unless in irreconcilable conflict therewith.

6. Where the answers of the jury to interrogatories are antagonistic or inconsistent, they neutralize each other, and will be disregarded.

7. The answers of the jury to interrogatories override the general verdict only when both cannot stand, the conflict being such as to be beyond the possibility of being removed by any evidence admissible under the issues.

8. The right of a traveler to cross the track of a street railroad is not inferior to the right of the street railroad to pass over the crossing.

9. While the failure of those in charge of a street car to give the required signals of its approach will not excuse a person attempting to cross the track in front of it from the exercise of due care, yet the jury may consider that fact, in connection with all the circumstances attending the accident, in passing on the conduct of one injured in making the attempt.

10. Answers to interrogatories by the jury in an action against a street railroad for personal injuries received by being struck by a car while attempting to cross the track, indicating that, had plaintiff stopped, he could have seen and heard the car in time to have avoided the injury, are not inconsistent with the general verdict, finding that he used due care.

* 8. See *Street Railroads*, vol. 44, Cent. Dig. § 198.
*Rehearing denied.

11. In an action against a street railroad for personal injuries, where it is averred in the complaint that the car which struck plaintiff was running at the high and dangerous speed of 40 miles an hour, evidence as to the speed of the defendant's cars at the place in question for 10 days preceding the accident is admissible; there being a conflict as to the rate of speed of the particular car which struck plaintiff.

Appeal from Circuit Court, Delaware County; Joseph G. Leffler, Judge.

Action by Michael E. Vandercook against the Union Traction Company of Indiana. From a judgment for plaintiff, defendant appeals. Affirmed.

James A. Van Osdol, Wm. A. Kittinger, Arthur W. Brady, and Rollin Warner, for appellant. Bingham & Long, for appellee.

ROBINSON, J. Suit by appellee for personal injuries. The complaint, which was held sufficient against a demurrer for want of facts, avers, in substance, that an ordinance limited the speed of appellant's cars to 10 miles an hour between street crossings, and to 6 miles an hour at crossings; that appellant's track crossed White river on a bridge parallel with, and immediately north of, High Street Wagon Bridge; that at a point about 68 feet southeast of the south end of these bridges appellant maintained a public street crossing across its tracks, leading from High street, a principal street; that on account of the close proximity of the two bridges, and the manner of their construction, a person traveling northwest on High street could not see an approaching car for more than 150 feet northwest of the bridge, and while it was crossing the bridge, and until it came within 60 feet of the southeast end; that appellee was unable to see the car until it reached a point 60 feet northwest of the south end of the bridge as he entered upon the crossing, all of which appellant knew; that appellant at all times, except when appellee was injured, sounded the gong upon approaching the crossing, which appellee knew; that appellee, seated in a rubber-tired, open, single road wagon, with due care and caution, looked and listened for cars before going upon the crossing; that no car could be seen or heard by appellee, though he could see a distance of 128 feet up the track; that at the time there was no car within 250 feet of the crossing; that the car had approached sufficiently near to be obscured by the bridge when appellee entered upon the crossing; that, because of the wind, appellee was unable to hear the approach of the car when more than 150 feet from the crossing; that, while looking and listening, appellee started across the crossing, when appellant, by its servants, negligently and wrongfully, without sounding the gong or giving any signal or warning, ran the car at a speed of 40 miles an hour at and against appellee, whereby he was injured; that after he saw the car he unsuccessfully tried to avoid being struck; that

appellant's motorman in charge of the car saw appellee's horse upon the crossing when the car was over 200 feet away; that the car was more than 250 feet away when appellee first drove his horse upon the crossing; that the car could have been stopped within a distance of 75 feet at any time after appellee's horse entered upon the track at the crossing; that appellee's injury was the result of appellant's negligence in running the car at the unlawful rate of speed, not keeping the same under proper control, and in not stopping the same before reaching the crossing, all without appellee's fault or negligence. We do not think the complaint open to the objection that the particular averments of what appellee did, show his own negligence contributed to his injury. It is averred that he looked and listened as he approached the crossing, and that, as he started to cross, there was no car within 250 feet of the crossing. He did not know that a car was approaching. No gong was sounded, nor warning given. Under the circumstances existing at the time, he had the right to assume that he could safely pass over the crossing. But it cannot be said, as matter of law, under the circumstances surrounding appellee at the time, that he was negligent in attempting to cross over the crossing. In determining his conduct at the time, he could not be held to presume that, if a car did approach the crossing, it would be running at a high and dangerous rate of speed. From the averments it appears that there was no car near when appellee started over the crossing. It is averred that the motorman saw appellee's horse upon the crossing when the car was 200 feet away, and that the car could have been stopped within a distance of 75 feet at any time after the horse entered upon the crossing. Under such circumstances, it was the motorman's duty to stop the car, if necessary to prevent an accident. It is not every act of negligence on the part of a person injured that will defeat a recovery, but only such negligence as materially contributes to the accident. *Citizens' St. Ry. v. Abright*, 14 Ind. App. 433, 42 N. E. 238, 1028. The complaint states a cause of action.

The jury answered interrogatories that the accident happened at a public crossing, which all cars approached from the northwest, running every 20 minutes, which appellee knew. Appellee drove northwest at 7 or 8 miles an hour until he turned to cross the tracks, when he was going 5 or 6 miles an hour. The car which struck appellee was about 100 feet from the southeast end of the bridge when appellee started to turn his horse to cross the tracks. The crossing was 67 feet from the southeast end of the bridge. After appellee turned his horse to cross the tracks, and before the horse entered upon the crossing, appellee looked and listened for a car, but did not stop his horse. The cars stopped regularly at the crossing to take

on and discharge passengers. Appellee knew that the sides of the two bridges obscured to some extent the view of a car approaching from the northwest. He did not know the rate of speed at which cars approached and ran over the crossing. "(75) If plaintiff had stopped and looked to the northwest, along said railroad, at any time after he began to turn his horse to the right, and before his horse entered upon said railroad track, could he have seen the approaching car in time to have avoided the injury? Ans. Yes; if he had stopped." "(77) If plaintiff had stopped and listened for an approaching car at any time on said occasion when within ten feet of the point where he began to turn to go over said crossing, and before his horse entered upon the same, could he have heard said car in time to have avoided the injury? Ans. Yes; if he had stopped." We think it unnecessary to enter upon a discussion as to whether these answers show that appellant's failure to stop before reaching the crossing was a want of due care on his part, as the jury answered other interrogatories as follows: "(76) Did plaintiff on that occasion at any time after he turned to the right, and before his horse entered upon said crossing, stop and look to the northwest for an approaching car? Ans. He looked, but did not stop." "(66) If the plaintiff had looked on that occasion to the northwest at any time after he had turned his horse to the right, and before his horse entered upon the tracks of said street railway, could he have seen the approaching car in time to have avoided the injury? Ans. No. (67) If plaintiff had stopped his horse at any time on that occasion after he reached the point where he turned to the right to cross said tracks, and before his horse entered upon the same, could he, by either looking or listening, have learned that a car was approaching, in time to have avoided the injury? Ans. No." Authorities need not be cited in support of the propositions that the general verdict determines all material issues in appellee's favor; that all reasonable presumptions will be indulged in favor of the general verdict, and none indulged in favor of the answers to the interrogatories; that, if the answers are to control, they must be in irreconcilable conflict with the general verdict; that, if answers are antagonistic or inconsistent, they neutralize each other, and will be disregarded; and that the answers override the general verdict only when both cannot stand, the conflict being such as to be beyond the possibility of being removed by any evidence admissible under the issues.

When appellee turned to go upon the crossing, the car was more than 160 feet away. He did not know a car was approaching at the rate of 40 miles per hour. Had he seen the car when that distance away, and there was nothing to lead him to believe that it was running any faster than the ordinary rate of speed, his attempt to cross the track

in front of the car would not have been, as matter of law, negligence. An attempt to cross in front of a street car running at an ordinary rate of speed, 50 feet distant, is not, as matter of law, negligence. *Wells v. Brooklyn, etc., Ry. Co.*, 58 Hun, 389, 12 N. Y. Supp. 67. Appellee had the right to cross the track, and his right was not inferior to appellant's right to pass over the crossing. Each was required to exercise his right so as not to interfere with the right of the other. *Citizens' St. R. Co. v. Damm*, 25 Ind. App. 511, 58 N. E. 564. In *Cincinnati St. Ry. Co. v. Whitcomb*, 66 Fed. 915, 14 C. C. A. 183, it is held that it is not the law that persons crossing street railway tracks in a city are obliged to stop, as well as look and listen, before going over such tracks, unless there is some circumstance which would make that ordinarily prudent. See, also, *O'Neal v. Dry Dock, etc., R. Co. (N. Y.)* 29 N. E. 84; *Evansville, etc., R. Co. v. Gentry*, 147 Ind. 408, 44 N. E. 311, 37 L. R. A. 373, 62 Am. St. Rep. 421. The rule is well settled that a street railway crossing is a place of danger, and that a person approaching such a crossing is required to use the caution of an ordinarily prudent person. He must look and listen before attempting to cross, but whether he must stop must depend upon the circumstances of the particular case. See *Marchal v. Indianapolis St. Ry. Co.*, 28 Ind. App. 133, 62 N. E. 286, and cases there cited. While the failure of those in charge of the car to give the required signals would not excuse appellee from the exercise of due care, yet the jury might consider that fact, in connection with all the circumstances attending the accident, in passing upon the conduct of appellee. *Louisville, etc., R. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128. The jury found by the general verdict that appellee was in the exercise of due care, and the interrogatories cannot be said to be inconsistent with that finding.

Witnesses were permitted to testify, over appellant's objection, as to the speed of appellant's cars at the place in question for 10 days preceding the accident. The complaint averred that the car was running at the high and dangerous speed of 40 miles an hour. The question before the jury was whether the speed of the car at the time and place of the accident was so great as to amount to negligence. There was some conflict as to the rate of speed of the particular car. Under such circumstances, it has been held in this state that the evidence above complained of is admissible. In *Chicago, etc., R. Co. v. Spilker*, 134 Ind. 390, 33 N. E. 280, 34 N. E. 218, the precise question here presented was determined adversely to appellant. In that case the court said: "We do not think this evidence prejudiced the case of appellant. The accident occurred on the 18th day of October. The question before the jury was whether the speed of the train on that day, at the time and place of

the accident, was so great as to amount to negligence on the part of appellant. There was some variation in the evidence as to the exact rate of speed on that occasion. The evidence here objected to was by way of comparison, that, by knowing how the vestibule train ran on other days about that time, particularly close before the day of the accident, the jury might have some aid in judging how fast the train did run on the day in question." The doctrine of the above case has not been overruled. It is applicable to the point in question, and is controlling here. Judgment affirmed.

(206 Ill. 464)

CROZER v. PEOPLE ex rel. HANBERG,
County Treasurer.*

(Supreme Court of Illinois. Dec. 16, 1903.)

**TAXATION—VALUATION OF REAL ESTATE—
TIME—STATUTES—CONSTRUCTION—CON-
STITUTIONAL PROVISIONS.**

1. A statute should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant, but every sentence and word shall be given its ordinary meaning and acceptance.

2. Act Feb. 25, 1898 (Hurd's Rev. St. 1901, p. 1494), entitled "An act for the assessment of property," etc., provides that all real property subject to taxation shall be listed and assessed for 1899, and every fourth year thereafter, with reference to the amount owned on the 1st day of April in the year of assessment. Section 12 provides for the making of lists by the assessor showing the value which has been added to various tracts by new or added improvements, and the amount of the diminution in value on account of the destruction of or injury to improvements or trees, or by the removal of structures. Section 14 directs the assessor to determine the amount of any change in the value of any tract of land, and to add to or deduct from the assessment accordingly. *Held*, that the power given the assessor by section 14 in years intervening the years of general assessment is merely to increase or decrease the assessment of property in accordance with the changed valuation resulting from the causes mentioned in section 12, and there can be no general increased valuation in assessed property in years intervening the quadrennial assessment years for other purposes than those mentioned in said section 12.

3. Const. art. 9, § 1, providing that each person and corporation shall pay a tax in proportion to the value of his, her, or its property, does not require mathematical uniformity in assessments; and the four-year period for re-assessment of property fixed by Act Feb. 25, 1898 (Hurd's Rev. St. 1901, p. 1494), is not an unreasonable one, and does not infringe such constitutional provision.

Appeal from Cook County Court; O. N. Carter, Judge.

Action by the people, on the relation of John J. Hanberg, county treasurer, against Samuel A. Crozer. From a judgment for relator, defendant appeals. Reversed.

Taylor & Martin, for appellant. James H. Wilkerson, Co. Atty., William F. Struckmann, Asst. Co. Atty., and Frank L. Shepard, for appellee.

*Rehearing denied February 3, 1904.

SCOTT, J. This is an appeal from a judgment and order of sale for taxes of 1902, entered against the real estate of appellant on the 28th of July, 1903, by the county court of Cook county, Ill. In 1899 the board of assessors in that county assessed the real estate involved in this proceeding, which is located in the town of South Chicago, in Cook county, at the sum of \$86,205. The board of review in that year increased the valuation, fixing it at \$90,515. The State Board of Equalization in the same year decreased the valuation, fixing it at \$85,889; and upon this latter valuation taxes were extended against the property for the years 1899, 1900, and 1901. In 1902 the board of review of Cook county notified 10 owners of taxable real estate in the town of South Chicago, in that county, of a proposed increase in the assessment of all the real estate in the town of South Chicago. In pursuance of such notice, and after a hearing, a horizontal increase was made in the valuation of all the real estate in that town; and in accordance with that action the valuation of appellant's real estate was increased to and fixed at the sum of \$105,000 by the board of review, and taxes were extended against this property upon this latter valuation for the year 1902. Appellant paid all the taxes extended against the property in question, computed upon a valuation of \$85,889—that being the valuation fixed in 1899—but declined to pay the taxes extended upon the valuation in excess of \$85,889; the sum of the taxes extended on such increase in the valuation being \$1,125.11. The county collector applied to the county court at the July term, 1903, for judgment against the property for these unpaid taxes, whereupon appellant appeared and filed his written objections, the substance of which was that, under the law of this state, real estate was to be assessed in the year 1899, and quadrennially thereafter, and that its assessed valuation could not be increased in any of the intervening years between 1899 and 1903 unless new or added improvements were placed thereon after April 1, 1899, while the position of appellee is that the assessing officers have the power to increase or reduce the assessment of real estate during the intervening years if the actual value of such real estate changes, from any cause whatever, during those years. The issue thus presented is the only matter for our determination, and involves a construction of certain sections of "An act for the assessment of property and providing the means therefor, and to repeal a certain act therein named," approved February 25, 1898, in force July 1, 1898 (Hurd's Rev. St. 1901, p. 1494). Section 9 of that act, so far as applicable, provides: "All real property subject to taxation under the general revenue laws of the state, including real estate becoming taxable for the first time shall be listed in the name of the owner thereof by such owners,

or persons required by law, or their agents, or the officers provided by law, and assessed for the year one thousand eight hundred and ninety-nine (1899), and every fourth year thereafter, with reference to the amount owned on the first day of April in the year in which the same is assessed, including all property purchased on that day, which assessment shall be known as the general assessment, and as modified or equalized or changed as provided by law, shall be the assessment upon which taxes shall be levied and extended during the quadrennial period for which the same is made." Section 10 requires the county clerk, before April 1, 1899, and every fourth year thereafter, to furnish duplicate lists of real estate to be assessed, and annually to make up lists, in duplicate, of real estate which is taxable and real estate which shall become taxable for the first time and which is not already listed, and lists of real estate which has been subdivided and not listed by the proper description. Section 11 requires the assessing officers, on or before April 1st in each year, to call upon the clerk and receive the assessment books and blanks for that year. Section 12 is as follows: "The assessor shall, before the first day of June in the year 1899 and every fourth year thereafter, in person or by his deputy, actually view and determine as near as practicable the value of each tract or lot of land listed for taxation as of the first day of April of each year, and assess the same at the value required by law, setting down the sum in proper columns prepared therefor in duplicate books furnished him. In making such assessments he shall set down his valuation of improved tracts and lots in one column, and his value of unimproved tracts and lots in another column. He shall, also, between the first day of April and the first day of June in each intervening year, list and assess in like manner all real property which shall become taxable and which is not upon the general assessment, and also make and return a list of all new or added buildings, structures or other improvements of any kind, the value of which shall not have been previously added to or included in the valuation of the tract or lot on which such improvements have been erected or placed, specifying the tract or lot on which each of said improvements has been erected or placed, the kind of improvement and the value which, in his opinion, has been added to such tract or lot by the erection thereof; and in case of the destruction or injury by fire, flood, cyclone, storm or otherwise, or removal of any structures of any kind, or of the destruction of or any injury to orchard, timber, ornamental trees or groves, the value of which shall have been included in any former valuation of the tract or lot on which the same stood, the assessor shall determine as near as practicable how much the value of such tract or lot has been diminished in consequence

of such destruction or injury, and make return thereof. And in case any assessor shall fail or neglect so to do, then the supervisor of assessment shall, in the case of such new or added improvements, assess the same according to the assessment of the same property in the general assessment, and in the case of such destruction shall abate from the assessment of the tracts or lots so damaged or lessened the proper proportion thereof, estimated according to the same principles; in counties containing 125,000 or more inhabitants such books shall be made up by townships." Section 13 provides that the assessor shall, from time to time, make such alterations in the description of real estate as may be necessary, and, where it has been subdivided since making the general assessment, shall change the descriptions to correspond with the subdivisions, and properly distribute the assessment according to the new descriptions, and, in case of a vacation of a subdivision, shall make readjustment of the assessment accordingly. Section 14 of the act is as follows: "On or before the first day of June in each year, other than the year of the general assessment, the assessor shall determine the amount, in his opinion, of any change in the value of any tracts or lots or lands, if any such change has taken place and is not already entered in the assessment books, determining such change in value as of the first day of April of that year, and add to or deduct from the assessment accordingly, setting down the amount of such change in a proper column in the assessment books." Section 34 of the act requires the board of review to meet each year for the purpose of revising the assessment of property, and authorizes them to revise the entire assessment, or any part thereof, of any taxpayer. Section 38 of the act authorizes and requires the board of review, in counties containing 125,000 or more inhabitants, to meet from time to time, and whenever necessary, to consider and act upon complaints, and to further revise the assessment of real property as may be just and necessary. By section 35 this board is given full power over the assessment of any individual or corporation, and has full power over the assessment, and may do anything in regard thereto that the assessors might and could originally have done, and is further authorized to equalize the entire assessment of real or personal property by increasing or reducing the amount thereof in any township or any portion of the county as may, in their opinion, be just, upon notice to not less than 10 owners of property in such portion of the county. Section 23 provides: "In counties having a board of assessors, such board shall meet on the first Monday of June in each year for the purpose of revising the assessment of real property." Section 25 provides: "The office of the board of assessors, the county supervisor of assessments and the county assessor shall be open all the year during busi-

ness hours to hear or receive complaints or suggestions that real property has not been assessed at proper valuation." No improvements of any kind had been placed upon the real estate involved since April 1, 1899.

It is argued on behalf of appellee that section 14 authorizes the assessor to reassess, in any year intervening the years of the general assessment, any real property the value of which shall have changed since the last general assessment; and it is urged that the language of section 23, providing for the revision of the assessment of real property each year, and the provision that the office of the board of assessors shall be open throughout the year to receive complaints that real property has not been assessed at a proper valuation, when taken in connection with the language contained in section 9, to the effect that the general assessment, *as modified or equalized or changed as provided by law*, shall be the assessment upon which taxes shall be extended during the quadrennial period, warrants the conclusion that such was the legislative intent, and that the modifications or changes contemplated by the language above italicized might extend to a reassessment of all the real estate in the county, without any reference to any change in the condition of the improvements, orchards, etc., thereon; and it is also said that the provision authorizing the board of review to meet from time to time to further revise the assessment of real property, as found in section 38, lends support to this view.

It is a cardinal rule of construction that a statute should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant, but that it shall be so construed, if possible, that every sentence and word shall be given its ordinary meaning and acceptation. *Decker v. Hughes*, 68 Ill. 33; *Thompson v. Bulson*, 78 Ill. 277; *Perteet v. People*, 65 Ill. 230. In the last case the following language from Lord Coke is quoted: "The good expositor makes every sentence have its operation; gives effect to every word; will not construe it so that anything shall be vain or superfluous, but so expressed that one part of the act may agree with the other, and all may stand together." We think it plain, in the first instance, that in enacting section 9 the Legislature had in view the fact that the values of real estate, taking the entire state into consideration, as a general proposition, do not change greatly throughout a period of four years, or that, if considerable changes do occur, they are changes common throughout a considerable extent of territory, so that no particular injustice could be anticipated to any taxpayer or body of taxpayers as a result of extending the taxes for four consecutive years upon the one general assessment. The twelfth section provides for the making of lists by the assessor showing the value which has been added to the

various tracts of real estate by new or added improvements, and the amount of the diminution that has occurred in the value of the various tracts on account of the destruction of, or injury to, the improvements or trees or groves thereon, or by the removal of structures of any kind therefrom. That section, in itself, does not provide for any increase or decrease in the assessment. The only authority found for making a change in the valuations by the assessor is contained in section 14, which directs him to "determine the amount in his opinion of any change in the value" of any tract of land, and to add to or deduct from the assessment accordingly. Without this provision in section 14, the provision in section 12 would be nugatory; but if the provision in section 14 has the meaning contended for by appellee, and authorizes a reassessment of any property whenever its value changes, then the provision contained in section 12 authorizing and directing the assessor to make the list, therein showing an increase or decrease in value on account of a change in the condition of the improvements or orchards, etc., would be entirely meaningless, superfluous, and useless, and would have no effect whatever, because, by section 14, in the view of appellant, the assessor is required to reassess all property where there has been any change in its value from any cause whatsoever; and, if the law requires him to do this, what purpose could be served by providing in section 12 that he should make a list showing changes in the value of part of the real estate only?

In our judgment, section 14 was intended only for the purpose of requiring the assessor to make effective on the assessment roll the changes in value shown by the information gathered by him in accordance with the provisions of section 12. To hold otherwise would require us to disregard entirely that portion of section 12 providing for the making of such lists showing the changes in the value of the improvements, orchards, etc., on certain real estate. It is to be observed, however, that in the intervening years it is the duty of the assessor to assess real estate which shall become taxable that year for the first time, and to assess real estate which is taxable, but which is not already upon the assessment roll, and to distribute the assessed value of a tract that has been subdivided, among the subdivisions thereof, and to consolidate the assessments where a subdivision has been vacated; and it is to such powers and duties as these, including the duty to change the valuation where made necessary by changes in the improvements, orchards, etc., that the authority given the board of assessors to revise the assessment of real property, and to hear complaints concerning the assessment of real estate in the years intervening the years of the general assessment, must be referred; and likewise the power given the board of

review to increase or reduce the entire assessment of real property, and the power, from time to time, and whenever necessary, to consider complaints and further revise the assessment of real property, so far as such intervening years are concerned, gives power only over such assessments as we have hereinabove held the assessor has the power to make in such years. The language in section 9 providing for a modification or change of the general assessment cannot be said, with reason, to contemplate any particular change or modification, if considered in connection with that section alone; and, when read with the sections which follow, it may as well be argued that the words of section 9 contemplate only such changes and modifications as are within the terms of sections 12 and 13, as that they contemplate a reassessment of any or all the real estate on the assessment roll. Section 14 cannot be held to authorize the assessor to make any increase or decrease in the valuation of any real estate during any year intervening the general assessments, except such increase or decrease as is anticipated by section 12 of the act.

Putting this construction on this statute makes each and every part thereof effective. Where the powers given the board of review and the board of assessors are general, as here, it was intended by the Legislature to make such provisions broad enough to cover their duties both in the years of the general assessment and in the intervening years; and, so far as the intervening years are concerned, these powers are limited by the sections which precede, in the manner we have above indicated.

It is suggested that the purpose in providing for quadrennial assessments was to save the expense of a new assessment of all the real estate, which, it is said, in a county like Cook, would be considerable. If this argument proves anything, it proves too much. If section 14 authorizes the assessor to change the valuation of all tracts the actual values of which have changed, it necessarily also requires him to ascertain the present value of each and every tract, for the purpose of determining whether any change should be made in its valuation. We think it fair to conclude that the most expensive portion of the work of making a new assessment, and the one requiring the greatest skill and care, is the ascertainment of the value of the property. This portion of the work, so far as real estate is concerned, by appellee's argument, must be done each year; and, on the same theory, we would be required to hold that the Legislature provided for a general quadrennial assessment for the sole purpose of saving the comparatively trifling expense of rewriting the assessment roll each year.

Reliance is also placed upon section 1 of article 9 of the Constitution, which provides that each person and corporation shall pay

a tax in proportion to the value of his, her, or its property; and it is said that this requirement is not complied with where quadrennial assessments, only, are provided for, and where the law requires an annual extension of the tax, because in the intervening years changes in the value of various tracts of real estate, aside from those anticipated by section 12 of the act, will occur. Absolute and mathematical uniformity cannot exist. By our present system, taxes are paid for each year. The Legislature fixes an arbitrary date (April 1st) in that year as the date when the property shall be taken. On the succeeding day the real estate of one man, of great value on April 1st, may, by fire or other calamity, be made worthless, and so remain until December 31st, while the property of his neighbor may continue throughout the year of the same value as on April 1st; and he who has sustained loss is thus compelled to pay taxes for an entire year on a valuation much greater than the property had throughout the year. The only method by which taxation could be made exactly and absolutely uniform, and in proportion to the value of the property, would be by ascertaining its value throughout the entire year, and fixing its assessed value accordingly. This would be impracticable, as it would require the assessor to assess the property on each and every day of the year, and to take an average of the various assessments. If the taxes for one year may be extended upon the valuation of the property fixed on a certain day, why may not the taxes for a longer period be also extended upon that valuation, if that period be not unreasonable in length? And where the property assessed is real estate, four years cannot be deemed unreasonable. The Constitution does not require the General Assembly to cause taxes to be levied each year. All that it is required to do is to provide such revenue as may be needful, by levying a tax by valuation; and, for aught that appears, it might make the levy but once in four years, making the tax payable in annual installments, or otherwise, as it saw fit, which would result, as now, in the extension of the tax for a four-year period upon one and the same assessment.

We therefore hold that the assessor and the board of review are without power, in the years intervening the years of the general assessment, to increase the assessed valuation of real estate, except in instances where new or added buildings, structures, or other improvements of some kind shall have been placed upon the real estate in question after April 1st of the year of the general assessment, and are without power to decrease the valuation during the intervening years except where the value of the real estate has been diminished after April 1st of the year of the general assessment by the destruction or injury by fire, flood, cyclone, storm, or otherwise, or removal, of any structures of

any kind, or by the destruction of or injury to orchard, timber, ornamental trees, or groves.

The judgment of the county court will be reversed, and the cause remanded to that court, with directions to the county court to enter a judgment sustaining the objections filed by the objector in that court. Reversed and remanded, with directions.

(206 Ill. 475)

LANG v. METZGER et al.

(Supreme Court of Illinois. Dec. 16, 1903.)

TRUSTS — TRUSTEE — VIOLATION OF DUTY — CONVERSION — RESTORATION OF PROPERTY — EVIDENCE — SUFFICIENCY — PLEADINGS — ALLEGATIONS — APPEAL — REVERSAL — PROCEEDINGS BELOW.

1. Where a cause is reversed and remanded generally, and without any specific directions, by the Appellate Court, the lower court is not required to proceed according to the opinion of the Appellate Court, but may permit a change in the pleadings, and may hear the cause de novo.

2. A trustee cannot be charged with a violation of his trust by releasing a deed of trust purporting to secure a loan of trust funds, without first obtaining a repayment of the loan, where in fact no such loan was ever made, the papers purporting to make the loan being a sham.

3. Where a bill alleges that a trustee made a loan of trust funds, secured by a deed of trust, and released the deed without obtaining repayment of the loan, complainant, in the absence of any amendment to the bill, cannot claim a lien on the land described in the deed of trust, on the theory that the trustee, after a conversion of the trust funds, purchased the land with his own money, to take the place of the funds converted.

4. The record of a judgment of a county court approving the report of an executor is not admissible against a stranger to the proceeding.

5. The declarations of a grantor in a deed of trust, made after the execution thereof, impugning the title to the land conveyed, are not evidence against the grantee.

6. Letters written by a husband, prior to his joining with his wife in a deed of trust conveying the wife's real estate, in which he had an inchoate dower right and homestead right, tending to show that he had, as trustee, invested trust funds in the land, were admissible against the grantee; the latter being a privy in estate to the husband.

7. Letters written by a trustee which tend to show that he had invested the trust funds in certain real estate were insufficient to enable the beneficiary to claim the property where it conclusively appeared that he did not invest any part of the trust funds therein, or anything that they represented; the declarations in the letters being false, and made for the purpose of covering up his conversion of the trust funds.

Appeal from Appellate Court, First District.

Suit by William Metzger and others against Anna N. Lang and others. From a decree for plaintiffs, affirmed by the Appellate Court (101 Ill. App. 380), defendant Lang appeals. Affirmed.

Herman B. Wickersham, for appellant. Edgar L. Masters (Kickham Scanlan, of counsel), for appellees.

RICKS, J. This is an appeal from a judgment of the Appellate Court for the First District affirming a decree of the circuit court of Cook county for a foreclosure and sale under a trust deed in favor of appellee. The trust deed in question was dated June 14, 1895, and was executed by Mary Pregler and her husband, Louis Pregler, and conveyed lots 3, 4, 5, and 6 in Gehrke's subdivision of part of lot 6 in Richon & Bauermeister's subdivision of the west half of the northeast quarter of section 25, township 40 north, range 13 east of the third principal meridian, in Cook county, to secure the payment of one principal note for \$3,000, due three years after date, and six interest notes, each for the sum of \$90, payable semiannually thereafter on the 14th days of December and June, all of said notes bearing interest at the rate of 6 per cent., and all payable to the order of the makers and indorsed in blank, which trust deed was made to Charles Fleischer as trustee for the legal holder of said notes. The bill was filed the 13th day of September, 1897, and appellant and a number of other persons were made defendants thereto.

Appellant answered the bill, and also filed her cross-bill, in both of which she set forth that on February 16, 1885, Josef Raback, her father, died testate, and that his will was duly admitted to probate on February 25, 1885, and letters testamentary issued to Louis Pregler; that, in addition to making Louis Pregler executor, the testator also constituted him trustee, and in and by which testament it was provided: "I hereby direct that all moneys belonging to me and collected by my executor are to be invested at the highest interest possible, upon good securities; that if the interest upon such investments shall prove insufficient for the support and maintenance of my said wife, then she may use any of said capital for such support. Third, after the death of my said wife I hereby order and direct that any balance remaining of my said property or money shall go to my two adopted daughters, Anna Raback and Julia Raback, and their heirs forever, in equal parts;" that on December 9, 1887, Louis Pregler, having administered the estate under the direction of the probate court, presented his final account and report, showing that there remained in his hands \$4,500, and that the account was approved by the probate court, and the said sum retained by said Pregler as trustee; that on the 7th day of August, 1891, Louis Pregler, trustee, loaned to one Emily Lucand the \$4,500 so held by him in trust, taking her note for that sum, payable five years after its date, with 7 per cent. semiannual interest, which loan was secured by a trust deed given by said Emily Lucand to the said Louis Pregler, trustee, on lots 3, 4, and 5 in block 1, Gehrke's subdivision, being the same property described in the trust deed to Fleischer, as trustee, securing the notes of appellee, except that ap-

¶ 5. See Evidence, vol. 20, Cent. Dig. § 248.

pellee has, in addition, lot 6 of said subdivision; that said trust deed was duly recorded August 12, 1891, in the recorder's office of Cook county; that, after the making of the trust deed to Fleischer, and the notes therein described, by Mary Pregler and Louis Pregler, Louis Pregler, the trustee, without the knowledge or consent of Magdalena Raback, the widow of Josef Raback, and cestui que trust in the trust created by the will of said Josef Raback, on June 22, 1895, by his formal written release, released to Emily Lucand the deed of trust bearing date August 7, 1891, in which release it was recited that the note had been fully paid; that the release deed was given in fraud and in violation of the trust; that the payment to Louis Pregler, trustee under the will of Josef Raback, and the loan to Emily Lucand, and the subsequent release of the trust deed by Louis Pregler to Emily Lucand before the maturity of the note secured by said trust deed, are matters of public record, and that Mary Pregler and Charles Fleischer, trustee and appellee, as the holder of said note secured by the trust deed of June 14, 1895, had full notice that the moneys loaned to Emily Lucand were trust funds in the hands of Louis Pregler, trustee under the will, and that they were bound, in law and in equity, to see that the trust deed made by Emily Lucand to Louis Pregler was not released, or the lien acquired thereby, until the moneys secured thereby were fully paid; that they were bound to see to the proper use, payment, and application of the trust money; that at the time of the making of the release deed by Louis Pregler, as trustee, to Emily Lucand, dated June 22, 1895, no moneys passed from Emily Lucand, or any one on her behalf, under the said will of said Josef Raback, to Louis Pregler, and that said release deed was given for the purpose of releasing the trust deed, and was not a bona fide transaction, but was in fact a conspiracy to deprive appellant of the valid first lien acquired by the trust deed made by Emily Lucand; that the title to the real estate included in the trust deed made by Emily Lucand to Louis Pregler was, prior to the making of the Fleischer trust deed, through the procurement of Louis Pregler, conveyed to Mary Pregler, the wife of Louis Pregler, and that the release deed executed by the latter to Emily Lucand and the trust deed executed to Charles H. Fleischer were made for the purpose of converting the funds in the hands of Louis Pregler to his own use, and for the purpose of destroying the lien of the trust moneys on the real estate above described; that Emily Lucand was a sister-in-law of Louis Pregler; that Magdalena Raback, the widow of Josef Raback, died September 17, 1895, and that, under the terms of the will of said Josef Raback, appellant became entitled to one-half of the moneys in the hands of Louis Pregler, trustee under the will, and that appellant, after the death of Josef Ra-

back, married one Joseph Lang, and that her sister Julia married one Antone C. Pregler; that she applied on September 22, 1895, to Pregler, as trustee, for an accounting of the trust moneys, and the payment to her of the amount due her, but that said Pregler refused to account, and insisted that she take in satisfaction of her claim a note for \$2,250, secured by a second trust deed upon this same property, made by one John Tanler, to whom the property was conveyed by Mary Pregler; that the premises conveyed in the trust deed are scant security for the \$2,250; that, after the property had been conveyed to Tanler (which conveyance, she alleges, was for the sole purpose of enabling him to execute certain trust deeds set out in the bill, among which is one securing the \$2,250 note which was accepted or taken by her), said Tanler reconveyed the property to said Mary Pregler; that she is entitled to \$2,250, with interest from August 7, 1895; that she is unable to find the notes made by Emily Lucand, and by the trust deed it is provided that, if default be made in the payment, they may be foreclosed; alleges default in the payment by Emily Lucand; makes William Metzger, Charles H. Fleischer, and the defendants to the original bill defendants to the cross-bill; asks for the appointment of a successor to Louis Pregler, trustee under the will of Josef Raback, to collect \$4,500 and interest, and pay it over to her; prays that the deed made by Emily Lucand to Mary Pregler, and the conveyance by Mary Pregler and husband to Bauerle, and the reconveyance from Bauerle to Mary Pregler, and the conveyance by Mary Pregler to John Tanler, and the trust deed made by Tanler to Louis Pregler as trustee, and the conveyance by Tanler to Mary Pregler, and each of them, be set aside; that the trust deed made by Emily Lucand to Louis Pregler, trustee, dated August 7, 1891, be revived and established as a first lien upon lots 3, 4, and 5 in block 1, above described; that a receiver be appointed, and that an accounting be had of the amount due, and that Mary Pregler, individually and as executrix, be decreed to pay to oratrix whatever sum shall be equitably due on the notes dated August 7, 1891, with interest and costs; and that in default thereof the premises be sold.

To this cross-bill answers were filed by appellee and Charles H. Fleischer, the trustee, and others made defendants thereto, denying all the allegations of the bill in so far as they charge either actual or constructive fraud or knowledge of fraud on the part of Louis Pregler, and denying all knowledge of the relation of Louis Pregler to the estate of Josef Raback or to the trust fund in question, and denying all acts of fraud or any knowledge of fraudulent acts on their part, and denying plaintiff in the cross-bill is entitled to the relief prayed.

The cause was referred to the master, and evidence was taken and report made. A decree was entered November 12, 1898, decree-

ing sale under the original bill, under the trust deed made to Charles H. Fleischer, and dismissing the cross-bill of appellant. From this decree an appeal was prosecuted to the Appellate Court for the First District, which court reversed and remanded the cause generally. The cause was redocketed in the circuit court of Cook county, and re-referred to the same master, who took further evidence, and made his report. Objections were filed to the report, and, on argument, overruled by the chancellor; and the decree now appealed from was entered, directing a sale under the Fleischer trust deed, and dismissing the cross-bill of appellant.

It will be necessary for a proper understanding of this case to go to some extent into the evidence relating to some of the material features of it. The evidence shows that Josef Raback died February 16, 1885, and that his will was probated, as set forth in the bill; that Louis Pregler was appointed both executor and trustee under the will, and qualified, and took upon himself the discharge of the duties imposed thereby; that he made his final report as executor December 9, 1887. Quoting from the final order of the court approving his report, the following is shown: "And thereupon the said executor presented to the court his final account with the estate of said decedent, showing receipts amounting to \$6,161, and disbursements, including the amount paid for certain notes and credits, amounting to \$6,153.95, leaving a cash balance due said estate amounting to \$7.05, which balance, together with the two Anderson credits, amounting to \$2,500, and the Wilkaryorz credits, amounting to \$2,000, has been retained by said executor as trustee under the will of said decedent." It thus appears from the only evidence upon that subject that at the time Louis Pregler made his settlement, with the court, of the estate of Josef Raback, he had but \$7.05 in money, but he did have securities called the "Anderson notes," amounting to \$2,500, and the "Wilkaryorz notes," amounting to \$2,000, with the interest coupons belonging to the same, which credits he had purchased prior to the settlement of the estate with the funds belonging thereto, and which he held after his settlement as executor, under the authority in the will given him as trustee. The record is barren of any evidence that these notes were ever paid by the makers thereof, or were ever converted into money by Louis Pregler, except what may be inferred from certain letters written to Magdalena Pregler, and admissions made by Louis Pregler to appellant. These matters will be referred to later, in the consideration of the evidence.

The history of the supposed loan to Emily Lucand of this alleged trust fund is another matter that needs to be specially stated. As has been said, Emily Lucand was the sister of Mary Pregler, wife of Louis Pregler. Louis Pregler was the treasurer and manager of a certain coal company doing business in Chi-

cago, and Emily Lucand was his bookkeeper, stenographer, and janitor in the coal office. She had no money, did no business except that as servant and clerk for Louis Pregler, and was possessed of no property. It appears that Gehrke's subdivision of lot 1, of which the real estate mentioned in the several mortgages and deeds in dispute in this case is a part, when laid out, was under the control of a syndicate composed of Vernon C. Gehrke, Louis Pregler, and Joseph Roetter; that the title to the property seems to have remained in the Gehrkes, although Pregler and Roetter were to have or did have some interest, the extent of which is not shown by the evidence. This syndicate, or Gehrke for it, had borrowed upon each of the lots \$270, and had secured the payment of the sums so borrowed by a trust deed. On August 3, 1891, Ferdinand C. Gehrke and wife, by their deed, conveyed to the said Emily Lucand lots 3, 4, and 5 in said block 1, subject to the trust deed securing the \$270 borrowed on each lot prior thereto. This deed was recorded August 11, 1891, and on August 7, 1891, Emily Lucand executed one principal note for \$4,500, due five years after date, and ten interest notes, each for the sum of \$157.50, due February 7th and August 7th, respectively, for the years said principal note was to run, and being the semiannual interest thereon, all of said notes being payable to the order of Louis Pregler, trustee; and she executed, to secure the same, a trust deed to Louis Pregler, as trustee, on said lots 3, 4, and 5 of said block 1. This trust deed was duly recorded August 12, 1895, and on August 1, 1891, Emily Lucand conveyed the same real estate contained in the trust deed to Louis Pregler, by quitclaim deed, to Mary Pregler and Louis Pregler, her husband. Mary Pregler and Louis Pregler on the 8d of October conveyed the same premises, together with lots 2 and 6 in the same block 1, to Michael Bauerle; and Michael Bauerle and wife, by warranty deed, on February 15, 1894, conveyed lots 3, 4, 5, and 6 in said block 1 back to Mary Pregler. All of these deeds were duly recorded, and the title so remained in Mary Pregler until the \$3,000 loan was made by Fleischer, Weinhardt & Co., mortgage brokers. This loan was requested by Louis Pregler, and arranged for with the above brokers; and as appellee, Metzger, was one of their customers, they arranged that he should take this loan when it was completed. When the loan was arranged for, and the title was examined, one Ludmil Kandlik, a member of the above brokerage firm and an attorney at law, examined the title, and submitted a written report of his conclusions to appellee, Metzger, in which he stated the title to be in fee in Mary Pregler, subject to, first, the trust deed executed by Gehrke June 20, 1891, securing the \$270 on each of said lots; second, the trust deed by Emily Lucand to Louis Pregler, dated August 7, 1891, given to secure her note for \$4,500, payable to the order of Louis Pregler, trustee, in five years, with interest at 7 per

cent. per annum. The brokerage firm continued to manage the matter until Louis Pregler brought to that firm the notes purporting to be executed by Emily Lucand, all of which were marked "Paid," and stated that he had paid these notes for his wife, the then owner in fee, and was seeking the loan to partially reimburse himself for that payment; and on June 22, 1895, said Louis Pregler executed a formal deed of release of the Emily Lucand trust deed, which was placed of record. It also appears from the evidence that, at the time that Louis Pregler formed a part of the syndicate for the development and sale of the Gehrke subdivision, he put no money in the scheme, but, as near as the evidence shows anything about it, was to have whatever interest or benefit he was to derive from it for his services in carrying out the scheme. It also appeared, when Emily Lucand was put upon the stand, that she never paid anything for the property that was conveyed to her by Gehrke, and had nothing to do with having it conveyed to her; that she never borrowed any money of Louis Pregler, but that she was a mere figurehead, accepting such conveyances as he saw fit to make to her, and signing any and all papers placed before her by him; and the evidence conclusively shows that, at the time she executed the \$4,500 trust deed and notes, she received nothing for the same, and was never at any time, by virtue of such notes, possessed of any part of the supposed trust fund held by Louis Pregler as trustee of Josef Raback's estate.

The evidence further shows that Louis Pregler never paid to Magdalena Raback, or any of the beneficiaries, any income or any of the proceeds of his trust until November 2, 1891. It will be recalled that he was discharged as executor December 9, 1887. This payment that was made was inclosed in a letter, which was as follows: "Chicago, November 2, 1891. Mrs. Magdalena Raback, 104 Bunker St., City—Madam: Enclosed please find check for \$106.92, which is for collections of interest on trust deed of Joseph Brandt \$81.25; int. for 2 mo. 11 days, at 6½ per cent., from Steimbacher, from Aug. 1 to Nov. 1, \$25.67, \$106.92. I had a chance to place the whole amount at 7%, which is the highest interest paid under the laws of the State of Illinois, and I have placed the same, and hereafter you will receive on the first day of May and November of each year the sum of \$157.50 interest. Hoping this will be satisfactory, I remain, respectfully, Louis Pregler." The next letter was of date May 4, 1892, and inclosed a check for \$157.50, "interest on your investment which I have collected." The next was November 3, 1892, which stated: "Enclosed will please find check for \$157.50, interest collected for past six months." Next was January 27, 1893, which said: "Your money is loaned out on the highest rate of interest that the laws of the State of Illinois will allow, which is seven per cent., making \$157.50, payable

every six months, which amount you have received." Next was February 7, 1894, which said: "I am sorry to state that the party holding your mortgage will not be able to pay the same before the 15th of this month, at which time I shall send you check for amount of interest note." On February 21st it was written: "Enclosed please find check for \$157.50, in payment of your fifth interest note. I have not received the money from party holding the trust deed, as they asked me to wait until the first of next month on account of hard times, but as I know it will be all right I have advanced it to you." August 7, 1894, it was written: "Enclosed find a check for your sixth interest note, amounting to \$157.50." And February 13, 1895: "Enclosed will please find \$157.50, for interest note of this month. You would have received it much sooner, but the party was a little behind in his payment." These letters were all objected to by appellee as being hearsay evidence.

It is apparent from the first letter above quoted, if the letters are to be considered at all, that, at the time it was written, Louis Pregler had certain credits, known as the "Joseph Brandt trust deed" and the "Steimbacher credits," and the time of the payment of interest "on the first day of May and November of each year" is entirely different from that provided by the Lucand notes; and, while the subsequent letters give dates, some that agree with the supposed interest that was payable on the Lucand loan, none, except the last two, agree with the loan as to time of payment, and the party to whom the loan is made is throughout all of them talked of in a sort of mysterious way—sometimes with no gender as to the party, other times as "they," and in the last letter the borrower is referred to as "his." It would seem to follow, from the evidence establishing the fact that Emily Lucand received nothing upon this loan, that, whatever may have been the condition of the funds as held by Pregler—whether they had been appropriated before that time to his own use, and he was merely paying to keep up appearances—it is quite clear that as late as November, 1891, he pretended to have securities of other persons than of Emily Lucand. The evidence incontestably shows that all these payments of interest that were made were by Louis Pregler himself. Emily Lucand never paid anything, and when, after his death, the notes given by her were found among his papers, and were produced on the trial of this case, the original note and all the coupons were together in one sheet, as originally executed, but all marked "Paid." When appellee paid the money and took the securities which he is now seeking to foreclose, \$1,150.65 of the \$3,000 was paid upon the notes given by Gehrke, and secured by trust deed on the loans in controversy before Emily Lucand ever had any paper title to any part of them, and, before the supposed

loan of the trust funds by Louis Pregler to her, the balance of the \$3,000 was paid to Louis Pregler for his wife, upon her written order.

Appellant argues that all matters except two questions of fact, namely, first, whether Emily Lucand ever paid her note, and, second, whether Louis Pregler left a solvent estate, are res judicata by the former decision of the Appellate Court in the first appeal in this cause, and that as it is shown by the evidence that Emily Lucand did not pay the note signed by her prior to the deed of release, or at all, and that as it also appears from the evidence that the estate of Louis Pregler was insolvent, it therefore follows that the decree should have been in favor of appellant. This contention grows out of a misapprehension on the part of appellant as to what constitutes a judgment. The difference between the opinion of the Appellate Court and the judgment of that court is marked, and well understood, as we think, by the bench and bar. On the first appeal in the Appellate Court the decree was reversed, and the cause remanded generally. In the opinion of the court, however, the following language is used: "Upon another trial of this cause, it may be more satisfactorily determined whether Mrs. Lucand had ever paid any portion of the debt evidenced by her note to the trustee, and there may also be a finding of fact as to the estate left by the trustee, Pregler, at his decease. Upon the evidence as now presented, the decree cannot be sustained." These remarks of the court, found in its opinion, were no part of its judgment. When the decree was reversed, and the cause remanded generally, without any specific directions to the lower court, that court was not required to proceed according to the opinion of the Appellate Court, but it had authority to permit a change in the pleadings, and to hear the cause *de novo*. *Chickering v. Failes*, 29 Ill. 294; *Parker v. Shannon*, 121 Ill. 452, 13 N. E. 155; *Perry v. Burton*, 126 Ill. 599, 18 N. E. 653; *Cable v. Ellis*, 120 Ill. 136, 11 N. E. 188; *West v. Douglas*, 145 Ill. 164, 84 N. E. 141; *Rush v. Rush*, 170 Ill. 623, 48 N. E. 990. It is true that the master did find that Emily Lucand did not pay the notes secured by the trust deed appearing of record to Louis Pregler, and which existed at the time appellee made the loan for which he seeks foreclosure, and it is also true that the reason she did not pay the loan was that she never received any loan. In fact, there was never such a loan made. The papers purporting to evidence such loan were a sham, and Emily Lucand but a figurehead in the transaction, so that appellant's cross-bill, so far as the rights under it rested upon the charge that the trust funds held by Louis Pregler had been loaned to Emily Lucand, and the trust deed appearing of record from Emily Lucand to Louis Pregler, the trustee, was given to secure such loan, and that such trust deed was fraudu-

lently released by the trustee without the repayment of the loan, necessarily failed, under the evidence.

It is contended, however, by appellant, that though it may be held, under this evidence, that Louis Pregler had converted trust funds to his own use, yet that it is the law that, where a trustee diverts or converts a trust fund to his own use, he may restore that fund by purchasing real estate with other moneys of his own, or by setting apart the proper amount of his own funds to take the place of the trust fund. In support of this contention, section 828 of *Perry on Trusts* (4th Ed.) is cited, which may be said to fairly support the view contended for. With reference to this contention it may be said, first, that there is no such allegation in appellant's cross-bill, nor is there any allegation that can be said to cover any such supposed state of facts. It is a fundamental rule of equity pleading that the allegations of a bill, the proof, and the decree must correspond, and that the decree cannot give relief that facts disclosed by the evidence would warrant where there are no averments in the bill to which the evidence can apply, and that, if the evidence disproves the case made by the bill, the complainant cannot be given a decree upon other grounds disclosed by the proofs, unless the court permits the complainant to amend his bill so as to present the case disclosed by the evidence. *McKay v. Bissett*, 5 Gilman, 499; *Morgan v. Smith*, 11 Ill. 194; *Bremer v. Canal Co.*, 123 Ill. 104; *White v. Morrison*, 11 Ill. 361; *Rowan v. Bowles*, 21 Ill. 17; *Russell v. Conners*, 140 Ill. 660, 30 N. E. 606; *Reed v. Reed*, 135 Ill. 482, 25 N. E. 1095; *Dorn v. Geuder*, 171 Ill. 362, 49 N. E. 492. This rule is not only based upon necessity, but upon the soundest reasons of equity. The requirement for written pleadings is that the defendant shall know the particular matter he is to answer and that the complainant shall know the particular answer made to the complaint. To allow a complainant in his bill to state one cause of action, and obtain a decree upon another cause of action not stated in his bill, by merely making proof supporting such decree, would work great injustice. There is no allegation in appellant's cross-bill that would support the contention now made, and there was no request to amend the bill to correspond to any such supposed state of the evidence.

It may be further said, secondly, that this contention was made before the master, the chancellor on exceptions, and argued in the Appellate Court, and each of them, in turn, has found that there is not sufficient evidence to support such contention. The most that is contended for, or can be, in so far as appellee's relation to the trust fund is concerned, is that he now seeks to foreclose a trust deed upon property a part of which was included in a trust deed which, by the admissions and declarations of Louis Preg-

ler, was given to secure the trust fund. The existence of the trust fund was sought to be established by, first, the introduction of the record of the probate court approving the final report of Louis Pregler as executor of the estate of Josef Raback; and, second, by the admissions and declarations of Louis Pregler as to the whereabouts of the trust fund. All this evidence was admitted over objections of appellee. Appellee was a stranger to the proceedings in the county court upon the final report of Louis Pregler as executor, and the record of the judgment of that court approving his report was *res inter alios acta*, and was not admissible as to him. 1 Greenleaf on Evidence, § 538.

In addition to the letters set out above, appellant was permitted to testify that one letter was written to Magdalena Raback, the *cestui que trust* for the debt of the Lucand trust deed, in which the particular property bought by Pregler, and standing as security for the trust fund, was pointed out; and appellant testified that lots 3, 4, and 5 (part of the lots in controversy) were the ones mentioned in that letter. This evidence was admitted over objections of appellee. Appellant also testified that on the day of the burial of Magdalena Raback, which was after the making of the trust deed to appellee, Louis Pregler took appellant to the property now in controversy, and told her that that property was the security for the fund. This was also objected to by appellee. As to this latter evidence, it was clearly incompetent. Whatever interest Louis Pregler had in the real estate now in controversy he had parted with before that admission or declaration by joining in the trust deed made by his wife to Flescher as trustee for appellee, and he could not then be heard to admit or declare anything to impugn the title that he had joined in making.

As to the admissibility of the letters, and the evidence as to the lost letter, the question is more difficult. Appellant contends that all of such evidence was admissible upon the theory of privity of estate between Louis Pregler and appellee. Appellee, on the other hand, contends that as to all such admissions he was a stranger, and that they should not be considered by the court. It is sometimes most difficult to determine, as a matter of law, when the relation of privity in estate exists. Mr. Greenleaf, in his work on Evidence (volume 1, § 180), says: "The term 'privity' denotes mutual or successive relationship to the same rights of property." We think it cannot be said, as a matter of law, that because Louis Pregler held a mortgage for \$4,500 on a part of the property in question, and appellee afterwards took a mortgage upon all the property for \$3,000, such a relation as privity in estate arose from that transaction. In a sense, their relation was successive and similar, but each was independent of the other. Another definition of this relation, as found in the books,

is: "A privity in estate is a successor to the same estate, not to a different estate in the same property." 23 Am. & Eng. Ency. of Law (2d Ed.) 102; *Pool v. Morris*, 29 Ga. 374, 74 Am. Dec. 68. Under this last announcement of the rule, it would seem clear that there is no privity between appellee and Louis Pregler, growing out of the trust deeds. They were not successors to the same estate. Their conveyances were entirely different and distinct, based upon different considerations, subject to different conditions, and running for different periods of time. But Louis Pregler became a principal maker of both of the notes and trust deed held by appellee, and, at the time of the execution of appellee's trust deed, Louis Pregler had an inchoate right of dower in the premises, and, the evidence tends to show, had a homestead right, as the premises seem to have been occupied by him and his family as their home. Under such circumstances, we are disposed to hold that the declarations and admissions made by Louis Pregler prior to the time of the conveyance to appellee were admissible. But when they are admitted they cannot avail appellant. The theory upon which they are admissible and have any bearing upon the case is that they tend to show that Louis Pregler invested the trust fund in the property in controversy, but when it appears, as it does quite conclusively, that he did not invest any part of the trust fund in this property, or anything that it represents, then the conclusion must follow that the declarations, if made by Pregler, were false, and for the purpose of covering up his misappropriation of the trust fund. As was found by the master, there is no legitimate evidence in this case to show that Louis Pregler ever had \$4,500 which he held as trustee, and, if he did, it is quite clear that it was converted to his own use.

The supposed restoration of property rests wholly upon the theory that Louis Pregler bought lots 3, 4, and 5 of the property in controversy, and held it by the trust deed, or in some indefinite manner, as representing the fund which he held in trust. It is quite clear that he never paid anything for the property, and it is also shown by the record that the title was never solely in him at any time, except such title as was made by the fraudulent and false Lucand trust deed. Instead of taking the title to himself, as an individual or as trustee, he caused it to be conveyed to Emily Lucand, and, after the execution of the notes and trust deed by her, caused a quitclaim deed to be made to himself and wife, and then immediately proceeded to convey the property to other persons, so that the same might come back and rest finally in the name of his wife. The restoration of a trust fund usually arises in cases where the trustee commingles the trust fund with his own funds in such a manner that the identity of the trust fund is lost,

and the trustee, still desiring to protect the beneficiaries under the trust, sets apart, out of his own funds or the commingled funds, or the proceeds of the trust fund, in some form, certain property, which he dedicates or appropriates to the particular trust uses. *Perry on Trusts* (4th Ed.) § 828. If the bill in this case was sufficient to support a decree upon the theory of restoration, we would be unable to find facts to warrant such a decree.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 553)

PITTSBURG, C., C. & ST. L. RY. CO. v. BANFILL.

(Supreme Court of Illinois. Dec. 16, 1903.)

RAILROADS—PERSONAL INJURIES—INSTRUCTIONS—CROSS-EXAMINATION.

1. Where the evidence fairly tends to prove the allegations of the declaration, it is proper to refuse a peremptory instruction to the jury to find for the defendant.

2. Where it appears that counsel for defendant in an action against a railroad for personal injuries was permitted to fully cross-examine a medical witness as to the manner in which he made an examination of plaintiff as to her injuries, it was not error to refuse to permit counsel to cross-examine such witness as to what his usual custom or method was of conducting examinations of that kind.

3. It is not error to refuse charges of an argumentative nature.

4. It is not error to refuse charges which attempt to specify what conduct on the part of plaintiff in an action against a railroad for personal injuries is imprudent or negligent.

5. It is not error to refuse charges containing matter contrary to facts established by the evidence.

Appeal from Appellate Court, First District.

Action by Hattie M. Banfill against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff (107 Ill. App. 254), defendant appeals. Affirmed.

Geo. Willard, for appellant. J. R. Beckett, Kitt Gould, and B. E. Kleeman, for appellee.

WILKIN, J. This is an action on the case, brought by appellee to recover for a personal injury sustained by her by being struck by a passenger train of appellant at 137th street, in the village of Riverdale, Cook county. About 20 minutes past 6 o'clock on the morning of June 21, 1898, she was walking in a westerly direction along the north sidewalk of said street, going to her place of employment. The railway track of appellant crossed this street in a north and south direction, and the view to the south was obstructed by the depot and by standing cars upon the side track some six or seven feet to the east of the said main track. These cars and the depot were but a short distance south of 137th street. Gates had been erected by the appellant at this crossing, but at the time of the accident no one was present to operate them,

and they were open. A passenger train, north-bound, consisting of 13 cars and an engine, traveling at the rate of 20 to 30 miles an hour, struck appellee as she was attempting to cross said tracks, and she was thrown 30 or 40 feet, and seriously injured. In the declaration it was alleged that the train at the time of the accident was going at a dangerous and unsafe rate of speed; that no bell was rung or whistle sounded at a distance of at least 80 rods from said crossing; that said train was permitted to approach said crossing without the gates at the intersection of said street with the said railroad tracks being lowered, as required by the ordinance of the village of Riverdale; and that, while exercising due care and caution for her own safety, appellee was struck by said train and injured. Upon a trial before the court and a jury a judgment was rendered against defendant for \$20,000, which has been affirmed by the Appellate Court for the First District.

But few questions are raised on this appeal. The first error assigned and urged for ground of reversal is the refusal of the trial court, at the close of all the evidence, to give a peremptory instruction to the jury to find for the defendant. The rule often announced by this court as to when the giving of such an instruction is proper and when it should be refused is that, where the evidence fairly tends to prove the allegations of the declaration, it is the duty of the trial court to refuse such an instruction, and submit the questions of fact, under proper instructions, to the jury. The evidence in this case was such as to entitle the plaintiff to the benefit of that rule. There was abundant evidence tending at least to support the material allegations of the declaration. The court therefore properly refused to take the case from the jury. Of the many cases supporting this conclusion the following may be cited: *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Baddeley*, 150 Ill. 328, 36 N. E. 965; *Pittsburg, Cincinnati, Chicago and St. Louis Railway Co. v. Hewitt*, 202 Ill. 28, 66 N. E. 829, and cases cited in the foregoing opinions.

The next error assigned is the ruling of the trial court in limiting the cross-examination of a medical witness named McGregor. The evidence shows that he was a practicing physician, and had made an examination of appellee as to her injuries, and testified concerning the result of such examination. Upon cross-examination appellant's counsel asked him concerning the manner in which he conducted the examination, and then asked him the two following questions: "Is that the usual way in which you make these examinations as to be so identified as to the time when an injury takes place—is that your usual custom?" "Do you, as a rule, make that inquiry when you make examinations of that kind?" Objections to both of these questions were made by counsel for the plaintiff, and the objections were sustained. The evidence shows that full cross-examination was

permitted by the trial court as to the manner in which the particular examination had been made, and there was no error in refusing to permit counsel for the appellant to cross-examine the witness as to what his usual custom or method was of conducting examinations of that kind.

The next assigned error complained of is the refusal of the trial court to give the instructions asked by the defendant numbered from 8 to 15, inclusive. Wherein the court improperly refused these instructions is not pointed out, the objection to the ruling of the court in that regard being general. We have, however, examined each of them, and are convinced that they were properly refused. They are argumentative, and seek to raise questions not proper to be submitted to the jury. They violate the rule often announced by this court that instructions which attempt to specify what conduct on the part of a plaintiff is imprudent or negligent should be refused, those being questions of fact for the jury to determine from all the evidence. *Illinois Central Railroad Co. v. Griffin*, 184 Ill. 9, 56 N. E. 337; *Chicago, Burlington and Quincy Railroad Co. v. Pollock*, 195 Ill. 156, 62 N. E. 831; *Chicago and Eastern Illinois Railroad Co. v. Huston*, 196 Ill. 480, 63 N. E. 1028. In the latter case we said that it is not proper for an instruction to tell the jury what acts or omissions constitute negligence, or that it was the duty of the deceased to have looked and listened; that the question what a reasonably prudent person would do for his own safety under like circumstances must be left to the jury as one of fact—citing *Chicago and Northwestern Railway Co. v. Hansen*, 186 Ill. 623, 46 N. E. 1071. For instance, the eighth refused instruction was intended to tell the jury "that if the plaintiff knew the train in question was approaching the crossing, or by looking or listening might have known it, and in time to have enabled her to keep out of its way, then she cannot recover in this action"; the effect of which would have been, if given, to instruct the jury that if she knew the train was approaching, or could have known it by looking or listening, in time to have avoided the accident, then, as a matter of law, she could not recover. And so with each one of the other instructions that were refused. Some of them are subject to the further objection that they are purely argumentative. Those given at the instance of the defendant sufficiently stated the rules of law applicable to the case, and fairly submitted the controverted questions of fact to the jury.

The tenth refused instruction stated "that the village ordinance of Riverdale, admitted in evidence, did not require said defendant to operate the gates at said 137th street crossing during the hours between six and seven o'clock in the morning." That instruction is directly contrary to the fact. That ordinance expressly provides upon its face that said gates should be operated from 6 o'clock a. m.; that is, that the watchman at said

street should be on duty daily from 6 a. m. to 8 p. m.

We have been unable to discover any substantial errors of law in this record. The judgment of the Appellate Court must therefore be affirmed.

Judgment affirmed.

(206 Ill. 453)

CHICAGO & A. R. CO. v. WISE.*

(Supreme Court of Illinois. Dec. 16, 1903.)

RAILROADS—STREET CROSSINGS—REGULATION—ORDINANCES—CONSTRUCTION—INJURY TO SERVANT—FELLOW SERVANT—COMBINED NEGLIGENCE OF FELLOW SERVANT AND OTHER EMPLOYEE—LIABILITY OF MASTER—INSTRUCTIONS—EVIDENCE.

1. A municipal ordinance requiring railroad corporations to maintain gates at street crossings within the limits of the city, and making it the duty of the persons operating the gates to pay diligent attention and use every effort to notify every person of the approach to the crossings of any locomotive engine, and to lower the gates, "so as to obstruct the approach along said streets to said railroad track," makes the gates a warning as well as a physical obstruction.

2. A municipal ordinance requiring railroads to maintain gates at street crossings, and making it the duty of the persons operating the gates to warn persons of the approach to the crossings of any engine, and authorizing several railroad companies owning and operating separate tracks across a street in close proximity to each other to unite in the maintenance of gates at the crossing, to be operated from a tower, affords protection to all persons who cross any of those tracks, no matter where they come on the street, whether within or without the gates.

3. Under a municipal ordinance which requires the person in charge of gates at a street crossing to lower the gates on the approach to the crossing of engines or cars, a person in charge of the gates who failed to lower the gates on the approach to the crossing of an engine was guilty of negligence, though he saw no person approaching the tracks.

4. In the absence of any evidence on the subject, it cannot be said that it is the duty of the foreman of a switching crew to ring the bell or blow the whistle on the engine on which he is riding.

5. The foreman of a switching crew is a fellow servant of the fireman and engineer in charge of the engine on which he is riding, and therefore he cannot recover against the company for an injury received on account of the negligence of the engineer and fireman alone.

6. The foreman of a switching crew and the person handling the gates at a street crossing are not, as a matter of law, fellow servants.

7. Defendant and other railroad companies owned separate tracks crossing a street at about right angles. The companies together maintained gates at the crossing, and had a person there to handle them. As defendant's engine approached the crossing the person in charge of the gates failed to lower one of them. A third person, driving towards the street between the tracks, on seeing the gate was open drove on and across the tracks. The engine, approaching the crossing, ran into the wagon, and plaintiff, a switch foreman, riding on the engine, was injured. The engineer and fireman failed to ring the bell or blow the whistle as the engine approached the crossing. *Held*, that the combined negligence of the gate keeper and of the en-

*Rehearing denied February 3, 1904.

¶ 5. See *Master and Servant*, vol. 34, Cent. Dig. § 512.

gineer and fireman was the proximate cause of the injury.

8. Where a foreman of a switching crew was injured because of the combined negligence of the railroad company's gate keeper at a street crossing and of the engineer and fireman in charge of an engine on which the foreman was riding at the time of the accident, the company was liable, as the foreman and the gate keeper were not fellow servants, though the foreman, engineer, and fireman were fellow servants.

9. Where a count in a declaration averred that a crossing was dangerous, and that it was the duty of defendant railroad company to give notice to persons about to cross the tracks on the street of the approach of engines and cars, and that it failed to do so, and the evidence tended to prove the averments, it was not error to refuse to direct a verdict for defendant because the count also alleged that the crossing was frequented by 5,000 persons daily, but which allegation was not sustained by proof, as this allegation might be rejected as surplusage.

10. Where, in an action to recover for personal injuries, a physician, after testifying as to his treatment of plaintiff for the injuries received, was asked what his services for treating plaintiff for his injury referred to were reasonably worth, which question was objected to and objection overruled, a subsequent question as to what his services were reasonably worth for the services performed in connection with plaintiff from the time of the injury up to the present time was not objectionable as allowing the witness to fix his compensation for services aside from the treatment made necessary by the injury.

11. Where, in a personal injury action, it plainly appeared that plaintiff was liable for the payment of a bill for medical treatment, evidence of the reasonable value of the physician's services was not improper, though the physician testified that he did not know whether he had a bill against plaintiff or some one else.

Appeal from Appellate Court, Second District.

Action by Dennis Wise against the Chicago & Alton Railroad Company. From a judgment for plaintiff, affirmed by the Appellate Court (106 Ill. App. 174), defendant appeals. Affirmed.

Jackson street, in the city of Joliet, runs east and west, and is crossed at about right angles by the tracks of four railroad companies. On the east is the track of the Elgin, Joliet & Eastern, then in order on the west come three tracks of the Lake Shore, five tracks of the Chicago & Alton, and then five tracks of the Chicago, Santa Fé & California. At the time of the occurrence upon which this action is based there was an existing ordinance of the city providing that every railroad corporation, or other corporation operating or using by steam power any railroad track within the limits of said city, should erect, maintain, and operate, at its own expense, gates at every public street or avenue crossed by such track and specified by ordinance, and station flagmen at street crossings not provided with gates; that it should be the duty of the persons who operated said gates, and the flagman stationed at street crossings, to pay diligent attention and use every effort to notify and inform all teams, vehicles, and all and every person or persons, by means of flags by day and colored lights by night, and, if directed by

ordinance, by the ringing of a bell of a prescribed size and weight, of the approach to said crossings of any locomotive engine, car, or train of cars, "and, in case of gates, to lower them, so as to obstruct the approach along said streets to said railroad track or tracks." The ordinance further provided that appellant should erect and maintain at its own expense, at all times, both day and night, gates, with tenders to operate the same, at the point where its tracks crossed Jefferson, Cass, and Jackson streets, provided "that, inasmuch as the tracks of the Chicago & Alton, the Chicago, Santa Fé & California, and the Elgin, Joliet & Eastern Railways cross Jackson street in close proximity to each other, said companies may unite in the erection and maintenance of gates at said crossing, provided said gates are operated from a tower." To conform to the provisions of said ordinance, gates were erected by the three companies mentioned at the Jackson street crossing, the east gate being located on or near the east line of the right of way of the Elgin, Joliet & Eastern Railway Company, and the west gate about on the west line of the right of way of the Chicago, Santa Fé & California Railway Company, being about three feet west of the most westerly rail of the tracks of said company. These gates were operated from a tower, which stood on the north side of the street, between appellant's west two tracks. The lower side of the windows of the tower were 19½ feet above the ground, thus giving the operator an unobstructed view of the street in both directions.

Appellee had been employed by appellant for about two years. He was foreman of a switch gang, consisting of an engineer, fireman, two switchmen, and himself. On June 27, 1900, at about 6 o'clock a. m., appellee, with his crew, started with a small switch engine on one of appellant's tracks north towards Jackson street. He and his two switchmen were riding on the footboard in front of the engine, appellee being on the west end of it. Their view, as they approached the Jackson street crossing, was obstructed on the west by cars standing upon the tracks there located. The whistle was not sounded nor the bell rung as the engine advanced, and just before the crossing was reached one of the switchmen, Glenn, saw a horse, drawing an open wagon, coming easterly along the street from behind the cars. Glenn called out to the others to jump, and jumped off the engine himself. Appellee attempted to jump off on the west side of the engine, which was then running at the rate of six to eight miles an hour, but was caught between the horse and wagon and the engine, and severely injured. The injuries suffered by him were to his right leg, the thigh being fractured, and the muscular tissues bruised and lacerated. Some of the muscles had to be removed, and appellee's leg was thus shortened about 2½ inches. The horse

with which the engine came in collision at the time appellee was injured was driven by one E. L. Graves, who was engaged in delivering meat shipped into Joliet by rail. He had loaded his wagon at a car on the tracks of the Chicago, Santa Fé & California, south of Jackson street, and had then started north on a roadway between two of the said tracks to Jackson street. When he reached the street crossing he was on the right of way of the latter road and within the west gate. This gate was up, and Graves turned east on the street. He had gone but a short distance when the collision occurred.

The evidence shows that the man at the tower, who had charge of the gates, was not attending to his duties. He claims that the east gate was down; that there were some teams on the east side of that gate; that switching was being done on the tracks near that gate, and that he was watching the gate for the purpose of letting the teams across when an opportunity should occur; that by reason of his being so occupied he failed to see the approach of the engine until after the accident. He is contradicted by three witnesses, who swear that the east gate was up, and that there were no teams east of it. There is also proof in the record that he was not in sight in his tower before the accident. He failed to give the warning of the approach of the engine, which the ordinance required he should do.

Appellee brought suit against appellant and others, but afterwards dismissed his suit as to all but appellant. Upon the trial the jury returned a verdict in favor of appellee for \$8,500, and, a motion for a new trial having been overruled, judgment was entered by the court for that amount. This judgment has been affirmed by the Appellate Court for the Second District, and the defendant below appeals to this court.

C. W. Brown, for appellant. John W. D'Arcy (C. B. Garnsey, of counsel), for appellee.

SCOTT, J. (after stating the facts). The statement of facts contained in the opinion of the Appellate Court in this cause is, we think, substantially correct. We have made such alterations therein as we deemed proper, and as so altered the same is above set forth and adopted as our statement of facts.

The question is properly presented here whether, as a matter of law, the evidence for the plaintiff below, with the reasonable inferences to be drawn therefrom, is sufficient to warrant a verdict for the plaintiff. Appellant attempts to excuse the failure of the towerman to lower the west gate on Jackson street by reasoning that under the terms of the ordinance the company was required to obstruct the approach to the tracks by the use of the gates, and that it was not required to lower them as a warning, and that, even if it could be held that one about to go upon

the tracks had the right to expect a warning by the gates being lowered, such right existed only for the benefit of persons approaching the railroad tracks from without the gates, and that Graves, who came upon Jackson street from the south, driving between two tracks of the Santa Fé road, was not within that class of persons that was entitled to notice of the approach of trains by the lowering of the gates. We think this entirely too strict a construction to be placed upon the ordinance. It provides: "And it shall be the duty of the persons who operate said gates, and the flagmen so stationed, * * * to pay diligent attention, and use every effort to notify and inform all teams, vehicles, and all and every person or persons, by means of flags by day and colored lights by night, * * * of the approach to said crossings of any locomotive engines, car or train of cars, and in case of gates, to lower them, so as to obstruct the approach along said streets to said railroad track or tracks." We think it a fair construction of this ordinance that the gates were intended as a physical obstruction and as a warning as well. The succeeding section of the ordinance provides for having one gate west of the Santa Fé tracks, and one east of the Elgin, Joliet & Eastern, both to be managed from a tower, instead of having one gate on each side of the tracks of each of the four companies whose tracks cross Jackson street between these two gates. We think it perfectly manifest that the purpose of this ordinance is to afford protection to all persons who cross any of these tracks on Jackson street, no matter where they come upon Jackson street—whether within or without the gates. By appellant's theory, a man who comes upon this street, as did Graves, from the south, between the tracks of the Santa Fé, and who turns east on the crossing and passes over the tracks of appellant and over the tracks of the Lake Shore, and then turns south and goes off the street upon the right of way of the Elgin, Joliet & Eastern, is left wholly without protection, so far as the ordinance is concerned. We cannot agree with this conclusion. The purpose of the ordinance was to afford protection to a man who only desired to cross the tracks of appellant on Jackson street as well as to a man who desired to cross the tracks of all four companies on that street.

It is further contended that Rubens, the towerman, was guilty of no negligence, because he swears that at the time the engine in question approached Jackson street no one was approaching the railroad tracks from the west on Jackson street, and it is concluded that, as he could see no one approaching, appellant was under no obligation to lower the gates. Under the ordinances of the city of Joliet above quoted, it is the duty of appellant to have these gates lowered whenever one of its engines or cars approaches Jackson street under such circumstances that

make it appear reasonable to the towerman that it is coming upon or going across that street. It is not for him to look or speculate about whether persons are approaching the track or not. His duty is to determine whether engines or cars are approaching the street, and whether they will come upon the street, and, if so, to drop the gates. By his own showing he was guilty of negligence on this occasion. He says he had the east gate down to keep persons east of that gate off the tracks on account of switching on the tracks near that gate. If this were true, it was also his duty to drop the west gate for the purpose of preventing persons from the west approaching the eastern tracks, where the switching was being done. So far as appears from his testimony, he did not see Graves' horse and wagon, or the engine upon which appellee was riding, until after the accident. The evidence of three witnesses, offered for appellee, showed that the east gate was not down, and that there were no teams waiting at that gate to cross at the time of or immediately preceding the accident, and there was evidence from which the jury were warranted in drawing the inference that at the time of the accident Rubens was not in the tower at all, or, if he was there, he was lying down.

Graves testified that, as he came upon Jackson street from the south, he looked to see if the west gate was up, and, finding that it was, he proceeded east on Jackson street, and it is said that, if it be true that appellant was negligent in failing to have the west gate lowered at that time, still the proximate cause of the injury was the fact that as the engine approached the crossing the bell was not rung and the whistle was not sounded, and that this was the negligence of appellee, who was the foreman of the switching crew. It does not appear to have been the duty of the foreman to ring the bell or sound the whistle. That, ordinarily, is the duty of the engineer or fireman, and, in the absence of any evidence on the subject, we cannot presume that this obligation devolved upon the foreman in this instance. The engineer and fireman, however, were the fellow servants of Wise, and he could not recover against appellant for an injury received on account of their negligence alone, and counsel for appellant take the position that Rubens and Wise were also fellow servants. To constitute two servants fellow servants it is necessary that they should be directly co-operating with each other in a particular business in the same line of employment, or that their duties be such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. *Chicago & Northwestern Railroad Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Chicago & Eastern Illinois Railroad Co. v. Kneirim*, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259. These men were

not co-operating with each other. It was the business of appellee to assist in and superintend the switching of the cars of appellant in its yards at Joliet, occasionally crossing Jackson street, while it was the business of Rubens to handle the gates at this crossing, lowering them as engines or cars approached, and closing them after they had passed. The duties of the two men were independent each of the other. Nor did those duties bring them into habitual association; they did not bring them into association at all. They simply made it possible that they might see each other on those occasions when appellee crossed Jackson street or came near to this street. We cannot hold as a matter of law that the two were fellow servants. It is apparent from the testimony of Graves that he would not have turned east and attempted to cross the tracks of appellant if the west gate had been down. It follows, then, that the injury resulted from the negligence of Rubens, the towerman, which is the negligence of appellant, and the negligence of the engineer and fireman operating the engine, who were the fellow servants of the injured man. But for the negligence of Rubens the negligence of the fellow servants would not have been sufficient to cause the accident; but for the negligence of the fellow servants the negligence of Rubens would not have been sufficient to occasion the accident. The negligence of appellant and the negligence of the fellow servants coincided to cause the accident, and together were the proximate cause thereof.

Where the negligence of the master is combined with the negligence of a fellow servant in producing the injury, and the negligence of neither is alone the efficient cause, both the master and the fellow servant are liable, and the injured servant may maintain his action against either or both together. 12 Am. & Eng. Ency. of Law (2d Ed.) p. 905; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Chicago & Northwestern Railway Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117.

The court properly refused to instruct the jury to find for the defendant.

What we have said in reference to the construction to be placed upon the ordinances of the city of Joliet disposes of the errors assigned upon the action of the court in modifying the fourth and refusing the fifteenth instruction asked by appellant.

The sixteenth instruction requested by appellant directed the jury to find a verdict of not guilty as to the second count of the declaration. This count avers that the crossing was of an unusually dangerous character, and, without relying upon the provisions of the ordinances of the city, charges that it was the duty of appellant to give notice to persons about to cross its tracks on Jackson street of the approach of the engines or cars of appellant, and that it failed in this duty.

It is drawn on the theory that in view of the long-continued practice of appellant in reference to the use of the gates at this crossing, independently of the ordinances, it could not at once cease their use without incurring liability to persons who might be injured as a result of such cessation, and who had been familiar with the practice theretofore followed by appellant, where no notice of any kind had been given by the appellant that any change would be made. There is evidence in the record which tends to prove the averments of this count so far as they have been referred to above.

The count also charged that the crossing was frequented by 5,000 persons daily. Of this there is no proof, and it is said that this is a material averment, and, there being no proof to sustain it, the instruction as to this count should have been given. The count was not strengthened by this averment, which might therefore be rejected as surplusage, and, that being true, the count could be sustained without any proof in reference thereto.

By this count plaintiff sought to recover for money expended for medicines and physicians' services. It appears from his testimony that he was in a hospital for 30 weeks, and that Dr. Cushing and Dr. Frederick treated him. Martin W. Cushing, a physician, testified that he was in attendance upon appellee immediately after the accident, and before he had been removed from the place where he was hurt; that he went to the hospital shortly after the patient was taken there, and visited him there every day for from 20 to 25 weeks, making one to three visits a day, treating him for the injury received in this accident. He was then asked, "What were your services reasonably worth for the attention you have given the plaintiff in connection with the wound you have referred to?" An objection was interposed, which was overruled. Thereupon counsel, instead of having the reporter read the question, asked this one: "What were your services reasonably worth, as a physician, for the attention and the treatment and services you performed in connection with the plaintiff from the time of the injury up to the present, as physician?" After an objection had been overruled and an exception preserved the witness fixed the amount at \$500. It is objected that this question which was answered permits the physician to fix the value of his services rendered the appellee whether those services were rendered in treating him for the injuries complained of or for something else, and that this bill of \$500 may include services aside from treatment made necessary by this injury. The witness had just been over a long recital of his treatment of appellee, and had heard an objection overruled to a question just preceding this one which properly defined the services the value of which was to be fixed, and, while this question is not entirely accurate, we do not

think the witness could have had reference to any charge except his charges for treating appellee on account of the injury received at the Jackson street crossing. The objection interposed was a general one. Had the specific objection now presented been made on the trial, no doubt it would have been obviated.

This medical gentleman, when asked if he had an account against plaintiff, stated that he had one against somebody, but did not know whether it was against the plaintiff or not; and it is urged that because he did not say that the account was against appellee the evidence was improper, or, as counsel puts it, "If the claimant himself did not know, how are the court or jury to ascertain?" If this were a suit by the physician we would be inclined to give weight to this proposition, but as the claimant or plaintiff here is appellee, and not the physician, and as it plainly appears that appellee is liable for the payment of this bill, this objection is without merit.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(206 Ill. 628)

MAMEROW v. NATIONAL LEAD CO.*

(Supreme Court of Illinois. Dec. 16, 1903.)

CONTINUING GUARANTY—CONSTRUCTION—INDEBTEDNESS COVERED—TERMINATION—NOTICE TO GUARANTOR—DIRECTORS OF CORPORATION—PRESUMPTIONS—EVIDENCE.

1. Where a guaranty provided that it should cover all debts, of whatsoever nature or character, then due or which might become due from a certain corporation to plaintiff, and recited that it was made to induce plaintiff to continue to sell goods to the corporation as the guarantors had requested, the guaranty covered purchases made by the corporation both before and after the date of the guaranty.

2. Where, in order to induce plaintiff to continue to sell goods to a corporation of which defendant was a stockholder and director, defendant and other directors executed their personal guaranty, guarantying payment on demand of all moneys, debts, obligations, and demands, of whatsoever nature or character, then due or which might thereafter become due from the corporation, the guaranty was not limited to subsequent sales made for cash, but covered, as well, sales made to the corporation on 30 days' credit.

3. Where a guaranty was a continuing one, and was not limited as to duration or amount, it will be construed to be limited to such time and amount as is reasonable under the circumstances of the particular case.

4. Where directors of a corporation personally executed a continuing guaranty, guarantying payment for goods sold and to be sold by plaintiff to the corporation, the guaranty could be revoked or withdrawn at any time thereafter on notice to plaintiff, in which case the guarantor's liability would extend only to sales made pursuant to it before notice.

5. Where, at the time of the default of a principal debtor, he was insolvent, so that the creditor could not collect his debt, or any part thereof, the creditor's failure to give notice of the default to a continuing collateral guarantor within a reasonable time, which did not result

*Rehearing denied February 3, 1904.

¶ 5. See Guaranty, vol. 25, Cent. Dig. § 77.

in any loss to the latter, would not discharge him from liability.

6. Where defendant executed a guaranty of payment for goods sold and to be sold to a corporation by plaintiff, in which guaranty defendant declared himself to be both a stockholder and a director of the corporation, and at the time of signing the guaranty he had knowledge that it was in embarrassed circumstances, and that its credit had been impaired, the guaranty having been executed for the purpose of inducing plaintiff to continue to sell goods to the corporation in due course of business, defendant was bound to take notice, and would be presumed to have notice, of the extent of the purchases made by the corporation under the guaranty, and of its default in payment.

7. Where defendant guaranteed payment of purchases made by a corporation, in which he was a stockholder and director, from plaintiff, and the last item of plaintiff's account for sales made did not mature until December 9, 1897, and on the 17th of December the corporation made an assignment for the benefit of creditors, under which only 9 per cent. of its indebtedness was realized from its assets, defendant's offer to show that the corporation was in possession of goods at all times between the making of the guaranty and until December 17, 1897, to have satisfied plaintiff's claim, and that defendant had no notice thereof until December, 1898, was properly refused; plaintiff's duty to make demand of payment and give notice of default not arising until a reasonable time after its transactions with the corporation had been closed.

Error to Appellate Court, First District.

Action by the National Lead Company against George Mamerow. From a judgment in favor of plaintiff, affirmed by the Appellate Court (98 Ill. App. 460), defendant brings error. Affirmed.

This is a writ of error to the Appellate Court for the First District to review a judgment of that court affirming a judgment of the superior court of Cook county in a suit brought by defendant in error against plaintiff in error to recover a balance for goods sold by defendant in error to a corporation known as the Berner-Mayer Company upon a written guaranty executed by plaintiff in error and others to defendant in error. The guaranty in question is as follows:

"Agreement made this 19th day of March, 1897, between Herman D. Berner, residing at 2673 Euclid avenue, in the city of Cleveland, Ohio, and Jacob J. Mayer, residing at the Arlington Hotel, in the city of Cleveland, Ohio, and George Mamerow, residing at Irving Park, in the city of Chicago, Illinois, parties of the first part, and the National Lead Company, a corporation of New Jersey, doing business at No. 287 Pearl street, in the city of New York, of the second part:

"Witnesseth: Whereas, the Berner-Mayer Company, a corporation organized under the laws of Ohio and doing business in the city of New York and at Cleveland, Ohio, is indebted to the National Lead Company in various sums of money for goods sold and delivered on open account and for other accounts; and whereas, the said National Lead Company has called upon the said the Berner-Mayer Company for security for its indebtedness to said National Lead Company, and has refused to permit the indebtedness

of the said the Berner-Mayer Company to increase until the said present indebtedness is amply secured; and whereas, the said parties of the first part are interested in the said the Berner-Mayer Company as stockholders and directors thereof, and desire that the said National Lead Company shall continue to sell goods to the said the Berner-Mayer Company, and have requested it so to do; and whereas, the parties of the first part have agreed to furnish the said National Lead Company security for all accounts due and to become due from said the Berner-Mayer Company to said National Lead Company:

"Now, therefore, in consideration of the foregoing, and in consideration of the sum of one dollar and other valuable consideration to the parties of the first part in hand paid by the parties of the second part at or before the enrolling and delivering of these presents, the said parties of the first part do jointly and severally, and for their heirs, executors and administrators, guarantee to the said National Lead Company the payment to said National Lead Company, upon demand, of all moneys, debts, obligations and demands, of whatever nature or character, now due or which may hereafter become due from said the Berner-Mayer Company to the said National Lead Company.

"In witness whereof the said parties of the first part have hereunto set their hands and seals this 19th day of March, 1897.

"Herman D. Berner.

"Jacob J. Mayer.

"George Mamerow.

"In the presence of R. M. Morley."

To the declaration in assumpsit the plaintiff in error pleaded only the general issue, with an affidavit of merits. The cause was submitted to the court, a jury having been waived; and the issues were found in favor of defendant in error, and damages were assessed at \$4,778.71. The action was for goods sold under the guaranty between the 19th day of March, 1897, and the 9th day of November, 1897.

It appeared from the evidence that the Berner-Mayer Company was an Ohio corporation, with places of business at Cleveland, New York, and Brooklyn. The items for which the plaintiff in error was held liable under the guaranty were all sold and delivered to the New York and Brooklyn branches on 30 days' credit. The company made an assignment for the benefit of its creditors December 17, 1897. The questions presented here were raised by holdings offered by the plaintiff in error, and refused by the trial court.

Benson Landon, for plaintiff in error. Tenney, McConnell, Coffeen & Harding, for defendant in error.

RICKS, J. (after stating the facts). Plaintiff in error's contention is that the superior

and appellate courts erred in construing the guaranty to cover purchases made by the Berner-Mayer Company after March 19, 1897—the date of the guaranty. This question was raised by a holding, presented to the court and refused, to the effect that the guaranty only covered all indebtedness existing at the time of its date. This contention, we think, is without merit. The preamble of the instrument recites that the parties to the guaranty “desire that the said National Lead Company shall continue to sell goods to the said Berner-Mayer Company, and have requested it so to do,” and the language of the guaranty itself purports to cover all debts, of whatever nature or character, “now due or which may hereafter become due from said Berner-Mayer Company to the said National Lead Company.” As was said by the Appellate Court: “Looking at the instrument as a whole, it is certainly open to the construction that it was intended to cover debts not only due, but which might become due thereafter, in pursuance of the express wish of the guarantors that the lead company should continue to sell goods to the Berner-Mayer Company. It cannot fairly be said that the recitals limit the guaranty to said present indebtedness, as counsel contends.”

It is next urged that the guaranty in question does not apply to or cover sales made by the defendant in error to the Berner-Mayer Company upon 30 days' credit, and that, as the entire demand is for goods so sold, the defendant in error ought not to recover on the guaranty. This question was raised in the trial court by plaintiff in error requesting the court to hold, as a matter of law, that plaintiff in error was not liable to defendant in error “for goods sold and delivered by said National Lead Company to the Berner-Mayer Company upon thirty days' credit.” This holding the court refused. In support of this contention, plaintiff in error cites *Miller v. Stewart*, 9 Wheat. 680, 6 L. Ed. 189, *Shreffler v. Nadelhoffer*, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626, and other cases, wherein the propositions are announced and held that the “liability of a surety is not to be extended by implication beyond the terms of the contract,” and that the surety or guarantor will not be held answerable unless the contract is strictly pursued. We are unable to see how this court is aided, or plaintiff in error benefited, by the rules here invoked. They can only be applied when it is determined what is the legal effect of the guaranty in question, or, in other words, the scope of the undertaking of the guarantors. The contract must be construed by and from its own terms and provisions, as far as they furnish a guide, and in aid thereof the circumstances of the making of the contract may be taken into consideration. By the express words of the contract, the makers guaranty the “payment, upon demand, of all moneys, debts, obligations and

demands, of whatever nature or character, now due or which may hereafter become due from the Berner-Mayer Company.” The language is broad, and, if given the interpretation it would usually import, must be held to cover not only the indebtedness existing at the time of the execution of the guaranty, and which might then be due or might thereafter become due, but also such indebtedness as might, in due course of trade, thereafter be created and become due. If a guaranty is clear in its terms, it must be interpreted and construed according to the language used; “that is to say, the parties must be presumed to have meant that which their language clearly imports. It is not what one of the parties may have intended, but what is shown by the contract to have been the intention of both parties.” *Peoria Savings, Loan & Trust Co. v. Elder*, 165 Ill. 55, 45 N. E. 1083.

Upon examination of the contract in question, it appears from its recitals that defendant in error had sold and delivered goods to the Berner-Mayer Company on open account, and that the latter owed the defendant in error for goods so sold and for other accounts. It also appears that the guarantors were “interested in the said Berner-Mayer Company, as stockholders and directors thereof”; that defendant in error had refused to permit the indebtedness of the Berner-Mayer Company to increase until the present indebtedness was amply secured; that the guarantors desired that the defendant in error should continue to sell goods to the said Berner-Mayer Company, and so requested; that the guarantors agreed to furnish to defendant in error security of all accounts, “due and to become due.” From these recitals, it is evident that plaintiff in error and his co-guarantors knew not only that defendant in error had been selling the Berner-Mayer Company goods upon open account, but that these accounts so existing comprised both classes of debts; that is, those that were due, and those that were not due, but were to become due. Furthermore, as directors of the Berner-Mayer Company, it was the duty of the guarantors to have knowledge of its affairs, and the nature, extent, and character of its indebtedness, and the recitals of their undertaking tend most strongly to show that they did know. They desired defendant in error to continue to extend credit to the Berner-Mayer Company, and agreed that they would, on demand, pay defendant in error all moneys, debts, obligations, and demands, of whatever nature or character, then due, or that might thereafter become due. Their guaranty was not, by such language, limited to sales on open account that should be payable by the Berner-Mayer Company upon demand of defendant in error, but “moneys, debts, obligations, and demands, of whatever nature or character”; nor such debts or obligations only as defendant in error could any moment de-

mand, and thereby make due, but the guarantors would, on demand, pay the debts, obligations and demands due and thereafter to become due. The general, and we may say the sole, object of the guarantors was to obtain from defendant in error the further continuation of sales to the Berner-Mayer Company on time. Defendant in error needed no guaranty if it was to sell for cash, and the use of the words "obligations and demands, of whatever nature or character," in conjunction with the words "all moneys, debts," would seem useless and meaningless unless the parties contemplated that the goods to be sold on credit would be upon the usual terms of credit, or that notes or other evidences of the indebtedness arising from such sales might be taken by defendant in error; otherwise "all moneys and debts" would have, according to plaintiff in error's contention, been descriptive of the full extent of their undertaking of payment.

Counsel for plaintiff in error say that the guarantors should have had the right to go to defendant in error at any time and require defendant in error to demand payment, and, if not paid by the Berner-Mayer Company, the guarantors should have had the right to pay at once and be subrogated. They might have had that right if they had so contracted, but we are unable to construe the contract before us as so providing or intending.

It is said in support of this contention that if this contract is held to be a continuing guaranty, and to be applicable to sales upon 30 days' credit, then, in law, there is no protection to the guarantor, and that defendant in error might as well have sold on 10 or 30 years' time as upon 30 days' time. This contention is not sound. We think the greater weight of authority is agreed that where the guaranty is a continuing one, and is unlimited as to duration and amount for which the guarantor will be liable, such time and amount must be reasonable, under the circumstances of the particular case. *Lehigh Coal Co. v. Scallen*, 61 Minn. 63, 63 N. E. 245; 14 Am. & Eng. Ency. of Law (2d Ed.) 1140. The guarantors could have limited their undertaking both as to time and amount, had they seen fit to do so, but, from a reading of the guaranty, it would seem that their desire and intention were that both should be unlimited.

Nor were the guarantors without reasonable protection against the acts of the Berner-Mayer Company under the contract as it is construed by us. As to all the indebtedness created after the execution of the guaranty, the undertaking was collateral and continuing, and could be revoked or withdrawn at any time thereafter upon notice to defendant in error, and the guarantors' liability would in such case only cover the sales made pursuant to it, and before the notice. 14 Am. & Eng. Ency. of Law (2d Ed.) 1160, and authorities cited.

The case of *Hunt v. Smith*, 17 Wend. 179, 31 Am. Dec. 296, is mainly relied on by plain-

tiff in error in support of his contention. We have examined that case, and do not think it applicable to the guaranty before us. In the case cited the guaranty was an express undertaking to pay for goods that might be furnished a proposed purchaser to the amount of \$70, and concluded with the expression, "and I will be responsible to you for that sum." Goods were sold, relying on that guaranty, on 30 days' credit, and the court held that the guaranty did not cover such sales. A marked difference will be found between the guaranty there and the one at bar. In *Hunt v. Smith* there was a direct and absolute undertaking to pay to the amount in the guaranty, and the guaranty was an accommodation one, in which the guarantor had no show of interest, while in the case at bar the guarantors, as shown by the recitals in the instrument of guaranty, were in fact, though not in law, the persons to whom and for whose benefit the sales were to be made. They were both directors and stockholders of the Berner-Mayer Company, and were making a personal, strenuous effort and extending their personal credit in their endeavor to carry the failing business of the Berner-Mayer Company. Its credit was then impugned and impaired, and they were vitally interested in maintaining and continuing the credit, and, as it seems to us, the whole consideration to the guarantors was that defendant in error should sell to the Berner-Mayer Company on credit.

Plaintiff in error contends that he was entitled to timely notice of the default of the Berner-Mayer Company, and that, as notice was not given for about a year and a half after the failure and assignment of said company, he is released. Plaintiff in error offered a holding that it was the duty of defendant in error to give him "notice of the default of the Berner-Mayer Company within a reasonable time," and also offered another holding to the effect that, although plaintiff in error was a stockholder and director of the Berner-Mayer Company, such fact would not relieve defendant in error from its duty to give timely notice of the default, and further asked the court to hold that the burden of proof was upon the defendant in error to show that it had given notice of default within a reasonable time. The court refused these holdings.

The general rule undoubtedly is that where the guaranty, as here, is a collateral, continuing one, the guarantor is entitled to reasonable notice of the default of the principal debtor. *Taussig v. Reid*, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504. The purpose of this notice is to enable the guarantor, if he elects to pay the guaranty and at once proceed against the principal debtor, to reimburse himself for the moneys thus paid. The right to this notice is not an absolute right, however, in the sense that the failure to give it will, in all cases and under all circumstances, release the guarantor, but it is a relative right, and the failure to give it can

only be availed of when it is made to appear that the guarantor has suffered loss by such failure. *Taussig v. Reid*, supra. If at the time of the default of the principal debtor the latter is insolvent, so that the creditor cannot collect his debt, or any part thereof, the failure to give notice of the default can work no injury to him, and therefore such failure would be no defense. There must not only be a want of notice within a reasonable time, but also some actual loss or damage thereby caused to the guarantor; and if such loss or damage does not go to the whole amount of the claim, but is only to a part, the guarantor is not wholly discharged, but only pro tanto. Before a guarantor can be discharged by the failure of the creditor to give notice, it is incumbent upon the guarantor to show that he is prejudiced by such failure. *Rhett v. Poe*, 2 How. 457, 11 L. Ed. 338; 14 Am. & Eng. Ency. of Law (2d Ed.) 1152. Such being the rule, it would seem that the question of notice or want of notice is a matter of defense. The guarantee has made his case by showing a guaranty broad enough to cover the transaction, and a sale or sales in compliance with and in reliance upon the guaranty, and the default of the principal; and if the guarantor seeks to relieve himself from the liability, and upon the ground that notice of the default was not given him within a reasonable time, the burden rests upon him to show the failure to give the notice, and the consequent injury by the loss of the whole or a part of the debt for which he stood as surety. *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504; *Rhett v. Poe*, supra; *Voltz v. Harris*, 40 Ill. 155; *Farmers' & Merchants' Bank v. Kercheval*, 2 Mich. 505.

In *Furst & Bradley Mfg. Co. v. Black*, supra, the court say: "The failure to give notice, and the resulting damages, were, however, matter of defense." In the case at bar, evidence was offered by plaintiff in error for the purpose of showing failure to give notice of default, and consequent injury. The evidence was objected to, and the objection sustained. The entire offer, as made by plaintiff in error, was that he had no notice until December, 1898, that credit had been extended by defendant in error to the Berner-Mayer Company subsequent to the date of the guaranty sued on, and had no notice of the default of the Berner-Mayer Company until the same date; that the Berner-Mayer Company was in possession of a large amount of goods, and continued to do business in Chicago, New York, and Brooklyn until December 17, 1897, and was in possession of enough goods during all the time that intervened from the making of the guaranty until December 17, 1897—the date upon which it made an assignment—to have satisfied the claim of appellee. A creditor is not required to give notice of default to a guarantor where the guarantor has notice from an independent source, or where it is his duty, under the law, to take notice,

or, in other words, where, in law, he is chargeable with notice. The law does not require a useless act. In the case at bar the guarantors, by their written guaranty, styled themselves as both directors and stockholders of the Berner-Mayer Company. As directors, it was their duty to know the liability and financial condition of the company; and, from the recitals in the guaranty, they did know at the time the guaranty was made that the company was in debt to defendant in error to such an extent, and its financial condition and character had then become such, that defendant in error would not extend it further credit without the guaranty in question. In *Rhett v. Poe*, supra, in discussing a similar question to the one here presented, it is said (page 483): "If the drawer of the bill was in truth the partner of the acceptor, either generally or in the single adventure in which the bill made a part, in that event notice of dishonor of the bill by the holder to the drawer need not have been given. The knowledge of one partner was the knowledge of the other, and notice to one notice to the other." Mr. Thompson, in his work on Corporations, in speaking of the duties of directors of corporations, uses the following language: "It is a sound view, at least in so far as the question respects the rights of third parties, that the directors of a corporation are, in law, conclusively presumed to know its condition, its business, its receipts and expenditures, and all the general facts which go to make up that condition and business, as shown by the entries on its regular books. The reason of this is that it is their duty to know these things in the exercise of their official functions. This doctrine is said to be one founded in public policy, essential to the safety of third persons in their dealings with corporations, and to the protection of stockholders interested in the welfare and safe management of corporations." 4 Thompson on Corporations, p. 4024. To the same effect is the case of *United Society of Shakers v. Underwood*, 9 Bush, 608, 15 Am. Rep. 731. We think, under the facts disclosed by the record in this case, that the rule announced by Mr. Thompson, supra, is applicable. Plaintiff in error, by his written guaranty, declared himself both a stockholder and a director of the defaulting company. He knew, then, that it was in embarrassed circumstances, and that it required the guaranty of the men composing its directorate to enable it to continue its business. It would seem, too, from the express language of the guaranty, that the recitals and undertakings of the guarantors in that instrument were the consideration upon which defendant in error accepted the guaranty, and continued the sales under it. The record showing, as we think it does, that the sales made after the guaranty were in the due course of business, and within the terms of the guaranty with defendant in error, it is our duty to hold that plaintiff in error was bound to take

notice, and will be presumed to have had notice, of the extent of the purchases made by the Berner-Mayer Company under the guaranty, and of its default in payment.

In this view of the case, the refusal of the court to admit the evidence offered, if error at all, was harmless. The record shows that the last item of defendant in error's account did not become due until December 9, 1897, and on the 17th of the same month—eight days after the default—the Berner-Mayer Company made an assignment for the benefit of its creditors, and less than 9 per cent. of its indebtedness was realized from its assets. The duty of defendant in error to make demand of payment and give notice of default did not, if at all, arise until within a reasonable time after the transactions with the Berner-Mayer Company, based upon the guaranty, were closed. *Ferst v. Blackwell*, 89 Fla. 621, 22 South. 892; *Douglas v. Reynolds*, 7 Pet. 113, 8 L. Ed. 626; *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. Rep. 508. The day after the assignment, defendant in error began an attachment against the Berner-Mayer Company, but received nothing by it; receiving only its per cent. of the general distribution under the assignment. Under such conditions, we would not be prepared to say that the offer made by plaintiff in error as to the financial condition of the Berner-Mayer Company between the date that the debts became due, December 9, 1897, and the date of the assignment of the company (the 17th), was sufficient evidence upon that question to relieve it from liability, even if the plaintiff in error had been entitled to notice. The rule is that the plaintiff in error must have shown that the Berner-Mayer Company had sufficient goods between those dates that plaintiff in error, by receiving notice, could have realized the debt, or some portion of it, that was lost by the failure to give the notice. The mere offer to show that it was in possession of goods of a large or small amount, taken in connection with its failure, and the payment of but so small a per cent. of its indebtedness under the assignment, would contradict any presumption, arising from the mere possession of a large amount of goods, that plaintiff in error could have realized the debt by timely notice and action, or that plaintiff in error, by notice, could have paid and saved himself.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 626)

McDONALD et al. v. PEOPLE ex rel. HANBERG, County Treasurer.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENT—VOLUNTARY PAYMENT—WAIVER OF OBJECTION.

1. Under the express provisions of Laws 1897, p. 125, § 66, the payment of an installment of an assessment for a public improvement is a

waiver of the right to make an objection to a judgment for sale for remaining installments.

Appeal from Cook County Court; E. C. Ruth, Judge.

Application by the people, on the relation of John J. Hanberg, county treasurer, for a judgment of sale of the property of M. C. McDonald and others to satisfy a special assessment. From a judgment against the property, defendants appeal. Affirmed.

George W. Wilbur, for appellants. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

HAND, C. J. This is an application for a judgment of sale to satisfy the fourth installment of a special assessment levied to pay the cost of paving Ashland avenue from Twelfth to Twenty-Second street, in the city of Chicago. The appellants appeared, and filed objections to judgment being rendered against their property, and, the same having been overruled and judgment entered, they have appealed, and have assigned as grounds for reversing the judgment of the county court the following: First, that the county court erred in not admitting in evidence the record of the first resolution of the board of local improvements, which was offered for the purpose of showing that the said resolution did not contain an itemized estimate of the cost of the improvement; and, secondly, that the court erred in refusing to hold that the ordinance providing for the improvement was void by reason of the fact that it contained clauses limiting a day's labor to eight hours, and requiring that only native-born or naturalized citizens be employed in constructing said improvement.

It was stipulated upon the trial that "the present proceedings relate to the fourth installment of a special assessment known as docket No. 23,013 and warrant No. 23,533; that the first installment as to the property objected for has been paid."

Section 66 of the improvement act (Laws 1897, p. 125, § 66) in part provides: "The voluntary payment by the owner, or his agent, of any installment, of any assessment, levied on any lot, block, tract or parcel of land, shall be deemed and held in law to be an assent to the confirmation of the assessment roll, and be held to release and waive any and all right of such owner to enter objections to the application for judgment of sale and order for sale." The objectors having voluntarily paid the first installment of this assessment, they will be deemed to have waived and released their right to object to a judgment of sale for the subsequent installments remaining unpaid. The validity of the part of section 66 of the improvement act hereinbefore set out was presented to us for consideration in *Downey v. People* (Ill.) 68 N. E. 807, and it was there held to be valid, and that the voluntary payment by the owner of any in-

stallment of a special assessment levied upon his property was a waiver on his part of the right to object to the confirmation of the assessment roll, and to be a release and waiver on his part of any and all right to enter objections to an application for judgment for the sale of his property to satisfy the subsequent installments remaining unpaid.

The judgment of the county court will be affirmed. Judgment affirmed.

(206 Ill. 597)

SKAHEN et al. v. IRVING.*

(Supreme Court of Illinois. Dec. 16, 1903.)

RESULTING TRUSTS — SUFFICIENCY OF EVIDENCE — ADVANCEMENT TO CHILD — QUITCLAIM DEED — PROPERTY TAKEN IN NAME OF ANOTHER — DEFERRED PAYMENTS — EFFECT.

1. Evidence in a suit to declare a resulting trust *held* sufficient to show that the consideration for the original acquirement of the property was furnished by the plaintiff.

2. Evidence in a suit by a parent to declare a resulting trust in property placed in the name of his child *held* sufficient to rebut the presumption that the transaction was intended as an advancement.

3. Where a father, on his daughter's representation that certain creditors of a son-in-law might seek to hold him as a partner, quitclaimed real estate to the daughter, limiting the equitable and legal title to her, and no fraud or undue advantage is shown, and any trust limiting the effect of the conveyance was oral, the daughter is entitled to retain the property as against the father, though paying nothing therefor.

4. Where, in a suit to declare a resulting trust, defendant files an answer, but no cross-bill, a decree attempting to vest title to property in her is erroneous, as attempting to grant affirmative relief where only a decree dismissing the bill would be proper.

5. Evidence in a suit to declare a resulting trust in property taken in the name of another *held* to show that the conveyance was so made as a matter of convenience, and that the intention of all the parties was that the title should inure to the benefit of plaintiff.

6. The fact that payment of a portion of the purchase money for property taken in the name of another is deferred, and that the grantee assumes all obligation therefor, does not prevent the creation of a resulting trust to the extent of such deferred payment, the obligation being in fact discharged by the cestui que trust.

Appeal from Superior Court, Cook County; Jesse Holdom, Judge.

Suit by the Title Guaranty & Trust Company, as conservator of William Irving, an insane person, against Annie Irving and others, in which William Irving, having been declared sane, was substituted as plaintiff. Decree for plaintiff, and defendants appeal. Modified.

O'Donnell & Drady and William Dillon, for appellants. Flower, Vroman & Musgrave, for appellee.

RICKS, J. The original bill in this case was filed November 28, 1900, by the Title Guaranty & Trust Company, as conservator of William Irving, an insane person, making

Annie Irving, a daughter, and Charles E. Harding, defendants. On the same day the suit was filed Annie Irving was married to Thomas Skahen, and the bill was afterwards amended making him a party defendant, Annie Skahen being the principal defendant, Charles E. Harding being made defendant by reason of having purchased of Annie Skahen a part of the property in controversy. There were three pieces of property, together with notes given by Harding to Annie Skahen for another piece, in dispute. Before the trial of the cause William Irving was, by order of the court, adjudged to be sane, and restored to the control of his property, and this suit was then prosecuted in his name. He was at the time of the trial 76 years of age.

The bill alleged that Annie Skahen, in August previous to the filing of the bill, had procured her father to be adjudged insane and sent to the asylum, and the bill sought to establish a resulting trust in certain property in the city of Chicago known as No. 300 Twenty-Third Place, No. 391 West Taylor street, No. 7703 Lowe avenue, and No. 7700 Lowe avenue; the property known as No. 7703 Lowe avenue being the property purchased by Charles E. Harding in 1897. The record title of the other property stood in the name of Annie Skahen. The bill further alleged that the property in question had been purchased with the money of William Irving, and that the title had been placed in the name of Annie Skahen and her mother, Mary, for convenience, inasmuch as appellee, William Irving, could neither read nor write, and that there was no intention of a gift or advancement, there being three other children living at the time of the conveyances to Annie Skahen. Mary Irving, wife of appellee and mother of appellant Annie Skahen, died previous to the filing of the bill in this suit.

Annie Skahen filed her answer, denying all the material allegations of the complainant's bill, and declaring that a part of the property (being the properties on Twenty-Third Place and Taylor street) was purchased with money belonging to herself and her mother, which they had previously earned at different times, the title being taken in the name of her mother, and by her mother conveyed to her, and it was therefore her separate property; that the two properties on Lowe avenue were purchased with funds belonging to herself and her mother, and were intended to be the sole property of appellant Annie Skahen. It sets up the statute of frauds, alleges that the trust claimed is not manifested by any writing, pleads the statute of limitations, and sets up laches as to all of said properties. Charles E. Harding and Thomas Skahen filed their answer, neither admitting nor denying the allegations of the bill, but praying for strict proof.

There had been several pieces of property besides those in question owned by William

*Rehearing denied February 3, 1904.

Irving, which had been disposed of, the title to all being taken in the name of Mary Irving at the time of the purchase. The title to the properties known as No. 300 Twenty-Third Place and No. 391 West Taylor street was at the time of the purchase placed in the name of Mary Irving, and October 23, 1889, was quitclaimed by Mary and William Irving to their daughter, Annie Skahen, then Annie Irving. The other pieces of property known as Nos. 7700 and 7703 Lowe avenue, were at the time of the purchase, in 1891, deeded directly to Annie Irving, now Annie Skahen.

The trial court found the issues for complainant, William Irving, as to the properties Nos. 7700 and 7703 Lowe avenue, but as to the properties No. 300 Twenty-Third Place and No. 391 West Taylor street found there was no fraud in procuring the deed from complainant, but that there was no evidence to show that he or his wife in executing that deed, intended to make a gift of the property therein conveyed to the daughter, Annie Skahen, and found, as to these two pieces of property, the complainant is estopped by that deed from asserting a resulting trust, and decreed the property in fee to be in appellant Annie Skahen. Cross-errors were assigned as to this part of the decree.

In the trial of the case there was no controversy between the parties interested as to the principles of law applicable to the facts, except in regard to the legal effect of the quitclaim deed of October 23, 1889, and, inasmuch as the result will have to be determined mainly from an examination of the facts, we will first discuss what the evidence shows the facts to be.

Appellee came to Chicago in 1860, and at that time had \$330 in cash. From the time of his arrival in Chicago until 1890 he had steady work as a stationary engineer, always commanding good wages. The wife, Mary, prior to her marriage with complainant, was a servant, with but little means, having at the time of her marriage about \$70. As shown by the evidence, the average wages of appellee from 1860 to 1873 were \$100 per month. He worked very steadily, never being out of employment, but for two years of the time mentioned he was unable to give a definite statement as to his employment and earnings. In 1873 he began working for the McCormick Harvester Machine Company at a salary of \$100 per month, and at various times thereafter his wages were increased until the termination of said employment, in 1887, when he was, and had been for several years, receiving \$1,600 per year. The books of the company show that during that period the company paid him the sum of \$19,650.43. He had two sons, who in 1880 began work at the McCormick plant, and, as they were not of age, their earnings went to their father. The books of the company show one of the boys earned \$5,082.07, which the father received. The other son is

shown to have earned \$1,763.43, which was likewise paid to his father. The wages of both father and sons were turned over to the wife of appellee. It is further disclosed by the evidence that appellee was the inventor of several valuable patents, and up to the year 1890 received as royalties therefrom the sum of \$10,680. The evidence shows that from 1860 to 1890 he received from his patents, his individual and his sons' earnings, an aggregate sum of \$53,305.85. This amount does not include rents received on properties or interest on money loaned. The evidence shows him to have been a sober, industrious man, and very economical. He transacted but little business, as he had but little time for that purpose, since he worked very steadily, going to his work early in the morning and remaining at his post until the close of the day, and frequently until late at night. His wife seems to have had a fairly good education, and she managed their business and assumed charge of their financial operations to the extent of holding and lending their money and collecting rents from real estate. Each appears to have had complete confidence in the other, so this arrangement was satisfactory to appellee. After the death of Mrs. Irving the business was attended to by the daughter, Annie, about the same as the mother had previously done. Appellants contend, and there is some evidence in that direction, that appellee, after the death of his wife, and after the purchase of all the property in dispute, had some difficulty with women; but, inasmuch as this does not affect the title to the property, we deem it unnecessary to discuss this contention. It is claimed by appellant Annie Skahen that her mother conducted a dairy on a small scale, and kept boarders for several years, and out of the profits thus accumulated a part of the money was secured for the purchase of the property here involved. The evidence, however, in this regard is conflicting as to whether either of the ventures just mentioned proved profitable. Said appellant also contends that she and her mother took contracts for sewing from a cloakmaker, but there is no evidence that more than \$200 or \$300 was realized from this source.

The trial court found in its decree that the four pieces of property above mentioned were purchased with the money of William Irving, and we think this finding well supported by the evidence. The first of the properties purchased was that at No. 300 Twenty-Third Place. It was bought of Cyrus McCormick June 27, 1873, being soon after the appellee went to work for the McCormick Company, a bond for a deed being first taken in the name of Mary Irving. The purchase price was \$2,200. There was paid in cash \$150, and the balance provided for by 41 notes for \$50 each, running from 1 to 41 months, all the notes being signed by Mary Irving. At the end of each month the

amount of a note was kept out of appellee's wages, and when the last note was paid, being in March, 1877, a deed was executed, by which the property was conveyed to Mary Irving.

The property known as No. 391 West Taylor street was purchased of Mary Conway October 3, 1882, the purchase price being \$5,000. Appellant Annie Skahen contends that this property was purchased with the earnings and money of her mother; appellee contends the purchase was made by him, \$600 being paid at the time of purchase, and \$400 being paid every three months. Appellee's contention seems to be supported by the evidence and the conditions that at that time existed, as he and his sons were at that time working at the McCormick works, and their collective income was \$2,600 per year, or over, from 1882 to 1886. The title to this property was also taken in the name of Mary Irving.

The Lowe avenue property No. 7703 was purchased from John L. Talbot April 27, 1891, at \$6,300; \$3,800 being paid in cash and an indebtedness of \$2,500 assumed. The title to this property was taken in the name of Annie Skahen. There is some dispute as to the source from which the \$3,800 cash payment was derived, but the evidence discloses that in the latter part of 1890 appellee received \$7,500 from foreign patent rights, and it is conceded by the appellant Annie Skahen that \$3,000 of this money went toward the payment for this property. This is the property purchased by appellant Charles E. Harding on September 8, 1897, who paid therefor \$6,700, part being cash, the exact amount not being shown by the evidence, and the balance was provided for by 83 notes for \$50 each, part of which have since been paid to Annie Skahen.

The property described as No. 7700 Lowe avenue was purchased September 26, 1891, from Thomas J. Rice, for \$7,000; \$4,000 being cash, and an incumbrance of \$3,000 assumed by the purchaser. The title to this property was taken in the name of Annie Skahen. The evidence shows that the purchase money was derived from money invested by a man named Schumacher for appellee and his wife, and, although the greater part of the money was deposited in the name of Mary Irving, we think the court was justified in finding the payment was made by appellee. There is no claim that Mary, the wife, had made any money, individually, for several years prior to this conveyance. It is shown that Mrs. Irving had sold some property that had previously been purchased in the same manner as the other property already mentioned, and placed the money at interest. Of the indebtedness on this property \$1,000 has since been paid, and there still remains an incumbrance of \$2,000.

As to the deed of October 23, 1889, it will be necessary to review the circumstances which led to its execution and the convey-

ance thereby of the properties known as No. 300 Twenty-Third Place and No. 391 West Taylor street. Appellee was working in Sioux City, Iowa, and, some time before, a mortgage had been placed upon the property known as No. 391 West Taylor street for \$3,000, and the money loaned to P. R. McLeod, son-in-law of appellee, to be used in the latter's business. In May, 1889, McLeod failed in business, and made an assignment. Mrs. Irving and Annie became uneasy, fearing the creditors would try to hold appellee liable because of this \$3,000, upon the theory that McLeod and appellee were partners. Immediately after the failure Annie went to see her father, and represented to him that it was dangerous for him and his wife to hold the title to their property, and procured the deed conveying this property to her, and also a bill of sale of all of appellee's household effects and personal property of every kind. The deed was a quit-claim deed, and recited as its consideration the sum of \$8,000, and contained the further recital that the grantee was to have and to hold the same, and all the estate, right, title, interest, and claim whatever of said party of the first part, either in law or in equity, to the only proper use, benefit, and behoof of said party of the second part, her heirs and assigns, forever. It is not pretended, however, that the grantee in fact paid any money. The bill does not charge that there was any fraud in the execution or procurement of this deed. Appellee subsequently assigned to Annie Skahen all his patent rights and the contracts for royalties arising from the same.

The evidence in this case was heard by the chancellor, except a part of the evidence of appellee, which was taken by deposition; but during the trial appellee went upon the stand as a witness, and testified to a great extent before the court, and from a patient and careful review of all the evidence we are unable to say that there was error in the conclusion of the court upon the facts in the record. We think the court was fully justified in finding that all the properties in controversy were purchased by appellee, and that the purchase price of all of them was paid by him from moneys arising from his own earnings, from his patents, and from the earnings of his minor sons. While the evidence shows that appellee is an illiterate man, it also shows that he has good business judgment, and that the purchases of the various properties here involved, as well as other properties disposed of before this controversy, and not involved, were made by him after careful investigation and consultation with his wife and family and with business men whose judgment and experience were large. There can be little doubt in the mind of any one, upon a careful consideration of the evidence, but that the title to the properties purchased by appellee was placed by appellee in his wife and in ap-

pellant Annie Skahen purely as a matter of convenience, and because of his illiteracy and his implicit confidence in them. The evidence discloses that for nearly 40 years appellee was a sober, industrious, economical man, and that his earnings and savings, for a man in the ordinary walks of life, were large. The finding of the chancellor that his earnings and income were more than \$53,000 is fully supported by the evidence. It also appears that during the life of his wife she collected the rents, which for a good part of the time were from \$75 to \$100 a month, and after her death these rents were collected by Annie Skahen.

While it is true that the placing of property by a husband or father in the name of a wife or child is ordinarily presumed to be an advancement or settlement, yet in a case like the one at bar, where the record discloses that the earnings and income were large, and the investments of an unusual character, and where to indulge the presumption that the placing of the properties in the name of the wife or child was a gift would have the effect of stripping the husband and father of all his property, and leave him at an advanced age penniless, and at the same time leave other children, having equal claims upon him, wholly without recognition, or a prospect of receiving any portion of his estate, such facts alone strongly tend to rebut such presumption. In such case the intention must control, and from the evidence in this record we are entirely satisfied with the finding of the chancellor that the conveyances, at the time they were made to the wife or to appellant Annie Skahen, were not intended as gifts or advancements. This view of the law, as applicable to this class of conveyances, has been many times recognized and declared by this court. *Pool v. Phillips*, 167 Ill. 432, 47 N. E. 758; *Dorman v. Dorman*, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; *Adlard v. Adlard*, 65 Ill. 212; *Wormley v. Wormley*, 98 Ill. 544; *Johnston v. Johnston*, 138 Ill. 385, 27 N. E. 930; *Smith v. Smith*, 144 Ill. 299, 33 N. E. 35; *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756; *VanBuskirk v. VanBuskirk*, 148 Ill. 9, 35 N. E. 383. Mr. Perry, in his work on Trusts (5th Ed. § 146), thus states the rule: "If there is any circumstance accompanying the purchase which explains why it was taken in the wife's or child's name, and shows it was not intended to be an advancement, but was intended to be a trust for the husband or father, the presumption of an advancement will be rebutted, and the inference of a trust will be established." The same author, at section 147, says: "The real purchaser, if otherwise competent, may be a witness to state what his object, purposes, and intentions were in making the trust and in taking the title in the name of his wife or child." In *Pool v. Phillips*, supra, we said (page 442, 167 Ill., page 760, 47 N. E.): "It has been uniformly held, whenever the question has arisen,

that the gift of a husband's or father's entire estate to a wife or child, by way of advancement, is unreasonable."

The trial court found that by the execution of the quitclaim deed of October 23, 1889, conveying to appellant Annie Skahen the properties designated as No. 300 Twenty-Third Place and No. 391 West Taylor street, appellee is estopped from now asserting any claim to said property, and decreed the title to the same to be in appellant Annie Skahen. These properties were originally placed in the name of Mary Irving, the wife of appellee and mother of appellant Annie Skahen, and the title to them was placed in Annie by the deed of October 23, 1889, above mentioned, upon the representation of the wife and daughter to appellee that there was danger that appellee would become involved in the failure in business of his son-in-law, McLeod, to whom he had advanced money; at least such seems to be the greater weight of the evidence. Appellee seems to have been of the impression that no such deed was in fact made, but finally admitted its execution, and, if he had not done so, the record amply and sufficiently shows the existence of such deed. Just what was said and done at the time of its execution is uncertain. The evidence would rather tend to show an express trust, but not in writing; and, as the statute of frauds was pleaded, appellee cannot have the benefit of such trust, if any there were. There is not sufficient fraud or undue advantage shown to have been taken of appellee by appellant Annie Skahen at the time of that conveyance to bring the same within the rule of *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116, 33 Am. St. Rep. 229, where a constructive trust was declared. By that deed both the equitable and legal title to the properties included in it were limited to appellant Annie Skahen as grantee, and, unless fraud or imposition were shown, out of which the law would raise a constructive trust, the conveyance must be given effect. *Donlin v. Bradley*, 119 Ill. 412, 10 N. E. 11; *Myers v. Myers*, 167 Ill. 52, 47 N. E. 309. So much of the decree, however, as attempts to vest title to the two properties last above named in appellant Annie Skahen must be reversed. She filed no cross-bill, and the effect of the decree was to give her affirmative relief, which cannot be done simply under an answer. *Mason v. McGirr*, 28 Ill. 322; *White v. White*, 103 Ill. 438; *Shields v. Bush*, 189 Ill. 534, 59 N. E. 962, 82 Am. St. Rep. 474; *Ballance v. Underhill*, 3 Scam. 453.

As to the properties Nos. 7700 and 7703 Lowe avenue, we regard the decree of the superior court as right, and as supported by the evidence. The records shows, relative to both of these properties, that when appellee purchased them each was subject to an incumbrance, and that the incumbrance was assumed by appellant Annie Skahen, as grantee in the deeds. The only assumption, how-

ever, made by her of such indebtedness was that arising from the recitals in the deeds themselves. She executed no personal obligation, and we think it clear from the whole record that at the time of the purchase it was not her intention or expectation, or the intention of appellee, or of any of the parties to the transaction, that she should, in fact, pay anything upon either of said properties, but the intention was that the transaction was the transaction of appellee only, the title to the properties being taken in appellant Annie Skahen purely for convenience and because of the illiteracy of appellee; and we think that the record shows that all the money that was paid upon these properties was the money of appellee, and not the money, or any of the money, of appellant Annie Skahen.

Appellants urge that, as only a part of the purchase money was paid at the time the deeds were made and the legal liability for the deferred payments was assumed by appellant Annie Skahen, who took the legal title, there can be no resulting trust to the extent of such deferred payments, no matter who in fact pays them; and they cite and rely upon *Reed v. Reed*, 135 Ill. 482, 25 N. E. 1095, and *Devine v. Devine*, 180 Ill. 447, 54 N. E. 336, and insist that these cases must be held to overrule *Fleming v. McHale*, 47 Ill. 282, wherein the converse of this contention is held. We do not think there is any conflict between the cases, nor do we think the cases of *Reed* and *Devine* are applicable to the case at bar. We regard the case of *Fleming v. McHale* as squarely in point, and directly applicable to this case, and adhere to the rule there announced. In that case two sons bought real estate for \$1,080, and caused the same to be conveyed to their mother. They paid \$300 cash, and the mother executed her note and mortgage for the balance of the purchase money. The sons in fact paid the note thus executed by the mother for such balance, and, the mother having died with the title still in her, a controversy arose between her heirs as to whether the property passed as part of her estate or was the property of the two sons who purchased it. On page 287 of that opinion the court said: "We agree with appellant that a resulting trust can only arise in favor of a person who claims to have furnished the consideration money when such consideration, or some aliquot part thereof, was furnished as part of the original transaction at the time the purchase was made, and the claimant must have occupied a position, originally, which would have entitled him to be admitted in the place of the person to whom the conveyance is made. *Perry v. McHenry*, 13 Ill. 227. Appellant insists that, as the purchase price of the land was \$1,080, the sum paid by the young men, \$300, was not an aliquot part thereof, and such part must be paid as one-half, one-third, or the like. Technically, \$300 was not an aliquot part of

\$1,080, because the latter divided by the former leaves a remainder, yet it was the whole amount required as the first payment. It was in part performance of the contract of purchase, and all that was demanded at the time. Had the contract been one-third down, or one-half, and a less amount paid, then it could not be said an aliquot part was paid; but when, as in this case, a definite sum was to be paid, less than one-third, and it was paid, the contract to that extent is performed."

The decree of the superior court relative to the Lowe avenue properties, Nos. 7700 and 7703, is affirmed. As to so much of said decree as relates to the West Taylor street and Twenty-Third Place properties, which gives appellant Annie Skahen affirmative relief under her answer, the decree is reversed. The order should have been to dismiss appellee's bill as to those properties. So much of the decree of the court below as relates to and requires appellant Annie Skahen to account for rents and profits derived from the properties Nos. 7700 and 7703 Lowe avenue since the 26th day of September, 1891, is modified. We entertain the view that under the evidence *Mary Irving*, appellee's wife, during her life, and appellant Annie Skahen, and appellee, all constituted one family, for the support of which and whom appellee and his property were liable, and that the wife, *Mary*, during her life, and appellant Annie Skahen after the death of her mother, continued to apply the rents and income of the properties to the support of the family, and the care and maintenance of the properties, and, so far as disclosed by the evidence, the expenditures thus made were satisfactory to appellee until about the time of bringing his bill. Appellee should have all the rents and profits of No. 7700 Lowe avenue from the date of filing his bill herein, and the entire proceeds, whether in money or notes, received by appellant Annie Skahen from the sale of No. 7703 Lowe avenue. The accounting, when taken, should not be further extended. Appellant will be taxed two-thirds of the costs in this court, and appellee will be taxed one-third of the costs of this court. The cause is remanded to the superior court of Cook county, with directions to enter a decree in conformity with the views herein expressed.

Affirmed in part, reversed in part, modified in part, and remanded, with directions.

(206 Ill. 451)

MAPLEWOOD COAL CO. v. PHILLIPS.*

(Supreme Court of Illinois. Dec. 16, 1903.)

APPEAL—DISMISSAL—SET-OFF—EFFECT.

1. Practice Act, § 31 (3 *Starr & O. Ann. St.* 1896, p. 3016), providing that, when a plea or notice of set-off has been interposed, plaintiff shall not be permitted to dismiss his suit without the consent of defendant or leave of court, does not apply to the dismissal of an appeal; and a plaintiff appealing to the city court from

*Rehearing denied February 3, 1904.

a judgment rendered for him by a justice of the peace may dismiss his appeal, though defendant appeared in the city court, and there filed a set-off.

Appeal from Appellate Court, Third District.

Action by Charles A. Phillips against the Maplewood Coal Company. From a judgment of the Appellate Court affirming a judgment of dismissal of plaintiff's appeal from a judgment rendered for him by a justice of the peace, defendant appeals. Affirmed.

The appellee recovered a judgment before a justice of the peace of Fulton county for \$75, the appellant not appearing. The appellee prosecuted an appeal to the city court of Canton. The appellant appeared in that court and filed a set-off, whereupon the appellee moved the court to dismiss the appeal, which motion was allowed, and the appeal was dismissed with a procedendo. The appellant prosecuted an appeal to the Appellate Court for the Third District, where the judgment was affirmed, and, a certificate of importance having been granted, a further appeal has been prosecuted to this court.

Pinkney & McRoberts, for appellant.
Chiperfield & Chiperfield, for appellee.

HAND, C. J. (after stating the facts). In *Bacon v. Lawrence*, 26 Ill. 53, it was held both parties may appeal from the decision of a justice of the peace, and, if only one party appeals, he may dismiss his appeal against the wish of the other. It is, however, contended by the appellant that section 31 of the practice act (3 Starr & C. Ann. St. 1896, p. 3016), which reads as follows: "When such plea or notice of set-off shall have been interposed, the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant, or leave of the court"—should govern this appeal, and prohibited the appellee from dismissing his appeal in the city court. We are of the opinion that section has no application to the dismissal of an appeal. The party appealing has the right to control his appeal, and may dismiss the same at any time before the case is finally disposed of, as a matter of right. If the appellant was not satisfied with the judgment of the justice, he should have appealed therefrom; and, having failed to appeal, he will be deemed to have acquiesced therein, and to now be content therewith.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(206 Ill. 441)

SPOHR v. CITY OF CHICAGO.*

(Supreme Court of Illinois. Dec. 16, 1903.)

CONDEMNATION PROCEEDINGS — AWARD — CROSS-EXAMINATION—REMARK OF COURT—HARMLESS ERROR—VALUE OF REAL ESTATE — PROOF.

1. Where an objection to the refusal of the court to permit a witness to answer questions

on cross-examination is general, the action of the court will be sustained if any tenable objection to the question in fact existed.

2. The consideration stated in a deed, as between strangers to it, is no proof that the property sold for the amount stated as the consideration.

3. Where the trial court permits a witness on cross-examination to testify, in an action to condemn and assess the value of property, in regard to sales made by the witness in several different years and on the day before he testified, the exclusion of a question as to what he knew about sales of land in the vicinity of the land in controversy, to test his knowledge and fairness, is harmless error, where such knowledge is not the chief element in determining the weight of his testimony.

4. Where the trial court permits a witness on cross-examination to testify, in an action to condemn and assess the value of property, as to his reasons for believing the property in controversy might be used at some future time for manufacturing purposes, the exclusion of questions which merely have for their object the compelling of the witness to repeat what he has already said is proper.

5. Where the jury, in an action to condemn and assess the value of property, is permitted to view the premises, and expert witnesses testify, placing widely divergent values on property, an attempt to show that the award of the jury must have been based on the evidence of a particular witness whose cross-examination was restricted, and being the only cross-examination objected to, is a mere matter of conjecture, and without merit.

6. Where the evidence is conflicting, and the jury make a personal inspection of the property sought to be condemned, there being nothing in the case to show that the verdict was the result of passion or undue influence, or of improper means, the award of the jury will not be disturbed.

7. Where the court, in the presence of the jury, after a witness had testified that he learned of a sale from the record concerning which inquiry was made, remarked that "it was a newspaper report of the sale," when there was nothing in the evidence to show that the witness had derived his information from a newspaper report, it was harmless error as to the party whose counsel was cross-examining the witness.

8. In an action to condemn and assess the value of land, fanciful or speculative damages cannot be allowed.

Appeal from Circuit Court, Cook County;
Frank Baker, Judge.

Suit by the city of Chicago, in trust for the use of the schools, against Charles Spohr and others. From a judgment on verdict for Spohr, awarding him \$11,750 for land condemned, he appeals. Affirmed.

This is a proceeding to condemn certain property for the use of schools, brought by or under the auspices of the board of education of the city of Chicago. Several lots, owned by different persons, were sought to be condemned, and there were about 18 respondents or defendants. The present appeal, however, was taken by the appellant, Spohr, alone. Appellant's property consisted of 44 feet of ground on Sigel street, known as "128 and 130 Sigel Street," and also a piece of ground 22 feet 4½ inches wide, fronting on Sigel street, and known as "132 Sigel Street," upon which also was a building. The two pieces of property, to wit, 128

*Rehearing denied February 2, 1904.

¶ 6. See *Eminent Domain*, vol. 18, Cent. Dig. § 685.

and 130 Sigel street, and 132 Sigel street, adjoined each other. The cause was tried before a court and a jury. During the trial the jury viewed the premises. The jury awarded the appellant, as compensation for 128 and 130 Sigel street, including the land and the building thereon, the sum of \$6,750, and allowed, as compensation for 132 Sigel street, including the land and the building thereon, the sum of \$5,000. The land on which the buildings numbered 128 and 130 Sigel street stood appears to have been valued at \$3,500, and the building or buildings thereon at \$3,250, making \$6,750. The land on which the building numbered 132 Sigel street stood appears to have been valued at \$1,772, and the building thereon at \$3,228, making altogether \$5,000. Judgment was rendered upon the verdict returned by the jury, and the present appeal is prosecuted from such judgment.

Adler & Lederer, for appellant. James Maher and Angus Roy Shannon, for appellee.

MAGRUDER, J. (after stating the facts).

1. The appellant, Charles Spohr, urges as a reason why the judgment below should be reversed that the court unduly restricted the cross-examination of a witness, introduced upon the trial below by the petitioner, or appellee, who testified in regard to the value of the property sought to be condemned. This witness, whose name was Mauritzon, testified, upon his direct examination, that he was a real estate agent, and had been engaged in that business in the city of Chicago for 20 years, and that the firm of which he was a member had during that time sold all kinds of property—vacant lots, residences, flats, and acre and business property. He also testified, upon his direct examination, that he had appraised property for several elevated railroad companies, and for a steam railroad company, and for the city of Chicago in track-elevation cases, and also for the board of education. He also testified, upon the direct examination, that he was familiar with the property, involved in this litigation, known as 128, 130, and 132 Sigel street.

Upon his cross-examination, the witness Mauritzon stated that there had been a sale of certain property known as 105 Sigel street on or about November 26, 1902, the petition in this case having been filed in March, 1903. His testimony was to the effect that all he knew about the sale of 105 Sigel street was what he learned from the record. He stated that he had gone to the recorder's office and examined the record index, and there learned the consideration named in the deed executed upon the transfer of the property at 105 Sigel street. All the testimony of the witness in regard to 105 Sigel street—a piece of property not involved in the present litigation—was called out upon cross-examination. Counsel for appellant complain that the trial court did not allow them to pursue

the cross-examination of the witness in regard to his knowledge of the sale of the property at 105 Sigel street. As we understand the evidence, he stated distinctly that he knew nothing about the sale, or the amount of the sale, except what he saw in the recorder's office upon an examination of the index record. He did not base his opinion of the value of the property here in controversy entirely upon what he learned from the record in regard to the sale of the property at 105 Sigel street, but he stated, upon his cross-examination by another lot owner, as follows: "I base my opinion on my general experience in the real estate business, taking into consideration the location of the property, the character of the surroundings, the improvements in the neighborhood, the transportation facilities, and the rental of the property. I used to have charge of No. 105 Sigel street in 1885 for a number of years, and the properties we have had for sale on Wells street, Division, Orleans, and Market, and in that immediate vicinity."

We find no fault with counsel's contention in regard to the rule as to cross-examination in such cases. The weight of the testimony of expert witnesses in regard to the value of property depends largely upon the facts and reasons which lie at the basis of their opinions. In other words, the opinions given by experts should be based upon facts within their actual knowledge and which they are prepared to state. "While, in the examination in chief, the expert can only be questioned in a general way as to the reasons of his opinion, the cross-examiner is entitled in every instance to demand a free disclosure, minutely and in detail, of all the facts and circumstances upon which the expert's opinion has been grounded." 8 Ency. of Pl. & Pr. p. 769; *Chicago & Northwestern Railway Co. v. Town of Cicero*, 154 Ill. 656, 39 N. E. 574. Upon cross-examination great latitude is allowed, so as to enable the jury to see upon what basis the witness has made his estimate of value, and what facts have induced him to form the opinion he has expressed. 3 Jones on Evidence, § 826; *Atchison, Topeka & Santa Fe Railroad Co. v. Blackshire*, 10 Kan. 487. But a large discretion is necessarily left to the trial judge in determining the range proper to be allowed counsel in cross-examining witnesses. *Chicago, Rock Island & Pacific Railway Co. v. Rathburn*, 190 Ill. 572, 60 N. E. 817; *City of Spring Valley v. Gavlin*, 182 Ill. 232, 54 N. E. 1035; *City of Chicago v. Lonergan*, 196 Ill. 518, 63 N. E. 1013. Of course, in such cases, the discretion exercised by the court in regulating or limiting the cross-examination should be a reasonable discretion, and cross-examination should not be excluded on subjects embraced or included in the examination in chief, if such ruling is calculated to prejudice the cross-examining party. In other words, so far as the cross-examination of a witness re-

lates either to facts in issue or facts relevant to the issue, it may be pursued as a matter of right. 3 Jones on Evidence (Ed. 1896) § 821. But we are unable to see that in the case at bar there was any unnecessary or undue restriction by the trial court of the right of cross-examination. Counsel for appellant have not called our attention to each particular question asked upon cross-examination, and pointed out specifically, wherein the court erred in refusing to permit the witness to answer such question. They have called our attention to some three or four pages of printed matter taken from the abstract, and have stated that the court erred in its rulings as there set forth. They range their objections under heads which they call "groups" of objections. The proper course to pursue in such cases is to call attention to a particular question and the ruling thereon, and not to several pages of questions and different rulings upon a number of questions. The objections were not specific in their nature, but were merely general objections. Where an objection is thus general in its character, and points out no specific ground upon which it is based, the action of the court in excluding the question will be sustained, if any tenable objection to the question in fact existed. *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 488, 29 N. E. 899. The court sustained objections to many of the questions put to the witness upon cross-examination, upon the ground that they were mere repetitions of questions already asked, and, if answered, would have called out testimony which had already been given.

As to the sale or transfer which was alleged to have been made of the property at 105 Sigel street, the witness was allowed in his testimony to state all that he knew about it. A further prosecution of the cross-examination in reference to that matter was improper and unnecessary. When the witness testified that his only knowledge of what the property had been sold for was the consideration named in the deed as he saw it stated upon the index record in the recorder's office, the matter was placed in the same light as though the deed itself had been introduced in evidence for the purpose of showing what the property had been sold for. But where the only purpose of introducing a deed under such circumstances is to prove the price of the lots therein mentioned as tending to establish the value of the lot in controversy, and this is to be done solely by the consideration expressed in the deed, such proof is of no value. It is true that the recital of the consideration in the deed may, as between the parties to it, be admissible evidence as tending to show the amount paid, but is not conclusive between them. As to strangers, however, to the deed, such recital is merely an *ex parte* statement of the parties to the deed. It is, at most, merely an admission of the grantor and

grantee in the deed, and therefore is hearsay when offered against a stranger to the deed. *O'Hara v. Chicago, Madison & Northern Railroad Co.*, 139 Ill. 151, 28 N. E. 923; *City of Chicago v. Lonergan*, 196 Ill. 518, 68 N. E. 1018.

Counsel also complain that the cross-examination was unduly restricted in reference to other sales spoken of by the witness Mauritzon, besides that relating to 105 Sigel street, but, upon reading over the cross-examination of the witness, we find that he was permitted to answer questions of counsel in regard to sales made by him in 1890, in 1893, in 1894, and on the day before he testified. Counsel say that they had a right to test the witness' knowledge and his fairness upon cross-examination, and for that purpose asked him what he knew about sales of lands in the same vicinity. *Lentz v. Carnegie*, 145 Pa. 627, 23 Atl. 219, 27 Am. St. Rep. 717. This is true, but counsel was permitted by the court to call out the fact that the witness had made such sales; but the fact of such sales was stated by the witness to be only one of the grounds upon which he based his opinion as to the value of the property. A witness may be allowed to state his knowledge of the actual sales in the vicinity of the property involved, but it is not always the chief element in determining the weight of the testimony of a witness when given. In *Chicago & Evanston Railroad Co. v. Blake*, 116 Ill. 163, 4 N. E. 488, we said (page 167, 116 Ill. and page 490, 4 N. E.): "The uses and capabilities of a particular property, the prices at which like property in the neighborhood is held or offered; knowledge or observation of the growth and development of towns and cities; a general knowledge of trade and business, and of the commercial advantages or prospects of the place where the property is situated—are all matters more or less taken into account by the intelligent witness in forming his opinion as to the value of a particular piece of property."

The witness had also stated, upon his direct examination, that the property involved had a prospective value, in that it might be used at some future time for manufacturing purposes. Complaint is made that the court unduly restricted the cross-examination of the witness upon this subject. But the court allowed counsel to call out from the witness the reasons why he was of the opinion that it might be used for manufacturing purposes. The witness stated, in answer to questions by counsel, that, on the opposite side of the street from where the property involved was located, a large building had already been erected which was used for manufacturing purposes. We are unable to say that appellant was deprived of any right by being too much restricted in his cross-examination of the witness Mauritzon. Where facts have already been stated by a witness, questions which merely have for

their object the compelling of the witness to repeat what he has already said may well be disallowed by the court. *Chicago City Railway Co. v. Cooney*, 196 Ill. 466, 63 N. E. 1029.

Counsel for appellant attempt to show that the award of the jury must have been based upon the evidence of the witness Mauritzon, whose cross-examination is the only cross-examination objected to. But this is mere matter of conjecture. Other testimony was introduced by the appellee, which placed the value of the property at about the same figure at which Mauritzon placed it, and which was not objected to on the part of the appellant. Witnesses for appellee placed the value of the land at \$75 and \$80 per front foot, whereas the witnesses for the appellant placed the value of the land at \$160 per front foot and \$175 per front foot. There was thus the usual conflict between the expert witnesses on both sides as to the value of the property. The jury viewed the premises, and we have held that what the jury have learned from their examination of the premises may be considered by them in passing upon the testimony of the witnesses, and that the damages awarded by a jury in a condemnation proceeding will not be disturbed where the evidence is conflicting and the jury have viewed the premises. "Where the jury make a personal inspection of the property sought to be condemned, the court is not justified in reversing the judgment based upon such verdict, unless the damages awarded are so grossly excessive as to show that the verdict was the result of passion, or of undue influence, or of improper means." *Rock Island & Peoria Railway Co. v. Lelsy Brewing Co.*, 174 Ill. 547, 51 N. E. 572, and authorities there cited; *Lanquist v. City of Chicago*, 200 Ill. 69, 65 N. E. 681. There is nothing in the case at bar to show that the verdict was the result of passion, or of undue influence, or of improper means.

2. Complaint is made by the appellant that the court made a remark in the presence of the jury which was prejudicial to the appellant. After the witness Mauritzon had stated that he had learned of the last sale of property on Sigel street from the record, the court remarked, "It was a newspaper report of the sale." This remark on the part of the court should not have been made, as there was nothing in the evidence to show that the witness had derived his information from a newspaper report of the sale. But after the court had made this remark the witness was further questioned, and stated—what has already been referred to—that he had gone to the recorder's office, and, although he had not examined the record of the deed, yet he had examined the index in the recorder's office, which showed the amount of the consideration in the deed. After this testimony by the witness, the jury could not have been led into the belief that

the witness had learned about the sale from a newspaper. Indeed, the remark made by the court, if it did any harm at all, was more calculated to injure appellee than appellant, because, as appellee's witness had stated that he had derived his information from the record, the remark of the court was calculated to cast discredit upon the witness, and make the impression that the witness had not correctly stated the source of his information. Although what the court said might well have been left unsaid, we do not think that it had any such influence upon the jury as to justify a reversal of the judgment.

3. Counsel for the appellant also complain of an instruction given by the court to the jury wherein the court told the jury that, in ascertaining the just compensation to be paid by the petitioner to the owner of the land sought to be taken, they should disregard any mere fanciful or speculative estimate of its value or use made by any of the witnesses, if they believed from the evidence that any of the estimates made by the witnesses were fanciful or speculative. It is said that this instruction left it to the jury to determine a question of law, and assumed that there were mere fanciful or speculative estimates of value or use in the testimony. We do not think that it was submitting to the jury a question of law in telling them that they must not allow damages based upon a mere fanciful or speculative estimate of value, in view of other instructions given upon the subject of value. Nor can it be said that there were not sufficient facts developed by the testimony to justify a warning to the jury against the allowance of mere fanciful or speculative damages. This court has held that it is not error to give such an instruction as is here complained of. In *Chicago & Alton Railroad Co. v. City of Pontiac*, 169 Ill. 155, 48 N. E. 485, we said (page 173, 169 Ill., and page 490, 48 N. E.): "Instructions 5 and 6 given for the plaintiff told the jury that nothing should be allowed for imaginative or speculative damages, or such remote or inappreciable damages as the imagination may conjure up, and which may or may not arise at all in the future; and that 'just compensation' means compensation for real, not speculative, damages, and that, unless actual damages are shown, only nominal damages can be awarded to the appellant for the extension of the street as prayed in the petition. This instruction is in accordance with the holding of this court in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 149 Ill. 457 [37 N. E. 78], and the cases therein cited." Other instructions given to the jury in the case at bar told them that the compensation to be paid to the owner for the parcels of land proposed to be taken by the city was the fair cash value in the market of said parcels of land. What constituted fair cash value in the market was sufficiently explained to

the jury in other instructions. In telling them that they must not base their award upon fanciful or speculative estimates of value, the court was merely enlarging its instruction to them that they must look only to the fair cash value in the market.

We discover no error which would justify us in reversing this judgment. Accordingly, the judgment of the circuit court is affirmed. Judgment affirmed.

(206 Ill. 584)

WHITE v. HARRIS et al.*

(Supreme Court of Illinois. Dec. 16, 1903.)

ADVERSE POSSESSION—PAYMENT OF TAXES—ACTS OF POSSESSION—SUFFICIENCY—QUESTION FOR THE JURY—INSTRUCTIONS.

1. A person claiming land under Limitation Law, § 7 (2 Starr & C. Ann. St. [2d Ed.] p. 2618, c. 83), providing that payment of taxes for seven successive years on unoccupied land by a person having color of title thereto gives title, must not only prove that he had color of title and that he paid taxes seven successive years on the premises while they were vacant and unoccupied, but he must also prove that after the lapse of seven years he took possession thereof.

2. One claiming land under Limitation Law, § 7 (2 Starr & C. Ann. St. [2d Ed.] p. 2618, c. 83), must pay taxes thereon for seven successive years after the acquisition of his color of title thereto, and must show that his possession was taken after seven years from the date of the first payment of taxes.

3. A person claiming land under Limitation Law, § 6 (Laws 1839, p. 266), relating to possession for seven years, or under section 7, relating to payment of taxes on vacant land for seven years, cannot be permitted to show a part compliance with one section and part with another, but must show a complete performance under either one.

4. A survey of vacant land and the placing of stone monuments at the corners of the quarter sections do not constitute such possession as will enable one to claim the land under Limitation Law, § 7 (2 Starr & C. Ann. St. [2d Ed.] p. 2618, c. 83), requiring payment of taxes for seven years with color of title and subsequent taking possession.

5. The fact that one employed an agent to keep people from cutting oak timber on vacant land, permitted the agent to cut ash timber and to pasture his cattle thereon, and that the agent went on the land once a week or once a month, and at different times prevented persons from cutting timber, did not constitute such possession as would enable the principal to claim the land under Limitation Law, § 7 (2 Starr & C. Ann. St. [2d Ed.] p. 2618, c. 83).

6. A claimant to vacant land under Limitation Law, § 7 (2 Starr & C. Ann. St. [2d Ed.] p. 2618, c. 83), constructed a hut thereon. The house was about 10 by 12 feet, and about 6 feet high. It was built of logs, the spaces between them being filled with mud. The roof was of clapboards and sloped one way. It had no windows and no floor. It was occupied by hunters for a week or two. The following spring it was destroyed, and was never rebuilt. There was evidence tending to show that it was built for a temporary purpose. Held, that the question whether the erection of the building constituted possession of the land was for the jury.

7. Where the question whether the construction of a house on vacant land constituted possession under Limitation Law, § 7 (2 Starr & C. Ann. St. [2d Ed.] p. 2618, c. 83), was for the jury, an instruction that if the possession by the

claimant was all that could well be had of land of that character, and if his appropriation was such as to apprise the community that the land was in his possession, such appropriation might be shown by evidence of such acts as cutting timber, surveying and establishing monuments, building a house thereon, or any other sufficient acts of ownership, was misleading, as authorizing the jury to take into consideration the survey made by the claimant and the cutting of timber by him as acts of possession, but which were insufficient.

Appeal from Circuit Court, Greene County; Robt. B. Shirley, Judge.

Action by Sarah E. Harris and others against George H. White and others. From a judgment for plaintiffs, defendant White brings error. Reversed.

This is an action of ejectment, brought on August 23, 1895, in the circuit court of Greene county, by Sarah E. Harris, widow, and Mary J. Dunaway and others, heirs at law, of John Harris, deceased, as plaintiffs, against the plaintiff in error, White, and his two tenants, as defendants, to recover possession of 200 acres of land in Greene county, described as the northeast quarter, and the northeast quarter of the southeast quarter, of section 31, town 10 north, range 13 west. The plea of not guilty was filed. The cause was tried before the court and a jury. The jury found the plaintiffs below (defendants in error here) to be the owners in fee simple and entitled to the possession of the real estate described in the declaration, and found the defendants below guilty of withholding the premises. Motion for new trial was overruled, and on September 9, 1898, the court rendered judgment that the plaintiffs recover against the defendants the possession of the premises according to the finding of the jury, and that they have a writ of possession therefor, etc. The present writ of error is sued out for the purpose of reviewing the judgment so entered by the circuit court.

Edward Boyle and Henry T. Rainey, for plaintiff in error. Frank A. Whiteside, for defendants in error.

MAGRUDER, J., after stating the facts, delivered the opinion of the court.

Upon the trial of this action of ejectment in the court below, the plaintiffs there (defendants in error here) did not claim to be the owners of the paramount or government title, but sought to recover under section 7 of the limitation law in regard to vacant and unoccupied lands. 2 Starr & C. Ann. St. (2d Ed.) p. 2618, c. 83. Where a plaintiff in an action of ejectment relies for his right of recovery upon this section 7, he must not only prove that he had color of title, and that he paid taxes for seven successive years upon the premises, while they were vacant and unoccupied, but he must also prove that after the lapse of the seven years he took possession of the premises. *Paullin v. Hale*, 40 Ill. 274; *Gage v. Hampton*, 127 Ill. 87, 20

*Rehearing denied February 3, 1904.

N. E. 12, 2 L. R. A. 512; McCauley v. Mahon, 174 Ill. 384, 51 N. E. 829; Travers v. McElvain, 181 Ill. 385, 55 N. E. 135.

The defendants in error introduced in evidence, as color of title, a deed dated November 18, 1867, and recorded November 20, 1867, executed by William J. Vandyke, as grantor, and conveying to John Harris, as grantee, the 200 acres in question. The title of John Harris and all those under whom he held was based upon a tax deed. John Harris died on May 17, 1888, intestate, and left the defendants in error as his widow and heirs at law. It is claimed on the part of defendants in error that John Harris in his lifetime paid all the taxes upon the 200 acres in question, while the land was vacant and unoccupied, under the deed from Vandyke to himself as color of title, and that after the lapse of the seven years he took possession of the land. In order to prove the payment of taxes, the defendants in error introduced certain tax receipts to show the payment of taxes by John Harris in his lifetime for the years from 1867 to 1887, inclusive, and by his widow and heirs after his death for a number of years subsequent to 1888 and including that year, but did not pay them for the years 1890 and 1891. None of these tax receipts for the years from 1867 to 1875, inclusive, are dated, and do not show upon what dates the taxes for those years were paid. Defendants in error claim that the premises were vacant and unoccupied from 1867 to 1874, inclusive, and that during those years they paid all the taxes legally assessed upon the land. Their further contention is that they took possession of the land in 1874 or in 1882. The evidence and the arguments leave it somewhat in doubt whether the claim is that one possession was taken in 1874 and another in 1882, or whether there was a continuous possession from 1874 to 1882.

The proof shows conclusively that the land in question was swamp land and liable to overflow. It did overflow very often, generally in the spring, and sometimes was under water to the depth of from 8 to 15 feet. There was also much timber upon the land. Three circumstances are relied upon by defendants in error as acts of possession. The first is that in 1874 John Harris had the 200 acres of land surveyed, and put stones at the corners of the quarter sections. The second circumstance is that, after he obtained his deed, John Harris employed a farmer, named Bushnell, whose farm adjoined the land in question, to act as his agent, and his duty as agent was to keep people from cutting the pin oak timber upon the land. Bushnell was to have the privilege of cutting the ash timber upon the land and of pasturing his cattle upon it. Bushnell states in one part of his testimony that he went upon the land about once a month, and, in another part thereof, that he went upon the land about once a week. There is some testimony

tending to show that at different times Bushnell stopped or prevented certain persons from cutting timber upon the land, but there is much testimony also tending to show that the land was used by the public and the people living in the neighborhood for the purposes of fishing, hunting, cutting timber, and pasturing their cattle. Whatever acts were done by Bushnell were occasional and done at long intervals. Bushnell testifies that he acted as agent for the party having a deed to the land before John Harris obtained his deed. Vandyke, the grantor of Harris, obtained his deed from one Jenks on September 16, 1867. Bushnell further testifies that thereafter he acted as agent for Harris, in the manner already stated, for some 10 or 11 years. It is somewhat uncertain from the testimony, and from the statements of counsel in their argument, whether the agency of Bushnell was for 10 or 11 years after 1867, or 10 or 11 years after 1874. The third circumstance relied upon by defendants in error as showing possession by John Harris is that a hut or shanty, or, as some of the witnesses call it, a "hunting shack," was erected upon the 200 acres about September 1, 1882. The proof tends to show that Harris, who at that time lived at Carrollton, some 14 miles from the land, gave \$10 to one Withers, an attorney, and authorized Withers to cause the erection of the house in question upon the premises. Withers employed a man named Goans to erect the house or shanty, and paid the latter the \$10 for doing so. This house or shanty is described as being about 10 by 12 feet, and about 5 or 6 feet high. It was built of logs, and the spaces between the logs were filled with mud. The roof was of clapboards and sloped one way. It had no windows and no floor. After Goans built it, he and several others, who helped him to build it, stayed there to hunt ducks for several days. Goans testifies that he stayed there a week or two weeks, he could not remember which, and then chained the door and left the premises. The proof also shows that in the spring of 1883 the shanty or house was washed away by the water, and was never rebuilt, nor was any other structure erected in its place.

Even if the survey of the land and the placing of the stone monuments at the corners of the quarter section were such acts of possession as the law required after the payment of taxes for seven successive years on vacant and unoccupied land under the terms of section 7, yet the defendants in error can derive no benefit therefrom under the facts of this case. There is nothing in the evidence to show when John Harris made the first payment of taxes upon the 200 acres. The receipt which purports to show a payment of taxes for the year 1867 is not dated. The deed, however, from Vandyke to Harris, which is relied upon as color, was dated November 18, 1867. The survey of the land and the placing of the stone monuments

took place on the 6th day of November, 1874. The certificate of the surveyor to the plat of the survey, as well as the testimony of the witnesses, shows that the date of the survey was November 6, 1874. There were not seven successive years between November 18, 1867, and November 6, 1874. The first payment of taxes was required to be under the color of title, and the color of title was dated November 18, 1867. Therefore, the first payment of taxes must have been subsequent to November 18, 1867. In *McConnel v. Konepel*, 46 Ill. 519, we said: "The settled construction of the limitation law of 1839 is, not that seven years must elapse between the date of the first payment of taxes and the date of the last payment, but that all the taxes must be paid for seven successive years, and that seven years must elapse from the date of the first payment, when the statute begins to run, before the commencement of the suit, or possession taken of the land, where the bar is claimed under the ninth [or seventh] section." See, also, *Lyman v. Smilie*, 87 Ill. 259; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Converse v. Dunn*, 166 Ill. 25, 46 N. E. 747; *Whitney v. Stevens*, 89 Ill. 53; *Duck Island Club v. Bexstead*, 174 Ill. 435, 51 N. E. 831; *Holbrook v. Debo*, 99 Ill. 372. Under section 7 the first payment of taxes is the payment from which the time of limitation begins to run, and must be made after the acquisition of the claim and color of title, and the taxes must be paid by the claimant for a period of seven successive years; otherwise, he is not entitled to the benefit of the statutory limitation. In other words, the payment of taxes and color of title must concur. *Stearns v. Gittings*, 23 Ill. 387. The language of the section is: "Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years," etc. It is the person having the color of title who must pay the taxes. A payment made before the color of title is acquired cannot be regarded as the first payment under this section. *Stearns v. Gittings*, supra. Inasmuch, therefore, as the first payment made by John Harris could avail nothing, unless it was made after he acquired his color of title, it must have been made after November 18, 1867. As the survey was not made until November 6, 1874, a full period of seven successive years could not have elapsed before the act of possession, if the survey can be regarded as an act of possession. Upon the theory upon which the case was tried, and upon which instructions were asked by the defendants in error in the trial court, the payment of taxes for seven successive years while the land was vacant and unoccupied was not made by the ancestor of defendants in error before possession was taken, if the survey and the erection of the stone monuments be regarded as acts of possession.

The same or a similar difficulty exists in regard to the agency of Bushnell, and his acts in pursuance of that agency, in so far as the same may be regarded as possession. If Bushnell was appointed agent in 1867, as the proof tends to show, and acted as such for the ten years following, then the land was not vacant and unoccupied from 1867 to 1874, but was in possession of John Harris through his agent, if his acts as agent constituted possession. If the agency began when the survey was made on the 6th of November, 1874, then, as an act of possession, it took place before the expiration of the seven years during which taxes were paid upon the land as vacant and unoccupied land.

To constitute a bar to an action of ejectment, the party must show a complete performance under either the one or the other of the sections of the limitation law of 1839 (*Laws 1839*, p. 266), that is to say, either under section 6, relating to possession for seven years, or section 7, relating to taxes upon vacant and unoccupied land for seven years. It will not be permitted to show part performance under one section, and part under another, and thus avail of the provisions of both. *Whitney v. Stevens*, 89 Ill. 53; *Iberg v. Webb*, 96 Ill. 415; *Duck Island Club v. Bexstead*, supra.

We are of the opinion, however, that the survey made by John Harris, and the appointment of Bushnell as his agent and the acts of Bushnell in pursuance of the agency, did not constitute such possession as the law requires. A mere survey of land is not sufficient to establish possession. *Thompson v. Burhans*, 61 N. Y. 52. "Adverse possession of uninclosed, uncultivated, unimproved, and unoccupied land is not shown by evidence that one had it surveyed and its boundaries marked by monuments, paid taxes on it for a few years, and from time to time cut trees on it for use on other land." *Mission of Immaculate Virgin v. Cronin*, 38 N. E. 964; 143 N. Y. 524. Where an agent is appointed to keep other persons from cutting timber, and is to receive for his services such timber as he wants for his own use, such appointment is not sufficient to constitute possession. *Travers v. McElvain*, 181 Ill. 385, 55 N. E. 135; *Stalford v. Goldring*, 197 Ill. 156, 64 N. E. 395. An arrangement with a neighboring farmer to look after land, with permission to pasture cattle thereon and to authorize others to cut grass thereon, is not sufficient proof to divest title to the land by adverse possession. *Judson v. Duffy*, 96 Mich. 255, 55 N. W. 837. Where land is used and enjoyed in common with others, or with the public in general, it cannot be regarded as held by a possession which is hostile to other persons claiming title. The act of possession must be of such a character as in its nature is calculated to arouse the attention, and put any other person claiming title upon inquiry. The use to which the land is de-

voted must be such as to apprise the community or neighborhood that it is in the exclusive use or enjoyment of the person so appropriating it. *Travers v. McElvain*, supra. The evidence tends to show, in the present case, that this land was used for pasturage, and for the cutting of timber, and for other purposes by the public generally. Entries upon land which are merely temporary, such as camping thereon, or leaving a chattel thereon, or occasionally building a haystack thereon, do not constitute actual possession, so as to change the character of vacant land to that of land actually possessed or occupied. *Taylor v. Wright*, 121 Ill. 455, 13 N. E. 529; *Walker v. Converse*, 148 Ill. 622, 36 N. E. 202; *Drake v. Ogden*, 128 Ill. 603, 21 N. E. 511; *Truesdale v. Ford*, 37 Ill. 210. "A party claiming title by adverse possession always claims in derogation of the right of the real owner. He admits that the legal title is in another. He rests his claim, not upon a title in himself, as the true owner, but upon holding adversely to the true owner for the period prescribed by the statute of limitations. Claiming a benefit from his own wrong, his acts are to be construed strictly." *Cornelius v. Gliberson*, 25 N. J. Law, 319. "Adverse possession cannot be made out by inference or implication, for the presumptions are all in favor of the true owner, and the proof to establish it must be strict, clear, positive, and unequivocal." *Zirngibl v. Calumet Dock Co.*, 157 Ill. 430, 42 N. E. 431. The rule is that every presumption will be made in favor of the holder of the legal title, and no presumption will be made in favor of the holder of color of title only. *Kurz v. Miller*, 89 Wis. 426, 62 N. E. 182.

The only remaining act of possession relied upon by defendants in error is the erection of the hut or shanty upon the premises in September, 1882. The evidence shows that the plaintiff in error, White, paid the taxes for the year 1879 before the taxes of that year were paid by John Harris. It also shows that White paid the taxes of 1880 before the taxes of that year were paid by John Harris. White paid the taxes for the year 1879 on February 26, 1880, while Harris paid them on March 9, 1880, as is shown by the receipts introduced. White paid the taxes for the year 1880 on February 16, 1881, while Harris paid the taxes for 1880 on March 31, 1881, as is shown by the tax receipts introduced in evidence. It follows that the defendants in error cannot rely upon the payment of taxes upon the land as vacant and unoccupied land for the seven successive years next preceding the erection of the house in 1882. "Where a party having color of title shows the payment of all taxes on the premises for seven successive years by the production of his tax receipts, showing the date of each payment and the amount thereof, this makes out a prima facie defense under the limitation law of 1839, which must prevail, unless the plaintiff shows that the

taxes for some one of the seven years were paid before the defendant made his payment." *Bolden v. Sherman*, 110 Ill. 418; *Osburn v. Searles*, 156 Ill. 88, 40 N. E. 462; *Stearns v. Gittings*, supra. The evidence shows that some correspondence passed between Harris and White, the latter claiming to be the owner of the paramount title, in April, 1880, wherein White proposed to pay Harris \$50 for a quitclaim deed; White contending that the tax deed under which Harris held was defective and could be set aside. The question arises whether the erection of the shanty in 1882 was such a possession as is required after the payment of taxes for seven successive years under section 7 of the limitation law. "What acts may or may not constitute a possession are necessarily varied, and depend to some extent upon the nature, locality, and use to which the property may be applied, and the situation of the parties; and a variety of circumstances necessarily have to be taken into consideration in determining the question. They must necessarily be left to the jury, whose peculiar province it is to pass upon the question of possession." *Morrison v. Kelly*, 22 Ill. 609, 74 Am. Dec. 169; *Ewing v. Burnett*, 11 Pet. 53, 9 L. Ed. 624.

The evidence tends to show that the hut which was erected upon the premises in 1882 was, as has already been stated, of an inferior character. The evidence of the plaintiff in error tends to show that it was constructed merely for a temporary purpose, and was what is known as a "hunting shack." The man who built it testifies that he was paid to erect it, and not to occupy it; that he used it for no other purpose than for hunting; and one of the men who aided in the construction of it testified that he supposed it was to be used only by those engaged in hunting. Another witness testifies that it was supposed to have been constructed for the use of men engaged temporarily in cutting timber, and who wanted some shelter when they ate their lunch. The testimony, however, of Withers, was that Goans was to occupy, as well as build, the house. An individual cannot, under claim and color of title, by some trifling improvement appropriate to himself a large and unusual body of land, or maintain an actual possession by entering upon a tract of land, and doing some useless thing thereon, as erecting a pen or sham building, or leaving a few rails or timbers thereon, with the intention thereby of excluding others, and not of permanently improving and using the land. A party will be protected in his possession who enters upon a tract of land under claim and color of right, and commences to improve the same with the intention of completing the improvement for actual use, while that intention continues, and for a reasonable time for convenient use by cultivation or otherwise. *Brooks v. Bruin*, 18 Ill. 539; *Brooks v. Bruyn*, 24 Ill. 373. See, also,

Scott v. Bassett, 186 Ill. 98, 57 N. E. 835; Stalford v. Goldring, *supra*. The evidence in the present case shows that the land was not inclosed by a fence or otherwise, or put under cultivation, until 1893, when plaintiff in error took possession of the same, and inclosed the land by a fence, and erected buildings and built ditches thereon. The erection of a temporary structure is no such occupation as will establish title by adverse possession. Royall v. Lisle's Lessee, 15 Ga. 545, 60 Am. Dec. 712. Mere occupation of a shanty by a party who is engaged in removing timber is not a bona fide and actual possession. McKinnon v. Meston, 104 Mich. 642, 62 N. W. 1014.

If the shanty or house in question was sufficient to notify the public and the owner of the paramount title that there was an intention to take permanent possession of the land, then the extent of the possession would be fixed by the boundaries in the deed. Where a man enters into possession of premises under a deed which specifies certain boundaries, and occupies, by residence or otherwise, a part of the premises, he will be held to be in constructive possession of the balance by virtue of his deed. Harms v. Kransz, 167 Ill. 421, 47 N. E. 746; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169. It was, therefore, a matter for the jury to determine, under the instructions of the court, whether the erection of this house upon the land, under the circumstances already stated, constituted possession or not. Accordingly, the trial court, at the request of plaintiff in error, instructed the jury that, if it appeared from the evidence that the witness, Goans, was simply instructed to build, and did build, a sham house on the premises for the purpose only of enabling plaintiffs to claim that they were in possession of said premises, the building of said sham house alone does not constitute that possession in good faith which the law requires. But the court instructed the jury, in behalf of the defendants in error, "that if the possession by John Harris of the land in controversy was all that could well be had of land of that character, and if his appropriation was such as to apprise the community in the immediate vicinity that the land was in his possession, it is sufficient. Such appropriation may be shown by evidence of such acts as cutting timber for sale, surveying and establishing monuments, building a house thereon, or any other acts of ownership sufficient to indicate to the community that he claims the exclusive possession of the land." We are of the opinion that this instruction was calculated to mislead the jury. They may have found under the instruction given for the plaintiff in error, as above stated, that the house constructed upon the premises was a sham house; but, even if they did so find, they may also have found, under the instruction given for the defendants in error, that the latter were in possession of the premises by

reason of the cutting of timber and the survey and erection of stone monuments. It was error to authorize the jury to take into consideration the survey and the erection of the stone monuments and the cutting of timber as acts of possession, because, even if under other circumstances those acts could be regarded as possession, they could not be so regarded under the circumstances of this case, in view of the fact that they occurred before the period of seven years, during which the taxes were paid, had expired. In other words, under the facts shown by the present record, the attention of the jury should have been directed only to the question whether the erection of the shanty in question was or was not possession, and not to the question whether the survey and the erection of the stone monuments and the cutting of timber constituted possession.

For the errors indicated, the judgment of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(206 Ill. 574)

LOHMEYER et al. v. DURBIN.*

(Supreme Court of Illinois. Dec. 18, 1903.)

DOWER—PURCHASE-MONEY MORTGAGE—FORECLOSURE—PARTIES—WIDOW—DECREE—CONCLUSIVENESS—MISTAKE—PETITION TO ASSIGN DOWER—EVIDENCE.

1. Where, in an answer to a widow's petition for dower, defendants filed a plea alleging that the land was sold to plaintiff's husband under an agreement that he was to execute to the vendor a mortgage for a part of the purchase price, which he failed to do, and that during his lifetime suit was brought against him to recover such unpaid price and to have the same declared a lien on the land and the land sold, which relief was granted, and the land sold to defendants' grantors, such plea stated a complete defense, the widow being concluded by the decree, in the absence of fraud or mistake, though she was not a party thereto.

2. Under 2 Starr & C. Ann. St. 1896 (2d Ed.) c. 41, par. 4, providing that a widow is not entitled to dower as against a purchase-money mortgage, a wife is neither a necessary nor a proper party to a bill to foreclose such a mortgage.

3. Dower Act, § 1 (2 Starr & C. Ann. St. 1896 [2d Ed.] c. 41, par. 1), provides that a widow shall be entitled to dower of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she has relinquished the same in legal form. And section 16 (paragraph 16), declares that no judgment recovered against a husband or wife, and no laches, default, forfeiture, or crime of either, shall prejudice the rights of the other to dower, or preclude the other from the recovery thereof, if otherwise entitled thereto. *Held* that, where certain land of a husband not a part of the purchase was included by mistake in a bill against him alone to foreclose an equitable mortgage for purchase money, and the land was sold under the decree, the husband's widow was entitled to have the decree vacated on a petition for the assignment of dower in the land and to recover such dower.

*Rehearing denied February 2, 1904.

¶ 2. See Mortgages, vol. 35, Cent. Dig. § 1281.

4. Where a bill to foreclose an equitable mortgage against certain land of plaintiff's husband for the purchase price alleged that B. sold and caused the land in question to be conveyed to plaintiff's husband on June 26, 1855, and the land was sold under a decree in favor of the plaintiff in such suit, mere proof, on petition of the husband's widow for the assignment of dower in the land after the husband's death, that the land was entered by D., and that he executed a deed to plaintiff's husband for the premises on May 9, 1855, was insufficient to establish that the land in question had been inserted by mistake in the bill to foreclose the mortgage, and that it had not been in fact sold by B. to plaintiff's husband.

Appeal from Circuit Court, McLean County; Jno. H. Moffatt, Judge.

Petition by Eliza A. Durbin against William Lohmeyer and others. From a decree in favor of plaintiff, defendants appeal. Reversed.

This is an appeal from the circuit court of McLean county to reverse a decree in favor of appellee against appellants for the assignment of dower. A petition was filed on January 23, 1900, by appellee, alleging the marriage of petitioner to Daniel M. Durbin, and that he died intestate June 25, 1899, and who, during said marriage, was seised in fee of the northeast quarter of section 8, township 21 north, range 5 east of the third principal meridian, in McLean county, Ill., in which, upon his death, she became entitled to dower. She further alleged that William Lohmeyer is the present owner and occupant of the north 100 acres and John Mullen of the south 60 acres of said quarter section, subject to her dower, and makes them parties defendant. Lohmeyer and Mullen first filed a plea to the petition, setting up that on November 21, 1859, in the circuit court of said county, John R. Blackford, Dudley Richards, and Asa Weedman filed their bill in chancery against the said Daniel M. Durbin and Amos Durbin, his brother, charging that on June 20, 1855, the said Blackford sold and caused to be conveyed to Daniel M. Durbin the property described in complainant's bill, together with other property, for the sum of \$1,470, evidenced by four notes for \$367.50 each, falling due on February 1, 1856, February 1, 1857, February 1, 1858, and February 1, 1859, respectively, with interest at 6 per cent., signed by said Durbin, and payable to said Blackford; that on the making of said sale Blackford gave Durbin a bond for a deed, and when the first payment was made, as a part of the consideration for the conveyance of said lands to him, Durbin agreed to execute and deliver to Blackford a mortgage on the premises sold to secure the remainder of the purchase price; that Blackford, relying upon said agreement, caused a warranty deed to be made and delivered to him, the said Durbin, but that he failed to make the mortgage as he had agreed to do; that by said bill it was further alleged that the first note had been assigned to Asa Weedman and the other two to Dudley Richards, none of which had been paid, the said Durbin being insolvent,

and that said Blackford, who assigned said notes, will be compelled to pay the same by reason of his indorsement thereof; that he supposed he had the mortgage agreed to be made by Durbin, but had since ascertained that by mistake or fraud he had failed to execute the same; that since the conveyance to him, and before the filing of the bill, Durbin had mortgaged the land to his brother, Amos H., for \$300 or \$400, and that the said mortgage was fraudulent and void as to the creditors of the said Daniel M. Durbin; that the prayer of said bill was for a cancellation of the mortgage by Daniel M. to Amos H. Durbin, and that the former be decreed to pay said several notes, and in default thereof said real estate be sold to satisfy the same, and for general relief. The plea further set up that upon the filing of said bill the defendants thereto, Daniel M. Durbin and Amos H. Durbin, were duly brought into court, the former by summons, and the latter, who was a nonresident, by publication, and at the September term, 1890, of said court a decree was rendered finding, in substance and effect, the facts alleged in the bill to be true, and decreeing that complainants were entitled to a lien in the nature of an equitable purchase-money mortgage, and directing that the property be sold to pay the balance due on the unpaid purchase-money notes, which decree remains in full force and effect; that the property in question was, in pursuance thereof, advertised and sold, and the defendants, relying upon such finding and decree, without notice of any claim on the part of appellee, in good faith and for value, by mesne conveyances through the purchasers at said sale became the owners of said property, and that by reason of the premises appellee is not entitled to dower therein. The plea, being set down for hearing, was sustained by the court, and thereupon the complainant, by leave obtained for that purpose, filed an amended bill or petition, in which she alleged that on March 29, 1855, William L. Drybread and wife, by warranty deed, conveyed to Daniel M. Durbin the land in question, again setting up her marriage to him, his death, and seisin of said real estate, and her right of dower therein. She also alleged in her amended bill that on June 6, 1855, John R. Blackford sold and caused to be conveyed to Daniel M. Durbin property other than that now in question for a consideration of \$1,470, for which the purchaser gave his promissory notes; the assignment of the last three; the failure of Durbin to pay the same; the filing of the bill by Blackford, Richards, and Weedman to foreclose a lien on said property for the purchase money, as alleged in said plea. She then alleged that the property in controversy in the present suit was included in that bill by mistake, and a decree entered directing that the same be sold to satisfy the said notes, etc. The defendants presented a special demurrer to the amended bill, which being overruled, they

filed their joint answer denying the allegations of mistake and setting up the same facts pleaded to the original bill. A replication was filed, and the cause referred to the master in chancery, who thereafter made his report finding that the material allegations of the amended bill were true, and complainant entitled to the relief prayed, and recommending a decree in her favor. Exceptions to that report were overruled, and a decree rendered accordingly. The defendants thereupon prayed and have perfected this appeal.

Herrick & Herrick and Barry & Morrissey, for appellants. Welty & Sterling and Ewing, Wight & Ewing, for appellee.

WILKIN, J. (after stating the facts). The correctness of the ruling of the chancellor upon the plea to the original petition was, we think, clearly right. It presented a complete defense to the claim of dower alleged in that petition. We regard the bill set up in that plea as in substance one to foreclose a mortgage given to secure purchase money. If Durbin in fact bought the land in question from Blackford, and agreed with him to execute and deliver back a mortgage to secure the unpaid purchase money, then, as against Durbin, a court of equity could properly treat that as done which was agreed to be done, and render a decree subjecting the premises to the payment of the amount remaining due and unpaid. *Richardson v. Hamlett*, 33 Ark. 237; *Morrow v. Turney*, 35 Ala. 131. Under the maxim that equity will treat that as done which ought to be done, the agreement to execute a mortgage to secure the payment of the purchase money could be treated as such a mortgage. *Daggett v. Rankin*, 31 Cal. 321; *Hall v. Hall*, 50 Conn. 111; *McQuile v. Peay*, 58 Mo. 56. To the same effect is *Sprague v. Cochran*, 144 N. Y. 112, 38 N. E. 1000. As against a purchase-money mortgage a widow has no right of dower. It is expressly so provided by our statute. 2 Starr & C. Ann. St. 1896 (2d Ed.) c. 41, par. 4. The statute is but a re-enactment of the common law. "The seisin of the husband passing from him eo instante that he acquired it, and being immediately revested in the grantor, the widow could not claim dower in the premises." *Stephens v. Bichnell*, 27 Ill. 444, 81 Am. Dec. 242, and cases cited. Hence the wife is neither a necessary nor proper party to a bill to foreclose such a mortgage. *Stephens v. Bichnell*, supra; *Baker v. Scott*, 62 Ill. 86; *Short v. Raub*, 81 Ill. 509. The same rule is applicable to a proceeding to enforce a vendor's lien. *Mutual Building & Loan Ass'n v. Wyeth*, 105 Ala. 639, 17 South. 45; *Sarver v. Clarkson* (Ind. Sup.) 59 N. E. 933.

But it is unnecessary to pursue this inquiry. We entertain no doubt that the petitioner below is concluded by the decree rendered upon the bill of Blackford et al. v. Durbin, and barred of all right of dower in

the lands in question, unless they were described in that bill and decree by mistake or fraud; and the decree in her favor was manifestly rendered by the court below upon that theory. It seems to be thought by counsel for appellants that she cannot, in this action, be heard to urge that there was such a mistake. We are unable to perceive upon what reason or authority that position can be sustained. Section 1 of the dower act unquestionably gave her a right of dower in the lands if the facts alleged in her amended petition are true; that is, she was endowed of the third part of all the lands whereof her deceased husband was seised of an estate of inheritance at any time during the marriage unless she had relinquished the same in legal form. Her petition was filed within a few months after the death of her husband, when her inchoate right of dower became consummate, and until which time she had no interest in the lands which she could assert. It makes no difference that the proceeding to foreclose the equitable mortgage set up first in the plea and afterward in the answer was a proceeding in rem, and binding upon all the parties thereto and their privies in estate, and could not be attacked by any of them in a collateral proceeding. Appellee was not a party to that bill or decree. It cannot be seriously urged that her husband so far represented her interests in that case as to conclude her. Any mistake made or fraud committed in that proceeding cannot bind her in this. If, as a matter of fact, her husband did not purchase the northeast quarter of section 8 of Blackford, or receive any deed of conveyance from or through him, and if the alleged agreement to give a mortgage to secure the unpaid purchase money related to other and different lands, but was made to apply to said quarter section by fraud or mistake, no default of her husband or acquiescence on his part could effectually bar her right of dower therein. Section 16 of the dower act provides: "No judgment or decree confessed or recovered against a husband or wife, and no laches, default, covin, forfeiture or crime of either, * * * shall prejudice the right of the other to dower or jointure, or preclude the other from the recovery thereof if otherwise entitled thereto." While, as already said, if the husband purchased the northeast quarter of section 8 of Blackford, and agreed to give him a mortgage to secure the unpaid purchase money, the wife (appellee) would not be a proper party to a bill to foreclose such a mortgage, because, as against such a mortgage, she would have no right of dower, yet if the lands described in that bill were not purchased from Blackford, or conveyed by or through him to the husband, then the wife became seised of an inchoate right of dower in the premises, and clearly no judgment or decree of a court could effectually deprive her of that right without giving her a day in court. It is

only where the wife joins with her husband in the execution of a mortgage for the purpose of relinquishing her dower that she becomes a necessary party to foreclose the same, and the only necessity for making her a party then is to bar her equity of redemption in her right of dower, or to give her the opportunity to redeem and prevent a sale of the mortgaged premises. *Wright v. Langley*, 36 Ill. 381; *Camp v. Small*, 44 Ill. 37; *Pope v. North*, 33 Ill. 440; *Sheldon v. Patterson*, 55 Ill. 507. If a husband executes a mortgage upon real estate of which he is seised during his marriage, without his wife joining therein, the mortgage may be foreclosed without the wife being made a party; and while she would have no interest in the land which could be asserted during the lifetime of her husband, it has never been claimed that she could not upon his death enforce her right to dower, or that such right would in any way be affected by the decree of foreclosure against the land and her husband.

There is in this case no question of laches or limitation. Appellee brought her action promptly upon the death of her husband. Upon the allegations of her amended petition, properly sustained by proofs, she was entitled to the decree in her favor. The proof should, however, as in all cases of alleged fraud or mistake, have been clear and satisfactory. Especially is this true where the decree called in question has remained in force for so many years. Does the evidence offered by appellee meet this requirement of the law? We think not. As appears from the abstract, the only proof offered on that subject was the record of a certificate of entry, as follows: Original entry in the county clerk's office in McLean county, Illinois, not paged, shows entry of northeast quarter of section 8, town 21-5, September 27, 1852, by William L. Drybread; a deed from William L. Drybread and wife to Daniel N. Durbin, dated May 9, 1855, for the premises in question; also the bill by John R. Blackford, W. Richards, and Asa Weedman against Daniel M. Durbin and Amos H. Durbin, filed November 21, 1859, in the circuit court of McLean county, Ill.; also the summons and return thereof, and the decree rendered in said cause. Conceding that the certificate of entry was competent evidence to prove title in William L. Drybread, the deed of himself and wife to Daniel M. Durbin, dated May 29, 1855, does not disprove the allegation of the Blackford bill that he "sold and caused to be conveyed to Daniel M. Durbin the northeast quarter of section 8," etc., nor the recital in the decree that "on June 28, 1855, said Blackford sold and caused to be conveyed to Daniel M. Durbin the northeast quarter of section 8," etc. The fact that Drybread and wife executed a deed for the land in question to Daniel M. Durbin dated May 29, 1855, does not prove that John R. Blackford did not sell and cause to be conveyed the same lands to Dan-

iel M. Durbin on June 20, 1855. In other words, all that the petitioner proved may be true, and the allegations of the Blackford bill and the findings and decree thereon be also true.

We are of the opinion, therefore, that the decree below was unauthorized by the evidence, and it will accordingly be reversed, and the cause remanded to the circuit court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

(206 Ill. 498)

LONDON GUARANTEE & ACCIDENT CO., Limited, v. HORN.*

(Supreme Court of Illinois. Dec. 16, 1903.)

MASTER AND SERVANT—INTERFERENCE WITH RELATION—THREATS OF THIRD PERSON INDUCING DISCHARGE—LIABILITY—SUPREME COURT—JURISDICTION—VERDICT—EXCESSIVENESS—REVIEW.

1. Plaintiff, while employed for an indefinite time by the A. S. Co., was injured while engaged in his work, and brought suit against such company for his injuries. The A. S. Co. was insured against loss for injuries to its employes by a policy issued by defendant which entitled the latter to cancel the policy on five days' notice, and to defend actions for injuries brought against insured, but gave defendant no right to demand the discharge of an injured servant. Defendant at various times sought to settle plaintiff's claim for a nominal sum, and in order to induce the settlement threatened to have plaintiff discharged from his employment; and on the date of plaintiff's discharge R., defendant's representative, went to the factory of the A. S. Co., and after an unsuccessful effort to settle plaintiff's claim for \$100 stated to plaintiff's employer that if he did not discharge plaintiff R. would have to cancel the policy that day; that he was there to bring the case to a focus then, and if plaintiff was not discharged R. would cancel the policy; that those were his orders; whereupon plaintiff's employer stated that though he expected plaintiff would have a steady job all the year around, and would not otherwise have discharged plaintiff, he was compelled to do so. *Held*, that defendant's act in inducing plaintiff's discharge was not an act done in the line of competition in business, but was a malicious interference with plaintiff's employment, in which defendant was not directly interested, for which it was liable.

2. The excessiveness of a verdict which has been sustained by the Appellate Court cannot be reviewed by the Supreme Court.

Wilkin and Cartwright, JJ., dissenting.

Appeal from Appellate Court, First District.

Action by Gustave Horn against the London Guarantee & Accident Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court (101 Ill. App. 355), defendant appeals. Affirmed.

This is an action of trespass on the case by Gustave Horn, appellee, against the London Guarantee & Accident Company, appellant, commenced in the superior court of Cook county, where, upon a trial before a jury, Horn was awarded damages in the

*Rehearing denied February 3, 1904.

¶1. See *Master and Servant*, vol. 34, Cent. Dig. § 1236.

sum of \$800, and judgment was entered by the court upon the verdict for that amount. Appellant appealed therefrom to the Appellate Court for the First District, where the judgment of the superior court was affirmed. The Appellate Court has granted a certificate of importance, and appellant brings the case to this court by appeal.

Appellee, on January 7, 1899, was in the employ of Arnold, Schwinn & Co., of Chicago, as foreman of the frame department of its bicycle factory, and on that date, while engaged in his work, was injured while attempting to operate a milling machine, from which he suffered the loss of two fingers on his right hand. At the time of this injury Arnold, Schwinn & Co. carried an indemnity policy in the London Guarantee & Accident Company, indemnifying said firm against loss from injuries to its employees to the extent of \$5,000 in case of injury to one person, and not exceeding \$10,000 for injuries to two or more persons from the same accident. The policy provided that, if any suit should be brought against the assured to enforce a claim for damages on account of an accident covered by the policy, immediate notice thereof should be given to the company, and the company would defend against such proceeding in the name and on behalf of the assured or settle the same at its own cost, unless it should elect to pay to the assured the indemnity above mentioned; that the assured should not settle any claim except at its own cost, nor incur any expense, nor interfere in any negotiation for settlement, or in any legal proceeding, without the consent of the company previously given in writing; that the assured, when requested by the company, should aid in securing information and evidence and in effecting settlements. The policy did not require the assured to discharge any employee at the request of appellant, but did provide that appellant could cancel the policy at any time upon giving five days' previous notice of its intention so to do. Appellee, after the injury, went to a hospital, and while there was visited by one Robinett, an agent of the guarantee company, and later by the same agent at the house of appellee, at which place the agent requested appellee to call at the office of the company. Some time afterward appellee called at the office of the company, and had a conversation with one Bloomington, who was at the head of the claim department of the appellant company and also its attorney, at which time Bloomington offered appellee \$50 in settlement of his claim for damages on account of the injury, which appellee refused to accept. Later appellee returned with an attorney, and Bloomington increased the offer to \$75, and informed appellee that unless he accepted that amount appellant would see to it that he was not re-employed by Arnold, Schwinn & Co., and would also see that he did not get work anywhere else. The offer was refused,

and appellee brought suit against Arnold, Schwinn & Co., in which a verdict was subsequently rendered for \$3,500, from which judgment an appeal was taken, which was pending at the time of the trial of this case. Pending that suit, and on June 26, 1899, Robinett, representing the guarantee company, called at the factory of Arnold, Schwinn & Co., where appellee had been re-employed, and in the presence of O'Connell, manager of the factory, offered appellee \$100 in settlement of his claim, and told him that unless he accepted that amount he would have him discharged by Arnold, Schwinn & Co. Appellee refused the offer, and said he did not think that Mr. O'Connell would discharge him even if appellant so directed. Robinett then said to O'Connell, in the presence of appellee, that O'Connell would have to discharge Horn, as he refused to give appellant a release. O'Connell expressed the view that he did not have to discharge him, and after a reference to the contract of insurance said there was nothing in that which required him to discharge Horn if he refused to give a release. To this view Robinett assented, but said: "If you don't discharge him I will have to cancel this policy to-day. I am here to bring this case to a focus to-day, and if you refuse to lay him off I will cancel it; that's my orders." O'Connell then said to Horn that he had lots of work for him, and had expected that he would have a steady job all the year around, but that the insurance company would cancel the policy unless Horn was discharged, and he accordingly directed him to finish the work he was then engaged in and then quit, and accordingly Horn was discharged and paid off on the following day.

The Appellate Court finds that appellee's employment was not for any particular time, but Arnold, Schwinn & Co. did not desire to discharge him; that the firm had regular work for him, desired to retain his services as a foreman indefinitely, notwithstanding the suit pending against it, and discharged appellee solely because of appellant's demand, and because of its threat to cancel its policy of insurance in case of a failure to comply with that demand.

Appellee brought this suit to recover damages against appellant upon the theory that the facts above set forth showed that appellant had maliciously caused his discharge from his employment by the wrongful acts of its agents, and that such conduct constituted an actionable wrong, for which appellant was liable in damages to appellee.

F. J. Canty and J. A. Bloomington, for appellant. Carl A. Vogel (Daniel V. Gallery, of counsel), for appellee.

SCOTT, J. (after stating the facts). As we understand the record in this case, appellee was in the employ of Arnold, Schwinn & Co., a corporation, under a contract ter-

minable by either party at any time, but under which the employment would have continued for an indefinite period had appellant not caused Arnold, Schwinn & Co. to discharge appellee for the purpose of compelling appellee to surrender and release a cause of action which he claimed, and for the satisfaction of which, if it existed, appellant was liable up to the amount of \$5,000, and as a result of which discharge appellee was without employment for several considerable periods, and sustained financial loss and injury consequent upon such discharge.

Under these circumstances, does a cause of action exist in favor of appellee and against appellant? The result of this suit depends upon the answer to this question.

We have been favored with most elaborate and exhaustive briefs by counsel for both parties. The case principally relied upon by counsel for appellant is that of *Allen v. Flood*, 67 L. J. Q. B. 119, decided by the House of Lords in 1897. This case has excited a wide discussion, and was considered at length by this court in *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203. In this English case certain boiler makers, members of a trade union, in common employment with the plaintiffs, who were shipwrights, members of a rival organization, working on wood, objected to working with the latter on the ground that in a previous employment they had been engaged on ironwork, it being contrary to the regulations of the union to which the boiler makers belonged for shipwrights to do work of that character. *Allen*, as a representative of the boiler makers, saw the manager of their employer, to whom he stated that if the shipwrights, who were engaged from day to day, were not dismissed, the boiler makers would leave their work or be called out by their union. The shipwrights were thereupon discharged, and brought an action against *Allen*. Their right to recover was denied, principally upon the ground that every workman has a right to exercise his own option with regard to the persons in whose society he will agree or continue to work, and that when the employer was confronted with a situation where he would lose the services either of the boiler makers or the shipwrights he had the right to elect which class of workmen to discharge, and, electing to discharge the shipwrights, both he and the boiler makers were within their legal rights, and no cause of action arose.

In *Mogul Steamship Co. v. McGregor*, 21 Q. B. D. 544, the plaintiffs and defendants were rival shipowners. The defendants offered certain inducements to secure the shipping of freight from those who might otherwise have patronized the plaintiffs. The right of action was denied, on the ground that the situation was the result of lawful competition between the parties.

Huttly v. Simmons, 67 Q. B. D. 213, is a case where the plaintiff was a cab driver, and the defendants were members of a cab drivers' trade union. All parties to the suit were engaged in business in the same city. The defendants induced a cab proprietor to refuse to engage the plaintiff to drive a cab for him or to let a cab to the plaintiff to be driven by him. It will be observed that in this case the plaintiff in his employ would come in competition with the union to which the defendants belonged, and in holding that no cause of action existed it was said that none of the acts done or agreed to be done gave the plaintiff any right of action for injury, in law, to any legal right of his; following the case of *Allen v. Flood*, supra.

In *Quinn v. Leatham*, App. Cas. of 1901, p. 495 (decided by the House of Lords), Lord Macnaghten, in speaking of *Allen v. Flood*, stated that its headnote might well have run in these words: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent;" and in this case last referred to it is said that "it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference."

We are of opinion that the contention of appellant in the case at bar, to the effect that competition in trade, employment, or business is such a justification, is in accord with the authorities. This view finds support in the case of *Chambers v. Baldwin* (Ky.) 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165, where it was held that a party to a contract for the sale of goods cannot maintain an action against one who maliciously, and with design to injure him and to benefit himself by becoming a purchaser in his stead, advises and procures the other party to break the contract.

In *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, the superintendent of a stone quarry had given one *Libersont* leave to go upon the quarry and cut some of the poorer granite. *Libersont* employed the plaintiff to assist in this work. Defendant had a right to terminate *Libersont's* license at any time, and *Libersont's* employment of plaintiff could be terminated by either of the parties thereto at any time. The defendant had a personal difficulty with the plaintiff, and thereupon induced *Libersont* to discharge him, threatening if *Libersont* did not do so he (the defendant) would revoke the leave which *Libersont* had to take granite. The court holds that no right of action existed, putting the conclusion on the ground that the defendant had the undisputed right to determine who might remain and work upon the quarry, and that he could have revoked *Libersont's* license for the express purpose of removing the plaintiff, and, that being true, he could also lawfully require *Libersont* to discharge the plaintiff or leave the quarry; but

it is said that "the authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act or threat aliunde the exercise of a lawful right, had broken up the contract relation existing between the plaintiff and Libersont, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor." The decision plainly proceeds upon the theory that the defendant had a right superior to the right of Libersont to determine who should be employed at the quarry in question.

In our judgment the cases cited by appellant, in so far as they lend support to its theory, will be found to be cases where the party who secured the discharge of the employé was in some way in competition with that employé in the business or work in which the employé was then engaged, or was a member of some organization which was in competition with the employé or some organization to which that employé belonged, and the fact that such competition existed has been treated by some of the courts as justification for the act of the defendant in bringing about the discharge. In fact, appellant seems to take this view, for it devotes a considerable portion of its argument to an attempt to show that plaintiff and defendant were in competition with each other, in that appellant desired to secure or satisfy the alleged right of action of appellee for the least possible sum, while appellee desired to secure for that right of action the greatest possible sum. Counsel seem to have been impelled to this view of the matter by the dissenting opinion of Mr. Justice Holmes in *Vegeahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, where, in discussing the proposition that one man may set up a business in competition with another with the intention and expectation of ruining another already engaged in that business in that locality, and if he succeed in his intent is not held to act unlawfully and without justifiable cause, Justice Holmes used this language: "If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly the policy [that of permitting free competition] is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests." While it is true that the temporal interests of Horn and appellant were involved in the negotiations between them, we believe that the authorities which look upon competition as a justification for the act of one party in securing the discharge of an employé have regarded the term in a more restricted sense, and given to the term "competition" its ordinary meaning and signification. This conclusion is certain-

ly warranted by the reasoning in *Doremus v. Hennessy*, supra, where this court discusses competition as a defense to an action of this character. It cannot be held that appellee and appellant were, in any ordinary sense of the term, in competition with each other. It is also to be observed that the injury which it was sought to visit upon Horn was not primarily to subject him to a deprivation of his employment, but was to compel him to surrender a right not connected with his employment. If the only object of appellant had been to secure appellee's discharge for the purpose of obtaining his position for another, or for the reason that the employment of appellee by Arnold, Schwinn & Co. in some way conflicted with the right of appellant, or some organization to which it belonged, to obtain the same or similar employment, a very different question, and one not now before this court, would be presented, and *Allen v. Flood*, supra, and other cases of that character cited by appellant, would then be worthy of greater consideration.

It is further contended on the part of the appellant that while the evidence may have shown that it was animated by "malice," in the ordinary acceptation of the term, toward Horn, the proof falls to show any legal malice. In this connection it is argued that appellant had the right to have Horn discharged under the terms of the contract, or, if it did not have that right, that it seriously and in good faith believed that it had, and that it is thereby relieved of any imputation of malice. There is no provision in the policy which by the wildest stretch of the imagination could be held to give any such right to appellant; and its conduct in attempting to secure a settlement of this claim shows it to have been animated by a wanton disregard of the rights of appellee. He was first told by the attorney of appellant that unless he settled for a trifling amount appellant would have him discharged by Arnold, Schwinn & Co.—a threat to do that which this attorney must have known his client had no right to do. Afterward Robinett, the agent for the company, made the same threat, and, upon his attention being called to the fact that the policy gave him no power to require Horn's discharge, he said to Arnold, Schwinn & Co.: "If you don't discharge him I will have to cancel this policy to-day. I am here to bring this case to a focus to-day, and if you refuse to lay him off I will cancel it." When Mr. Robinett made this threat, which resulted in appellee's discharge, he was making a threat to do an unlawful thing—to do a thing which appellant, by the terms of the contract, had no right to do. The contract provided only for its cancellation upon five days' notice. It is not pretended that any such notice had been given, but Robinett secured Horn's discharge by threatening to cancel the contract "to-day." We think it perfectly apparent that the attorney for ap-

pellant, and its agent, Robinett, each sought to bring about, and finally did bring about, the discharge of appellee by threatening to do acts which each, respectively, knew he had no right to do.

"Malice," in its legal sense, means a wrongful act done intentionally, without just cause or excuse; the willful violation of a known right. 19 Am. & Eng. Ency. of Law (2d Ed.) p. 623. Were the acts of appellant wrongful?

In *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289, it is said: "We apprehend that there no longer is any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as performance is concerned, imposes a duty only on the promisor. Again, in the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant, who has controlled the employer's action to the plaintiff's harm."

In *Hollenbeck v. Ristine*, 114 Iowa, 358, 86 N. W. 377, it is stated that the contention of appellant "is bottomed on the thought that he did not act unlawfully in inducing Mr. Hall to discharge the plaintiff, and therefore no action will lie." This position is said to be incorrect, and it is held to be unlawful to induce another to discharge an employé without just cause.

In *Quinn v. Leatham*, supra, it was said: "It is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." This gives rise to the question, what is sufficient justification? As we have already seen, the ends of competition have been deemed sufficient. No doubt the fact that the employé was inefficient, untrustworthy, dishonest, or dissolute would be deemed a legal justification, but certainly a desire to compel the employé to surrender a cause of action wholly disconnected with the continuance of his employment does not afford justification for interference by a third party, who desires the satisfaction of the alleged liability. "If the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." *Bowen v. Hall*, 6 Q. B. D. 333. The right to maintain an action can be sustained upon the doctrine that a man who induces one of two parties to a contract to break it, intending thereby to injure the other or to obtain a benefit for himself, does the other an actionable wrong. *Gore v. Condon* (Md.) 39 Atl. 1042, 40 L. R. A. 382, 67 Am. St. Rep. 352. It follows, therefore, that the act of the defendant complained of was wrongful,

and, in the legal sense of the term, malicious.

Arnold, Schwinn & Co. had the undoubted right to discharge Horn whenever it desired. It could discharge him for reasons the most whimsical or malicious, or for no reason at all, and no cause of action in his favor would be thereby created; but it by no means follows that while the relations between *Arnold, Schwinn & Co.* and Horn were pleasant, and while, as the evidence shows, it was the expectation of the company that Horn would continue in its employ "all the year around," that the interference of appellant, whereby it secured the employer to exercise a right which was given it by the law, but which, except for the action of appellant, it would not have exercised, is not actionable. In *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252, the conclusion of the court is "that wherever a person, by means of fraud or intimidation, procures either the breach of a contract or the discharge of a plaintiff from an employment which, but for such wrongful interference, would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether by these wrongful means a contract of employment definite as to time is broken, or an employer is induced, solely by reason of such procurement, to discharge an employé whom he would otherwise have retained." In *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367, it is said: "From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it, but, so long as the former is willing and ready to perform, it is not the legal right, but is a wrong on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it."

This question has frequently been before courts of last resort in this country. The view taken in the two cases last cited finds support in the following authorities: *Moran v. Dunphy*, supra; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; *Raycroft v. Tayntor*, supra; *Lucke v. Clothing Cutters*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; *Hollenbeck v. Ristine*, supra; and also in *Blumenthal v. Shaw*, 77 Fed. 954, 23 C. C. A. 590, decided by the Third Circuit Court of Appeals. In our own state the case of *Doremus v. Hennessy* is first reported in 62 Ill.

App. 391. Plaintiff there kept a laundry office, where she received clothing which her patrons desired to have laundered. She would then procure persons operating laundries to do the work and return the garments to her for delivery to her customers. The defendants were members of the Chicago Laundrymen's Association. She charged, by her declaration, that the defendants, by false representations and by threats and intimidation, induced certain parties who had been doing the work for her to break their contracts and engagements with her. The Appellate Court, after stating that it is now well established that in civil actions the conspiracy is not the gravamen of the charge, but may be pleaded and proved in aggravation of the wrong, declares the law to be that an action may be maintained for the malicious interference with the business of another, his occupation, profession, or way of obtaining a livelihood, and affirmed a judgment of \$6,000 in favor of the plaintiff. The case came to this court, where it is reported in 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203. The judgment of the Appellate Court was affirmed, and it appears from the statement of facts made by this court that with some of the persons who did work for her the arrangement was that they would do her work as long as the laundry association did not interfere, and that these persons, among others with whom she had contracts for specific periods, were induced, by threats made by the laundry association, to cease connection in business with appellee. Appellants contended that their acts were not mere malicious acts, done solely with the intent to injure plaintiff's business, but were in the line of legitimate competition. It was there said by this court (page 614, 176 Ill., and page 925, 52 N. E., 43 L. R. A. 797, 802, 68 Am. St. Rep. 203): "No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which in his judgment his own interest does not require. Losses willfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill, and credit, will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss." It is true that in the additional opinion delivered upon the petition for rehearing Mr. Justice Phillips distinguishes the case of *Allen v. Flood*, by pointing out

the fact that in the latter case there was no contract the breach of which was induced by the defendant, while in the *Doremus Case* contracts existed in which the plaintiff had a property right, and which were broken as a result of the actions of the defendants; but, as we have already seen, the clear weight of authority is to the effect that, where the contract is one of employment, it is immaterial whether it is for a fixed period, or is one which is terminable by either party at will, both parties being willing and desiring to continue the employment under that contract for an indefinite period.

We therefore conclude, both upon reason and authority, that where a third party induces an employer to discharge his employé who is working under a contract terminable at will, but under which the employment would have continued indefinitely, in accordance with the desire of the employer, except for such interference, and where the only motive moving the third party is a desire to injure the employé and to benefit himself at the expense of the employé by compelling the latter to surrender an alleged cause of action, for the satisfaction of which, in whole or in part, such third party is liable, and where such right of action does not depend upon and is not connected with the continuance of such employment, a cause of action arises in favor of the employé against the third party.

Appellee asked no instruction on the trial in the superior court. In addition to the instructions given at the request of appellant, the court gave one instruction of its own motion. In this instruction the word "plaintiff" was in one instance inadvertently used instead of the word "defendant," but we do not think the jury could have been misled thereby.

Other objections are made in reference to the action of the court in passing upon instructions and the admission of evidence. We have carefully considered these, and are of the opinion that the appellant sustained no wrong of which it can complain here.

It is urged that the verdict is excessive in amount. We have frequently held that this question is conclusively determined by the judgment of the Appellate Court.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

WILKIN and CARTWRIGHT, JJ. (dissenting). By the express terms of the policy issued by appellant to Arnold, Schwinn & Co., insuring that company against liability for personal injuries to its employés, appellant had the absolute legal right to terminate the insurance at five days' notice, in which case the unearned premium was to be repaid. That right was unconditional, and could be exercised by the appellant at its will, with or without a reason, or from any motive which might prompt it to such action. The cause, and only cause, of the

discharge of appellee was the threat of appellant's agent, Robnett, to exercise the right reserved in the policy and cancel it unless the appellee should be discharged. We see no justification for saying that the threat was to cancel the policy in any different way from that provided in it. Having an absolute legal right to cancel the policy at its own election, the threat of appellant to do it was not a threat to do a legal wrong. If there was a legal right to cancel the policy it was not unlawful to declare an intention to do so, and if the right was not affected by the reasons influencing appellant's action the motive was immaterial. The motive which actuated Robnett in threatening to exercise the legal right of appellant secured to it by its contract, and terminate the insurance, was to force a settlement of the suit and to prevent the insured from furnishing appellee with lucrative employment while carrying on the suit, which was, in effect, against appellant. If there was any legal liability for appellee's injuries the liability was upon appellant to the extent of \$5,000, and it was bound by the policy to defend the suit or settle it at its own cost. There was no evidence tending to prove that the officers or agents of appellant did not honestly believe that there was no legal liability for such injuries. So far as appeared, the position of appellant that appellee had no legal claim against it or Arnold, Schwinn & Co. was assumed in entire good faith and on sufficient grounds. Appellee was a foreman in the shop where accidental injuries were insured against, but whether that would be a justifiable reason for declining to continue the insurance while he was prosecuting a suit which in fact was against appellant, or whether the motive of appellant was a proper one according to moral standards, we regard as immaterial. That appellant had a legal right to cancel the policy if its motive had not been bad is not denied, and the threat to do it did not become unlawful because of a bad motive. On that subject Mr. Justice Cooley says: "Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful." He illustrates the rule by the case of *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461, and then says: "So it has been held that no action would lie for maliciously conspiring as insurance officers to refuse insurance on the plaintiff's property; or for maliciously collecting the notes of a bank and presenting them for redemption; or for maliciously adopting a trade-mark to the prejudice of a plaintiff who has no exclusive right to appropriate it; or for throwing open one's land to the public so that they may pass over it, thereby avoiding a toll gate; or for maliciously throwing down fences put up through one's land to mark the lines of a road which has never lawfully been laid out."

Cooley on Torts, 690. One may sue his debtor from no motive but ill will, and yet if there is a legal cause of action there could be no liability for bringing the suit. It will be manifest from these examples that immunity from liability for the exercise of a legal right does not rest alone upon the right of competition in trade, but is founded upon the truism "that the exercise by one man of his legal right cannot be a legal wrong to another." Cooley on Torts, 688. To justify a recovery, there must be legal wrong as well as damage.

This case is, in our judgment, not different in principle from cases where one, in the exercise of a legal right, refuses to continue in the employment of another unless some other employé shall be discharged. It is not claimed that such an act would give rise to a cause of action. It certainly makes no difference whether the motive is to injure the employé who is discharged or to obtain a benefit to the one causing the discharge. It was held in *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, that "if one, in the exercise of a lawful right, threatens to terminate a contract between himself and another unless the latter discharges his employé not engaged for any definite time, the discharged employé has no right of action for damages against the party making the threat, although his motive in procuring the discharge may have been inspired by malice." In that case the defendant was the manager and superintendent of a granite quarry. One Libersont obtained from him leave to go into the quarry and cut the poorer granite into paving stones by paying an agreed price therefor. The contract was for no definite time. He expected to continue the work through the winter. The plaintiff was employed by the latter in the work of cutting the paving stones. While so employed a disagreement arose between him and the defendant about matters having no connection with the quarry or his employment by Libersont. The defendant, becoming angry, ordered the plaintiff to leave the premises and threatened to have him discharged. He afterwards went to Libersont, and told him that if he did not discharge the plaintiff he could no longer cut paving blocks on the premises. Libersont informed him of his arrangement with the plaintiff; that he was satisfactory to him, and he did not want to discharge him, but the defendant insisted that he must be discharged or that Libersont should leave the works, and thereupon the latter did discharge him solely because of that demand. The plaintiff showed that he suffered loss by reason of such discharge, and recovered a judgment in the trial court, but the Supreme Court reversed it on the ground that the defendant's demand for the plaintiff's discharge was but a threat to exercise a legal right; that is, the right to terminate his agreement with Libersont whenever he chose to do so. That decision seems to be

supported by the authorities referred to in the opinion, and none are cited or to be found to the contrary.

In *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252 (decided in 1897), the Vermont Case, *supra*, was cited for that part of the opinion which says: "The authorities cited for the plaintiff clearly established that if the defendant, without having any lawful right, or by an act or threat allunde the exercise of a lawful right, had broken up the contract relations between the plaintiff and Libersont maliciously and unlawfully, although such relations could be terminated at the pleasure of either, and the damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor." But it is also said: "We think that the important question in a case of this kind is as to the nature of the defendant's act and the means adopted by him to accomplish his purpose. Merely to induce another to leave an employment or to discharge an employé by persuasion or argument, however whimsical, unreasonable, or absurd, is not, in and of itself, unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employé whom he desires to retain and would have retained except for such unlawful threats, is an actionable wrong. Nor do we differ from the recent decision of the Vermont court in the case above referred to, which holds that a threat to do what the defendant had a right to do would not be such a one as to make the defendant liable in an action of this kind."

We think the conclusion must be that the evidence produced upon the trial, with all its legal intendments, not only failed to fairly tend to prove that the plaintiff's discharge was accomplished by the illegal acts of the defendant, but that it affirmatively showed that it was accomplished by threatening to do that which it had the lawful right to do, and therefore the trial court erred in refusing to give the peremptory instruction asked to return a verdict of not guilty.

(177 N. Y. 247)

KETCHAM v. NEW YORK & H. R. CO. et al.
(Court of Appeals of New York. Jan. 26, 1904.)

RAILROADS—ERECTION OF STATIONS—DAMAGES TO ABUTTING OWNERS.

1. An owner of land sued to recover fee and rental damages caused by the erection of a passenger station in connection with a viaduct structure in front of plaintiff's premises. The court, in awarding damages, considered that caused by the operation of the railroad prior to the erection of the station upon the premises and the physical effects produced by the new elevated structure, including the station and its appurtenances, and did not confine its award to the damages caused by the erection and main-

tenance of the station. *Held* error, the rule being that, if plaintiff proves that the steel viaduct connected with the station has been extended beyond the width of the original structure, and is clearly a part of the work necessary in erecting the station, and an injury is established by reason thereof, proper damages should be awarded.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Augusta A. Ketcham against the New York & Harlem Railroad Company and others. From a judgment of the Appellate Division (79 N. Y. Supp. 1185) affirming a judgment for plaintiff, defendants appeal. Reversed.

Ira A. Place and Thomas Emery, for appellants. Thomas P. Wickes, for respondent.

BARTLETT, J. This action is brought to recover fee and rental damages of the defendants by reason of the erection of their passenger station at 125th street in the city of New York. The plaintiff's premises are situated on the southwest corner of Park avenue and 126th street, being a plot of 75 feet on Park avenue and 90 feet in depth, upon which are erected one-story buildings used for stores, said premises being known by the street numbers 1834, 1836, and 1838 Park avenue. The 125th street station extends north to 126th street, and is consequently in front of plaintiff's premises. The plaintiff, according to the prayer of her complaint, seeks to perpetually enjoin the defendants from maintaining, continuing, or using the elevated railroad structure and its appurtenances and the station, station platform, stairways and appurtenances, tracks, switches, ties, stringers, girders, and rails in front of, over, or adjacent to plaintiff's said premises, and that defendants be required forthwith to remove said railroad structure, etc., unless the defendants pay to the plaintiff such sum or sums as may be found to be the value of the easements of which the plaintiff has been deprived.

The trial court found (finding 4) that the defendants erected a passenger station at 125th street and Park avenue—a solid iron structure—in front of the plaintiff's premises, which was eventually modified so as to be 82 feet wide and 23 feet and 3 inches high. Finding 5 reads: "By the adoption of plans for the station, and by the increase of the width and alteration of the structure for the sole purpose of accommodating the station, and by the work done by the defendants themselves or by their contractors, the defendants became parties to the process of construction at this point of the station buildings and appurtenances from the time of the commencement of the work in August, 1893, to its completion in November, 1897." Finding 9 reads: "The plaintiff has suffered damages by reason of the increase of inconvenience from the operation of trains upon the viaduct structure since the 16th of February, 1897, not including that from noise.

and in the erection and maintenance of a passenger station at 125th street, and the passing, starting, and stopping of numerous trains thereat, in the depreciation of the value of fee of her real estate in the sum of \$11,500, and in the loss of rents from the 16th of February, 1897, down to the date of trial, in the sum of \$5,500. The said sums * * * represent as to fee damages and rental damages, respectively, the net difference, measured in money, between the physical effect of the former operation of the railroad upon the premises in suit and the physical effects produced by the new elevated structure, including the station and its appurtenances and its use, less benefits conferred upon the same premises by reason of increased traveling facilities and increased traffic."

As this case is one of a large number involving the same situation, it is deemed proper to state what this court has already decided, and to point out the one question which has been left open. This court has decided that the steel viaduct in Park avenue, upon which the defendants' railroads are now operated, extending from 104th street to the Harlem river, was a public improvement effected through a governmental agency, and that defendants were not liable for damages resulting to abutting property owners from the maintenance of the structure or the operation of trains thereon. *Muhlik v. N. Y. & Harlem R. R. Co.*, 173 N. Y. 549, 66 N. E. 558; *Fries v. N. Y. & Harlem R. R. Co.*, 169 N. Y. 270, 62 N. E. 358. It has also been decided "that the station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required by the government to be constructed by the railroad companies under their implied contract with the state to afford suitable and proper facilities for the accommodation of their own patrons." *Dolan v. N. Y. & Harlem R. R. Co.*, 175 N. Y. 367, 67 N. E. 612.

A single question is presented by this appeal, the defendants (appellants) contending that the findings of the trial court include not only the damages, fee and rental, arising from the construction of the station at 125th street, but embrace damages produced by the new elevated structure, including the station and its appurtenances. The plaintiff insists that, reading the fifth and ninth findings together, it is clear that the trial court limited the damages to the construction and operation of the station. We are of opinion that the contention of the appellants must be sustained, as it seems to us clear, on a careful reading of the findings, that the trial court did not confine its award of damages to the erection and maintenance of the station building and appurtenances. Finding 9 distinctly states that the plaintiff "has suffered damages by reason of the increase of inconvenience from the operation of trains upon the viaduct structure since the

16th of February, 1897, not including that from noise, and in the erection and maintenance of a passenger station at 125th street, and the passing, starting, and stopping of numerous trains thereat." This finding further states, after fixing the fee and rental damages, that they represent "the net difference, measured in money, between the physical effect of the former operation of the railroad upon the premises in suit and the physical effects produced by the new elevated structure, including the station and its appurtenances and its use, less benefits conferred upon the same premises by reason of increased traveling facilities and increased traffic." It is clear from the phraseology of this finding that the trial court did not confine the assessment of damages to the station and its appurtenances, but considered the former operation of the railroad upon the premises in suit and the physical effects produced by the new elevated structure, including the station and its appurtenances. In *Dolan v. N. Y. & Harlem R. R. Co.*, 175 N. Y. 367, 67 N. E. 612, Judge Haight, writing for the court, said (page 371, 175 N. Y., and page 613, 67 N. E.): "If the station houses occupy more of the street than the viaduct, and tend to deprive the plaintiffs of their easements of light, air, and access, we think the defendants should pay therefor." This language is, in general terms, an indication of the rule of damages to be applied in these station house cases which have survived the former decisions of this court. It is desirable that the rule should be clearly stated for the guidance of counsel in the trial of similar cases. If the plaintiff proves that the steel viaduct has been extended beyond the width of the structure between stations, and is clearly a part of the work necessary in erecting the station, and an injury is established by reason thereof, proper damages should be awarded.

The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event.

PARKER, C. J., and O'BRIEN, HAIGHT, MARTIN, and CULLEN, JJ., concur. GRAY, J., not sitting.

Judgment reversed, etc.

(177 N. Y. 237)

PEOPLE v. TAYLOR.

(Court of Appeals of New York. Jan. 26, 1904.)

HOMICIDE—SELF-DEFENSE—EVIDENCE—THREATS.

1. On the trial of a wife for the murder of her husband, evidence of previous threats and assaults made by deceased against her is competent on the question whether the homicide was justifiable, as committed in self-defense, after evidence on the part of defendant that the killing was accidental, while they were struggling for the possession of the revolver

¶ 1. See *Homicide*, vol. 26, Cent. Dig. §§ 289, 401.

with which deceased had shot at her; she believing from his language that he intended to kill her.

Appeal from Supreme Court, Trial Term, Sullivan County.

Kate Taylor was convicted of murder, and appeals. Reversed.

Henry Willis Smith and William W. Smith, for appellant. Frank S. Anderson, for the People.

GRAY, J. The defendant was charged with the crime of murder in the first degree, committed upon her husband by shooting him with a revolver and by cutting off his head with an ax. She was tried upon the indictment, and the jury returned a verdict of guilty, as charged therein.

The defendant and her husband were in humble circumstances, and, with a daughter by her former marriage, at the time of the homicide, occupied a small house, composed of two rooms and a pantry, and of an attic overhead, in an isolated part of Sullivan county. The occurrences attending the killing of the deceased were narrated by Ida De Kay, the daughter, who was about 14 years of age, for the people, and by the accused, testifying in her own behalf. The daughter's testimony is to the effect that on Monday evening, January 28, 1903, the deceased returned, intoxicated and in a quarrelsome mood. Her mother had to take from him a stove hook, with which he was breaking or injuring the household articles, and, when an occasion was given by his going out of the house, she tried to put them out of his way. All three slept in a bedroom containing two beds; one being used by the mother and daughter, and the other by the deceased. His bed was about opposite to a door of the bedroom opening outward into the adjoining room, which was called the "kitchen." After Ida had gone to bed, she was awakened from her sleep by hearing the sound of a shot. By the light upon the table, she saw the deceased standing by the door leading into the kitchen. She says that she heard him exclaim that he was shot, and that "if she would let him be until morning, and not shoot him any more, he would get out, and not bother her any more." Ida arose and, went out of the bedroom, passing by her father, who was holding a strap, by which the door was fastened, and with his other hand was putting on his boots. He allowed her to pass out, and then she saw her mother standing in the kitchen, by the bedroom door. At first she went out upon the stoop, but in a minute or two returned into the kitchen, and, while crossing it towards the pantry, at the further end, she heard another shot, which she says was in the kitchen. She looked around, and saw her mother trying to get the bedroom door open by putting her hand through the crevice between the door casing and the door to reach the strap; the construction being of single

planks, flimsily put together. Succeeding in opening the door, she went into the room. Ida followed her, and saw the deceased lying upon the floor, and her mother snapping a revolver at him. She tried to reload the pistol with some cartridges; but, upon Ida's telling her not to do so, she desisted and put the weapon away. Her father and mother were both dressed at the time. Her mother then took an ax, which was standing at the foot of their bed, and cut off the head and right arm of the deceased. She put them into a stove which stood in the bedroom, and burned them; using kerosene oil. She cut off the other arm and the legs, put them and the trunk of the corpse away, and on the next day endeavored to consume the remains of the body by fire. She pounded up the skull and the bones, and dispersed them, concealed the effects of the deceased, burned clothing and the ax handle, and, as far as she could, endeavored to remove all traces of the occurrence. She told the witness to say, if inquired of, that her father had gone to Orange county to look for a house. On the Sunday following, Ida says, she and her mother went to the residence of a relative named Yerkins, and in the course of a conversation she heard her mother relate to him that she had killed her husband and burned him up, and that now he could come over and get the furniture. Yerkins laughed; said he would do so; inquired if everything had been cleaned up; and, upon her mother's request, furnished her with some paint for use in the house. It was also then arranged that after a while the furniture was to be taken to a house known as the "Benson House," in which she and her mother were to take up their residence. It further appeared by Ida's testimony that in the previous month of September she overheard a conversation between her mother and Yerkins, in which, the quarrelsomeness of the deceased having been spoken of, Yerkins said that, if he was in her place, he would kill the deceased and get rid of him, and that he would give her the Benson place. He suggested that she should kill him some night, when he was drunk.

This was, in substance, the material portion of the narrative of the witness Ida, and, except as to what occurred on the night of the homicide between her mother and her father, and as to what was said in the interviews between her mother and Yerkins before and after that night, it is not contradicted. It received corroboration in the evidence of some facts, as well as in the testimony of witnesses to whom the defendant subsequently made statements relating to the affair. The effects of the deceased and the ax were found in their places of concealment. Some burned flesh and bones found in the manure heap were pronounced by medical experts to have been portions of a human body. Two bullets were found in the wall, over the bed of the deceased, in a

line with the door leading into the kitchen. There was a bullet hole through the casing of the door, and upon the building paper covering the casing were marks of powder smoke. Measurements showed these to be about three feet and seven inches from the floor, and that one bullet hole over the side of the bed was about three feet and eight inches from the floor.

According to the testimony of two deputy sheriffs, the defendant, in conversation with one of them, upon being asked what she "did with the body after killing him," told how she had disposed of it, substantially in the manner in which Ida had narrated it. This statement was after her arrest, but appears to have been made quite freely and notwithstanding that she had been cautioned not to speak.

The defendant testified in her own behalf: That she was 40 years of age. That she had married the deceased in 1891, and how they had lived up to the time of the homicide. At one time they had resided in Yerkins' house, and her husband had worked for him. Yerkins was her half-uncle, and an unmarried man, of about 45 years of age. Near to Yerkins' residence was the Benson place, in which they also had resided for some time. According to her account of the night of the homicide, her husband was killed during a scuffle between them over the possession of a pistol. She testified that, when he returned home that evening in his wagon, she went, as it had been her custom, to the stable to care for the horse; that he was intoxicated and disorderly, and swore at her; and that after they entered the house he was violent, knocking the furniture about and jerking the house door off its hinges. She moved some furniture and crockery aside, and, after her daughter had retired, she lay down upon the bed, but without taking off her clothes. She did not go to sleep, and lay there in fear, watching him. She heard him go out of the house, and, when he re-entered the bedroom, he took her revolver, which was in a box at the foot of her bed, and shot at her. She jumped up, took the revolver from his hands, ran out into the kitchen, and held the bedroom door closed. She opened it to let her daughter, Ida, pass out; and afterwards, upon her husband's saying to her that he would not bother her any more, she stepped back into the bedroom. He then seized the revolver, which she was holding in her hands, by the muzzle, and, in the struggle for its possession, it was discharged, and he was shot. She retreated to the kitchen, holding the door closed until she heard the body drop, and, going in with her daughter, found the dead body upon the floor. She says that there was a bullet wound in the side of the head, substantiating Ida's statement that there was a wound in the temple. She denied having any idea or intention of killing her husband, and stated that the revolver had been purchased by her some months pre-

viously as a protection against attacks apprehended by her from a bear said to be in the neighborhood, and from persons prowling about the country. She denied having any such conversation with Yerkins in the previous September as her daughter had testified to. Her statement as to the interview with him upon the Sunday subsequent to the homicide is that she told him that her husband was dead, when he exclaimed: "Dead! You don't mean to say you have killed Taylor!" She says that she made no reply to this, and that she did not tell him how the deceased had been killed, otherwise than that he was shot. She testified that she did not deny chopping off, with an ax, the head of the deceased. She gave no testimony in contradiction of what had been narrated with respect to her acts in disposing of the body. She testified that there were only two shots, and that her object in getting the revolver from her husband was to save her own life, as he had shot at her, and that, from his language, she supposed "he would take her life." In answer to a question as to whether the deceased had threatened to take her life, and had made the attempt upon other occasions, she answered, "Yes." This answer, however, was stricken out; the trial judge ruling that such evidence was inadmissible, upon the theory of the defense that the killing of the deceased was accidental. An exception was noted to the ruling. The defendant called a witness, and offered to show by him and by a number of other witnesses what had been the conduct of the deceased towards her—threats made by him and injuries done to her since their marriage—"for the purpose of showing, as a defense," that she had not committed the crime of murder or of manslaughter, and to prove that what she "did upon that occasion . . . was justified in self-defense, to prevent Lafayette Taylor from inflicting upon her serious bodily harm, and to prevent him from using the pistol and taking her life." The people objected, and the witness was not permitted to be examined as to such facts, nor was the defendant allowed to prove them by other witnesses. The defendant was allowed an exception to the rulings. No exception was taken to the charge, which was sufficiently fair and temperate. Requests of the defendant to charge were also allowed as made, or with such qualifications as were proper.

The case, as presented by this appeal, raises but one important question for our consideration; and it is such as, in my opinion, seriously to affect the correctness of the judgment of conviction. Doubtless the jurors were warranted in reaching their determination, upon the evidence before them, that the defendant was guilty of the charge of having deliberately murdered her husband. Such a determination could rest upon the testimony of the daughter, the sole eyewitness, and upon inferences from corrob-

rating facts and circumstances which the proofs disclosed; relating not only to the scene of the homicide, but to what subsequently took place at the interview with Yerkins, and to the confession made to the deputy sheriff after the arrest. They could find—believing Ida's story—that the defendant deliberately and premeditatedly killed the deceased, of her own design, or induced thereto by the previous arrangement with Yerkins, and that the motive was to get rid of a drunken and quarrelsome husband, or, in addition to such, to get possession of the Benson farm, promised by Yerkins. The opportunity and the means existed, and there was no lack of evidence from which to infer the existence of a motive. Notwithstanding the youth of the daughter, she appears to have given her testimony artlessly, and neither confusion of mind nor imagination appears to have affected it. If it was murder, it was atrocious and revolting in its details; but if it was homicide committed in self-defense, or accidental, the defendant is not chargeable under the indictment, and could not suffer thereunder because of what she did with the body, in the mistaken notion of destroying what she may have apprehended as damning evidences of the commission of a crime.

In my opinion, for the trial judge to have excluded evidence proving or tending to prove previous violent conduct of the deceased towards the defendant, and his threats against her, or his attempts to take her life upon other occasions, was an error gravely prejudicial to her defense, because it deprived her of the right to have competent testimony in her favor considered by the jury. I know of no sufficient ground upon which the ruling may rest. The reasoning of the trial judge in support of his exclusion of such testimony was in disregard of the body of evidence—whether we consider what were the circumstances under which the homicide occurred, or what was the whole of the testimony given by the accused concerning it. It is true that in a portion of her testimony she characterized the killing as accidental, and it was upon the theory of a defense of accidental killing that the trial judge based his ruling; but what she may have said to that effect in response to questions put by the trial judge or by counsel must be taken in connection with her previous statements. She had testified that she sought to prevent his getting possession of the weapon, because of her apprehension that he would use it again upon her, and that she believed, from the language used toward her, that he was going to take her life. Upon her testimony, the facts were that the deceased was killed while they were struggling for the possession of the weapon, and that she was justified, by reason of her fear, in resisting his efforts to obtain it, from which it would follow, whether it was discharged by her intentionally, or as an accident of the struggle, that she was not liable

to the charge in the indictment. She may have believed, or, upon reflection, may now believe, that the killing was an accidental incident; but, under her plea of not guilty, how can she be deprived of any evidence tending to acquit her upon the ground that she was acting under apprehension of great bodily harm? Such a rule would be neither just nor humane. The case presented to the jurors was one where the evidence as to what occurred between the defendant and her husband at the time was conflicting. Her own testimony was at variance with that of her daughter, and the determination of the truth of what happened was left to the jurors, upon the credit which they might give to the one or the other, under all the circumstances disclosed by the evidence. Whatever was corroborative of the testimony of the one or the other witness, if competent as proof, was admissible in evidence; and that it was corroborative of the defendant's evidence to show that she had reason to apprehend great bodily harm, and therefore was justified either in using the weapon in self-defense, or in preventing its use by the deceased, cannot reasonably be denied. Under our statute, which in that respect but affirms the common-law rule, homicide is justifiable when committed by a defendant in lawful defense of his person, when there is reasonable ground to apprehend a design on the part of the person slain to do some great personal injury to the slayer, and when there is imminent danger of such design being accomplished. Of the reasonableness of the ground for the apprehension, it is, of course, for the jurors to judge from the evidence. Under the defendant's plea of not guilty, the whole matter of her guilt or innocence was referred to the jury; and that included the intention, as well as all the facts of the transaction. However grewsome and callous the conduct of the defendant in disposing of the body of her husband, the jurors could believe that she was innocent of the accusation, and was endeavoring to avoid coming under suspicion of having caused his death. Her conduct in that respect was not actually inconsistent with innocence, and should have no other weight in the accusation than as the acts may tend to supplement the direct or circumstantial evidence of an intentional killing. The homicide would be justifiable, whether appearances to her proved to be true or false, if they were such as to furnish reasonable grounds for her entertaining an apprehension of personal injury. *Shorter v. People*, 2 N. Y. 197, 202, 51 Am. Dec. 286. It was for the prosecution to prove beyond any reasonable doubt the accusation made, and the accused was not to be deprived of the benefit of any relevant fact which might prove her innocence. If the jurors, upon the evidence, should believe that the homicide was accidental, the defendant would be innocent of any crime, or, if they should believe that

the homicide was of her doing, but committed in an effort to defend her person, she was equally innocent. The defendant was entitled to the benefit of any competent or relevant fact, or of any reasonable inferences from facts proved, which might tend to establish her innocence of the crime charged, and evidence of previous attempts upon her life, or of threats against her, whether known to her or only to others, was admissible. The case of *People v. Druse*, 103 N. Y. 656, 8 N. E. 733, is authority for the proposition, simply, that a defendant, after giving evidence that the homicide was committed in self-defense, may follow it by proof of the general reputation of the deceased for quarrelsomeness and violence. *Stokes v. People*, 53 N. Y. 171, 13 Am. Rep. 492, is authority upon the proposition that evidence of the threats of the deceased, whether communicated to the defendant, or not, was admissible, because in either case it bore upon the question whether the homicide was excusable, as committed by the accused in defending himself against an attempt to murder or to injure him, or in resisting an attack from which he had reasonable ground to apprehend either of those results. In *Abbott v. People*, 86 N. Y. 460, it was held that it was competent to show the reputation of the deceased for quarrelsomeness, vindictiveness, and other like traits, in a case where an assault is threatened at the time when the homicide was committed, or is so intimately connected with it as to justify the taking of life in self-defense, or to ward off or to prevent a great, impending, and imminent danger of bodily harm.

In my judgment, the exclusion of this evidence was so grave an error that the defendant should be retried upon the charge made against her, when she may be permitted to introduce such evidence as she has, showing what were the relations between herself and her husband, what were his threats, or what his previous attempts upon her life. With the exclusion of the evidence offered, I do not think it can reasonably be said by us that she has had that fair trial upon the indictment to which she was entitled under the laws of this state.

The judgment of conviction should be reversed, and a new trial ordered.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur.

Judgment of conviction reversed, etc.

(177 N. Y. 233)

LITTAUER et al. v. STERN.

(Court of Appeals of New York. Jan. 19, 1904.)

JUDGMENT BY DEFAULT—RIGHT TO ENTER.

1. Where a copy of an order extending the time of defendant to answer or demur for 20 days, and the affidavits on which it was found-

ed, were served on plaintiff's attorney, he cannot enter judgment by default against defendant before the time to answer, as extended, has expired.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Lucius N. Littauer and others against James Stern. From an order of the Appellate Division (85 N. Y. Supp. 71) affirming an order of the Special Term vacating a judgment against defendant, plaintiffs appeal by permission. Affirmed.

Andrew J. Nellis, for appellants. Daniel P. Hays, Ralph Wolf, and Hiram C. Todd, for respondent.

VANN, J. On the 23d of April, 1903, this action was commenced in the Supreme Court by the service of a summons and complaint on the defendant personally. May 9, 1903, upon an affidavit of merits, made by himself, and an affidavit showing that further time to answer was necessary, made by his attorney, he procured an order from one of the justices of the Supreme Court extending his time to answer or demur for the period of 20 days. On the same day a copy of the order and of the affidavits upon which it was founded were served by mail on the attorney for the plaintiffs, with the following notice indorsed thereon: "Take notice that the inclosed is a copy of an order this day granted by Judge Kellogg in the within action. Dated May 9th, 1903. Hiram C. Todd, Attorney for Defendant. To Andrew J. Nellis, Attorney for Plaintiffs." The office address of the attorney for the defendant was neither added to his signature, nor elsewhere stated, and the other "particulars" required by sections 417 and 421 of the Code of Civil Procedure nowhere appeared. The attorney for the plaintiffs did not return the papers so served on him, but retained them without objection, so far as appears. No other attempt to appear in the action was made by or in behalf of the defendant until after May 14, 1903, when judgment by default was entered in favor of the plaintiffs for the amount demanded in the complaint, with costs. An execution was at once issued, and a levy thereunder promptly made upon the property of the defendant. The judgment was vacated on motion of the defendant, made at Special Term, on notice, as irregularly entered in disregard of said order. Upon appeal to the Appellate Division the order granting said motion was affirmed, but leave to appeal to this court was duly given and the following question certified to us for decision: "After the granting and service of the order of Mr. Justice John M. Kellogg on the 9th day of May, 1903, were plaintiffs authorized to enter judgment as upon default before the time to answer, as extended by said order, expired?"

The last day to answer, according to the summons, was on May 13th, and judgment was entered on May 14th, although an order

extending the time to answer for 20 days had been made and served. The plaintiffs claim that this practice was regular, upon the ground that the defendant had made no lawful appearance in the action, that the order extending the time to answer did not extend the time to appear, and that judgment was properly entered for default in appearing. They insist that the course pursued by them is authorized by certain sections of the Code of Civil Procedure, which we will briefly examine:

Section 418, in prescribing the form of a summons, contains a notice to the defendant that, in case of his "failure to appear or answer" within the time provided, "judgment will be taken against" him "by default for the relief demanded in the complaint." Section 421 provides that "the defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in section 417 * * * concerning the office address of the plaintiff's attorney." Section 1212 authorizes judgment by default in certain actions on contract, "if the defendant has made default in appearing," and also "if the defendant has seasonably appeared, but has made default in pleading." According to section 781, "where the time, within which a proceeding in an action, after its commencement, must be taken, has begun to run, and has not expired, it may be enlarged, upon an affidavit showing grounds therefor, by the court, or by a judge authorized to make an order in the action." Such an order "may be made by any judge of the court, in any part of the state." Section 772. An appearance may be made by the service of a formal notice, or a copy of an answer, or a copy of a demurrer. Section 421. As an answer is an appearance, an extension of the time to answer is necessarily an extension of the time to appear, and would be useless without it. Unless an appearance has already been made, an answer cannot be served without thereby effecting an appearance, and hence the right to answer includes, by implication, the right to appear. If an answer is served within the 20 days prescribed by the summons, but without a formal notice of appearance, judgment cannot be entered upon the expiration of said period for default in appearing, because an appearance goes with the answer, as a part of it. It is impossible to answer without appearing, for, by command of the statute, service of a copy of an answer is ipso facto an appearance. The order enlarging the time to answer carried with it the right to do whatever could be done by the service of an answer. The practice is general to obtain time to answer, whether

by order or stipulation, without expressly including in either the right to appear, yet never before in our experience has it been claimed that for this reason judgment might be entered for default in appearing, notwithstanding the extension of the time to plead. Universal practice is generally correct practice, because it is sanctioned by the judgment of the entire bar. When a statute regulating a subject coming within the daily experience of almost every lawyer in the state has been in force for more than 20 years, but has never been held by the courts or acted upon by attorneys as authorizing a certain act, it is safe to conclude that authority for such an act does not come within the intention of the Legislature.

We think that the defendant was not in default in any respect, and that the practice pursued by the plaintiffs was irregular. The order should therefore be affirmed, with costs, and the question certified answered in the negative.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur.

Order affirmed.

(177 N. Y. 264)

DUNK v. DUNK.

(Court of Appeals of New York. Jan. 26, 1904.)

SECURITY FOR COSTS.

1. Under Code, § 3276, providing that at any time after the allowance of an undertaking to secure costs given by order of court, the court, on a showing that the undertaking filed is insufficient, must make an order requiring plaintiff to give an additional undertaking, if the first undertaking is voluntarily given without any order requiring it, after service of a notice of motion therefor, which was abandoned, the court has no power to require an additional undertaking.

Bartlett and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Alfred O. Dunk against Eliza Dunk, executrix. From an order of the Appellate Division (85 N. Y. Supp. 25) reversing an order requiring plaintiff to give additional security for costs, defendant appeals. Affirmed.

David H. Carver and Israel T. Deyo, for appellant. Harry C. Walker, for respondent.

O'BRIEN, J. The order from which this appeal is taken was made on the 3d day of February, 1903, and required the plaintiff to give additional security for costs in the sum of \$750. The learned court below upon appeal reversed this order, and from that decision the case comes here. No appeal will lie to this court, as matter of right, from such an order; but the appeal is allowed by the learned court below, and the following question has been certified to this court:

"Had the Special Term the power, under section 3276 of the Code of Civil Procedure, to grant the order appealed from upon the undisputed facts appearing in the record?"

The undisputed facts referred to in this case are these: The proceeding was for the purpose of enforcing a disputed claim against the estate of a deceased person. The executor, in the administration of his trust, advertised for claims in pursuance of the statute. On the 31st day of December, 1898, the plaintiff presented his claim, duly verified. It was rejected by the executor, and on the 23d day of May, 1899, an order was made referring the matter in controversy to a referee, who rendered his report on November 24, 1902, in favor of the defendant, and judgment against the plaintiff for costs was rendered accordingly. The plaintiff is a nonresident of the state, and soon after the reference the defendant's attorneys served notice of a motion, the purpose of which was to procure an order requiring the plaintiff to file an undertaking in the sum of \$250 as security for costs, on the ground that the plaintiff was a nonresident. On the 23d of April, 1900, the plaintiff delivered such an undertaking to the defendant as such security. Some time in the month of October, 1901, the defendant's attorneys served a notice of motion, the object of which was to require an additional undertaking for costs on the ground that the sum specified in the first undertaking was insufficient. The plaintiff thereupon procured to be executed such an undertaking, and delivered the same to the defendant, which was accepted without question. No order was ever made requiring the plaintiff to give either of these undertakings. They were given voluntarily upon demand of the defendant's attorneys. They were not filed with the clerk, and there was never any allowance of the same. The undertakings were received by the defendant's attorneys, and kept and retained in their safe in their law office. The referee reported in favor of the defendant, and judgment for costs was rendered against the plaintiff in November, 1902—some months before the order in question was made, and before it was noticed for a hearing.

The ground upon which the learned court below reversed the order was that the case did not come within the statute requiring additional security for costs. Code, §§ 3268-3279. The provision of the statute upon which the defendant relies is section 3276. The material part of that section reads as follows: "At any time after the allowance of an undertaking given pursuant to such an order" the court, upon a showing that the undertaking filed is insufficient, must make an order "requiring the plaintiff to give an additional undertaking." This is the only authority which requires the plaintiff to give additional security, and it will be seen from the language of the statute that the time when such additional security may be re-

quired is "at any time after the allowance of an undertaking given pursuant to such an order." What the learned court below decided is that, inasmuch as, upon the undisputed facts in this case, no order was ever made requiring the plaintiff to give security, and no allowance of an undertaking given pursuant to such an order was ever indorsed upon the papers by any judge, there was no authority in the statute for granting the application. It is quite clear that the statute does not, in terms, apply to a case where the plaintiff has voluntarily given security in the form of an undertaking where there was no order of the court requiring it, or any allowance of the same. But it is said that this court should enlarge the language of the statute, and read into it words which the lawmakers have not used. That is to say, we should construe the statute in the same way as if it read as follows: "At any time after the allowance of an undertaking given pursuant to such an order, or at any time after an undertaking has been voluntarily given, without any order or allowance," then additional security may be required. The statute is a very plain one, free from all ambiguity whatever; and it would be simply judicial legislation to hold that we ought to reverse the court below on the ground that the case, though not within the language, must be within the spirit, of the statute.

The question involved in the appeal is a matter with respect to the practice in the Supreme Court in such cases, and since the learned court below has construed the statute according to its plain terms, we do not think that this court should interfere with the decision by enlarging the language which the Legislature has selected in the enactment of the law. Moreover, the decision below is in accordance with the precedents in this court. Indeed, the question has already been disposed of by one of our own decisions. In the case of *Republic of Honduras v. Soto*, 112 N. Y. 310, 19 N. E. 845, 2 L. R. A. 642, 8 Am. St. Rep. 744, this court reversed an order of the court below which required the plaintiff to give additional security after it had made a deposit of \$250 in money in lieu of an undertaking. It was held that the court had no power to make such an order, as the case was not one within the terms of the statute. The court in that case was invited, as it is in this, to enlarge the language of the section in order to conform to what was supposed to be the intention of the Legislature; but it declined to do so. A deposit of money, in such cases, takes the place of an undertaking; and there was just as much reason in that case as there is in this to attempt to enforce what is claimed to be the spirit of the law by incorporating into the statute words which are not found there. Indeed, that was a very much stronger case for compelling the plaintiff to give additional security than the one at bar. There a foreign

government brought a suit in our courts, and made a deposit of \$250 only; and it was held that that was the only security the defendant could require. Here the plaintiff has already given two undertakings, which amount to \$750. There is no claim that the sureties are not responsible, or that the plaintiff himself is insolvent. If, in this case, the plaintiff had deposited \$750 in money, instead of giving the two bonds, the case would then be absolutely identical with the one cited. A few extracts from the opinion in that case will, I think, furnish a complete answer to the defendant's contention: "We are of the opinion that when a deposit of money has once been made the court has no authority to require an undertaking, and whether the plaintiff shall give an undertaking in the first instance depends solely upon his election. If he then makes a deposit the court cannot afterwards require any further security to be given. The statute is explicit and unambiguous, and there is no room or occasion for interpretation. To require a plaintiff under this statute to file an undertaking after he has made a deposit would be an exercise of the power of legislation, and not a matter of judicial construction. * * * The argument that the case is within the spirit of the provisions authorizing additional security is without force in view of the absence of language providing for it, and also the presence of language which, by clear implication, excludes it. It is always competent for the Legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain intent and obvious meaning of the act, rather than to speculate upon what might have been the views of the Legislature in the emergency which may have arisen. It is wiser and safer to leave to the legislative department to supply a supposed or actual *casus omisus* than attempt to do it by judicial construction." In this case there is no occasion for straining or supplying words in order to execute what is called the spirit of the statute. The plaintiff may neglect or refuse to comply with an order of the court requiring him to give security for costs, and the only penalty that he is subjected to in such a case is the liability to have his complaint dismissed. It will be seen that in this case, long before any application was made for this order, the case had been decided, and judgment entered against the plaintiff; so that his complaint is already virtually dismissed. This is really an application to compel the plaintiff to give security for the payment of a judgment rendered against him. There is nothing to prevent the defendant from proceeding to enforce his judgment. As already remarked, there is no claim that the plaintiff is insolvent, or unable to respond to the demand. The provisions in regard to security for costs were not, I think, ever intended to apply to such a case. If the plaintiff had appealed, the defendant, by

enforcing his judgment in the usual way, could compel him to stay the execution of the judgment in the usual way; and under these circumstances it is wiser and safer to follow precedents than to help the defendant out by judicial legislation.

I think the order appealed from should be affirmed, with costs.

BARTLETT, J. (dissenting). The provisions of the Code of Civil Procedure relating to security for costs should be liberally construed. The defendant's attorney, on the ground of plaintiff's nonresidence, served notice of motion asking security for costs, and later another notice of motion demanding increased security. On both occasions plaintiff gave the security so demanded without defending the motions. A third motion after appeal taken to the Appellate Division was made for further security for costs, and an order duly granted by the Special Term directing the undertaking to be filed. This order was reversed by the Appellate Division, and we are asked to review the latter decision. The sole ground for reversal is that in the first two motions for security orders were not entered, the plaintiff furnishing undertakings without that formality. In each case motion papers had been duly served and the proceeding was pending when undertakings were given, and it seems to me a narrow and unreasonable construction to hold that this failure to enter orders when plaintiff voluntarily gave the proper undertakings in pending motion proceedings deprives the defendant of the statutory provisions under which he was pursuing his remedy in a proper manner. The plaintiff swears on information and belief that neither undertaking was filed. The second undertaking furnished by plaintiff states that the first one was duly executed and filed. The case of *Republic of Honduras v. Soto*, 112 N. Y. 310, 19 N. E. 845, 2 L. R. A. 642, 8 Am. St. Rep. 744, has no application to section 3276 of the Code of Civil Procedure, as amended in 1891. Laws 1891, p. 345, c. 161. The case cited was decided in January, 1889, and was dealing with that section when it did not contain any provision as to the payment of money into court, as did section 3272, at that time, in reference to giving original security. In 1891 section 3276 was amended in four different places so as to couple with the provisions relating to an undertaking additional enactments covering the case where there should be payments of money into court. This section deals exclusively with proceedings for an order to give additional security.

The order appealed from should be reversed, with costs.

PARKER, C. J., and MARTIN, CULLEN, and WERNER, JJ., concur with O'BRIEN, J. VANN, J., concurs with BARTLETT, J.

Order affirmed.

(177 N. Y. 252)

BLINN v. SCHWARZ et al.

(Court of Appeals of New York. Jan. 26, 1904.)

INSANE PERSON—DEED—VALIDITY—RATIFICATION—EJECTMENT—ELECTION.

1. The deed of an insane person is not absolutely void, but voidable, at his election, on recovery of his reason, and has full force and effect until his option to declare it void is exercised.

2. In ejectment, by a person who was insane at the time of the execution of the deed, to recover the property conveyed, the fact of such insanity is immaterial, where the evidence shows that he ratified the deed after regaining his reason.

3. Plaintiff in ejectment sued to recover the land on the ground that the deed had been executed while he was insane, and defendant offered in evidence a complaint in a previous action brought by the plaintiff against his agent, appointed by power of attorney executed while he was insane, to recover from the agent the consideration for the property conveyed which he had received. The action against the agent was pending at the time of the trial of the ejectment action. *Held* that, plaintiff having elected to sue for the money, the allegations of the complaint in the action against the agent are material on the question of ratification.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Christian Blinn against Julia Schwarz and others. From a judgment of the Appellate Division (71 N. Y. Supp. 343) overruling plaintiff's exceptions, denying motion for a new trial, and directing judgment for defendants, plaintiff appeals. *Affirmed*.

By her answer to a complaint in ejectment, the defendant Julia Schwarz denied that she wrongfully withheld the land in question from the plaintiff, and alleged that she was in possession thereof by virtue of a deed executed to her by him on the 31st of March, 1890, in consideration of \$78,000 paid by her, and to the extent of \$54,000 applied to discharge mortgages that were liens on the property. The plaintiff, by his reply, alleged that he had no knowledge or recollection of having signed or acknowledged the deed purporting to convey said property; denied that he ever, in person or otherwise, delivered the deed or received the consideration; averred that he was insane at the date of the alleged conveyance, and that the said Julia Schwarz took advantage of his condition by procuring his signature "to a certain paper purporting to be a deed of the premises" described in the complaint.

On the 26th of September, 1887, the premises in question were conveyed to the plaintiff, who entered into possession thereof, and so remained until March 31, 1890. On the same day he made and delivered to his grantor six purchase-money mortgages upon the property to secure the sum of \$65,000 in all. On the 31st of March, 1890, a deed, dated and acknowledged that day, made by the plaintiff and his wife to the defendant Julia Schwarz, purporting to convey the premises

described in the complaint, was recorded in the office of the register of the county of New York. Since that date Julia Schwarz has been in possession of said premises, "claiming to be the owner thereof under and pursuant to the tenor of said deed."

Evidence was given tending to show that "from about the 1st of January, 1890, until within a few months from the time he was discharged from a sanitarium in 1895," the plaintiff was insane, his mind a blank, "and he knew nothing whatever of signing any papers or of anything else which occurred during that time." It does not appear that an inquisition was made, or that the plaintiff was ever adjudged insane. The plaintiff was sane when he brought this action on the 25th of October, 1897, and also when, prior thereto, he brought an action, which is still pending and undetermined, against one Henry Ungrich, alleging in his complaint therein, verified July 2, 1897, that on or about the 17th of February, 1890, he was engaged in the business of buying and selling real estate, and owned 35 parcels of real property in the city of New York, including those in question; that at the date last named, being obliged by ill health to withdraw from business, he appointed said Ungrich "his agent and trustee," through a written power of attorney, "the exact manner and form" of which he was unable to state; that on the 16th of April, 1890, he executed a second power of attorney, a copy of which was annexed to said complaint, and reappointed said Ungrich his "agent and trustee," with further and enlarged powers to act for him in the management of his business; that said Ungrich accepted the agency and trust, entered into the possession, control, and management of the property, including that now in question, and from time to time sold and disposed of "certain of the said property, if not all," and received the consideration therefor; that said Ungrich abused the trust and confidence reposed in him by the plaintiff, and confided to him by said powers of attorney, by selling some of the property to his relatives at less than it was worth, and other parcels at prices below what at or about the time he was actually offered for the same; that he failed to use due diligence and discretion, and acted in a manner injurious to the plaintiff's interests and rights; that he retained and used the moneys received by him for his own use and benefit, and made large and secret profits in the management of the plaintiff's property, to his great damage; that said powers of attorney had never been revoked, and said Ungrich was still in full charge of the affairs of the plaintiff that were intrusted to him at the time of the execution of the first power of attorney; that he had never paid to the plaintiff any of the moneys received by him for the property sold, and had never accounted therefor, or for any of his acts or dealings in connection therewith; that the plaintiff was not able to resume active par-

¶ 1. See Deeds, vol. 16, Cent. Dig. § 203; Insane Persons, vol. 27, Cent. Dig. § 93.

helpation in business affairs until on or about October, 1895, since which time he had frequently demanded of said Ungrich an accounting for the moneys received by him, and for his acts and dealings in the execution of the agency and trust conferred upon him; that an accounting was necessary, upon which "there will be found to be equitably due and owing from [said Ungrich] to this plaintiff a large amount of money, which should be decreed to be paid by [him] to plaintiff." The prayer for judgment was "that the defendant be directed to make discovery of, and to account to plaintiff for, the moneys and other valuable considerations received by [him] in trust for the plaintiff while acting as agent and trustee of plaintiff, and had and retained by him for his own use and benefit, and for [his] profits made in the course of his management of plaintiff's property and business, and for all of his transactions as agent and trustee of plaintiff, and for such other and further relief," etc.

The defendant Schwarz paid to said Ungrich \$77,750 as consideration for the deed to her of the property in question, and there was no evidence of a return or offer to return the same to her, or that she had notice of the plaintiff's condition when she made the payment. By a power of attorney dated, executed, and acknowledged April 16, 1890, the plaintiff appointed Henry Ungrich his true and lawful attorney "to grant, bargain and sell all and every, the real estate and property which I own, have owned and possessed, wheresoever situate or any part thereof, for such price and upon such terms as to him shall seem meet, and for me and in my name to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same"; to borrow such sum or sums of money "upon the security of my said estate and property" as he shall from time to time deem proper and to execute bonds and mortgages to secure the same; to lease the property, and exercise general control and supervision of the same; to prevent trespass, waste or other injury thereto; to purchase and sell for cash or on credit all such articles and property as he may deem useful and proper as connected with my estate, business and property, both real and personal; to sign and endorse notes and drafts, state and adjust accounts, sue and compromise claims and "take the general management of my affairs, property and business." The power of attorney dated February 14, 1890, was substantially to the same effect, as to the right to sell, convey, borrow, mortgage, sue, compound, and lease; "to exercise the general control and supervision of all my lands and tenements * * * and to do all and every act and thing in and about my said property for the keeping, conveyancing, mortgaging and leasing of the same as I might or could do."

At the close of the evidence the court di-

rected a verdict in favor of the defendants and against the plaintiff. To this direction the plaintiff excepted, and asked to have the question of the plaintiff's insanity at the time of the making of the deed to the defendant Schwarz submitted to the jury; but the court declined, and an exception was taken. No other request or motion was made by or in behalf of either party. The court ordered the exceptions to be heard in the first instance by the Appellate Division, which overruled the same, and ordered judgment to be entered upon the verdict in favor of the defendants.

George Newell Hamlin, George B. Lester, and Harmon S. Graves, for appellant. Edward W. S. Johnston and Edward P. Orrell, for respondents.

VANN, J. (after stating the facts). The deed in question and both powers of attorney were executed by the plaintiff when he was of unsound mind and incapable of attending to his affairs, as the jury might have found. About two years and a half after he recovered his mind he sued his agent and trustee for a general accounting, and the allegations of his complaint would have permitted the recovery, among other moneys, of the sum of \$77,750 paid by the defendant Julia Schwarz upon the purchase of the property in question. The plaintiff did not allege in his complaint in that action that his agent had received that sum, or any specific money; and it does not expressly appear that he knew when he brought the action what sums had been paid, or under what circumstances, or for what property. After that complaint had been put in evidence by the defendants, however, the burden was upon the plaintiff of explaining the same, or of showing what he could in answer thereto, but the record contains nothing upon the subject. As he had never been adjudged a lunatic, he could not proceed on the assumption that he was insane, as he alleged, for that was a question for the jury. The lapse of time between his recovery and his act has an important bearing upon what he is presumed to have known. While neither power of attorney specifically covered the receipt of money paid in consideration of property conveyed by the plaintiff in person, still the general powers were broad enough to authorize the agent and trustee to collect the same.

Although the plaintiff in the action now before us excepted to the direction of a verdict in favor of the defendants, he did not rest there, but asked to have the question of his insanity at the time of the making of the deed to Mrs. Schwarz submitted to the jury. He did not ask to go to the jury on the whole case, or upon any other question; and by requesting that the question of insanity, only, should be submitted, he waived the right to have the question of ratification, so far as it was one of fact, sent to the

jury. The evidence warrants the conclusion that the plaintiff ratified the act of his agent, as well as his own, with reference to the deed under consideration, provided the deed and the powers of attorney were not absolutely void, but merely voidable. As we must assume that the plaintiff was insane when he executed those instruments, we thus reach the principal question presented by the record—as to whether the contract of a person actually insane, but never so adjudged, is void, or merely voidable, at his election.

Using the term in its exact sense, and limiting it to the parties themselves, a void contract is binding upon neither, and cannot be ratified. Even if ratified in form by both, it would be a new contract, and would take effect only from the date of the attempt at ratification. A voidable contract, on the other hand, binds one party, but not the other, who may ratify or rescind at pleasure. The word "void," however, is used both in statutes and in decisions of the courts with several meanings, and seldom with the exact one. This is illustrated by an opinion of the Court of Errors, from which we extract the following: "A thing is void which is done against law, at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done. Bacon classes under the head of acts which are absolutely void, to all purposes, the bond of a feme covert, an infant, and a person non compos mentis, after an office found, and bonds given for the performance of illegal acts. He considers a fraudulent gift void as to some persons only, and says it is good as to the donor and void as to creditors. Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, is not utterly void, but merely voidable. Another test of a void act or deed is that every stranger may take advantage of it, but not of a voidable one. 2 Leo. 218; Viner, tit. 'Void and Voidable,' A, pl. 11. Again, a thing may be void in several degrees: (1) Void, so as if never done, to all purposes, so as all persons may take advantage thereof; (2) void to some purposes only; (3) so void by operation of law that he who will have the benefit of it may make it good." *Anderson v. Roberts*, 18 Johns. 516, 527, 9 Am. Dec. 235.

Contracts to defraud creditors, those made under duress or while one of the parties was intoxicated, and the like, are not void, but voidable, at the option of the injured party, while contracts to do acts forbidden by law, such as the commission of crimes, or not to do acts required by law, such as refusing to obey a subpoena, are utterly void. So are contracts of insane persons, "made after an inquisition and confirmation thereof, but not when made before office found, even if with-

in the period overreached by the finding of the jury, although they are presumed to be so until capacity to contract is shown by satisfactory evidence." *Hughes v. Jones*, 116 N. Y. 67, 73, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. Rep. 386. In *Van Deusen v. Sweet*, 51 N. Y. 378, relied on by the plaintiff, the headnote is misleading, for the learned judge writing the opinion used the word "void" with a flexible meaning, as on page 384 he says that the deed then in question "was not merely voidable, but absolutely void," and in the third sentence following that "it would have been competent for the plaintiff to have shown that the deed was voidable, if that had been necessary to defeat the defendant's claim. See *Phillips v. Gorham*, 17 N. Y. 270; *Lattin v. McCarty*, 41 N. Y. 107." It is evident from reading the entire opinion that the court had in mind the remedy of the plaintiff at law when it used the former expression, and the rights of the parties in equity when it used the latter. This case has produced some confusion, because, owing to the syllabus, it has been misunderstood. In *Goodyear v. Adams* (Sup.) 5 N. Y. Supp. 273; *Id.*, 119 N. Y. 650, 23 N. E. 1149—also relied on by the plaintiff, it was held that a deed executed by an insane person is absolutely void at law, but, if taken in good faith and for a valuable consideration, may be upheld in equity.

The question before us is not whether the deed is void at law, but whether it is void in the extreme sense of the word—not only at law, but in equity, so that there was nothing for ratification to act upon. One of the defenses pleaded by the defendant Schwarz is of an equitable nature, as she alleged the payment of a consideration of \$78,000, and that \$54,000 of that amount was applied upon the mortgages on the property, which were satisfied of record. I think the true rule was suggested by the great English commentator, when he said that "idiots and persons of nonsane memory, infants, and persons under duress, are not totally disabled either to convey or purchase, but sub modo only, for their conveyances and purchases are voidable, but not actually void." 2 Black. Com. 291. Chancellor Kent uses similar language (2 Kent's Com. 451), and other writers lay down substantially the same rule. Mr. Wharton, after a full discussion of the subject, says that "the true rule is that a voidable deed is capable of ratification, and if a grantor, when insane, makes a deed, and should afterwards, in a lucid interval, well understanding the nature of the instrument, ratify and adopt it as his deed, as by receiving the purchase money due under it, this would give effect to it, and render it valid in the hands of the grantee." The learned author cites many authorities in support of this position. 1 Wharton's Law of Contracts, § 107, p. 138. In *Bishop on Contracts*, §§ 873 and 874, it is said: "Plainly, in justice, the same party ought ordinarily to be holden, whether he

knew of the insanity or not, if the other or his representative so elects. The authorities on this point may be conflicting, but such is believed to be the better doctrine. This last would make the contract voidable, whatever the courts should hold its other consequences to be. * * * In general, this contract, like an infant's, may be ratified or disaffirmed by the insane party's guardian or committee, or by himself during a lucid interval or on becoming sane, or after his death by his proper legal representative." In *Clark on Contracts*, p. 268, it is laid down "as a general or almost universal rule" that the contracts of an infant or insane person "are not void, but simply voidable at his option, and they are binding on the other party if he elects to hold him." In *Lawson on Contracts*, § 161, the rule is stated in this language: "The contract of an insane person is voidable at his option, and therefore one may prove in avoidance of his contract that he was non compos mentis when he entered into it, although a similar privilege is not allowed to the party with whom he contracted. The insanity, to avoid the contract, must be an absolute incapacity to understand the effect of the act; and therefore mere weakness of mind, or partial insanity or monomania, unconnected with the subject-matter of the contract, is not sufficient, though a moderate degree of incapacity may be sufficient where the transaction is accompanied with fraud, imposition, or duress. Where the person has been adjudged a lunatic and placed under guardianship, contracts made by him thereafter are absolutely void, unless the guardianship has been abandoned, or no guardian has been appointed, or the guardian appointed has resigned." We will close our quotations with the following from *Pollock's Principles of Contract*, p. 81: "The contract of a lunatic or drunken man, who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests, is not void, but only voidable at his option; and this only if his state is known to the other party." See, also, *Shelford on Lunacy*, 419; *Story's Eq. Jur.* 228, 28 Am. & Eng. Encyc. (1st Ed.) 478; 9 Am. & Eng. Encyc. (2d Ed.) 119; *Addison on Contracts* (6th Ed.) 1033; *Smith on Contracts* (5th Ed.) 343, 344.

Although the decisions of the courts upon the subject are not uniform, according to the weight of authority in this state, as well as elsewhere, the deed of a lunatic before office found is voidable only and not void. *Hughes v. Jones*, 116 N. Y. 67, 73, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. Rep. 336; *Valentine v. Lunt*, 115 N. Y. 496, 22 N. E. 209; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541, 545; *Ingraham v. Baldwin*, 9 N. Y. 45, 47; *Jackson v. Gumaer*, 2 Cow. 552, 568; *Fitzhugh v. Wilcox*, 12 Barb. 235, 237; *Canfield v. Fairbanks*, 63 Barb. 461, 465; *Matter of Beckwith*, 3 Hun, 443; *Riley v. Albany Savings Bank*, 36

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Hun, 513, 519; *Id.*, 103 N. Y. 669; *Brown v. Miles*, 61 Hun, 453, 456, 16 N. Y. Supp. 251; *Baldwin v. Golde*, 88 Hun, 115, 34 N. Y. Supp. 587; *Wagner v. Harriot*, 10 N. Y. St. Rep. 709; *Merritt v. Merritt*, 43 App. Div. 68, 70, 59 N. Y. Supp. 357; *Loomis v. Spencer*, 2 Paige, 153; *L'Amoreux v. Crosby*, 2 Paige, 427, 22 Am. Dec. 655; *Allis v. Billings*, 6 Metc. 415, 39 Am. Dec. 744; *Lancaster Co. Nat. Bk. v. Moore*, 78 Pa. 407, 21 Am. Rep. 24; *Long v. Long*, 9 Md. 348; *Mattheussen Refining Co. v. McMahon*, 38 N. J. Law, 536; *Wilder v. Weakley*, 34 Ind. 181; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Molton v. Cameroux*, 2 Ex. Ch. 487; 4 Ex. Ch. 17; *Beavan v. McDowell*, 9 Ex. Ch. 309.

We think the rule laid down by these cases is sound, and in the interest of those afflicted with disease of the mind. The deed of a lunatic is not void, in the sense of being a nullity, but has force and effect until the option to declare it void is exercised. The right of election implies the right to ratify, and it may be greatly to the advantage of the insane person to have that right. If the deed or contract is void, it binds neither party, and neither can derive any benefit therefrom; but, if voidable, the lunatic, upon recovering his reason, can hold onto the bargain if it is good, and let go if it is bad. This option is valuable, for it gives him the power to do as he wishes, and to bind or loose the other party at will. Upon the record before us, therefore, even of the plaintiff was insane at the date of the deed, there was no error in directing a verdict for the defendants.

The only exception, aside from those involved in the foregoing discussion, was taken to the admission in evidence of the complaint in the action brought by the plaintiff against his agent, subject to the objection that it was immaterial. That action was brought to recover the purchase price of the very premises sought to be recovered in this. It was pending when this action was commenced, and was pending at the time of the trial. As was said in the prevailing opinion below, the defendants had "the right to show any facts to establish that at the time of the trial the deed was plaintiff's deed." The plaintiff could not recover the land and money both, and he was in the act of trying to recover the money when his action to recover the land was brought as well as when it was tried. He made no request to go to the jury as to his knowledge or want of knowledge when the first action was commenced. Having the right to sue for the money or the land, he sued for both, and upon the trial of the second action it was material upon the question of ratification to show what he alleged in his complaint in the first.

Without considering the question, so ably discussed in the concurring opinion below, whether the plaintiff, in any event, should have resorted to equity for relief, we think the record shows no reversible error, and

that the judgment should therefore be affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

(163 Ind. 288)

CHICAGO, I. & E. RY. CO. v. WYSOR LAND CO.¹

(Supreme Court of Indiana. Jan. 14, 1904.)

CONDEMNATION PROCEEDINGS—EXCEPTION TO AWARD OF DAMAGES—SUFFICIENCY—RIGHT TO JURY TRIAL—OPINION EVIDENCE—APPEAL—RIGHT TO ALLEGE ERROR—SUFFICIENCY OF BRIEFS—SUFFICIENCY OF RECORD.

1. On an appeal from the overruling of a demurrer, appellant's failure to set out the pleading demurred to, or the substance thereof, in his brief, as required by Sup. Ct. Rule 22, cl. 5 (55 N. E. vi), is harmless where it is given in full in appellee's brief.

2. An exception to an award of damages in condemnation proceedings by a railroad company, which alleges that certain described lots, in addition to those mentioned in the instrument of appropriation were appropriated in whole or in part by the strip of land described in such instrument, is sufficient to withstand a demurrer for want of facts.

3. Where exceptions to the award of damages in condemnation proceedings go only to the amount of damages, a jury trial is proper.

4. The statute governing condemnation proceedings by a railroad company provides that no deduction shall be made for any benefit that may be supposed to result to the owner from the contemplated work. *Held* that, though a witness' opinion as to value of property before and after appropriation of the right of way over the same, if it involved an estimate of any supposed benefit, would be inadmissible, yet the error was such as the railroad company could not complain of.

5. Where instructions are not brought into the record by a bill of exceptions, and the record does not show that those tendered were filed as required by Burns' Rev. St. 1901, § 542, cl. 6, or made a part of the record by order of the court, they cannot be considered.

6. Where the record fails to show that it contains all the instructions given, no question concerning instructions given or refused is presented for decision on appeal.

Appeal from Circuit Court, Delaware County; Joseph G. Leffler, Judge.

Condemnation proceedings by the Chicago, Indiana & Eastern Railway Company against the Wysor Land Company. From a judgment in favor of defendant after trial on its exceptions to an award of damages, the railroad company appeals. Transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901; Acts 1901, p. 590, c. 259. Affirmed.

Bingham & Long, for appellant. White & Young and Warner & Brady, for appellee.

MONKS, J. Appellant filed an instrument of appropriation in the court below and sought to appropriate for its right of way certain real estate owned by appellee. Appraisers were appointed, who made and filed their award. Appellee, within the time allowed, filed written exceptions in the clerk's

office, claiming that the damages awarded were inadequate. The court overruled appellant's demurrer for want of facts to appellee's third exception. A trial of said cause by a jury resulted in a verdict, and, over a motion for a new trial, a judgment in favor of appellee.

It is insisted by appellant that the court erred in overruling its demurrer to the third paragraph of exceptions. Appellant has failed to set out said paragraph, or the substance thereof, in its brief, as required by clause 5 of rule 22 (55 N. E. vi), but as the same is given in full in appellee's brief, the defect in appellant's brief is harmless, because we can determine said question from an examination of the briefs. The third paragraph of exceptions alleged, in substance, that certain described lots in addition to those mentioned in the instrument of appropriation were appropriated in whole or in part by the strip of land described in such instrument. The same was clearly sufficient to withstand the demurrer for want of facts. If there were other allegations which were insufficient or improper, the remedy was by a motion to strike out, or objections to any evidence in support thereof.

It is next insisted by appellant that the court erred in submitting the question of damages to a jury. If the exceptions filed to an award in such a case as this go to the regularity of the proceeding, and are sustained, a new appraisalment will be ordered, to which exception may be filed the same as to the first award. But if the exceptions go only to the amount of damages, this court has uniformly held that either party may demand and have a jury trial. *Louisville, etc., R. Co. v. Dryden*, 39 Ind. 393, 395; *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558, and cases cited; *Hughes v. Lake Erie, etc., R. Co.*, 21 Ind. 175, 176; *Barrett v. Carthage, etc., Co.*, 16 Ind. 105, 106; *Piper v. Connersville, etc., Co.*, 12 Ind. 400, 403; *Swinney v. Fort Wayne, etc., R. Co.*, 59 Ind. 205, 218; *Woollen's Special Proc.*, § 266. It has been the uniform practice of the trial courts to submit the question of damages to a jury. *Ohio, etc., Co. v. Kerth*, 130 Ind. 314, 30 N. E. 298; *Lake Erie, etc., R. Co. v. Kinsey*, 87 Ind. 514; *Chicago, etc., R. Co. v. Curless*, 27 Ind. App. 306, 60 N. E. 467. At the trial of said cause witnesses on behalf of appellee were permitted by the court, over objection of appellant, to give their opinion as to the value of each lot before the right of way over the same was appropriated by appellant and the value after the appropriation. Appellant insists that the admission of evidence as to the value of said lots after the appropriation was to permit the witness to give his opinion of the damages done by the construction of the road, and, further, that such evidence is expressly prohibited by the statute in such cases, which provides that "no deduction shall be made for any benefit that may be supposed to result

¹ Rehearing denied.

to the owner from the contemplated work." There has been some confusion in the cases in this state on this subject. It has been uniformly held, however, that it was error to permit a witness to give an opinion as to the amount of damages. *Yost v. Conroy*, 92 Ind. 464, 465, 47 Am. Rep. 156, and cases cited. In *Hagaman v. Moore*, 84 Ind. 496—a proceeding to establish a public highway—it was held that opinions of witnesses were not admissible to show the values of the land across which the road was to be located "with and without the road." This case was expressly disapproved on this question in *Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156. It was held in said case (pages 468-470, 92 Ind., 47 Am. Rep. 156) that when there is no law excluding benefits from consideration in estimating damages, or when the question is one affecting the right to assess benefits (as in highway and ditch cases), a witness may state his opinion of the value of the land without the proposed ditch or highway and what its value would be with the highway or drain. It would seem, therefore, that in cases where the law excludes benefits from consideration in estimating damages (as in railroad appropriation cases), the witness may testify as to the value of the property without the railroad and the value with the railroad, not taking into account any supposed benefit the road, when constructed, would be to the land. Under this rule, however, appellant cannot complain of the action of the court, for the reason that, if the witness did not, in his opinion of the value after the appropriation, exclude the supposed benefits, the party injured thereby was the appellee, not the appellant. If any supposed benefits were considered by the witness, the value after the appropriation would be greater than if benefits were excluded. Appellee might be injured by such evidence, but not appellant. In the following railroad appropriation cases the method of proving damages approved in *Yost v. Conroy*, supra, that a qualified witness may be asked his opinion of the value of the land a part of which is appropriated before and after the appropriation was adopted by the trial court, and the same were not reversed: *Evansville*, etc., R. Co. v. *Fettig*, 130 Ind. 61, 62, 63, 29 N. E. 407; *Ohio*, etc., R. Co. v. *Kerth*, 130 Ind. 314, 319, 320, 30 N. E. 298; *Evansville*, etc., v. *Swift*, 123 Ind. 34, 27 N. E. 420. The values of the lands before and after the appropriation were facts which the jury was authorized to consider in determining the amount of damages. This is not, however, the only mode of showing the amount of the damages sustained by the location of a railroad. In assessing the amount of damages the jury are not required as a matter of law to accept the opinion of witnesses as to value, but must exercise their own judgment in determining that question, as well as the amount of the damages, after considering all the evidence in the cause which may throw

any light on that subject. *Patterson v. Boston*, 20 Pick. 159, 166; *Murdock v. Sumner*, 22 Pick. 156, 158; *Chicago*, etc., R. Co. v. *Drake*, 46 Kan. 568, 26 Pac. 1039; *Kansas*, etc., R. Co. v. *Ryan*, 49 Kan. 1, 16, 30 Pac. 108; *The Conqueror*, 166 U. S. 110, 131-133, 17 Sup. Ct. 510, 41 L. Ed. 937; *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1023; *City of Kansas v. Butterfield*, 89 Mo. 646, 1 S. W. 831; *Johnson v. Chicago*, etc., R. Co., 37 Minn. 519, 521, 35 N. W. 438; *McReynolds v. Burlington*, etc., R. Co., 106 Ill. 152, 155, 156; *Louisville*, etc., R. Co. v. *Mason*, 79 Tenn. 116, 120-124; *Humphries v. Johnson*, 20 Ind. 190; *Pittsburgh*, etc., R. Co. v. *Town of Wolcott* (this term) 69 N. E. 451.

It is contended by appellant that the court erred in giving and in refusing to give certain instructions. Appellee insists that no question involving the instructions is presented, because (1) they are not properly in the record, and (2) it is not shown by the record that it contains all the instructions given. The instructions tendered and those given were not brought into the record by a bill of exceptions. As the record does not show that the instructions tendered were filed as required by clause 6 of section 542, Burns' Rev. St. 1901 (section 376, Rev. St. 1881, and section 376, Horner's Rev. St. 1901), or made a part of the record by order of court, they are not in the record, and cannot be considered. *Riley v. Allen*, 154 Ind. 176, 56 N. E. 240, and cases cited; *Thompson v. Thompson*, 156 Ind. 276, 59 N. E. 845; *Woolen's Trial Proc.* § 4063; *Ewbank's Manual*, § 28. Conceding, without deciding, that the record shows the instructions given were properly filed, as it does not show that it contains all the instructions given, no question concerning instructions given or refused is presented for decision. *Lake Erie*, etc., R. Co. v. *Holland* (this term) 69 N. E. 138; *Board*, etc., v. *Gibson*, 153 Ind. 471, 489, 490, 63 N. E. 982; *State v. Windstandley*, 151 Ind. 495, 51 N. E. 1054, and cases cited; *Barton v. State*, 154 Ind. 670, 671, 57 N. E. 515.

Appellant insists that the amount recovered was too large, and that the verdict is not sustained by sufficient evidence, and is contrary to law. There was a conflict in the testimony as to the value of the real estate before and after the appropriation, but there is evidence which supports the amount of damages assessed. We could not, therefore, disturb the verdict without weighing the evidence, which we have no power to do.

Several other rulings of the trial court were assigned as causes for a new trial and argued in appellant's brief, but neither the part of the record necessary to fully present the error relied upon nor a concise statement thereof is set forth in appellant's brief, as required by clause 5 of rule 22 of this court. 55 N. E. vi. Under rule 26 of this court (55 N. E. vi), in force until November 26, 1900, when the new rules took effect, it was uniformly held that, when a party failed to comply

with said rule by citing the pages and lines of the record showing the ruling of the court claimed to be erroneous, he waived the error, if any was committed, and the court would not search the record therefor. *Siberry v. State*, 149 Ind. 684, 689, 39 N. E. 936; *McCaslin v. Advance, etc., Co.*, 155 Ind. 298, 306, 58 N. E. 67, and cases cited; *State v. Windstandley*, 151 Ind. 495, 501, 502, 51 N. E. 1054, and cases cited; *Ewbank's Manual*, § 183, p. 277; *Elliott's App. Proc.*, § 440; *Remy's Indiana Digest*, § 490, p. 55, §§ 491, 492, p. 56. Rule 22, among other things, requires that a succinct statement of the record, fully presenting every error and exception ruled upon, shall be set forth in the brief of the complaining party, referring to the pages and lines of the transcript. This court, following the cases above cited, has held that said rule 22 requires that the briefs be so prepared that all the questions presented by the assignment of errors can be determined from an examination of the briefs without looking at the record, and that to the extent said rule is complied with the errors assigned will be determined and the others will be considered waived. *McElwaine, etc., Co. v. Wall*, 159 Ind. 557, 559, 65 N. E. 753; *Cleveland, etc., R. Co. v. Stewart* (Ind. Sup.) 68 N. E. 170, 172; *Perry, etc., Co. v. Wilson*, 160 Ind. 435, 67 N. E. 183, 184; *Pittsburgh, etc., R. Co. v. Wilson* (Ind. Sup.) 66 N. E. 899. We have, however, examined the record as to said questions, and after a careful consideration thereof find that the same does not show that any reversible error was committed against appellant.

Judgment affirmed.

(162 Ind. 17)

GILLER v. WEST.

(Supreme Court of Indiana. Jan. 15, 1904.)

PLEADING — MISJOINDER — SEPARATION OF CAUSES—APPEAL—ADJACENT OWNERS—FENCES—PRIVATE NUISANCE—OBSTRUCTION OF VIEW—INJUNCTION—TRESPASS.

1. *Burns' Rev. St. 1901*, § 279, cl. 5, permitting several causes of action to be joined in the same complaint, where they are for "claims to recover possession of real property, with or without damages, rents, and profits for the withholding thereof, and for waste or damage done to the land, to make partition of and to determine and quiet the title to real property," does not permit a joinder of causes of action for unlawful maintenance of a fence constituting a nuisance, and for the recovery of real estate and to quiet title.

2. The cause of action for the maintenance of the fence as a nuisance was properly docketed as a distinct action, under *Burns' Rev. St. 1901*, § 343, providing that, where several causes of action are improperly joined, the court shall cause as many separate actions to be docketed as there are causes improperly joined.

3. Under *Burns' Rev. St. 1901*, § 343, providing that, after separate docketing of causes of action improperly joined, each shall stand as a separate action, in which complaint shall be filed, appearance entered, and answer made as in the original action, an appeal is properly taken from the judgment in one of such separately docketed causes without including the proceedings in the other causes.

4. Where plaintiff used her lot for gardening, and had an unobstructed view for a space of 59 feet therefrom across an adjacent lot to a side street, she had no cause of action against the owner of the adjacent lot for erecting a high and unsightly close board fence along the boundary line, though it was done for malice only, and injured plaintiff's lot for the purpose named, and obstructed the view.

5. An averment that a line fence erected by an adjacent owner was partly on plaintiff's land did not entitle plaintiff to relief on a bill to enjoin the maintenance of the fence.

6. An allegation that an adjacent lot owner was about to build a fence across the end of plaintiff's lot did not entitle her to an injunction, as the act would amount merely to a trespass.

Appeal from Circuit Court, Marshall County; A. C. Capron, Judge.

Bill by Harriet B. West against John B. W. Giller and others. From a judgment for plaintiff, defendant Giller appeals. Transferred from the Appellate Court, under section 1337u, *Burns' Rev. St. 1901*. Reversed.

J. D. McLaren, for appellant. Chas. Kelison and H. A. Logan, for appellee.

DOWLING, J. Action by the appellee against the appellant and two other persons to recover the possession of certain real estate, to quiet her title to a portion of the same, and for a mandatory injunction against the maintenance of a partition fence. The complaint was in four paragraphs. A demurrer to each was overruled, and answers in denial of the several paragraphs were filed by the appellant. The cause was tried by the court, and a finding upon each paragraph of the complaint was made in favor of the appellee. On motion of one of the codefendants of the appellant, the causes of action set forth in the first, second, and fourth paragraphs of the complaint were docketed as a separate suit. That stated in the amended third paragraph of the complaint stood as a distinct action. Appellant's motion for a new trial was overruled, and separate judgments were rendered and entered in favor of the appellee in the two causes so separated and docketed. This appeal was taken from the judgment upon the third paragraph of the complaint so docketed as a separate action. The errors assigned are the decisions of the court overruling the demurrer to the third paragraph of the complaint and the motion for a new trial.

The cause of action stated in the third paragraph of the complaint, as amended, which was the alleged unlawful maintenance of a fence constituting a nuisance, was improperly joined with the causes of action set out in the first, second, and fourth paragraphs, which were for the recovery of real estate, and to quiet the appellee's title thereto. Section 279, cl. 5, *Burns' Rev. St. 1901*. While such misjoinder is not ordinarily sufficient ground for a reversal of the judgment, the several causes so improperly united may be separated, on motion, and docketed as dis-

§ 1. See Injunction, vol. 27, Cent. Dig. §§ 92, 102.

inct actions. Sections 343, 344, Burns' Rev. St. 1901; Langsdale v. Woollen, 120 Ind. 16, 21 N. E. 659; Lane v. State ex rel., 27 Ind. 108; Cargar v. Fee, 140 Ind. 572, 39 N. E. 93. The procedure in the present case in ordering the several causes of action which were improperly united in the complaint separated and docketed was unobjectionable. After such separation the third paragraph of the complaint, as amended, stood as a separate action, and an appeal was properly taken from the judgment therein. The proceedings and judgment on the first, second, and fourth paragraphs of the complaint were neither necessary nor proper parts of the transcript on this appeal.

Did the court err in overruling appellant's demurrer to the third paragraph of the complaint as amended? It was alleged in this paragraph that the appellee was the owner in fee simple of the east half of lot No. 5, and the east half of the north half of lot No. 8, in Brownlee's Addition to the town of Plymouth; that she owned a one-storied dwelling house on the northeast corner of the said premises, in which she and her family resided; that the appellant was the owner of an adjacent lot, on which he and his family resided, the same being the only property between appellee's lot and Pierce street, a public street of said city of Plymouth; that in October, 1901, the appellant erected on the division line between appellee's premises and his own a tight board fence, 8 feet high by 86 feet long, extending from his shed on the east to his barn on the west, making, with those structures, a barrier more than 8 feet high and 114 feet long immediately adjacent to the south side of appellee's lot; that a portion of said fence was constructed and maintained partly on the land of the appellee and partly on the land of the appellant; that the said fence was solid, and shut out the view and the sunshine; that the appellee used her lot for gardening purposes, and that the fence interfered with such use by shading the ground; that, before said fence was built, the appellee had, for a space of 59 feet, a full, clear, and unobstructed view across appellant's premises to Pierce street; that in building said fence the appellant was actuated by malice only, and constructed the same for the sole purpose of annoying and injuring the appellee and her property, and that he continued to maintain said fence for that purpose only; that the appellant and his wife, Hannah, had lately begun the construction of another fence on appellee's land, beginning at the northeast corner of appellant's barn, and running northeast across appellee's lot, and had set three fence posts and a number of line stakes on appellee's ground, and intended to construct a fence across her said lot; that in erecting said first-mentioned fence, and said fence across her premises, the appellant acted without consultation with or authority from the appellee, and had built the same of old and rough lumber and ma-

terial, making said fence unsightly, with its rough side towards her lot; that the appellant would, unless restrained by the court, erect said fence across her said lot, and would continue to injure the production of her garden by shutting off the sunlight by and with the 8-feet tight board fence, and would continue to cut off the view from, and the enjoyment of, her said premises; that appellee's property has been and will be damaged. Prayer that the appellant be enjoined from erecting the fence across the appellee's lot, and from cutting off the sunlight and view from her premises, and from maintaining said tight board fence on said division line between said lots, and for damages. This paragraph states no sufficient ground for an injunction or other relief. The fact that the division fence erected by the appellant was close and high, and made of rough and unsightly materials, and that it cut off the view from appellee's lot toward Pierce street, and shaded and thereby injured her garden, did not render the fence a private nuisance, nor entitle the appellee to have it abated. The appellant had the right to build a partition fence, a house, or any other structure on his premises, and along the entire length of the line dividing them from the real estate owned by the appellee. The latter had no easement of light, air, or view in or over the appellant's lots, and she had no legal cause for complaint if these were interfered with or entirely shut off by the erection of a fence, house, or other building. The appellant had the right to use his premises, and every part of them, for any lawful purpose which did not deprive the adjacent owner of any right of enjoyment of her property recognized and protected by law. The erection and maintenance of a division fence thereon was such a lawful use of the appellant's land, and no legal right of the appellee was violated or invaded thereby. Had the appellant erected a house 30 feet high and 114 feet long on the part of his lot adjacent to the appellee's premises, thereby in a much more serious manner cutting off the sunlight, air, and view from appellee's lot and residence, she could not have been heard to complain of such use of his land. If appellant could lawfully construct such a building on his lot, he could, without doubt, lawfully erect and maintain a close fence, eight feet in height, on the division line. That it was rough and unsightly made no difference. The law does not require that such fences shall be constructed of fine materials, or that they shall be attractive in appearance. The motives of the appellant in putting up and maintaining the division fence were unimportant. He had a legal right to construct and keep up the fence, and, having such right, his motives in asserting and exercising it did not impair or destroy the right. Section 5746, Burns' Rev. St. 1901; Kelper v. Klein, 51 Ind. 316; Stein v. Hauck, 56 Ind. 65, 26 Am. Rep. 10; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep.

114; *Russell v. State* (Ind. App., No. 5,074, Jan. 14, 1904) 69 N. E. 482; *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461; *Chatfield v. Wilson*, 28 Vt. 49; *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Walker v. Cronin*, 107 Mass. 555; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570.

The very vague and uncertain averment that the fence was partly on the land of the appellee is not sufficient to entitle her to any relief. Nor does the allegation that the appellant was about to build an ordinary fence across the rear end of appellee's premises give her the right to an injunction. The acts charged to have been done by the appellant amounted, at most, to a trespass, for which an action of ejectment or for damages would have furnished a full and adequate remedy.

The third paragraph of the complaint as amended was insufficient, and the demurrer to it should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the third paragraph of the complaint as amended, docketed as a separate action, and for further proceedings in conformity to this opinion.

(32 Ind. App. 569)

SOUTHERN INDIANA RY. CO. v. DAVIS.*
(Appellate Court of Indiana, Division No. 2.
Jan. 15, 1904.)

**NEGLIGENCE—INJURIES TO ANOTHER'S SERV-
ANT—NEGLIGENCE OF MASTER—IMPUTATION
TO SERVANT—ACTION FOR INJURIES—EVI-
DENCE—DECLARATIONS OF INJURED PERSON
—INSTRUCTIONS—PREJUDICIAL ERROR—TRIAL
—REMARKS OF COUNSEL—DAMAGES—DIS-
TURBANCE ON APPEAL.**

1. Since, under the co-employee's liability act, a fireman can recover against his employer for negligence of the engineer resulting in injury to him, the fact that the negligence of the engineer contributed to a fireman's injury does not preclude him from recovering against another railroad, the train of which collided with that on which he was employed.

2. Rules made by a railroad for the management of trains may be superseded by habit and custom.

3. A rule for the operation of a railroad, making it the duty of trains crossing the tracks of another road at grade to stop, was construed by the Supreme Court not to require an engineer to stop at the intersection of a road permitted by his road to use its tracks at a certain town. For some months the employees of the two roads had recognized the right of way of the proprietor road, and the employees of the other road had been in the habit of sending forward a flagman to warn employees of the proprietor of an approaching train. *Held*, that it was not contributory negligence, in law, for an employee of the proprietor road to proceed on to the tracks used in common without stopping his train, where the road whose duty it was to send out the flagman failed to do so.

4. Declarations of an injured person, connected with existing suffering and expressions of it, but not an account of the manner in which he received them, may be given in evidence in an action for the injuries; and the interval of time between the injury and expression of pain goes to the weight of the testimony, and not to its admissibility.

5. Refusal to strike out an answer which, while not directly responsive, stated facts which

plaintiff was entitled to prove, was not reversible error.

6. In an action for injuries, a question as to the condition of plaintiff was proper.

7. In an action for injuries to a railroad fireman, testimony that extra firemen, such as plaintiff was, were promoted to be regular firemen in case of vacancy, was improper, as speculative, where it did not appear that there was any rule that promotion would follow vacancy.

8. Where a fireman was not charged with the management of the engine and train upon which he was employed, and was, immediately before and at the time of receiving his injuries, subject to the orders of the engineer, whom he was obliged to obey, negligence of the engineer could not be imputed to him.

9. There is no reversible error in refusing to give instructions fully covered by others given.

10. Special findings that, prior to the date of collision, the train upon which plaintiff was fireman had been flagged by servants operating defendant's train approaching the point of intersection, and that plaintiff knew the custom of defendant's servants of flagging the trains when they were approaching that point, when considered in the light of instructions that if plaintiff's injury was in any way due to voluntary violation on his part of rules of his company for his conduct in the line of his employment he could not recover, although his injury was also attributable to defendant's negligence, show that defendant was not prejudiced by a refusal to charge that if plaintiff could have seen defendant's train approaching the intersection, and could have known of the danger in time to have avoided it, and failed to do so and know, he could not recover.

11. The court cannot disturb damages given, where they are not so great, in view of the evidence, as to induce the belief that the jury acted from prejudice, partiality, or corruption.

12. In an action for injuries, plaintiff's attorney, in reference to special interrogatories, stated, in closing, to the jury, that the interrogatories had been put to them by defendant for the purpose of entangling them. The court sustained a motion to withdraw the language from the jury, and instructed them not to consider the statement in deciding the cause, and further in its charge instructed them not to consider by whom the interrogatories were submitted, but to act only on the evidence and the law as given by the court. *Held*, that the action of the court showed that defendant was not prevented by the remarks from having a fair trial.

Appeal from Circuit Court, Martin County;
H. Q. Houghton, Judge.

Action by John R. Davis against the Southern Indiana Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed on rehearing. Former opinion (68 N. E. 191) withdrawn.

James B. Marshall, F. M. Trissal, and Shea & Wood, for appellant. A. J. Clark and Gardiner & Gardiner, for appellee.

COMSTOCK, J. The appellee was plaintiff below. The Evansville & Indianapolis Railroad Company owns and operates a railroad running north and south by the town of Elnora, in Daviess county, at which place it maintains a station. The Southern Indiana Railway Company, appellant, owns and operates a railroad running east and west from Elnora to Westport, in Decatur county. The latter company uses the former's Elnora station, which it reaches from the north by means of passing its trains over the north

* See Evidence, vol. 20, Cent. Dig. §§ 380, 381.

* Rehearing denied.

stem of a "Y" onto the main track of the Evansville & Indianapolis Railroad Company, thence backing down to the station, and thence regaining its own track by heading out on the south stem of the "Y." On August 24, 1898, as appellant's passenger train No. 1, headed in a northerly direction, was in the act of passing from the "Y" to the main track of the Evansville & Indianapolis Railway Company, it collided with the latter's south-bound locomotive, drawing its passenger train No. 33.

The complaint was in two paragraphs. The first charges the defendant with negligence as follows:

"That for the purpose of moving, conducting, and running the locomotives, cars, and trains of the defendant from said town of Elnora to the town of Washington, in the state of Indiana, the defendant, the Southern Indiana Railway Company, by an agreement with said Evansville & Indianapolis Railway Company, has certain track privileges over the right of way and railroad tracks of said Evansville & Indianapolis Railway from the place where the defendant's switch at Elnora, Indiana, intersects and transfers its locomotives and cars to the main line of said Evansville & Indianapolis Railway tracks to the town of Washington as aforesaid; that, by the rules and regulations adopted and agreed upon by and between the defendant and said Evansville & Indianapolis Railway Company, it was, at the time hereinbefore complained of, the duty of the defendant, its agents, engineers, conductors, and other employes, in operating its locomotives, cars, and trains, before it entered upon the track of the said Evansville & Indianapolis Railway Company, to stop its locomotives, cars, and trains on said switch hereinbefore mentioned, and send forward a flagman to prevent the locomotives, cars, and trains that might be upon the said right-of way and tracks of the defendant railway company herein from entering upon the right of way and tracks of the Evansville & Indianapolis Railway Company in violation of the rules governing the track privileges of the defendant company upon the right of way and tracks of the said Evansville & Indianapolis Railway Company, and for the purpose of giving to the locomotives, cars, and trains of the Evansville & Indianapolis Railway a preference over said tracks of the Evansville & Indianapolis Railway Company, and for the further purpose of protecting the lives of the employes and the property of the said Evansville & Indianapolis Railway Company. That the Evansville & Indianapolis trains had right of track inside of yard limits at Elnora. That the defendant negligently and carelessly failed to discharge the alleged duty as above set out, but negligently and carelessly ran its train at the rate of twenty-five miles per hour over said intersection, and onto the main track of the Evansville & Indianapolis Railroad, and collided

with the said train thereon, causing plaintiff's injury."

The second paragraph is substantially the same as the first, except that it does not allege that the Evansville & Indianapolis train had the right of track.

To these two paragraphs of complaint, separate demurrers were addressed, which were overruled by the court, and exceptions were reserved by appellant.

The appellant's answer was in two paragraphs: First General denial. Second. Sets out the facts of track connection at grade, joint use of track by appellant and Evansville & Indianapolis Railroad between Elnora and Washington, Daviess county, for a period of more than four months, during all of which time appellee was a fireman on the Evansville & Indianapolis, and was familiar with said joint use of track, station and yards. "Rule 1. S. I. Railway trains and engines will occupy the main track inside the yard limits at Elnora in time of all trains. Have your train under full control." Also rule "c" and marginal rule, as follows: "(c) When tracks of two railroads cross each other, or in any way connect at common grade, all trains or engines passing over such tracks must come to a full stop before reaching such crossing." "Yard limit signs have been erected at the following points: Overholzen and Lancaster Branch, Worthington, Elnora, and Washington. It will not be necessary for any train or engine occupying the main track inside the yard limits to be protected by flagmen except in the time of second-class trains"—were in full force and effect on said date, with full knowledge of appellee. That appellee, with the other employes, disregarded rule "c" and rule "i," and violated the law by running their train at a high rate of speed, to wit, 30 miles per hour, inside yard limits at Elnora, without having train under full control, and without coming to a full stop, and without first ascertaining that appellant's train was approaching the intersection, in full view, on its schedule time, and about to pass out on the Evansville & Indianapolis track, where it had right of way at that time.

The plaintiff filed reply in three paragraphs: The first, a general denial. The second alleges that the engine was in the exclusive and full control of the engineer of the Evansville & Indianapolis Company; that he (the appellee) was under complete control, and subject to the orders and direction of the engineer and conductor. The third alleges, in substance, that the defendant had for a period of more than four months been in the habit of sending out a flagman at said point of intersection at the time mentioned, and that because of that fact a custom was established which gave the Evansville & Indianapolis train right of track, and therefore a right to proceed across said intersection without stopping, because said flag was not out. Demurrers to second and third par-

agraphs of reply were overruled, and exceptions taken.

Upon the trial a verdict was returned in favor of appellee for \$4,500, of which sum appellee remitted \$1,000, and the court rendered judgment for \$3,500. A motion for judgment on the facts found in answer to interrogatories submitted to the jury and a motion for a new trial were each overruled, and exceptions taken.

Specifications of the assignment of errors from 1 to 6, inclusive, question the sufficiency of the several paragraphs of the complaint. In *Southern Ind. R. Co. v. Peyton*, 157 Ind. 690, 61 N. E. 722 (a case growing out of the same collision. Peyton was the engineer and appellee was the fireman on the locomotive on the Evansville & Indianapolis Railroad), the questions raised by these specifications are decided adversely to appellant.

The seventh and eighth specifications of error relate to the sufficiency of appellee's second paragraph of reply, to which a demurrer was overruled. We have set out the substance of the paragraph in question, and the paragraph of answer to which it referred. It avers that the engine that was so operated as to cause appellee's injury was under the exclusive and full control of the engineer, and that appellee was under the complete control, and subject to the orders of, and the direction of, the engineer and conductor. It is insisted that this paragraph of the reply is bad, because it shows that another than appellant caused appellee's injuries. The reply must be considered in connection with the other pleadings to which it relates. The complaint alleges that appellee's injuries were due to the negligence of appellant; the answer, that the collision was caused by the disregard of the law, and the rules for the operation of the Evansville & Indianapolis Railroad Company. The reply avers that the appellee was not in any way responsible for either the violation of the law, or the rules governing the operation of the Evansville & Indianapolis Railway Company, of which he was an employé. The injury to the appellee was due to the negligence of appellant and the Evansville & Indianapolis Railway Company. Under the co-employees' liability act, if the accident was due to the negligence of the engineer in control of the engine of which the appellee was fireman, under the averments of the second paragraph of reply, he would have had a right of action against his employer corporation. If the accident was due to the negligence of appellant and the Evansville & Indianapolis Railway Company, he would have a right of action against either or both of them. He charges that the negligence of the appellant caused his injury. That the negligence of another corporation, for which he was in no way responsible, contributed to his injury, would not defeat his right of action against appellant.

The ninth and tenth errors assigned ques-

tion the sufficiency of the third paragraph of reply. It is argued that this paragraph proceeds upon the theory that although the appellant company and the Evansville & Indianapolis Railway Company had written rules made for the purpose of controlling the movements of trains and for the government of employes at the particular time and place in question, to wit, the junction of the two roads at Elnora, yet the employes of the appellant company and appellee could, by a custom or habit established by themselves, without any authority from their employers, change the written rules; that they might then continuously and repeatedly violate the rules, and excuse themselves from negligence on that account. The construction given to rule "c" (which requires a train approaching a crossing to stop) by the Supreme Court in *Southern Ind. R. Co. v. Peyton*, supra, did not require the appellee engineer to stop his train at the intersection of the roads to ascertain whether another train was about to come upon his track. The custom, conduct, and manner of handling both roads for more than four months immediately preceding the accident, by their respective conductors, engineers, and employes, gave to and recognized the right of the Evansville & Indianapolis trains to have the right of way in the yards at the town of Elnora, and at the point therein where appellee was injured; and appellant had daily for said four months, when its trains were approaching the point of junction, sent forward a flagman on the Evansville & Indianapolis Road to warn the engineer of any approaching train. The custom, and the omission of which proximately contributed to appellee's injury, was omitted by appellant. Rules may be made and superseded by habit and custom. *Southern Ind. R. Co. v. Peyton*, supra.

It is averred that upon occasion named the appellant failed to give the customary signal. Upon the construction of the rule referred to, we do not feel warranted, upon the facts averred, to hold, as a matter of law, that the fireman was guilty of contributory negligence.

The following question was propounded to James L. Cox, a witness in behalf of the appellee, upon his examination in chief: "What, if anything, prevented him [appellee] from answering or responding to your calls to go out upon the engines, if you know?" Upon motion of the appellant, the court struck out a portion of the answer, but overruled the motion as to the following: "Sometimes he would be feeling bad, and would fall down with his ankles." The witness had testified that it was his duty to see that the engineers and firemen reported to him when they were called out. The evidence is claimed to be incompetent, as irresponsible, as self-serving, as made in the absence of appellant, and long after the injury was received. It has been frequently decided in this state that an injured person may give in evidence declarations connected

with existing suffering, and expressions of it, but cannot give an account of the manner in which he received his injuries. The interval of time between the injury and expression of pain would go to the weight of the testimony, but not its admissibility. *Board v. Leggett*, 115 Ind. 544, 18 N. E. 53; *Pelrce Rec. v. Jones*, 22 Ind. App. 173, 53 N. E. 431; *City of Huntington v. Burke*, 21 Ind. App. 661, 52 N. E. 415. The answer was not directly responsive, but stated facts which appellee was entitled to prove; and the overruling of the motion to strike out was not, therefore, reversible error.

The following question to the same witness, and answer thereto, were objected to upon the grounds given to the last question considered: "Q. If you know, you may state whether he ever made complaint of his ankle until after he was injured in the wreck of the Evansville & Indianapolis Railway? Ans. No, sir; never did make any complaint until after he was hurt." The evidence elicited by this question was of a negative character. Necessarily it would be entitled to but little weight, but that was for the jury.

The court permitted the following question to Daniel S. Cook, and the answer thereto, over appellant's objection: "Q. What has been his condition, with reference to his ankles, and also his lower limbs, since the wreck? Ans. Well, he complained of his ankles for some time after the wreck." What we have said as to the answer of the witness Cox to the first question supra, addressed to him, applies here.

The following question addressed to the witness Paine: "What was his condition at the time, and especially with reference to his ankles?" was answered: "Well, he complained of his ankles, and they would swell up on him." The motion to strike out was addressed to the question and answer. The question was proper. It was not error to overrule the motion.

The court overruled the appellant's objection to the following question put to Daniel S. Cook: "Q. What has been his condition, with reference to his ankles, and also his lower limbs, since the wreck?" The witness answered: "Well, he complained of his ankles for some time after the wreck." The meaning of the verb "complain" is to express regret or pain. The ruling of the court was not reversible error, for reasons already given.

The following question to Ida Kern: "Q. During that time you may state whether he made any complaint about being unable to labor or work?" was answered: "Well, during the time that he was there he was laid up several different times, complaining of his ankles hurting him; and I made inquiry several times why he was not at work, and they said it was on account of his ankles." The court struck out all after "him." For reasons heretofore given on the consideration of other errors, there was no error in this ruling.

John R. Davis, appellee, was permitted to answer over appellant's objection: "Q. State, if you know, how—whether an extra fireman on the Evansville & Indianapolis Railway and the Evansville & Terre Haute Railway, at the time you were injured, was promoted to regular fireman in case of vacancy? Ans. Yes, sir; they were in line of promotion." The testimony was improper. The promotion was too problematical and uncertain. It was speculative. It does not appear that there was any rule that promotion would follow vacancy. *Railroad v. Elliott*, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728; *Brown, Adm'r, v. Railroad*, 64 Iowa, 652, 21 N. E. 193. It does not necessarily follow that, because the testimony was improper, the judgment should be reversed. It could have had but little weight, compared with the rest of the proof as to appellee's claim for damages. We cannot believe that the testimony affected the verdict to any appreciable extent.

Appellant complains of instructions Nos. 4 and 6 given to the jury at the request of appellee. Instruction No. 4, in effect, said that if the appellee was not charged with the management of, or authorized to manage, the engine and train upon which he was employed, and that, as fireman, he was, immediately before and at the time of receiving his injuries, subject to the orders and directions of the engineer of the engine on which he was employed, and, when directed, he was obliged to obey, then the negligence, if any, of said engineer, should not be imputed to him. In this there was no error. What we have said with reference to the second paragraph of reply is applicable to this instruction.

Instruction 6 informed the jury that if the switch target showed the track clear to the engineer and fireman of the Evansville & Indianapolis Railway, and that said engineer and fireman saw or might have seen defendant's train approaching the intersection on its "Y," they would have the right to presume that the employees in charge of defendant's train would stop the same before it approached so near the Evansville & Indianapolis Railway as to make it unsafe for the train on that road to pass by, and they would have had a right to act upon that, and proceed upon their way until they discovered that the employees would not stop their train even though it should then be too late to stop the Evansville & Indianapolis train in time to prevent such collision. Standing alone, the instruction was too broad. But considered in connection with other instructions upon the question of contributory negligence, we think that it could not mislead the jury. Besides, appellee was not in control of the engine, and the negligence of the engineer and conductor cannot be imputed to him.

It is argued that the refusal to give to the jury instructions Nos. 1, 10, and 21 tendered by appellant was error.

Instruction 1 directed the jury to return a verdict in favor of the appellant. It took

from the jury the right to determine the question of negligence and contributory negligence. The rejection was not error.

Instruction 10 reads: "If you find in this case that the plaintiff, John R. Davis, could have seen the Southern Indiana train approaching said intersection, and could have known of the danger in time to have avoided it by care proportionate to the dangerous surroundings, then said John R. Davis is charged with seeing what he could have seen, and knowing what he could have known; and if, under such circumstances, the said John R. Davis did so fail to see and know, and his said failure in any way contributed to his injury, then I instruct you that he cannot recover in this action, and your verdict should be for the defendant." In other instructions requested by the appellant and given by the court, the jury, in varying phraseology, were repeatedly and plainly told that it was the duty of appellee to be diligent in the exercise of his natural senses; that he could not recover alone upon the negligence of the appellant, but must himself be free from fault contributing to his injury; that he must be held to have seen what he could have seen by looking carefully and by the exercise of ordinary care. The instruction refused was fully covered by others given, and it was therefore not reversible error to reject it.

Instruction 21 is as follows: "There has been evidence introduced for the purpose of showing that the servants of the defendant company had, by practice and custom, changed the written rules of said company governing the movements of their trains at the point of intersection where said accident occurred. I instruct you that, no matter what has been the practice and custom of the servants of the two companies as to stopping and flagging their respective trains, unless John R. Davis knew of said practice and custom, and acted upon it, he cannot excuse himself for intentionally and voluntarily violating the rules of his said company, with which it was his duty to become familiar. If you find that under such circumstances the said John R. Davis violated the rules of his company in approaching said intersection upon the date of such accident, and you further find that his said violation of said rules in any way contributed to his injury complained of, then I instruct you that he cannot recover in this action, and your verdict must be for the defendant." The jury found, in answer to interrogatories, that prior to the date of the collision the train upon which the appellee was fireman had been flagged by the servants operating appellant's train in approaching said point of intersection, and that appellee knew the custom of the servants of the appellant railway company, operating its said trains, of flagging the Evansville & Indianapolis Railway trains when they were approaching said point of intersection, prior to the accident. These special findings show, in the light of instruc-

tions given to the effect that, if the injury of appellee was in any way due to voluntary violation on his part of a rule or rules of his company for his conduct, in the line of his employment, he could not recover although his injury might also be attributable to the negligence of appellant, that appellant's right could not have been prejudiced by this action of the court.

It is contended that the answers to interrogatories are in irreconcilable conflict with the general verdict. Considered together with any other facts which the jury might have reasonably found under the issues and the evidence, such conflict does not exist.

It is claimed that the damages assessed are excessive. There is evidence that appellee's injury is permanent. "The damages are not so great, in view of the evidence, as to induce the belief that the jury acted from prejudice, partiality, or corruption." This court would not, therefore, under numerous decisions, be sustained in disturbing it. *Lauter v. Duckworth*, 19 Ind. App., at page 544, 48 N. E. 864, and cases cited.

W. R. Gardiner, as attorney for appellee, in his closing argument to the jury, with reference to interrogatories which had been submitted to the jury to be answered, used this language: "These interrogatories have been put to you by the defendant for the purpose of entangling you." The defendant excepted to said language, and moved the court that it be stricken out and withdrawn from the jury, and the jury discharged. The court sustained said motion so far as to withdraw said language from the jury, admonished and instructed the jury not to consider said statement in deciding said cause, and no further statement on the subject was made in the jury's presence, but overruled the motion as to the discharge of the jury. In instruction No. 7, the court said: "In the consideration of this cause, you will not consider the question of what party to this suit requested interrogatories to be submitted to you. That is not a matter which you should consider at all, but, in determining the right of the parties to this suit, you should only consider the evidence, and the law applicable thereto, as given by the court." The court properly treated the statement of counsel as improper, and by oral and written instructions directed the jury to disregard it. The withdrawal of the language from the jury by the court, and the admonition and instruction given, induce the conclusion that the appellant was not thereby prevented from having a fair trial. There is evidence fairly tending to sustain the verdict, and, being within the issues, we cannot concede the claim of appellant that it is contrary to law.

It is earnestly insisted by appellee that the evidence is not in the record, and that the questions raised by appellant upon the admissibility of certain testimony and upon the giving of certain instructions, and the re-

fusal to give others, are not properly presented. We have herein, for the consideration of the questions raised, treated the evidence as properly before us.

There is no question as to appellee's injury. There is evidence fairly tending to sustain the verdict of the jury that his injury was proximately caused by the negligence of the appellant, and that appellee was free from fault proximately contributing thereto.

We find no error for which the judgment should be reversed. Judgment affirmed.

WILEY, J., concurs in the result.

(32 Ind. App. 249)

HAMMOND, W. & E. C. ELECTRIC ST. RY. CO. v. EADS.

(Appellate Court of Indiana, Division No. 1. Jan. 15, 1904.)

COLLISION WITH STREET CAR—ACTION FOR DAMAGES—PLEADING—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

1. The complaint in an action against a street railroad company alleged that plaintiff was driving his horse and wagon along a street on the north side of defendant's track, and when within 10 or 12 feet west of a cross street, on which he intended to drive north, his horse took fright at the rapid approach of one of defendant's cars, then about 200 feet east of him; that his horse, on account of such fright, ran rapidly, and shied to the north, and the wagon struck violently against a pole at the corner of the street intersection, and the horse became unmanageable, and reared and fell back toward the wagon, and wheeled toward the track, running along the same, and that during all such time his horse was unmanageable; that his horse continued thus to run along the track for about 75 feet, when the car caught up with the wagon, and was carelessly and negligently run into and against the same, and the wagon was broken, the horse injured, and plaintiff knocked out and injured. *Held*, that it clearly averred that plaintiff's injury was the result of defendant's negligence, and that this was all that was necessary, and the fact that the complaint also averred that plaintiff was not guilty of contributing to his injury was unnecessary, and did not render it bad; such averment being immaterial, and, at most, merely surplusage.

2. Defendant's street car was 200 feet or more distant from the place where plaintiff had hitched his horse when he started to get into his wagon, and, before he had reached or could reach the lines, the horse jumped and threw him down, and then, being unmanageable, started with the wagon and plaintiff along and near the track before the car, swerving from one side to the other until they were struck by the car. *Held*, that plaintiff's negligence, if any, did not contribute to the injury, and that he could not be charged with negligence after the horse became unmanageable.

3. It being shown that the motorman, by the exercise of due care under all the circumstances, might and should have prevented the injury, the case was fully within the rule that where one person sees another in peril, from which he is unable to extricate himself by reasonable care, it is his duty to so act as not to increase the peril, and if he acts so as to increase the danger, with full knowledge of the facts, he will not be relieved from the damages resulting from his negligence.

Appeal from Circuit Court, Lake County; Willis C. McMahan, Judge.

Action by James S. Eads against the Hammond, Whiting & East Chicago Electric Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John B. Peterson and Peter Crumpacker, for appellant. Stinson Bros. and A. F. Knotta, for appellee.

HENLEY, O. J. Appellee began this action against appellant to recover damages sustained by him, and caused by the alleged negligence of the appellant. The errors relied upon for a reversal of this judgment are (1) that the trial court erred in overruling appellant's demurrer to the complaint; (2) that the trial court erred in overruling appellant's motion for a new trial; (3) that the trial court erred in overruling appellant's motion for judgment in its favor on the special findings of the jury notwithstanding the general verdict.

It is averred in the complaint that the appellant is a corporation operating an electric railway in the city of Hammond, Ind., upon a street in said city known as "State Street," and that it propels its cars by means of electric power; that the appellee was on the 6th day of July, 1901, driving his horse and wagon along said street north of appellant's tracks near Sohl street, and that when appellee had arrived within 10 or 12 feet west of Sohl street, intending to drive north on said street, his horse took fright at the rapid approach of one of appellant's cars which was approaching appellee from the east, and was at the time about 200 feet east of him; that appellee's horse, on account of such fright, ran rapidly, and shied to the north, and the wagon in which he was riding struck violently against a pole standing at the corner of State and Sohl streets, and the horse became unmanageable, and reared and fell back toward the wagon, and wheeled toward appellant's track, running along the track, and that during all of said time appellee's horse was unmanageable; that the horse continued to run along said track in such unmanageable condition for about 75 feet, where the appellant's car caught up with the wagon, and said car was carelessly and negligently run into and against appellee's wagon and horse; and the said wagon was broken, the horse injured, and appellee knocked out of his wagon, and thereby severely and permanently injured and crippled. We think the complaint clearly avers that appellee's injury was the result of appellant's negligence, and that this is all that it was necessary to show in the complaint. The averment that appellee was not guilty of contributing to his injury was unnecessary, and the fact that the complaint contains such an averment does not render it bad; such an averment being immaterial, and regarded, at the most, as merely surplusage.

¶ 1. See Street Railroads, vol. 44, Cent. Dig. § 212.

It is contended by counsel for appellant that the evidence does not show that the appellant was guilty of any negligence whatever, and that the evidence shows that the appellee was guilty of contributory negligence, and that the injury was the result of an unavoidable accident. It is shown by the evidence that appellant's car which struck appellee's wagon and horse, and caused the injury complained of, was 200 feet or more east on State street from the place where appellee's horse and wagon was hitched at the time he started to get into the wagon; that when appellee unhitched his horse and stepped into the wagon, and before he had reached or could reach the lines, the horse jumped and threw him down, and the horse started with the wagon and appellee along the side of appellant's track; and that the horse was unmanageable, and was drawing the wagon along and near the track, swerving first from one side to the other, and the fact that the horse was unmanageable, and the danger that appellee was in, was fully known and apparent to the motorman who had charge of the car which struck appellant's wagon. It is further shown by the evidence that the motorman, by the exercise of due care, under all the circumstances, might and should have prevented the injury. The evidence also shows that appellee's negligence, if any, did not contribute to his injury. He could not be charged with negligence, under the circumstances shown by the evidence, after the horse had become unmanageable. This brings the case fully within the rule that where one person sees another in a position of peril, from which he is unable to extricate himself by the exercise of reasonable care, it is the duty of such person to so act as not to increase the peril, and if he does so act in a manner which increases the danger, with full knowledge of the facts, he will not be relieved from the damages which might result from such negligent acts. *Citizens' St. Ry. Co. v. Damm*, 25 Ind. App. 511, 58 N. E. 564, and cases cited.

In the case at bar the evidence fairly shows that there was ample time, after the motorman saw the impending danger in which appellee was placed, to have stopped the car and to have avoided the injury. The evidence does not show, as counsel for appellant contend, that the horse drawing appellee's wagon was trotting along the street at a safe distance from the track, and that there was no indication that the horse was frightened, and that the vehicle would, by the action of the horse, be suddenly drawn upon the track. In *Muncie St. Ry. Co. v. Maynard*, 5 Ind. App. 372; 32 N. E. 343, the law applicable to a state of facts such as was proven in this case was stated by this court in the following language: "We think the evidence shows that the engineer could have seen the helpless condition of the appellee in time to have stopped his train and have avoided the injury. It was his duty to

be constantly on the alert, and, if he discovered appellee's property so situated that injury must follow unless he stopped his engine, it was his duty to make all reasonable effort to do so. Those in charge of an engine upon a street car track are not required or under obligation to immediately stop an engine upon seeing a horse or team by the side of the track that is manifesting fright, unless the situation and all the circumstances would cause a reasonable man to see and believe that damage to the property could not otherwise be avoided." In the case of *Terre Haute Electric Railway Co. v. Yant*, 21 Ind. App. 486, 51 N. E. 732, 69 Am. St. Rep. 376, this court adopted and approved the doctrine of the Supreme Court of North Carolina in *Doster v. Charlotte St. Ry. Co.*, 117 N. C. 651, 23 S. E. 449, 34 L. R. A. 481; that court saying: "Where a horse is being driven or is running uncontrolled along a highway parallel to a railway of any kind, though it give unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed, unless the animal is actually on the track in his front, or he has reasonable ground to believe that, in its excited state, it is about to go or may go upon it, so as to cause a collision." We believe that the jury in this case had a right to conclude, from all the facts, that the motorman in charge of the car, and having in plain view the unmanageable horse, must have had, as a reasonably prudent man, reasonable grounds to believe that the horse, in its unmanageable condition, swerving on and off of the track, was about to or might go upon the track and cause a collision. The rule as stated by Booth on St. Ry. Law, at section 298, and which is applicable to the facts produced in this case, has been adopted as a law in this state. It is stated as follows: "And * * * for obvious reason, companies which have been duly licensed, and therefore have as much right to run their cars in the streets as others have to drive through them with their horses and vehicles, cannot ordinarily be held responsible for horses taking fright at the appearance, movement, or noise of the cars. If a horse takes fright at an approaching car, and, because the car is not stopped, * * * becomes unmanageable and runs away, injuring the driver or others, the company is not liable, unless the conduct complained of, in the management of the car, is attributable only to a wanton or malicious disregard for the safety of the driver or other travelers upon the street. * * * To the extent that travelers, whether in cars, on foot, or in private vehicles, have the right to proceed without unnecessary interruption or delay, the rights of all are equal, and the law makes no distinction between the vehicles used or the means employed. No other rule would be reasonable or practicable, for, if drivers, motormen, or gripmen were required to stop

their cars, slacken their speed, or omit or discontinue necessary signals, upon which the safety of others depends, because timid horses become frightened, or already manifest symptoms of fear, not indicating imminent peril, street railway service would be so materially embarrassed by numerous delays as to defeat the purpose for which such franchises are granted, and the dangers to the general public, for whose protection warnings are given, would be greatly enhanced." The facts in this case, we think, justified the jury in concluding that appellee was in imminent peril, and that the motor-man in charge of the car must have known of appellee's peril.

What we have heretofore said disposes of appellant's contention that the injury was the result of an unavoidable accident.

The facts found by all of the answers to the interrogatories are not in conflict with the general verdict, and a careful examination of all of the instructions given to the jury convinces us that no error was committed by the trial court in this regard.

The judgment is affirmed.

(32 Ind. App. 203)

CITIZENS' GAS & OIL MIN. CO. v. WHIPPLE et al.

(Appellate Court of Indiana, Division No. 1.
Jan. 13, 1904.)

NATURAL GAS—USE FOR FUEL—CONTRACT RELATION WITH CONSUMER—NEGLIGENCE—FAILURE TO REGULATE FLOW—SETTING FIRE TO BUILDINGS—ACTION FOR DAMAGES—PLEADING—EVIDENCE—INSTRUCTIONS—REVIEW—OBJECTION TO EVIDENCE—HARMLESS ERROR.

1. A complaint showed that defendant was furnishing natural gas to plaintiffs, and that it negligently failed to regulate the flow into pipes leading to plaintiffs' stove, by reason of which the pressure and quantity were increased beyond that theretofore supplied to such an extent that the stove was overheated, setting fire to plaintiffs' property, without their fault. *Held* to state a cause of action.

2. Sustaining a demurrer to paragraphs of the answer pleading material facts which were provable under the general denial was harmless error.

3. In an action for damages alleged to have been caused by defendant's negligence in regulating the flow of natural gas into the pipes leading to plaintiffs' stove, any fact showing that defendant's gas system at the time in question was properly managed, that it was not negligent in any particular charged in the complaint, and that the plaintiffs were not without fault, could be shown under the general denial.

4. An objection to evidence that it is not competent nor material presents no question for review.

5. Objection to the admission of evidence argued in an appellant's brief without reference to the bill of exceptions by which the evidence and ruling questioned may be found will not be considered.

6. In an action for buildings burned by reason of defendant's negligence, error, if any, in permitting the introduction of the certified copy of a deed of the land on which the buildings were situated, was harmless.

7. In an action for buildings burned by reason of defendant's negligence, evidence that plaintiffs had, by subscriptions, received a great-

er sum than the loss by fire, and that at the time of the fire they were not claiming that it occurred by reason of any act of omission on the part of defendant, was not admissible on the question of damages; the subscription not being made by defendant or by its procurement, nor to satisfy its liability.

8. In an action for buildings burned by reason of defendant's negligence in furnishing natural gas for fuel, an instruction that a corporation or person furnishing such gas "is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of its business, in order that injury may not be done to others: that is to say, if the danger, delicacy or difficulty is extraordinarily great, extraordinary skill and diligence is required"—*held* not erroneous, as being controlled by the concluding part thereof.

9. In an action for buildings burned by reason of negligence in supplying natural gas thereto, instructions as to the use thereof as a fuel, declaring, in short, that it was a dangerous substance, and that the care must be commensurate with the danger, were not objectionable.

10. In an action for buildings burned by reason of negligence in supplying natural gas thereto, an instruction declared that if the jury found that defendant, when plaintiffs' property was burned, was furnishing plaintiffs' natural gas for fuel for a valuable consideration, and negligently failed to provide appliances, etc., reasonably necessary to control the amount and pressure, and, on account of such failure, plaintiffs' property was destroyed by fire occasioned by an overheated stove, caused by failure to regulate the pressure, defendant would be liable for resulting damages, unless they found that plaintiffs were guilty of contributory negligence. *Held*, that this did not state what plaintiffs must prove to authorize a recovery, but stated only that certain conduct on defendant's part was actionable negligence.

11. A company engaged in furnishing natural gas for fuel purposes may waive its written permission to make a connection for such purposes.

12. If, without the knowledge or consent of a company engaged in furnishing natural gas for fuel, a stove is connected with their pipes, and gas is used, and afterward the company is paid, at its request, the amount demanded therefor, the persons making the connection become consumers from such time, and are entitled to use gas, unless ordered to cease by the company.

13. In an action for buildings burned by reason of negligence in furnishing natural gas for fuel, there was evidence that the defendant was supplying gas at a ten-pound pressure, and that a pressure of about eight ounces was dangerous, and that, while there were regulators to control the pressure, they did not control it until it reached ten pounds; and an instruction declared that if, at the time of the burning, defendant was furnishing plaintiffs' natural gas to be used for fuel in a stove in plaintiffs' office, and defendant suffered and permitted its regulator or regulators to be in such condition that it or they did not regulate or control the pressure, and the regulator admitted gas to the stove at a high and dangerous pressure, and plaintiffs' stove was thereby overheated, thereby causing the destruction and damages, without contributory negligence on the part of plaintiffs, defendant was liable. *Held*, that the instruction did not necessarily proceed on the theory that the regulators were out of order, but apparently on the theory that they may have been in proper repair, but were so adjusted as to permit a dangerous quantity of gas to pass through, and there was evidence to which the instruction was applicable.

14. The use of the word "plaintiff" in an instruction where there are two plaintiffs to the action is not misleading, where a jury of average intelligence would understand that the court meant the parties suing.

15. It is not negligence to leave a natural gas stove burning at night, if proper care and caution are used in turning down and adjusting the key valve, and looking after the service pipes and appliances, so as to properly regulate the flow at a safe pressure.

Appeal from Circuit Court, Adams County; Abram Simmons, Special Judge.

Action by Stephen A. D. Whipple and others against the Citizens' Gas & Oil Mining Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Taylor, MacGinnitie & Taylor, Shafer Peterson, and Dore B. Erwin, for appellant. McGriff & Bergman, C. J. Lutz, and Williamson & Whipple, for appellees.

ROBINSON, J. Appellees recovered a judgment for the burning of certain property, caused by appellant's alleged negligence.

The sufficiency of the complaint, which is in three paragraphs, is first questioned. The first paragraph avers that appellant was engaged in supplying citizens with natural gas for domestic and manufacturing purposes; that appellees were patrons of appellant, and were using gas, under a contract, in a stove in their factory; that the natural pressure of the gas is so great that it is necessary at all times to maintain regulators, which regulators were maintained by appellant, to control the flow of gas, and make the use of the same safe for consumers, and that it is necessary that the pipe lines and regulators should be under the control and management of a skilled person, to oversee and control the same, that gas might be furnished to consumers at a low, safe, and uniform pressure; that on a certain date such regulators did not properly control the pressure and flow of gas so as to furnish appellees' stove with gas at a safe, low, even, and uniform pressure; that appellant carelessly and negligently failed to regulate and maintain such regulators on such date, and negligently and carelessly failed and neglected to watch and oversee the mains, regulators, and appliances, and negligently and carelessly left such regulators and appliances without the oversight or supervision of any person, and because of such carelessness and negligence the gas flowed in and through the pipes and regulators with great force and high pressure, thereby forcing through the service pipe and into the stove, when the gas was burning therein, a large quantity and volume of gas, largely in excess of the amount theretofore supplied by appellant for heating purposes, and by reason thereof the stove was, by the gas burning therein, so intensely heated that it set fire to the building, all without appellees' fault. The three paragraphs of complaint are quite voluminous, and the material averments in each paragraph are substantially the same. The action is in tort, and not for damages for breach of a contract. It is true,

the complaint alleges that appellees were receiving gas under a contract, but the cause of action is based upon negligence: Indianapolis, etc., Gas Co. v. Anthony, 28 Ind. App. 307, 313, 58 N. E. 868; Coy v. Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535. Each paragraph of the complaint shows that appellant was furnishing natural gas to appellees; that it negligently failed to regulate the flow of gas into the pipes leading to appellees' stove, by reason of which the pressure and quantity of gas were increased beyond that theretofore supplied, to such an extent that the stove was overheated, setting fire to the property, without appellees' fault. Under the authorities the complaint states a cause of action. Alexandria, etc., Min. Co. v. Painter, 1 Ind. App. 587, 28 N. E. 113; Indiana, etc., Gas Co. v. New Hampshire, etc., Ins. Co., 23 Ind. App. 298, 53 N. E. 485; Ibach v. Huntington Light, etc., Co., 23 Ind. App. 281, 55 N. E. 249.

Appellant's answer was in three paragraphs, the first of which was the general denial. As the material facts pleaded in the second and third paragraphs of answer were provable under the general denial, sustaining the demurrer to these paragraphs was not harmful error. Any fact or facts showing or tending to show that appellant's gas system at the time of the fire was properly managed, that it was not negligent in any of the particulars charged in the complaint, and that appellees were not without fault, could be shown under the general denial. Wabash, etc., Ry. Co. v. Johnson, 96 Ind. 44; Crow v. Carver, 133 Ind. 260, 32 N. E. 569.

Appellant's counsel have discussed at some length the evidence upon the questions of negligence and contributory negligence. No good purpose would be subserved by a discussion of the evidence at this time. It is sufficient to say that an examination of the record discloses evidence to authorize the jury's conclusion upon both these questions.

An objection to evidence that it is not competent or material presents no question for review. Mortgage Trust Co. v. Moore, 150 Ind. 465, 50 N. E. 72; Western Assurance Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

Many objections to the admission of evidence are argued in appellant's brief, where no reference is made to the bill of exceptions by which the evidence and the ruling questioned may be found. It has long been the rule that the court will not search the record for such evidence and rulings. Ewbank's Manual, § 183; McCaslin v. Advance Mfg. Co., 155 Ind. 298, 58 N. E. 67; rule 22, subd. 5.

Appellant's counsel have not shown that the error, if any, was harmful, in permitting the introduction in evidence of a certified copy of a certain deed to the land on which the buildings burned were situated. Its in-

production in evidence would in no way harm appellant.

Appellee Whipple was recalled as a witness by appellant, and asked whether, after the fire, he did not circulate a paper among the citizens, and get from five to six hundred dollars in cash and material for the purpose of reimbursing him for the loss by the fire. Upon objection being sustained, an offer was made to show that by such subscriptions he had received a greater sum than the loss by the fire, "and for the further purpose of showing that at the time of the fire the plaintiffs were not claiming that the fire occurred by reason of any act or omission on the part of the defendant gas company." This evidence might have been admitted, with an instruction properly limiting its purpose, as going to the credibility of the witness, who was a party to the action, but its exclusion is not reversible error. It was not proper evidence as affecting the amount of damages. The subscriptions were not made by appellant or by its procurement, and were not made to satisfy, in whole or in part, appellant's liability for the alleged wrongful act. *Cunningham v. Evansville, etc., R. Co.*, 102 Ind. 478, 1 N. E. 800, 52 Am. Rep. 683; *Sherlock v. Alling*, 44 Ind. 184; *Ohio, etc., R. Co. v. Dickerson*, 59 Ind. 317.

At the request of appellees the court gave, among others, the following instructions: "(1) I instruct you that a corporation or person furnishing natural gas to the stoves, heaters, burners, pipes, pipe lines, machinery, or apparatus of another, to be used for the purpose of domestic heating, for fuel in a dwelling house, storeroom, office, or shop, is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of its business, in order that injury may not be done to others; that is to say, if the danger, delicacy, or difficulty is extraordinarily great, extraordinary skill and diligence is required. (2) I instruct you that, by the law governing this case, it was the duty of the defendant, as it is of all corporate companies which are invested for their own private advantage with the great and important privilege of supplying a community with natural gas for private habitation heating, to exercise such care, diligence, and skill in the conduct of its business as is proportioned to the danger and risk to the property of others. (3) I instruct you that natural gas is a dangerous, explosive, inflammable, and deadly substance, and the person or corporation who furnishes it, for a valuable consideration, to heat the stoves, service pipes, heaters, burners, or apparatus of another for the purpose of fuel for domestic heating, must use such care, skill, attention, and diligence, so that no greater amount of pressure thereon shall be furnished than is proper to be furnished, in order to prevent injury to the person and property of others; and in such case care, skill,

attention, and diligence must be used in proportion to the danger of such substance and business, and, unless such corporation uses such care, skill, attention, and diligence, it is guilty of actionable negligence. (4) I instruct you that if you find, from the evidence, that the defendant, at the time of the burning of the plaintiffs' property, as alleged in their complaint, was furnishing, for a valuable consideration, natural gas to the service pipes, mixers, valves, burners, and stoves of the plaintiffs, for the purpose of using such gas for fuel for domestic heating, or warming plaintiffs' office in the factory building mentioned in the complaint, at the time of such burning, then it was the duty of the defendant, under the law, to use such care, diligence, and skill, both in providing proper machinery, regulators, and apparatus, work, labor, and attention, in order to control such gas and the amount of pressure furnished to such service pipe, mixer, valve, burner, and stove, as was in due proportion to the nature of the substance used. (5) I instruct you that if you believe from the evidence that, at the time of the alleged injury and burning of plaintiffs' property mentioned in the complaint, the defendant, for a valuable consideration, was furnishing natural gas to the service pipe, mixer, burner, and stove of the plaintiffs, to be by them used for the purpose of fuel in their said stove, and the defendant negligently and carelessly suffered and permitted a greater amount of pressure of such gas to be furnished than was proper for such purpose, and that by reason thereof, and without fault or negligence on the part of the plaintiffs or their agents contributing thereto, the plaintiffs' said building and property was destroyed by fire, then the jury should find for the plaintiffs, and assess their damages occasioned by said burning in such sum as is proper under the evidence and the law as given you by the court, if you find that the plaintiffs have been damaged by the burning of the property mentioned in the complaint. (6) I instruct you that if you find from the evidence that the defendant, at the time that plaintiffs' property was burned, if you find it was burned, was, for a valuable consideration, furnishing to the plaintiffs natural gas to be used for fuel for domestic purposes, and that said defendant at the time of said burning negligently failed to provide such appliances, regulators, and machinery, and watch and care for the same, as were reasonably necessary to control the amount of pressure of said gas so furnished, and, on account of the defendant failing so to do, the plaintiffs' property was destroyed by fire, occasioned by an overheated stove, caused by said failure to so regulate the pressure of said gas, then the defendant would be liable to the plaintiffs for such damage to their property as was the direct result of such negligence, unless you should further find that the plaintiffs, or their agents, were also guilty of negligence which contributed

to the destruction of said property. (7) I instruct you that if you find from the evidence that, at the time of the burning of the property of the plaintiffs as alleged in their complaint, the defendant, for a valuable consideration, was furnishing to the plaintiffs natural gas to be used for fuel in a stove in plaintiffs' office for the purpose of heating the same, and that said defendant permitted and suffered its regulator or regulators to be in such condition that it or they did not regulate or control the pressure thereof, and that said regulator admitted gas to said stove at a high and dangerous pressure, and that plaintiffs' stove was thereby overheated by such high and dangerous pressure, thereby causing destruction and damage to plaintiffs' said property by fire caused by said overheated stove, and you further find that plaintiffs, and neither of them, nor their agent, were guilty of any negligence contributing to the destruction of such property, then the defendant is liable to the plaintiffs for the damages in this action." "(9) I instruct you that in a case of this kind; when it is alleged that the defendant was negligent in failing to properly regulate the pressure of the gas which it was supplying to plaintiffs at the time of the alleged destruction of their property, that, under the law of this state, it is not sufficient to relieve the defendant from liability for it to show that its regulators that supplied and controlled the pressure of the gas in plaintiffs' stove were in good repair and working order, but it must go further, and show that it had maintained an efficient system of inspection; that it provided a watchman or competent servant to control the pressure when it became necessary so to do to make said pressure safe to the life and property of its consumers." "(11) I instruct you that if you find from the evidence that the plaintiffs purchased the real estate described in their complaint, and the purchase price therefor was paid by said plaintiffs, and that you further find that the plaintiffs took possession of said real estate under and by virtue of said purchase, and you find that at the time of said purchase it was agreed by and between said plaintiffs that plaintiff Whipple should take the title thereto in his own name, then I instruct you that he held title thereto for himself, and in trust for his co-plaintiff, and the plaintiffs can maintain a joint action for any injury thereto."

We do not think it can be said that the concluding part of the first instruction is its controlling part. There is nothing objectionable in either the first, second, or third instructions, as statements of general principles of the law applicable to the use of natural gas as a fuel. It is recognized as a dangerous substance, and the care in its use must be commensurate with such danger. The third instruction does not purport to state what appellees must prove to authorize a recovery, but goes no further than to state that certain conduct on appellant's part is actionable negligence.

It may be that the connection of appellees' stove with the service pipe was not made with the consent or permission of appellant, had at the time; but there is evidence that appellant recognized the connection as made, and received pay for gas furnished. Appellant might waive the obtaining of its written permission to make the connection, and there is evidence from which it may be said it did so. The court properly instructed the jury in the twelfth instruction that if appellees connected their stove with appellant's pipes and used gas without the knowledge or consent of appellant, and afterwards appellees paid appellant, at appellant's request, the amount demanded for such gas, by such payment and acceptance appellees became consumers of appellant from such time, and after such payment and acceptance appellees would have a right to use gas, unless ordered to cease by appellant.

There is evidence that appellant was supplying gas at a ten-pound pressure, and that a pressure of above eight ounces was dangerous, and that, while there were regulators to control the pressure, yet the regulators did not control the pressure until it reached ten pounds. The seventh instruction does not necessarily proceed on the theory that the regulators were out of repair. They may have been in proper repair, but were so adjusted as to permit a dangerous quantity of gas to pass through. The instruction seems to proceed upon this theory, and there was evidence to which it was applicable.

The use of the word "plaintiff" in an instruction, where there are two plaintiffs to the action, is not necessarily misleading. A jury of average intelligence would certainly understand that the court meant the parties who had brought the action.

The court correctly told the jury that it was not, as a matter of law, negligent for appellees or their agent to have the gas burning in their stove during the nighttime, if they used proper care and caution in turning down and adjusting the key valve, and looking after the service pipes and appliances, so as to properly regulate the gas while the same was furnished at a safe pressure. In the same instruction the jury was further told that they were to consider all the evidence, facts, and circumstances which tended to show the condition as it existed at the time of the fire, and from all such facts and circumstances they were to determine whether appellees were guilty of negligence. This instruction, with others given, left the question of appellees' negligence at the time of and before the fire with the jury.

The court, on its own motion, gave, among others, the following instructions: "(9) I instruct you that the credibility of a witness is a question exclusively for the jury. You have the right to determine from the appearance of the witness on the stand, his manner of testifying, and his apparent candor and fairness, bias, interest, or lack of interest in the case, if any should appear, his bias

or prejudice, if any should appear, and from all other surrounding circumstances, if any appear on the trial, which witnesses are more worthy of credit, and to give credit accordingly. (10) I further instruct you that you are the judges of the credibility of the witnesses, and of the weight to be adjudged to the testimony of each and all of them. You are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied, from all the facts and circumstances proven on the trial, that such witness is mistaken in the matters testified to by him, or that for any other reason his testimony is untrue or unreasonable. I also instruct you that you are the judges of the credit that ought to be given to the testimony of the different witnesses, and you are not bound to believe anything to be a fact because a witness or witnesses stated it to be so under oath, provided you believe from all the evidence that such witness or witnesses is or are mistaken, or has knowingly testified falsely." "(13) I instruct you that if, after a full and a fair consideration of all the testimony, you should be unable to harmonize the statements of all the witnesses in relation to matters pertinent to the issues submitted to you, then it will be your duty to consider on which side is the preponderance of the evidence, and to find your verdict in accordance therewith." The eleventh and twelfth instructions given by the court on its own motion were to the same effect as the above. These instructions are no more than general statements of the law concerning the credibility of witnesses and the weight of testimony. No attempt was made in any of them to apply the principles announced to any witness or witnesses who had testified. They apply to appellees' witnesses as well as appellant's. They were equally favorable to both parties. It is not made to appear that they were prejudicial to appellant.

The instructions given to the jury are very lengthy, and may contain some repetitions. Considering them as a whole, we find nothing in them authorizing a reversal of the case. From a careful consideration of the whole record, we can but conclude that the case was fairly tried, and a correct conclusion reached. We find no error in the record sufficient to reverse the case.

Judgment affirmed.

(69 Ohio St. 286)

CITY OF FREMONT v. DUNLAP.

(Supreme Court of Ohio. Dec. 8, 1903.)

CITY — LIABILITY FOR NEGLIGENCE — BILLBOARD IN ALLEY—ACTUAL NOTICE—DIRECTING VERDICT—PRACTICE.

1. Where the plaintiff, in an action against a municipal corporation for an injury which the plaintiff received from a billboard, which was blown out of an alley upon the street by wind, striking him, fails to show actual notice to the corporation of the existence and position of the billboard and its dangerous character; and when it appears that under ordinary circumstances

such an accident was improbable and could not with reasonable care have been foreseen, and where it also appears that the street upon which the plaintiff was injured was open, in repair, and free from nuisance, the material facts in the case not being in dispute, it is error to refuse a request by the defendant to instruct the jury to bring in a verdict for the defendant.

(Syllabus by the Court.)

Error to Circuit Court, Sandusky County.

Action by one Dunlap against the city of Fremont. Judgment for plaintiff, and defendant brings error. Reversed.

Defendant in error instituted this action by filing a petition in the court of common pleas, setting forth that the plaintiff in error is a municipal corporation duly organized under the laws of the state of Ohio; that, about 10 months before the injury complained of occurred, certain persons, whose names are unknown to the defendant in error, erected a billboard for posting notices and advertisements on the west side of a certain alley leading from Front street to Arch street, and near to the west line of Front street, where the alley intersects with Front street; that the street and sidewalk along the west side of Front street is much traveled upon; that the billboard so erected was about seven feet high and eight feet wide, and was so constructed as to be a nuisance and hindrance in and to the alley, and dangerous to persons passing along the sidewalk on the west side of Front street; and said billboard was not fastened, being negligently, carelessly, and insufficiently set up, and not properly fastened or stayed; that the officers and councilmen of the city knew that the billboard was so wrongfully placed, and negligently suffered and permitted it, as aforesaid, to remain for a long space of time, to wit, for 10 months or more; and that by the exercise of ordinary care they should have known, and, in fact, did know, all of the facts aforesaid. It is further averred in the petition that on September 24, 1899, in the night of said day, the defendant in error was passing along said sidewalk on Front street when he came to the point where said alley intersects with Front street, and, while using due care on his part, the billboard fell upon the plaintiff, crushing him to the stone pavement and sidewalk, and injured him; for all of which he claims a judgment against the city in the sum of \$15,000. There was a demurrer to the petition, which was overruled in the court of common pleas. The city answered, denying each and every allegation in the petition, except that it is a municipal corporation as alleged, and that the sidewalk on the west side of Front street is much traveled upon. At the close of plaintiff's evidence the defendant's counsel moved the court to arrest the testimony from the jury, and to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted. The motion was renewed at the close of all of the evidence, and was again overruled, and the

same exception taken. Verdict was rendered in favor of the defendant in error, and judgment was entered thereon, after overruling a motion for a new trial in the court of common pleas. On petition in error in the circuit court the judgment was affirmed.

A. E. Culbert, City Sol., and James Hunt, for plaintiff in error. Garver, Garver & Garver and Finebrock & Garver, for defendant in error.

DAVIS, J. (after stating the facts). In this case the question is raised on the record, and argued, that the city, if it failed at all in its duty, merely failed to exercise a governmental power or duty, and that for such failure it is not liable under any circumstances. But assuming for the purposes of this case that the city might be liable for an injury resulting from the alleged nonfeasance, still it could not be held liable before reasonable notice of the unsafe condition of the street had been brought home to the corporation. *Circleville v. Sohn*, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777. It does not appear that actual notice was given to this corporation or its officers; but it is claimed that under the circumstances the city ought to have known that the billboard was dangerous and threatening to people passing along the street, and therefore that the city is chargeable with constructive notice of the alleged nuisance. In those jurisdictions where municipal corporations are held liable to individuals for negligence in respect to keeping its streets open, in repair, and free from nuisance, it is held that while the corporation is not an insurer of the safety of its streets, alleys, and sidewalks, it will be held liable for injuries to persons resulting from neglect of the corporation to keep its ways in a reasonably safe condition for travel in the ordinary modes under ordinary circumstances. In *Chase v. Cleveland*, 44 Ohio St. 506, 9 N. E. 225, 58 Am. Rep. 843, it is said in the opinion: "We do not understand that a city is bound at all hazards to have knowledge of defects in sidewalks. Municipal corporations are not insurers of the safety of their public ways, or of the lives and limbs of pedestrians. The law provides that such corporations shall have the care, supervision, and control of the streets, and shall cause them to be kept open and in repair and free from nuisance. This requires a reasonable vigilance in view of all the surroundings, and does not exact that which is impracticable. When the authorities have done that which is reasonable in this regard, they have discharged the entire obligation imposed by the law. They are not bound to use all possible vigilance in inspection or in obtaining information." Also, in *Village v. Kallagher*, 52 Ohio St. 183, 39 N. E. 144, it is held that a municipal corporation "is not bound to anticipate improbable

or unprecedented events, and provide against their possible results."

Under the law as thus stated, and upon the undisputed facts of this case, we do not think that the defendant in error has shown a right to recover against the plaintiff in error. It is not claimed that the city had actual knowledge of the existence of the billboard, and of the danger to the public therefrom. Constructive notice is claimed from the fact that it was loose, and stood leaning against a building, in an alley and near to the street. If it stood there six or eight months, as claimed by the defendant in error, it does not appear to have been such a permanent inconvenience or obstruction, or that it was such a threatening danger, as to have attracted much, if any, attention, or to have caused any alarm, or to have induced any complaint to the officers of the city. It is perfectly plain that under ordinary circumstances it was not dangerous, nor in any serious sense an obstruction. If the billboard was as large and heavy as the plaintiff claims, it could not have been expected to be thrown out into the street, with the force and violence claimed, by a light breeze or any ordinary wind. The city was not bound to interfere with private rights to prevent an improbable result, or one which in ordinary experience might not have been foreseen. In short, upon the undisputed facts, it is palpable that the city was not guilty of want of ordinary care.

The judgment of the circuit court and that of the court of common pleas are reversed, and judgment for plaintiff in error.

BURKET, C. J., and SHAUCK and CREW, JJ., concur.

(69 Ohio St. 311)

LUHRIG COAL CO. v. LUDLUM.

(Supreme Court of Ohio. Dec. 8, 1903.)

AFFIDAVIT FOR ARREST—CERTAINTY OF INTENT—STATEMENT OF FACTS—FRAUDULENT PURCHASE.

1. In an affidavit for arrest under the fifth particular of section 5402, Rev. St., certainty to a certain intent in general is sufficient.
2. Such affidavit should contain a statement of the facts claimed to justify the belief in the existence of such particular, but it need not contain a statement of the evidence by which such facts are to be established.
3. A debt is fraudulently contracted where a purchase of property is made with an intent on the part of the purchaser not to pay for the same.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Action by the Luhrig Coal Company against Aaron M. Ludlum. An order vacating an order of arrest was affirmed by the circuit court, and plaintiff brings error. Reversed.

On October 18, 1899, the Luhrig Coal Company began its action in the court of com-

¶ 2. See Arrest, vol. 4, Cent. Dig. § 42.

mon pleas for the recovery of the sum of \$825.99 against said Aaron M. Ludlum on an account for said sum for coal before that time sold and delivered to said defendant. At the time of the filing of said petition said coal company also filed an affidavit duly signed and verified under oath before the clerk of the court, in the words and figures following:

"State of Ohio, Hamilton County, ss.: William Montgomery, being duly sworn, says he is the authorized agent of the plaintiff herein, The Luhrig Coal Co., and that the claim sued on in this action is on an account for coal sold and delivered to the defendant at his request, for which defendant promised to pay plaintiff what the same was reasonably worth, which is set forth in the account marked Exhibit 'A,' attached to the petition, and all the averments of said petition are made part of this affidavit; that said claim is just, and its amount is \$825.99, with interest from October 4, 1899.

"Affiant says that the defendant fraudulently contracted the debt and incurred the obligation on which this suit has been brought; and that at the time of each purchase of the coal set out in the petition and each item thereof, said defendant was indebted to an amount largely in excess of the value of all his property and assets, had knowledge of such facts at each of said times, and that at each of said times he did not intend or expect to pay for the coal so purchased, and had no reasonable expectation of paying for the same."

Bond was duly given, the order of arrest was issued and delivered to the sheriff with a copy of the affidavit, and was duly served by the sheriff, and defendant taken into custody. Thereupon the defendant filed a motion for the vacation of the order of arrest on various grounds; among others, "because the affidavit filed to procure the order of arrest does not state facts sufficient in law to warrant the issuance of an order of arrest." Upon the hearing of said motion the court made the following final order: "This cause came on for hearing upon the motion of defendants to discharge the order of arrest herein issued and discharge the defendant from imprisonment and arrest, and the court, being fully advised in the premises, finds that the affidavit is not sufficient, and does grant said motion, and orders that the accused be released from the custody of the sheriff." The coal company duly excepted to said order, and filed its petition in error in the circuit court seeking its reversal, but the circuit court affirmed the same. Thereupon the coal company came here, seeking the reversal of the judgment of the circuit court, as well as the reversal of said final order made by the court of common pleas.

Burch & Johnson, for plaintiff in error.
Shay & Cogan, for defendant in error.

BURKET, C. J. (after stating the facts). The only question in this case worthy of report is as to whether the affidavit is sufficiently full and certain to meet the requirements of the statute in such cases. So much of section 5492, Rev. St. 1892, as applies to this case, is as follows: "An order for the arrest of defendant shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, stating the nature of the plaintiff's claim; that it is just, and the amount thereof, as nearly as may be, and establishing one or more of the following particulars: * * * (5) That he * * * fraudulently contracted the debt, or incurred the obligation for which suit is about to be or has been brought. The affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of such particulars." It will be noticed that in the forepart of the section an order of arrest is allowed when an affidavit is filed stating the nature of the plaintiff's claim, that it is just, and the amount thereof, as nearly as may be, and establishing one or more of the six particulars for an arrest mentioned in the section. This word "establishing," standing alone, would seem to mean the same as "proving by affidavit," but the latter part of the section, which provides that the affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of such particulars, seems to modify the meaning of the word "establishing," to the extent that, when the plaintiff has a belief in the existence of one or more of said particulars, and sets out facts tending to justify such belief, and makes positive affidavit thereto, he thereby establishes such particular. As this affidavit is a part of the plaintiff's proceeding against the defendant for the recovery of his claim—a charge against him—certainty to a certain intent in general is all that can be required. As to such certainty, it is held that it consists in such clearness and distinctness of statement of the facts constituting the cause of action that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who is to give judgment. *Rex v. Horne*, Cowp. 682; 6 Cyc. Law & Pro., 727; *The King v. Lyme Regis*, 1 Doug. 158. See, also, *Crofton v. State*, 25 Ohio St. 253. The affidavit in question in this case fully meets the above requirements as to certainty. It charges, in the words of the fifth particular of the statute, that the defendant fraudulently contracted the debt and incurred the obligation on which the suit was brought, and then states the facts claimed to justify the belief in the existence of this particular as follows: "And that at the time of each purchase of the coal set out in the

petition, and each item thereof, said defendant was indebted to an amount largely in excess of the value of all his property and assets, had knowledge of such facts at each of said times, and that at each of said times he did not intend or expect to pay for the coal so purchased, and had no reasonable expectation of paying for the same." This fully and clearly informed the defendant—and he must have so understood it—that he would be required to answer the charge that at the time of the several purchases of coal he was indebted to an amount largely in excess of the value of his property and assets; that he had knowledge of such facts at the time of each purchase; that he did not intend or expect to pay for the coal so purchased; and that he had no reasonable expectation of paying for the same. This statement in the affidavit as to the facts justifying the belief that the defendant fraudulently contracted the debt and incurred the obligation is so clear and certain that not only the defendant, who was to answer the charge, but also the court, who was to ascertain the truth of the allegations and render judgment, could not fail to fully and clearly understand the facts upon which the plaintiff relied. That being so, the affidavit is certain to a certain intent in general, and sufficient. The affidavit is required to contain a statement of the facts claimed to justify the belief, and not the evidence proving such facts. The rule as to the statement of such facts in such an affidavit is the same as the rule as to the statement of facts in a pleading. The facts claimed to justify the belief should be stated in the affidavit, and then upon the hearing the evidence tending to prove such facts should be brought forward. In the case at bar the charge in the affidavit that at the times of the several purchases of coal the indebtedness of the defendant largely exceeded the value of all his property and assets, that he had knowledge of that fact, that he did not intend or expect to pay for the coal, and had no reasonable expectation of paying for it, is a charge of facts clearly showing that the debt was fraudulently contracted; because he who purchases property not intending to pay for the same is guilty of a fraud. *Wilmot v. Lyon*, 49 Ohio St. 296, 34 N. E. 720. It is therefore clear that the court of common pleas erred in sustaining the motion to vacate the order of arrest and in discharging the defendant from custody, and that the circuit court erred in affirming the common pleas. The orders and judgments of both courts will be reversed, and cause remanded to the court of common pleas for further proceedings according to law.

Judgments and orders reversed, and cause remanded.

SPEAR, DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(207 Ill. 34)

CRAMER et al. v. BURKHALTER et al.*

(Supreme Court of Illinois. Dec. 16, 1903.)

QUESTION OF FACT—FINDING OF APPELLATE COURT—APPEAL.

1. Judgment of affirmance by the Appellate Court is conclusive, in the Supreme Court, of all controverted questions of fact.

2. Whether the evidence in mandamus proceedings to compel the commissioners of highways of a town to take necessary steps to lay out a road proved the giving of the required statutory notice by the commissioners of the meeting at which they proposed to take action on the petition to lay out the road is a question purely of fact, and a finding thereon by the Appellate Court is conclusive in the Supreme Court.

Appeal from Appellate Court, Second District.

Petition by John C. Burkhalter and others against Benjamin Cramer and others for writ of mandamus. From a judgment of the Appellate Court affirming a judgment awarding the writ (108 Ill. App. 513), defendants appeal. Affirmed.

Chiperfield & Chiperfield, for appellants. Fletcher Carney, James W. Carney, and Williams, Lawrence & Welsh, for appellees.

CARTWRIGHT, J. Upon the petition of appellees, the commissioners of highways of the town of Maquon, in Knox county, and two individuals who joined in the petition, the circuit court of said county awarded a peremptory writ of mandamus against appellants, the commissioners of highways of the town of Chestnut, in said county, commanding them, as such commissioners, to take the necessary steps to lay out a road on the division line between the two towns, by drawing orders for the payment of damages awarded, notifying owners to remove fences, directing the road to be worked, etc. A writ of error was sued out from the Appellate Court for the Second District, and, the record being returned into that court, the judgment was affirmed. This appeal was prosecuted from such judgment of affirmance.

In the circuit court a jury was waived, and the issues of fact made by the petition, and the pleas of the defendants to the same, were submitted to the court for trial, resulting in the finding and judgment in favor of the petitioners. The judgment of affirmance by the Appellate Court is conclusive of all controverted questions of fact, and the principal question presented and argued on this appeal is one purely of fact—as to whether the evidence proved the giving of the required statutory notice by the commissioners of the meeting at which they proposed to take action on the petition to lay out the road. That question not being in any sense a question of law, we cannot consider it. There was no objection to any evidence offered at the trial, nor any exception to any ruling of the court.

*Rehearing denied February 4, 1904.

No propositions of law were submitted to the court to be held or refused, and the bill of exceptions contains no exception to the finding or judgment of the court. There is no assignment of error which we can consider. *Bailey v. Smith*, 168 Ill. 84, 48 N. E. 75; *Aden v. Road District No. 3*, 197 Ill. 220, 64 N. E. 274.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(206 Ill. 523)

ILLINOIS CENT. R. CO. v. WADE.*

(Supreme Court of Illinois. Dec. 16, 1908.)

WITNESSES—IMPEACHMENT—CONTRADICTORY STATEMENTS—FOUNDATION—SUFFICIENCY—INTRODUCTION—GROUNDS OF EXCLUSION—APPEAL—EVIDENCE—SUFFICIENCY OF GENERAL OBJECTION.

1. In an action for servant's injuries it was error to exclude, when offered for purposes of impeachment, statements signed by one of plaintiff's witnesses, who had been in defendant's employ at the time of the accident, and had subsequently left, contradicting his testimony on the trial.

2. A sufficient foundation is laid for supposed contradictory statements signed by a witness, by showing the paper to the witness, allowing him to inspect it, and read it if he desires, and proving by him or others that the signature thereto is his genuine signature.

3. Where a foundation for the introduction of a writing as impeaching testimony has been laid, the proper practice is to offer such writings in evidence with other testimony in the same behalf.

4. Where a witness was asked if he had signed a certain statement contradictory of his testimony on the trial, and on the inspection of the statement he admitted his signature, but stated that there was a mistake in the statement concerning which he had spoken at the time he signed the same, the statement was not rendered inadmissible on the ground that such evidence had already sufficiently brought it to the knowledge of the jury, since witness' answer was not a direct admission to the making of the statement.

5. Written statements offered in impeachment of a witness cannot, on appeal, be deemed properly excluded as mere opinions of the witness, where merely a general objection to them was offered at the trial.

Appeal from Appellate Court, First District.

Action by George F. Wade against the Illinois Central Railroad Company. From a judgment of the Appellate Court (108 Ill. App. 423) affirming a judgment for plaintiff, defendant appeals. Reversed.

W. A. Howett (J. G. Drennan, of counsel), for appellant. Moses, Rosenthal & Kennedy, for appellee.

BOGGS, J. In an action on the case brought in the circuit court of Cook county to recover damages for a personal injury inflicted, as it was alleged, through the negligence of a servant of the appellant company, the appellee was awarded judgment in the sum of \$7,000, and the same was affirmed in the Appellate Court for the First District; hence this appeal.

In order that disposition be made of the assignment as for error that the court improperly excluded certain testimony tendered by the appellant company, it will be necessary to briefly refer to the facts. On the 20th day of July, 1900, a force of workmen called a "bridge gang," of which the appellee was a member, and which was under the control of a foreman and an assistant foreman, all being employees of the appellant company, were engaged in the construction of an iron bridge across a small stream on the line of appellant's railroad near Denison, Iowa. In the work were employed a small stationary steam engine and a derrick, both of which were placed upon a flat car, by means of which a boom, for the purpose of raising and lowering heavy material, and a runner line for handling lighter material, were operated. To the end of the runner line was attached a metal ring and two clamps, of the aggregate weight of 40 or 50 pounds. In the prosecution of the work it was necessary that the boom, runner line, and clamps should be shifted from side to side of the bridge as often as once in each two or three minutes during the day. While standing upright on one of the girders on the west side of the bridge, a point some 6 or 7 feet higher than the floor beams of the bridge, the appellee was struck by the ring and clamps—which, with the boom, were being swung from the east—and knocked from the bridge to the ground, a distance of about 18 feet, and thereby received the injuries for which the judgment was awarded. The appellee had been in the employ of the appellant company as a bridgeman in this bridgework for several years, and previous thereto had served in the capacity of a bridge carpenter for other railroad companies for a number of years.

One of the defenses presented by the appellant company was that the injury was occasioned, or materially contributed to, by the failure of the appellee to exercise ordinary care for his own safety. There was a conflict in the evidence on the question whether it was usual and customary to raise the boom when swinging it across the bridge, so that the clamps would not hang down low enough to strike a man standing upright on the bridge. The testimony produced on behalf of the appellant company was that the work of repairing or building bridges was necessarily carried on during the time intervening between the passage of trains, and that, consequently, the work was customarily carried on in haste; that it was necessary to shift the boom from side to side of the bridge almost constantly—25 times each hour, as the appellee testified—and that it would be impracticable to raise and lower the boom every time it was moved across the bridge, and that the bridge workmen were expected to watch the movements of the boom, and not stand in the path of its movements; that the appellee had long experience on the work.

*Rehearing denied February 4, 1904.

and had served in many different capacities in connection with handling and moving of the booms, the line, and the clamps; that he knew well the manner in which the work was usually and customarily carried on, and was aware that the boom and the clamps hanging from it were to be moved across the bridge almost constantly—25 times each hour, as he testified—and that he was warned by his fellow workmen that he was in a place of danger, in time to have moved out of the way of the moving boom and clamps. Evidence produced by the appellee tended to show that it was customary to raise the boom, runner line, and clamps high enough to go above the height of a man standing on the bridge. The greater number of witnesses supported the contention of appellant company.

As to the evidence in support of the defense that the injury was occasioned by the want of due care on the part of the appellee, it is said in the opinion of Appellate Court: "There is evidence tending to show that appellee, when struck by the clamps, was standing erect on one of the girders of the bridge, near where he knew that every two or three minutes the clamps were being swung back and forth, and where they were plainly visible to him had he looked, and directly in their path; also, that he was given ample warning, so he could have avoided being struck by stooping down or stepping to one side." This evidence was directly contradicted (but by the lesser number of witnesses) in so far as it tended to show that appellee knew he was in the path of the clamps, and as to whether any warning given was heard by or made known to appellee in time to enable him to avoid injury. The Appellate Court, as appears from the opinion of the court, found the contention of the appellant company had the support of the greater number of witnesses, and affirmed the judgment because they did not feel warranted in saying the verdict was manifestly and palpably wrong. In such state of case it is essential to maintain the judgment that all competent evidence offered by the appellant company should have been heard by the jury.

The appellee produced as a witness one Wolfington, who was also a member of the bridge gang at the time appellee was injured, but who had left the employ of the company before the time of the trial. The substance of the testimony of this witness was that, had the usual and customary mode of doing the work been observed on the occasion when the appellee was injured, the boom runner line, ring, and clamps would have been raised to a sufficient height to pass above the heads of the workmen on the bridge, and that the appellee exercised ordinary care to protect himself from being struck by the clamps. During the cross-examination the above witness was asked if the signature to a written statement on a paper

which was handed to him was his signature. He examined the paper, and asked that a portion of it should be read to him, which was done, and he testified he had signed the same. Subsequently a second paper purporting to bear his signature was handed to him, and he was asked if he had signed it. He was informed that he could examine the entire writing, and he admitted that he had signed the same. Counsel for the appellant company, when producing testimony in its behalf, desired to offer the papers which had been so identified in evidence as containing statements relative to the facts connected with the injury of the appellee directly at variance with the statements of the witness on the stand, and thereupon the following colloquy occurred: Mr. Howett (counsel for appellant): "I want to introduce these statements that I have had identified. The Court: I don't understand that the statement of a witness is competent. The statement of a party or a letter, but the statement of a witness—You may ask him whether on a certain day if he didn't make that statement, and, if he said no, why— Mr. Howett: I will submit them. See if you have any objection to these statements. Mr. Rosenthal (counsel for appellee): Let me read them and see. (Mr. Howett hands the papers to Mr. Rosenthal.) The Court: If you object to the statements, they do not go in. Mr. Moses (counsel for appellee): Certainly we object to the statements as a whole. The Court: That is all you have to do. Save your point on that, Mr. Howett. I don't understand that the statement of a witness is competent. Mr. Howett: Suppose that I present to a witness a paper, and he identifies it as his signature, and I ask him if that is a true and correct statement of the facts set forth in there, and he says that it is, and he then proceeds—with one little exception to one line—and tells another entirely different statement of that accident. He has already told you—told the court and the jury—that this statement contained a true statement of this accident, and tells an entirely different story. Couldn't I introduce his statement over his own signature? The Court: I never understood so."

The first of these papers contained separate statements made and signed by F. D. Hayes, foreman of the bridge gang, William H. Miller, assistant foreman, and Joseph McAlly, a member of the bridge gang, relative to the facts and circumstances of the occurrence which resulted in the injury received by the appellee, and also the following statement, in writing, signed by the witness Wolfington:

"J. Wolfington, of bridge gang, states that he has heard the statements made by Foreman Hayes, Assistant Foreman Miller, Bridgeman McAlly, and that he fully agrees in same and makes same his statement in fact; that he was standing some sixteen feet distant from Wade, saw that boom was about to strike him, and warned him at about the same time Miller did, after which he had am-

ple time to get out of way but did not seem to do so. J. Wolfington."

The statement signed by Hayes, referred to and adopted by the witness Wolfington as being his statement, among others contained the following statement. "The men were expected to watch movement of boom line, and keep out of its way. This was generally understood by all the men on the work, as well as any other work of a similar nature."

The statement of Miller, also made a part of the statement of Wolfington, was as follows:

"That at time of accident he was standing on same girder with Wade, about forty feet distant from him, and seeing that the line was liable to strike him warned him of the danger, and had he paid attention to the same he could have gotten out of the way, as he had time to do so. Joe McAlly was some ten or fifteen feet from me and heard me warn the man. J. Wolfington was standing not far away and heard me warn him, and also called at him himself.

"W. H. Miller."

The statement of McAlly was, in substance, the same as that of Miller and the witness Wolfington. All these parties, except the witness Wolfington, signed the statements on the 4th day of January, 1901, some six months after the appellee was injured, and the witness Wolfington signed January 14, 1901.

The second of the papers so offered in evidence and rejected was signed by Hayes, foreman; Miller, assistant foreman; Sutton, Smith, Rlorden, McAlly, and the witness Wolfington, all members of the bridge gang. In this statement it was said: "(4) To have the man who handles and raises the rope in a position to see what is going on in advance would necessitate an entire change in the arrangement of the engine, swing beam, etc., and such a change would be entirely impracticable; (5) to have raised the rope above a man's head would necessitate an extra man on the boom to do this, and such an arrangement would be entirely impracticable in bridge work; * * * (7) that he [appellee, Wade] had notice from several parties, including Superintendent of Bridges O. J. Travis, Foreman Hayes, Assistant Foreman Miller, and others, of his impending danger, and that such notice was given him in ample time to have gotten out of the way had he been attending to his duties."

As we construe the ruling of the trial court, the written statements were excluded partly on the ground they were the statements of a witness, and not a party to the proceeding, and partly on the ground it was necessary, as a foundation for their admission, the witness should have been asked if he did not make the statement on a specified day. That the statements of a witness made out of court, orally or in writing, if contradictory on a material point to his sworn statements as a witness, may be introduced in evidence, not as substantive proof of the

truth of such statements, but as tending to discredit the witness, has been so frequently declared by courts and law writers, and is so universally understood and accepted, that the citation of authorities in support of the proposition is considered entirely unnecessary.

The court was also in error in confounding the rule as to the foundation to be laid to authorize the admission of oral impeaching statements of a witness with the foundation necessary to justify the offer to introduce contradictory statements made in writing and signed by the witness. When it is desired to impeach a witness by proof of oral statements made by him out of court contradictory upon a material point of his testimony given from the witness stand, it is requisite that a foundation for the introduction of such oral statements be made by asking the witness if he did not, at a given time and place, in the presence of specified persons, make the supposed contradictory statements. But where the supposed contradictory statements were reduced to writing by the witness, or signed by him, a sufficient foundation for the introduction of the writing is laid by showing the paper to the witness, allowing him to inspect it and to read it if he desires, and proving by him or others that the signature thereto is his genuine signature. 10 Ency. of Pl. & Pr. 283, 284; 2 Phillips on Evidence, § 963; Romertze v. East River Nat. Bank, 49 N. Y. 577; 1 Greenleaf on Evidence, § 596; 29 Am. & Eng. Ency. of Law (1st Ed.) p. 786, and cases cited in note 2; Mommence Stone Co. v. Groves, 197 Ill. 88, 64 N. E. 835. Having laid the foundation for the introduction of the writings as impeaching testimony, the proper practice (as was the course pursued by counsel for the appellant company in the present case) was to offer the writings in evidence with the other testimony in the same behalf. Peyton v. Village of Morgan Park, 172 Ill. 102, 49 N. E. 1003. The case of Aneals v. People, 184 Ill. 401, 25 N. E. 1022, announces no contrary rule. In that case the plaintiff in error complained that the trial court had refused to allow him to prove oral statements made out of court by Hunter and Knox and other witnesses who had testified for the people. The exclusion of the testimony was approved for the reason that the attention of the witnesses had not been called to the time, place, etc., of the alleged oral statements, and an opportunity for explanation afforded. It is true it was there said, "This we understand to be the uniform practice, and to which we are aware of no exception," but this ruling and the expression quoted had reference only to the rule which applies when the supposed contradictory statements were made orally. The trial court was under a misapprehension as to the rule applicable to the introduction of written statements for purposes of impeachment, and under the influence of that erroneous view excluded the statements.

It is urged, however, that other grounds than those which moved the court existed justifying the rejection of this testimony, and that it is immaterial that the reasons which actuated the court in rejecting it were insufficient if the ruling was for other reasons correct. It is therefore said the rejection of the written statements should be sustained on three other grounds, viz.: First. That, after presenting the first statement to the witness, counsel for the appellant company asked the witness questions with regard to the alleged contradictory language therein, and read a portion of the statement to the witness in the presence and hearing of the jury, and that thereby the contents of that statement were as fully made known to the jury as if it had been read to them; and, that being true, no further proof of the writing was necessary, and the exclusion thereof did not prejudicially affect the appellant's case. Second. That the two statements were offered together, and the ruling was as to the admission of both of them together, and, the first statement being wholly unnecessary, and its exclusion not prejudicial, it was not error reversible in character to refuse the offer to admit both statements in evidence. Third. That the statements, in some portions, are mere expressions of opinions or conclusions, and not admissible; and the statements, being offered as a whole, should have been rejected for that reason.

Without being understood as deciding that any or either of such reasons would or would not justify the rejection of the statements, the insistence may be disposed of thus: When the first of the statements was presented to the witness, he requested counsel for the appellant company to read certain portions of it to him, and parts of it were read to him, but what part or parts the record does not disclose, nor does it appear whether the reading was in the hearing of the jury. The argument of counsel for the appellee proceeds on the assumption the jury heard such parts as were read, and heard what counsel and the witness said. Counsel for the appellant company say: "No portion of the statement was at any time read within the hearing of the jury, nor did the jury at any time ever become informed of any portion of the contents of either of the statements. * * * Privately, a small portion of it was read to the witness for his own understanding and information while in the presence, but not within the hearing, of the jury." The occurrence, as preserved by the reporter, is as follows: "(Paper handed to witness.) Mr. Howett: He wishes me to read it to him. If you will step over here a moment, and see that I read it correctly to him. (Mr. Howett read part of the statement to witness.)" The reporter either did not hear or did not enter in his notes the portions that were read. The record is obscure, and we are unable to say whether the

jury heard what was read or not. The witness admitted his signature to the first statement, but said "there was a little mistake in it; that he spoke of that at the time" (to the persons present when he signed it); "that the mistake was in what was said about following" to the appellee, etc. If a witness admits that he made statements imputed to him to have been made as fully as claimed to have been made, further proof of the fact may be unnecessary; but when the witness denies, or does not directly admit, that he made the statements, the impeaching proof should be permitted to be given. *Ray v. Bell*, 24 Ill. 444; *Atchison, Topeka & Santa Fé Railroad Co. v. Feehan*, 149 Ill. 202, 36 N. E. 1036. The first statement was not, therefore, rendered inadmissible on the ground that it was fully brought to the knowledge of the jury. The first statement being admissible, the second supposed reasons for sustaining the rejection of the statements by the court necessarily falls. The third reason is equally untenable. That some of the statements in the writings were but conclusions or opinions was not pointed out as a ground of objection. It is only when the evidence is inadmissible for any purpose, and the objections cannot in any manner be obviated, that a general objection will suffice. 8 *Ency. of Pl. & Pr.* 228. In courts of review only such grounds of objection to the admissibility of evidence will be considered as were urged in the trial court. *Sullivan v. People*, 122 Ill. 385, 13 N. E. 248; 8 *Ency. of Pl. & Pr.* 223. If some of the statements in the writings, or either of them, were deemed inadmissible for any reason, the objectionable statements should have been pointed out, and their exclusion asked. On a rehearing of the cause, any special objection to the admissibility of the statements, or either of them, or any portion of either of them, may be presented to the trial court, and there determined.

Objections are urged to three instructions given at the request of the appellee, but they are of minor importance, and relate to inaccuracies which there are no reasons to suppose will again present themselves.

For the reasons indicated the judgment of the Appellate Court and that of the circuit court are each reversed, and the cause will be remanded to the circuit court for such other proceedings as to law and justice shall appertain.

Reversed and remanded.

(207 Ill. 50)

PEOPLE v. GLENN et ux.*

(Supreme Court of Illinois. Dec. 16, 1903.)

DRAINAGE-TAXATION-CERTIFICATE OF COMMISSIONERS-STATUTORY REQUIREMENTS-OMISSION-VALIDITY OF CERTIFICATE.

1. 2 *Starr & C. Ann. St.* 1896, p. 1567, c. 42 par. 178, § 70, provides that it shall be the duty of the commissioners of every special drainage

*Rehearing denied February 4, 1904.

district to file with the county clerk a certificate giving the date, number, amount, and description of all notes or bonds issued by the commissioners which remain unpaid, the time of their maturity, rate of interest, and time when such interest falls due, the amount necessary to be levied to meet payment of interest for the ensuing year, the amount necessary for repairs for the ensuing year, and the amount of any deficiency in the payment of interest or in payment for repairs, from which the clerk shall compute the amount which each parcel of land will have to pay, etc., and which amount shall be extended on the collector's books, etc. *Held*, that a certificate which failed to state the things required by the statute, but named the amount to be raised in a gross sum, was invalid.

2. On an application by the county collector for a judgment of sale against certain lands, the invalid certificate could not be remedied by introducing the drainage record, the reports of the commissioners, and parol evidence.

3. The failure of the certificate to conform to the statutory requirements was not rendered immaterial by Revenue Law, § 191 (Hurd's Rev. St. 1901, c. 120), providing that no assessment shall be considered illegal for any irregularity, or for any error or informality not affecting the substantial justice of the tax.

Appeal from Jackson County Court; W. F. Ellis, Judge.

Proceedings by the people, on the application of W. H. Trobaugh, collector, for a judgment of sale against lands of J. O. Glenn and wife for a drainage tax. From the judgment the people appeal. **Affirmed.**

This is an application by the county collector of Jackson county, in the county court of said county, for a judgment of sale against certain lands of the appellees for a drainage tax extended against said lands by the county clerk by virtue of a certificate of levy of the commissioners of the Big Lake special drainage district. The appellees appeared and filed objections, which were sustained, and judgment was refused, and an appeal has been prosecuted to this court.

The certificate of the commissioners is in the following form:

"To D. L. Boucher, County Clerk:

"We, the commissioners of the Big Lake special drainage district, in the county of Jackson and state of Illinois, make and file with you, pursuant to the provisions and requirements of section 70 of the act of the General Assembly of this state approved June 27, A. D. 1885, in force July 1, A. D. 1885, entitled 'An act to provide for drainage for agricultural and sanitary purposes and to repeal certain acts therein named,' and of the various acts amendatory of and supplementary to said act, the following statement: That during the fiscal year of the said drainage district ending on the 31st day of October, A. D. 1902, no notes, bonds, or other evidences of indebtedness of or against the said drainage district were made or issued by the commissioners thereof. We further state and certify to you that we shall require during the fiscal year of the said drainage district ending the 31st day of October, A. D. 1903, for the payment of interest and principal maturing on certificates and other evidences

of indebtedness not registered, for costs and expenses of carrying on the work of dredging and repairs of drains and ditches, and for ordinary and contingent expenses, including costs of collection and disbursement, the sum of four thousand dollars (\$4,000.00), to be levied upon the lands and property, including railroad, within and of the said drainage district benefited, which sum you are directed and required to apportion to and among the various tracts of land and property, including railroad, as other drainage assessments and taxes, in addition to such sums or sum as may have been or may be certified to you by the Auditor of Public Accounts, pursuant to law, for payment of interest, or interest and principal, upon the registered indebtedness of the district.

"Dated November 21, A. D. 1902.

"H. L. Brickey,

"Henry Arbeiter,

"Wm. Walther,

"Commissioners.

"Filed Nov. 21, 1902. D. L. Boucher, County Clerk."

The section of the statute authorizing the certificate to be made and the tax to be extended reads as follows: "It shall be the duty of the commissioners of every special drainage district heretofore organized under any law of this state, as also the commissioners of every such district hereafter organized, to file on or before the first day of December of each year, with the county clerk of the county in which the district was or may be organized, a statement of the date, number and amount of all notes or bonds issued by them as such commissioners, and which remain unpaid, the time the same will mature, the rate of interest such notes or bonds bear and the time the interest falls due, the amount necessary to be levied on the lands assessed for benefits in order to meet the payment of the interest for the ensuing year; also the amount, if any, necessary to be levied to keep the work, or any part thereof, in repair for the year next ensuing; also the amount of any deficiency in the payment of interest before accrued, or in the payment for repairs made; and the clerk shall compute the pro rata share which each tract or parcel of land or property in said district, assessed for benefits, will have to pay to raise said respective amounts, which pro rata share shall be in the same proportion as the assessment for the construction of said work, and it shall be the duty of the county clerk of the county in which the lands are located to extend the same on the collector's book, the same as state, county, municipal or other taxes are extended, in appropriate column or columns, and in case the lands or property assessed lie in more than one county, the county clerk of the county in which the district is organized shall certify to the clerk, or clerks, of such other county or counties, a description of the lands or property assessed in such other county, and the amount to

be extended against the same for interest, as also for repairs, either or both, and on receiving such certificate the clerk of the proper county shall extend the same on the proper collector's book, in proper columns, the same as though the whole proceedings and district were in his county. And the amounts so extended shall be collected at the same time and in the same manner as other taxes on like property, and shall be paid over by the party collecting, to the treasurer of the drainage district, in the same time and manner as taxes collected are required to be paid to treasurers of municipal corporations. No levy or assessment made by the commissioners to meet the payment of interest on the notes or bonds of the district unpaid shall be used for any other purpose, but shall be faithfully applied to the payment of such interest as it becomes due: provided, where the whole or any part of the bonds of the district are registered, and the Auditor of Public Accounts has levied, as hereinbefore provided, an amount sufficient to meet the payment of the interest on such registered bonds as it becomes due, then the commissioners shall make their levy so as to meet the payment of the interest on the bonds that are not registered." 2 Starr & C. Ann. St. 1896, p. 1567, c. 42, par. 178, § 70.

John Venable, State's Atty. (R. J. Stephens, of counsel), for the People. Otis F. Glenn and James H. Martin, for appellees.

HAND, C. J. (after stating the facts). It is too plain to admit of argument to the contrary that the certificate of the commissioners does not conform to the requirements of the statute. The statute requires the certificate to state (1) the date, number, and amount of all notes or bonds issued by the commissioners which remain unpaid, the time of their maturity, the rate of interest they bear, and the time when the interest falls due; (2) the amount necessary to be levied on the lands assessed for benefits in order to meet the payment of the interest for the ensuing year; (3) the amount, if any, necessary to be levied to keep the work, or any part thereof, in repair for the next ensuing year; and (4) the amount of any deficiency in the payment of interest before accrued, or in the payment for repairs made. This the certificate failed to do, and the amount proposed to be raised is named in a gross sum, to wit, the sum of \$4,000. The power of the commissioners to impose a tax is a limited power, and is to be strictly construed. *Commissioners of Highways v. Newell*, 80 Ill. 587. The statute clearly contemplates that the several amounts to be levied for interest, repairs, or to meet a deficiency for accrued interest or for repairs already made, should be stated. The provisions of the statute are intended for the protection of the taxpayer, and are mandatory. The taxpayer has the right to be informed for what

purposes his property is to be taxed, and the statute provides that the amount collected with which to pay interest shall be kept separate from the balance of the tax levied and collected under said section of the statute.

The appellant, on the trial, appears to have conceded the certificate was insufficient, and, although no motion was made to amend the certificate, it was in the county court sought to remedy its defects by introducing the drainage record, the report of the commissioners as approved by the county judge, and parol evidence. The defects in the certificate could not be thus cured. The authority of the county clerk to extend said drainage tax is the certificate of the commissioners, and unless a valid certificate is on file in his office he is powerless to extend the tax. *Peoria, Decatur & Evansville Railway Co. v. People*, 141 Ill. 483, 31 N. E. 113.

It is, however, urged that the objections made to the extension and collection of this tax do not affect the substantial justice of the tax, and that the defects pointed out in the certificate are cured by section 191 of the revenue act (*Hurd's Rev. St. 1901, c. 120*). We held, in *Chicago & Eastern Illinois Railroad Co. v. People*, 200 Ill. 237, 65 N. E. 701, that the provisions of a statute designed for the protection of the taxpayer are mandatory, and a disregard of them will render a tax illegal, and that the substantial justice of a tax is affected if the authorities authorized to impose it have no power to levy it.

From an examination of this record it clearly appears that the certificate of the commissioners was not sufficient to authorize the county clerk to extend said tax, and that the county court properly refused to order the sale of appellees' land to pay said tax. The judgment of the county court will therefore be affirmed.

Judgment affirmed.

(206 Ill. 615)

CHICAGO UNION TRACTION CO. v. BROWDY.*

(Supreme Court of Illinois. Dec. 16, 1903.)

STREET RAILROADS—INJURY IN A COLLISION—EVIDENCE—INSTRUCTIONS.

1. A street railway company is not guilty of actionable negligence because of the failure of the motorman in charge of a car to stop or slacken its speed on seeing a horse and wagon near the track, but sufficiently distant to permit the car to pass in safety, and is therefore not liable for the injury occasioned by the horse being suddenly driven on the track so near the car that it cannot be stopped before striking the horse and wagon.

2. In an action against a street railway company for injuries sustained in a collision, the witnesses of defendant testified that a horse and wagon were near the curb, and sufficiently distant to enable the car to pass in safety; that the horse was facing the same way the car was going; that, when the car was about 40 feet from the wagon, plaintiff suddenly drove

*Rehearing denied February 5, 1904.

¶ 1. See *Street Railroads*, vol. 44, Cent. Dig. § 192.

the horse toward the track; that the motorman rang the bell, and that he commenced to apply the brake on seeing the horse going towards the track, but was unable to stop the car before striking the wagon and injuring plaintiff. Held sufficient to require an instruction that, if plaintiff unexpectedly drove his wagon on the track and defendant's servants did all they could in the exercise of ordinary care to stop the car, there could be no recovery.

3. Where a party's evidence on an issue presented by him is sufficient to require the submission thereof to the jury, the court is not warranted in refusing to submit it because the evidence is conflicting.

Appeal from Appellate Court, First District.

Action by Maurice Browdy against the Chicago Union Traction Company. From a judgment for plaintiff, affirmed by the Appellate Court (108 Ill. App. 177), defendant appeals. Reversed.

John A. Rose and Louis Boisot (W. W. Gurley, of counsel), for appellant. Waters & Johnson, for appellee.

HAND, C. J. This is an action on the case brought by the appellee against the appellant, in the superior court of Cook county, to recover damages for a personal injury. The declaration contained one count, and alleged that on July 15, 1900, the plaintiff was riding in a wagon drawn by one horse, along Twelfth street, in the city of Chicago, and that the defendant, by its servants, so carelessly, negligently, and improperly drove and managed a certain motor car then running on Twelfth street that said car ran against said wagon, whereby the plaintiff was injured. The general issue was pleaded; and a trial before the court and a jury resulted in a verdict and judgment for \$2,500 in favor of appellee, which has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

It appears from the evidence that the accident occurred on the afternoon of Sunday, July 15, 1900; that the appellee, who was in the candy business, used a one-horse covered wagon with which to deliver his goods; that he left the horse and wagon standing near the curb upon the south side of Twelfth street, in front of the store of a customer, upon which street the appellant operated a double-track street railway; that after supplying his customer he got into his wagon and started to the place of business of another customer on the north side of the street, and a little east of the place where his horse and wagon had been standing; that he drove east on the south track of appellant a few feet, and then turned north across the tracks; that, just as he turned, the rear of his wagon was struck upon the south track by an east-bound motor car, to which was attached a trailer. The appellee testified that he did not see the car when he got into the wagon; that before he got into the wagon he saw the car standing on the southwest corner of Halsted and Twelfth streets, which point, the

evidence shows, was in the neighborhood of 200 feet west of where the horse and wagon were standing. He further testified that he drove upon the south track, went east 10 or 15 feet, and then turned north, when the car struck the rear of the wagon and capsized it.

The appellant requested the court to give to the jury the following instruction, which request was refused. "The court instructs the jury that if they believe from the evidence in the case that, while the defendant and its servants were (if they were) exercising ordinary care, the plaintiff, at the time and place of the injury, suddenly and unexpectedly, and without the knowledge of the defendant, drove his wagon across and upon defendant's track, and thereby placed himself in a position of danger, then, in order to charge the defendant with a duty to avoid injuring him, the plaintiff must show, by a preponderance of the evidence in the case, that the circumstances were of such character that the defendant's servant or servants had an opportunity to become conscious of the facts giving rise to such duty, and a reasonable opportunity, in the exercise of ordinary care and caution, to perform such duty. And if the jury further believe from the evidence that the facts as shown by the evidence did not charge the defendant and its servants with a duty as thus defined, or if the jury believe from the evidence that the defendant and its servants did not have a reasonable opportunity, in the exercise of ordinary care, to perform such duty as thus defined, then they should find the defendant not guilty. And if the jury believe from the evidence in the case that the plaintiff suddenly and unexpectedly drove his wagon across and upon the track, in front of the car of the defendant which occasioned the injury, and that the servant or servants in charge of such car did all that could be done, in the exercise of ordinary care, to avoid injuring and damaging him, then the plaintiff cannot recover in this case, and the jury should find the defendant not guilty."

The theory of the appellant was that the appellee, without notice to the motorman, suddenly drove upon the track directly in front of an approaching car, and that the motorman did not have time, after the appellee drove upon the track, to stop the car before the same came in contact with the wagon of the appellee; and it is contended that the instruction properly stated the law applicable to such state of case, and that it was error for the court to refuse to give such instruction to the jury. The law seems to be well settled that, where the alleged negligence of a servant consists of an omission of duty suddenly and unexpectedly arising, it is incumbent on the plaintiff to show that the circumstances were such that the servant of defendant had an opportunity to become conscious of the facts giving rise to the duty, and a reasonable opportunity to perform it, before the master can be held liable. Booth

on Street Railways, § 105; *M. & F. Pass. R. R. Co. v. Kelley*, 102 Pa. 115; *Fenton v. Second Avenue Railroad Co.*, 126 N. Y. 625, 26 N. E. 967; *Rack v. Chicago City Railway Co.*, 173 Ill. 289, 50 N. E. 668, 44 L. R. A. 127. The evidence of appellant tended to show that the horse and wagon of appellee were left standing upon the street in such position that its car could safely pass the same, and that it remained in such position until the car was so near the horse and wagon that it was impossible for the motorman to stop the car before it would come in contact with said wagon if it was driven upon the track, when the appellee, without warning, turned upon the track. It is clear that negligence cannot be imputed to the motorman because he did not stop the car while the horse and wagon were standing near the curb and out of the line of contact with the car. The peril to appellee did not commence and become apparent until he turned upon the track. Then, and not until then, was the motorman required to act. To hold that it was the motorman's duty to stop the car because the horse and wagon were standing near the track, although sufficiently distant to permit the car to pass in safety, would be to impose upon the appellant a duty not imposed upon it by law. Neither was the motorman required to assume that, when his car was too near the horse and wagon to permit him to stop his car before it would strike the wagon, the appellee would suddenly and without notice drive upon the track. He was only required to operate his car with reference to perils which reasonably might be expected to occur. To require him to run his car with such caution as to guard against unusual or extraordinary perils would be to require him to so operate his car as to prevent the practical operation of the road. The instruction correctly stated a principle of law which was applicable to the case, the principle contained therein was not given to the jury in any other form, and the instruction should have been given.

It is, however, said that there was no evidence upon which to base said instruction, and for that reason it was not error to refuse it. We do not so understand the record. *Henry Vornkahl*, the motorman, testified: "In July, 1900, I was in the employ of the Union Traction Company. I was operating a car on that date on Twelfth street. I remember an accident by which my car ran into a covered wagon. That occurred just a little way east of Halsted street—I should think about 130 or 140 feet. I didn't measure it. I stopped on both sides of Halsted street. After leaving Halsted street I went right down the street. There was no obstruction or anything in the way east of Halsted street. There was a wagon standing out at one side of the track, and I didn't see no driver get into the wagon. The wagon was standing there. It was a one-horse covered vestibule confectionery wagon. It was stand-

ing when I saw it. The horse was facing east—the same way the car was going. The wagon was standing right near the curb. It is a narrow street—60 feet wide. There was a show for me to go by the wagon. The wagon was standing. I seen it down the street. I seen the wagon, and when about 40 feet of the wagon the horse stepped over north—that is, he turned to the left. I rang the bell right along, and it didn't make any difference. He didn't look. I tipped them over. I stopped my car with the brake. It was a hand brake. I was standing on the front of the car. I commenced to apply the brake as I seen the man pull over. He was then something like 40 or 50 feet away. I did not succeed in stopping the car until I hit him. The car ran about four or five feet after it struck him. There were two cars in that train. When I struck this wagon I tipped it over—turned it over on the right side, so that the right side of the wagon was down against the ground. After the collision the wagon lay in the street right beside the car, on the north side of the car."

Olaf Lindstrom, the conductor in charge of the motor car, testified: "I am a conductor in the employ of the Union Traction Company. I was in its employ in July, 1900. I was operating a car on West Twelfth street that day. I remember an accident to Mr. Browdy. It was a covered candy wagon. The wagon, when I first saw it, was on the south side of the street. I was conductor on the first car—the motor car. There were two cars in that train. When I first saw this horse and wagon I was on the rear platform. My car was east-bound. We had left Halsted street. It was a covered, one-horse wagon. It was facing east. It was standing between the curbing and the tracks. Well, as we had left Halsted street, about—well, it was about, well, say 50 to 75 feet, I looked out on the side and saw a wagon there. That was all there was to it; and the motorman he was ringing his gong. As he came up closely he pulled right in front of it. The motorman put on the brake as soon as he see he was going to pull across the tracks, and, of course, the car struck the hind wheel. He made just a little circle. I should think the car was about 30 feet, or something like that, at the time he commenced to make the circle. The wagon was not traveling along on that track. The car struck the left hind wheel of the wagon. It tipped the wagon over. The wagon lay on the ground on the right side of the wagon. The car stopped immediately. The front end of the car was clear of the wagon, so the car could have gone by, but it stopped probably five feet in front of the rear wheel of the wagon. I saw the horse when it turned. He tapped the bell quickly. You can hear the motion of the brake when he sets it quick. The car was stopped in about 25 feet, I should think, from the time he applied the brake."

Walter Lindberg, the conductor in charge

of the trailer, testified: "I am a conductor on a street car, in the employ of the Chicago Union Traction Company. I was in the employ of that company in July, 1900. I was operating a car on West Twelfth street in that month. I remember the occasion of a collision with a wagon of Maurice Browdy, the plaintiff, just this side of Halsted street, in that month. I was a conductor then. There were two cars in that train. I had charge of the rear car. I saw the wagon before the collision. When I first saw it, it was on the south side of the street. It was standing still at that time. It was about two feet from the curb. The horse was facing east. I did not see a man about there. The wagon was standing there when we were going east, and, of course, I was on the rear platform at that time, and when the car was almost up to the wagon the wagon started and turned right in front of the car. At the time the wagon started up, the train was about 50 feet away from the wagon. The people on the car saw the horse was coming around toward the track. The motorman started to ring the gong, and the people hollered, and he hollered, and he started to set the brake. The car struck the wagon after the wagon turned into the track. The wagon was not on the track going east at that time. When it crossed, it crossed from the south to the north side—right across. The car struck the left hind wheel. At the time of the collision I was on the rear platform and helped stop the car, and as soon as the car was stopped I jumped off in front. I was on the rear platform, and I started to set the brake when I saw the horse coming toward the track."

Jesse Steipp, a passenger, testified: "I live at 4067 Dearborn street. I am a janitor. I remember a collision on Twelfth street, east of Halsted street, in July, 1900. I saw it. I was on about the third or fourth seat in the front car. The car was moving east. I was on the left side of the car—that is, the north side. I saw the man who was driving the wagon at that time. I do not recognize him now. There was a gray horse on the wagon. It was going north when I first saw it. The wagon was to the right of me when I saw it. The horse was about three feet from the track when I first saw it. I guess I was about 35 or 40 feet from the horse when I first noticed it within 3 feet of the track. At that time the gripman was ringing the bell and put on the brake, and the wagon was going across, and the car hit the hind wheel and turned him over. After the wagon was turned over, the car ran about three or four feet, I think. When the car stopped, the front end of the car was about three or four feet east of the wagon."

Mrs. James Rupp, also a passenger, testified: "I remember an accident occurring on a street car on Twelfth street, near Halsted,

in July, 1900. I was sitting on the first seat of the car. The car was going east. My husband was with me. He sat on my left. He was on the outside. The motorman was on the platform. That is all I remember. There was nobody on the seat on the other side of the door. When I first saw this wagon the horse was on the track, starting to cross over to the other side. The horse's head was turned north. I saw the horse on the track—the whole horse was on the track. The wagon at that time was on the south side of the track. The car was 30 to 40 feet away when I saw the horse and wagon in that condition. The horse attracted my attention first. Just as soon as I see the horse on the track the motorman sounded the gong and turned the power off as quick as he can with both hands. I don't know that he did that with both hands, but he used both hands. The car went slower. I did not hear any hollering until the car was stopped. At the moment I was excited myself. I don't just remember. The car struck the left wheel on the back of the wagon. It tipped the wagon to one side—to the right side of the wagon. The car stopped. When the car stopped it was even with the wagon."

The evidence, as shown by the foregoing excerpts from the testimony of the witnesses called by the appellant, was amply sufficient to require the submission to the jury of the issue covered by the instruction. While the evidence was conflicting, it was not the province of the trial court, by reason of that fact, to withdraw the issue thus made by the appellant from the jury. Each party has the right to have the jury instructed upon his theory of the case, if it has a basis in the evidence upon which to rest. In *Chicago, Rock Island & Pacific Railway Co. v. Lewis*, 109 Ill. 120, on page 134, it was said: "It is not necessary the court should be satisfied the hypothetical case stated in an instruction is fully sustained by the testimony before it would be required to submit it to the jury. That would practically include the services of a jury, and would debar a party of the constitutional right to have his cause tried by a jury. The court might take one view of the evidence, and yet, if submitted, a jury might reach a different conclusion, and it is for that reason a party has the right to have submitted any hypothetical case the testimony tends to sustain, otherwise the court might try the cause without the intervention of a jury in the first instance."

We are of the opinion said instruction was vital to the proper presentation of the defense sought to be interposed by the appellant, and that its refusal was reversible error. The judgments of the appellate and superior courts will therefore be reversed, and the cause remanded to the superior court for a new trial. Reversed and remanded.

(206 Ill. 548)

KRAFT et al. v. HOLZMAN.*

(Supreme Court of Illinois. Dec. 16, 1903.)

MORTGAGES—FORECLOSURE—LIMITATIONS—EXTENSION OF TIME—SUSPENSION—STATUTES—CONSTRUCTION—RECORD—APPEAL—OBJECTIONS AT TRIAL.

1. Where a mortgage on land is given to secure a note, Limitation Act, § 11 (Hurd's Rev. St. 1901, p. 1163), limiting the right of action to foreclose the mortgage, is to be construed in connection with section 16, limiting actions on notes so that the action to foreclose will not be barred until the debt is barred.

2. Where various agreements extending the time of payment of a note secured by mortgage were executed, such extensions extended the statute of limitations as to the mortgage as well as the notes.

3. Hurd's Rev. St. 1901, p. 427, c. 30, § 30, provides that all deeds, mortgages, "and other instruments of writing" authorized to be recorded, shall take effect from the filing of the same for record, as to all creditors and subsequent purchasers without notice, and all such deeds and title papers shall be void, as to all creditors and subsequent purchasers without notice, until filed for record. *Held*, that where an agreement extending the time of payment of notes secured by a mortgage, which was duly recorded, provided that all stipulations of the note and mortgage not inconsistent with the extension agreement should remain in full force, and that the mortgage might be foreclosed for nonpayment, it was not necessary that such extension agreement should be recorded to operate as a suspension of limitations as to the mortgage as against subsequent incumbrancers or purchasers.

4. Where the record on appeal did not contain the documentary evidence on which an alleged estoppel by judgment was based, an adverse ruling on such contention would not be reviewed.

5. Where an objection, in a suit to foreclose a mortgage, that the chancellor erroneously allowed certain items of master's fees, was not raised in the trial court, it could not be raised on appeal.

Appeal from Appellate Court, First District.

Action by Frederick Holzman against Frederick W. Kraft and others. From a judgment in favor of plaintiff, which was affirmed by the Appellate Court, defendants appeal. Affirmed.

F. William Kraft, for appellants. Lackner, Butz & Miller, for appellee.

WILKIN, J. This is an appeal from a judgment of the Appellate Court affirming a decree of the circuit court of Cook county foreclosing a deed of trust as a mortgage, given May 15, 1884, by William F. and Mary D. Nennemann to Philip Stein, as trustee, to secure their note of the same date for \$2,000 payable four years after its date to their own order, with interest at 7 per cent. The note was indorsed by the makers, and, with the deed of trust, delivered to Stein. No question is made as to the consideration. On May 15, 1893, by their writing on the back of the note, signed by them, the makers extended the time of payment five years

from that date, that is, to May 15, 1898. At the same time appellee, Frederick Holzman, purchased the note of Stein, and the makers made and delivered to said Holzman their agreement in writing, in addition to the one indorsed on the note, extending the time of payment for five years, and also made nine interest notes for \$10 each, payable to their own order, one every six months, which they also indorsed, all of which said principal note and interest notes and said extension agreement were delivered to the appellee. The deed of trust had been duly recorded September 4, 1884, but the extension agreement was not recorded.

The first contention of the appellants is that, when the bill was filed to foreclose the deed of trust, the suit was barred by the eleventh section of the act in regard to limitations, which section is as follows: "No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues." Hurd's Rev. St. 1901, p. 1163, c. 83.

We have repeatedly held in such cases that the debt is the principal thing, and the mortgage or trust deed but an incident thereto; that section 11 of the limitation act must be construed in connection with section 16, applicable to promissory notes, and that the mortgage will not be barred until the debt is barred. *Emory v. Keighan*, 88 Ill. 482; *Schifferstein v. Allison*, 123 Ill. 662, 15 N. E. 275; *Hibernian Banking Ass'n v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 919; *Aetna Life Ins. Co. v. McNeely*, 166 Ill. 540, 46 N. E. 1130; *Richey v. Sinclair*, 167 Ill. 184, 47 N. E. 364; *Wellman v. Miner*, 179 Ill. 326, 53 N. E. 609; *Murray v. Emery*, 187 Ill. 408, 58 N. E. 327. In the *Schifferstein* Case it was held that where payment was made upon the note the statute would not run against the mortgage securing the note until the lapse of 10 years after such payment. In like manner, where the time of payment is extended, as it was in the case at bar, the statute will not run against the mortgage until it runs against the note. We see no ground upon which to base any distinction between this case and many others which we have decided, so far as the question here involved is concerned. Counsel for appellants has referred us to decisions in other states which take a different view of statutes somewhat similar to our own, but we are satisfied with the construction we have given to our statute, and are not disposed to depart from it. The extension of the time of payment of the note extended the time within which the deed of trust could be foreclosed. To have that effect it was not necessary to record the extension agreement. The deed of trust was of record and not released, and persons dealing with the land were bound to take notice of it, and ascertain, at their peril, whether the indebted-

*Rehearing denied February 4, 1904.

† See *Mortgages*, vol. 35, Cent. Dig. § 431.

ness it secured had been paid or barred, or the lien created by the deed of trust had ceased to exist.

But appellants, who claim under liens subsequent to that created by appellee's deed of trust, contend, further, that by section 30 of the act concerning conveyances the extension agreement must have been recorded before it would operate, as to subsequent lienholders or purchasers without notice, to extend the time within which the deed of trust could be foreclosed. The section referred to is as follows: "All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all creditors and subsequent purchasers, without notice, until the same shall be filed for record." Hurd's Rev. St. 1901, p. 427, c. 30, § 30. The argument is that the extension agreement is one of the "other instruments in writing" mentioned in the section, and that by the express terms of the statute it was void as to appellants or subsequent purchasers without notice.

The extension agreement, in addition to providing for the extension of the time of payment of the indebtedness, provided that all the stipulations of the note and deed of trust not inconsistent with the extension agreement should remain in full force and be performed by the makers of the note and deed of trust, and also that the deed of trust might be foreclosed for nonpayment. We are unable to perceive how the failure to record this agreement would affect the rights of appellants, since its execution was unnecessary to keep the deed of trust alive. The extension of the note accomplished that result. Counsel's argument, based on the foregoing section of the statute, is that an extension of the note does not operate to extend the mortgage, but that it is necessary, in order to accomplish that purpose, that the mortgage, as a separate instrument, should be renewed by some proper writing designed to have that effect. It is not, of course, contended that an extension of the time of payment of a promissory note must be recorded in the recorder's office for any purpose. It was not necessary that subsequent incumbrancers or purchasers should have notice of any such extension. The recording of the deed of trust gave all the notice necessary to be given. The interest notes, executed when the extension was made, were paid as they accrued, up to May, 1898, and the bill to foreclose was filed in November, 1898. It is clear the statute of limitations had not at that time run.

Counsel also contends, in argument, that appellee was guilty of laches, but no facts to support that defense were set up in the answer, nor do they appear in proof. The

only delay in bringing the bill to foreclose was from May to November, in 1898.

It is further contended that appellee is barred by estoppel in not asserting his prior lien in a certain suit to foreclose a junior mortgage, wherein it is said appellee was made a party, with others, by the name of "unknown owners," and duly notified by publication. We are unable to determine from the record what force there might be in this contention, as the documentary evidence on which it is based is not set out in the record. For instance, the bill of complaint in the former suit is not set out, nor are its allegations shown in any way. It may be that said bill did not allege any right in the complainants therein superior to appellee's lien or claim under his deed of trust. What the allegations of the bill were which are said to have been taken as confessed by the appellee, as an "unknown owner," not appearing in the proofs or otherwise, this court cannot determine that appellee is estopped by the record in that case. 1 Greenleaf on Evidence (7th Ed.) 647, § 511; 24 Am. & Eng. Ency. of Law (2d Ed.) 834, 835.

It is also insisted that the chancellor erroneously allowed certain items of master's fees, but as this question was not raised in the trial court it cannot be raised on this appeal.

We find no substantial error in this record, and the judgment of the Appellate Court will be affirmed. Judgment affirmed.

(206 Ill. 612)

PEOPLE ex rel. TALBOTT, County Collector,
v. INDIANA, I. & I. R. CO.*

(Supreme Court of Illinois. Dec. 16, 1903.)

TAXATION—TOWN TAX LEVY—SPECIFICATION
OF PURPOSES—NECESSITY—BOARD OF AU-
DITORS—RECORD—EFFECT.

1. A town tax levy "for town purposes," without defining the purposes, is not sufficient.

2. Hurd's Rev. St. 1901, c. 189, § 124, directs that the board of town auditors shall make a certificate of claims allowed, and deliver the same to the town clerk, who shall certify the amount thereof to the county clerk, with other amounts to be raised by taxation for town purposes. Section 126a requires the board of auditors to keep a record which shall include all certificates of accounts audited. *Held*, that the record of the board of town auditors, showing the aggregate amount of claims audited during a year, is insufficient to sustain a town tax levy for town purposes, without defining the purposes, for a smaller amount than the amount of the claims audited; the statute requiring the making of a certificate by the auditors in addition to the record, when the claims audited by them are intended to be the basis of a tax levy thereafter to be made.

Appeal from Circuit Court, Livingston County; F. H. Carrithers, Judge.

Proceedings by the people, on the relation of the county collector of Livingston county, for judgment against the real estate of the Indiana, Illinois & Iowa Railroad Company

*Rehearing denied February 4, 1904.

for delinquent taxes. From a judgment for defendant, relator appeals. Affirmed.

R. S. McIlhuff and Stevens R. Baker, for appellant. A. C. Norton (Cary & Walker, of counsel), for appellee.

SCOTT, J. This was an application by appellant, made to the county court of Livingston county, for judgment against the real estate of appellee for delinquent taxes of the year 1902. Appellee filed objections to the town taxes of the towns of Sunbury, Nevada, and Round Grove, in that county; and the court, by a judgment entered at the June term, 1903, sustained these objections.

The certificate of levy made by the town clerk of each town was introduced in evidence, and in each instance the only purpose stated for which the tax was levied is "for town purposes." The record of the annual town meeting in each of the three towns was introduced. The record of the meeting in Sunbury shows a levy of a tax, without specifying its purpose. The record of each of the town meetings in Round Grove and Nevada shows the levy of a tax "for town purposes." We have held that the designation of such a tax as a tax "for town purposes" is not sufficient. *People v. Chicago & Alton Railroad Co.*, 194 Ill. 51, 61 N. E. 1064. The certificate of the clerk in each instance was for the exact amount of tax levied at the town meeting, and seems to have been made for the purpose of certifying that levy to the county clerk.

Appellant, for the purpose of sustaining these taxes, offered in evidence the record of the board of auditors in each of the towns in question for the meetings of September, 1901, and March, 1902, showing the claims audited at those meetings; the aggregate audited at the two meetings being, in the case of each town, greater in amount than the amount of the levy certified to the county clerk. It was contended that these records so offered were a substantial compliance with section 124 of chapter 139 of Hurd's Revised Statutes of 1901, and that they afforded a sufficient basis for the certificate made by the clerk of each town. This section directs the auditors to make a certificate of claims allowed, and to deliver the same to the town clerk, and that officer is required to certify the amount thereof to the county clerk, with other amounts, which are to be raised by taxation for town purposes. It will be observed from section 126a of that chapter that the board of auditors is required to keep a record, and the auditors in each of the towns concerned in this litigation complied with this requirement, and in each instance it was the record so kept that was offered in evidence. No certificate made as a basis for certifying a tax levy to the county clerk was offered. The Legislature undoubtedly intended to require the making of a certificate by the auditors, in addition to

their record, when the claims audited by them were intended by them to be the basis of a tax levy thereafter to be made.

Appellant relies upon the case of *St. Louis, Rock Island & Chicago Railroad Co. v. People ex rel.*, 147 Ill. 9, 35 N. E. 228. But in that case, in addition to the minutes of their meeting, the auditors wrote in their record, which was left with the town clerk, a certificate setting forth the amount of money which they needed to pay certain town charges, and the town clerk made his certificate of levy accordingly. The fact that the certificate was written in the record was no objection to it, where it was delivered to the clerk, and clearly showed that it was intended to authorize a certificate of levy. In the case at bar no such certificates are found in the records of the auditors, and those records were therefore properly excluded by the court.

The judgment of the county court will be affirmed. Judgment affirmed.

(207 Ill. 17)

COMMISSIONERS OF HIGHWAYS et al. v. BIG FOUR DRAINAGE DIST.*

(Supreme Court of Illinois. Dec. 16, 1903.)

DRAINAGE DISTRICT — ASSESSMENT AGAINST TOWN — ILLEGAL CONTRACT — MATERIALITY OF ISSUE — JUDGMENT OF CONFIRMATION — JURISDICTIONAL DEFECT — WAIVER — PROPRIETY OF MANDAMUS — COSTS.

1. Under Levee Act (Hurd's Rev. St. 1901, p. 699), § 34½, providing that the act shall be liberally construed, and collection of assessments not defeated by reason of any omission, defect, etc., in any proceedings occurring prior to the judgment of confirmation, but that such judgment should be conclusive of the regularity of all prior proceedings, the issue whether a contract between the commissioners of a drainage district and the commissioners of highways of a town, fixing the amount of the town's drainage assessment, was legal, is immaterial in mandamus to compel the levy of a tax for the payment thereof, as the objection might have been urged at the time judgment of confirmation was entered.

2. Where, in mandamus to compel the levy of a tax to pay a drainage assessment, counsel for respondents objects to the introduction of the judgment of confirmation merely as immaterial and not in issue, an objection thereto on the ground of the want of jurisdiction of the court to enter it is waived.

3. In order to maintain mandamus against a town to compel the levy of a tax to pay a drainage assessment, judgment confirming which has been entered conformably to Hurd's Rev. St. 1901, p. 689, a further judgment at law is unnecessary, the town having had an opportunity to be heard at the time of the entry of the judgment of confirmation.

4. Levee Act (Hurd's Rev. St. 1901, p. 707), § 55, provides that, where a drainage assessment is made against a township, the commissioners of highways of the town shall cause the same to be levied and paid in the manner provided by sections 13, 14, 15, and 16 of the Road and Bridge Act (Hurd's Rev. St. 1901, p. 1523). Road and Bridge Act, § 15, requires the commissioners of highways, where damages have been allowed for ditching, to include them in the first succeeding tax levy, in addition to the levy for road and bridge purposes. Section 16 directs the commissioners to certify the geo-

*Rehearing denied February 5, 1904.

eral levy and the amount for the payment of such damages, separately, to the town clerk, who certifies the same items separately to the county clerk, who is directed to extend the two items as one tax. Held that, machinery for the levy of a specific tax for a drainage assessment having been thus provided, and the amount of such an assessment having been fixed by a judgment of confirmation, mandamus was the proper remedy to compel a levy.

5. In pleading the judgment of a county court, which is a court of general jurisdiction, it is unnecessary to aver the facts on which its jurisdiction of the parties and subject-matter is based.

6. Where, prior to the beginning of mandamus proceedings to compel the levy of a tax by a town to pay a drainage assessment, demand was made on the commissioners of highways of the town to levy a tax, which they refused to do, a judgment against them for costs is proper.

Appeal from Circuit Court, Ford County; Jno. H. Moffett, Judge.

Petition for mandamus by the Big Four Drainage District against the commissioners of highways of the town of Dix and others. From a judgment for petitioner, respondents appeal. Affirmed.

Tipton & Tipton, for appellants. Cloud & Moffett, for appellee.

SCOTT, J. Appellee filed a petition on September 6, 1902, for a writ of mandamus, in the circuit court of Ford county, against the town of Dix, the commissioners of highways, the board of town auditors, and the town clerk of the town of Dix, in that county, commanding the commissioners to levy a tax to pay an assessment of \$3,250, made by the appellee and confirmed by the county court, against the town of Dix, for the purpose of establishing a system of drainage in the Big Four Drainage District, commanding the board of auditors to consent thereto, in writing, if the amount of the total levy was so great as to require their written consent under the road and bridge act, and commanding the clerk to certify the levy, when made, to the county clerk. The petition was amended, and to it, as amended, a demurrer was interposed, which was overruled. Thereupon defendants answered, presenting 11 issues or denials. To certain of these denials a demurrer was sustained, and overruled as to the remainder, and to this remainder replications were filed. A general demurrer was interposed to the replications, which was overruled by the court, whereupon issues were joined on the replications, and at the April term, 1903, the circuit court of Ford county, after a trial without the intervention of a jury, entered a judgment in accordance with the prayer of the petition. The town of Dix and the commissioners of highways bring the case to this court by appeal.

As the suit was brought by the drainage district for the purpose of collecting an assessment made by it against the town of Dix, the case relates to the revenue, under the authority of Kilgour v. Drainage Com'rs,

111 Ill. 342, and comes directly to this court from the circuit court.

The Big Four Drainage District of Ford county, Ill., was organized in August, 1899, under the statute commonly called the "Levee Act." Hurd's Rev. St. 1901, p. 689. Commissioners were appointed, and they initiated a plan for a system of drainage, the main ditch of which was to run through the town of Dix, in that county. The commissioners, in making their estimate for the purpose of raising funds with which to construct the necessary drainage of the district, entered into negotiations with the commissioners of highways of the town of Dix, and as a result thereof a contract in writing was entered into at Elliott, in that county, in accordance with the provisions of section 55 of the levee act, some time in the month of October, 1899, and, as shown by the preponderance of the evidence, at a regular meeting of the highway commissioners on October 28, 1899. By this contract it was agreed that the town of Dix should be assessed in the sum of \$3,250. This action of the highway commissioners was not made a matter of record by them, nor was the contract entered into recorded upon their records. On February 14, 1900, the commissioners of the drainage district filed their assessment roll in the county court of Ford county, and upon that roll the assessment of the town of Dix appeared at the sum of \$3,250. The contract referred to was filed in that court on the 9th day of May, 1900, and on that same day that court entered a judgment confirming the assessment roll, the assessment against the town of Dix so confirmed being for the sum of \$3,250, and on the same day said court entered an order dividing this assessment into eight equal installments, one of which was payable on the first day of each of the years from 1902 to 1909, both inclusive, and each of said installments was made to draw interest at the rate of 6 per cent. per annum from May 9, 1900, payable on January 1st of each year, the first installment of interest to be due and payable on January 1, 1901. The town of Dix has never paid anything on account of this assessment. On September 2, 1902, appellee made a demand on the commissioners of highways and the board of town auditors of the town of Dix, requiring them to levy taxes for the payment of the first three installments of the assessment, with interest on the whole assessment to January 1, 1903. This demand was refused.

Appellants devote a considerable portion of their brief and argument to an attempt to demonstrate the invalidity of the contract of October 28, 1899, on the grounds, first, that the commissioners of highways had no authority to bind the town, and, second, that the contract is not binding upon the town because it cannot be made to appear by the record of the commissioners.

We do not consider the question of the

¶ 5. See Judgment, vol. 20, Cent. Dig. §§ 1741, 1797. 69 N.E.—37

validity of this contract material. The proceeding is to enforce the assessment. The amount of that assessment has been determined by the judgment of confirmation entered by the county court. Section 34½ of the levee act provides: "This act shall be liberally construed to promote the ditching, drainage, and reclamation of wet or overflowed lands; and collection of assessments shall not be defeated by reason of any omission, imperfection or defect in the organization of any district, or in any proceedings occurring prior to the judgment of the court, confirming the assessments of benefits and damages; but said judgment shall be conclusive that all prior proceedings were regular and according to law." In proceedings under this act we have heretofore held that, in a proceeding to collect the amount of the assessment, no objection to the assessment will be considered which could have been urged at the time of the confirmation of the assessment roll. Objections which could have been made then, and which were not made then, must be considered as waived. *Riebling v. People*, 145 Ill. 120, 33 N. E. 1090; *Hammond v. People*, 169 Ill. 545, 48 N. E. 573. Objections which question the jurisdiction of the county court are excepted from the operation of this rule, but such objections, being a collateral attack upon the judgment of the county court, will not be considered unless they appear from the record of that court. *Dickey v. People*, 160 Ill. 633, 43 N. E. 701; *Young v. People*, 171 Ill. 299, 49 N. E. 503; *Casey v. People*, 165 Ill. 49, 46 N. E. 7. The question of the validity of the contract fixing the amount of the assessment, being one which could have been presented upon the application for the confirmation of the assessment, will not be considered here. When the judgment of confirmation was introduced in evidence counsel for appellants said: "I am objecting to that as being immaterial and not in issue; the only issue of fact is what occurred down there at Elliott." This objection was overruled, and no other objection to the introduction of the judgment was made, consequently appellants could not now insist that the county court was without jurisdiction to enter the judgment of confirmation, even if there was anything in the record of that court to warrant such an objection.

It is argued that the remedy by mandamus is improper in advance of a judgment at law determining the amount due, and we are referred to *Commissioners of Highways v. Drainage Com'rs*, 127 Ill. 581, 21 N. E. 206. The drainage district in that case was not organized under the levee act, but under the farm drainage act. *Hurd's Rev. St.* 1901, p. 712, c. 42. The procedure for the collection of money is quite different under that act. According to its provisions the lands are classified, and by this classification it is determined what proportion or percentage of the total tax to be raised each tract shall

bear. This classification is confirmed by the county court. The drainage commissioners then certify to the county clerk the amount of taxes they desire levied. The clerk spreads this tax upon the lands in accordance with the classification. The landowner has no opportunity to object to the amount of the tax levied upon his land until application is made for a judgment and order of sale against his land for the delinquent drainage tax. When that application is made he has a right to make any defense that has arisen since the confirmation of the classification, as that the levy is not made in accordance with the statute, or that it has not been distributed in accordance with the classification. The case last cited was an action of debt to recover a judgment at law for the amount of the drainage assessment, and in deciding the case the court said, incidentally, that before applying for mandamus there must be a judgment at law determining the amount due. It will be observed that the amount of that assessment had not been fixed by a judgment of confirmation or otherwise, except by the levy made by the drainage commissioners, and the town had the right to be heard as to the amount properly due. It was not concluded in regard to the amount by the action of the drainage commissioners in making the levy, or of the clerk in extending the assessment.

County of McLean v. City of Bloomington, 106 Ill. 209, was an appeal from a judgment for a special assessment against the courthouse square of the county of McLean for the improvement of adjacent streets in the city of Bloomington. What was there said, as well as what was said in 127 Ill. 581, 21 N. E. 206, in reference to the necessity of a judgment at law preceding mandamus, was wholly unnecessary to the disposition of the case then before the court; and, moreover, so far as the *McLean County Case* is concerned, there was no statute specially providing the method by which a county should meet a special assessment against its property, and in that respect the *McLean County Case* is distinguishable from the one at bar, as we shall hereafter see.

In *People v. Clark County*, 50 Ill. 213, this court decided that mandamus would not lie to compel the board of supervisors to levy a tax to pay an order drawn by that board upon the county treasurer which was payable out of the general revenue fund, and it was said that the order was no more than an acknowledgment that the sum specified is due from the county, and this court, in *People v. Getzendaner*, 137 Ill. 234, 34 N. E. 297, said in reference thereto (page 261, 137 Ill., page 304, 34 N. E.): "In such cases no single general creditor has a right to any previously ascertained specific part of the general revenue, and there is, moreover, judgment and discretion to be exercised by the municipal authority with respect to the purpose and amount of general revenue which they shall

annually cause to be collected by taxation upon the taxable property of the municipality."

In the Getzendaner Case, which was an original proceeding in this court, the town of Mt. Morris, in Ogle county, had issued bonds to assist in the construction of the Chicago & Iowa Railroad. They were delivered to the railroad company, and by that company negotiated and sold. The purchaser of a part of the bonds filed a petition for mandamus in this court, seeking to have the town officers commanded to levy a tax to pay the bonds. It was objected that, inasmuch as the claim had never been reduced to judgment, the proceeding by mandamus was improper. This court held that, as it was provided by the act to incorporate the Chicago & Iowa Railroad Company that any town donating its bonds should, by its corporate authorities, "annually thereafter assess and levy a tax upon the taxable property of such town * * * sufficient to pay and liquidate the annually accruing interest on such bonds, and so much of the principal thereof as from time to time shall become due, which taxes shall be levied and collected in the same manner as other corporate taxes in such town," there was presented a lawful debt against the town, the amount of which was fixed and certain, and it was the duty of the proper officers to assess and levy a tax upon the taxable property of the town for the payment of that particular debt, and, upon their failure to do so, mandamus was a proper remedy. In the case at bar the amount of the debt is fixed by the judgment of confirmation. This is a proceeding to collect that debt. If it had been against a natural person or private corporation, it would have been by application in the county court for a judgment and order of sale against real estate. That course cannot be pursued here, as there is no property of the town which can be sold under such a judgment for the satisfaction of this assessment. To require appellee to first recover a judgment at law before resorting to mandamus would be to require a useless thing. If suit were brought at law, appellants could interpose no defense questioning the amount or validity of the assessment, unless they could show by the record of the county court itself that that court had no jurisdiction to render the judgment; and they had that right in this proceeding, so that a suit at law would simply result in another judgment for the amount of the assessment, which is already fixed absolutely by the judgment of confirmation, and the appellee would still be obliged, if the judgment at law were not paid, to resort to mandamus for its satisfaction. No good purpose could be served by requiring appellee to recover a judgment at law.

Section 55 of the levee act provides, among other things: "In case such assessment is made against any township in this state, the commissioners of highways of such town

shall cause the same to be levied and paid to said district in the manner provided by sections 13, 14, 15 and 16" of the road and bridge act. Section 15 of that act (Hurd's Rev. St. 1901, p. 1523) requires the commissioners of highways, where damages "have been agreed upon, allowed or awarded * * * for ditching to drain roads, the amounts of such damages, not to exceed for any one year, twenty cents on each \$100 of the taxable property of the town, shall be included in the first succeeding tax levy," and shall be in addition to the levy for road and bridge purposes. The succeeding section directs the commissioners to certify the general levy and the amount for the payment of such damages as separate items to the town clerk, and he is to certify the same items separately to the county clerk, who is directed to extend the two items as one tax. It is apparent that the Legislature intended the taxation provided by section 55 of the levee act, for the payment of a drainage assessment, to be levied under section 15 of the road and bridge act, and has thus provided for the levy of a specific tax for the payment of assessments of this character against the town; and, as the amount of the assessment is fixed by the judgment of confirmation, the right of appellee to the writ of mandamus is clear and certain under the law as stated by this court in *People v. Getzendaner*, supra.

What we have said disposes of the questions which arose on the pleadings, with one exception. When the demurrer to the amended petition was overruled appellants answered, but they insist that nevertheless the court should now find the petition insufficient, for the reason that it does not show that the county court had jurisdiction to render this judgment of confirmation. We deem it unnecessary in this case, after judgment, to discuss the averments of the petition for the purpose of determining whether or not they show that the county court had such jurisdiction. "County courts in this state are courts of general jurisdiction with respect to all matters coming within the purview of their jurisdiction as given by law." *Matthews v. Hoff*, 113 Ill. 90; *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304. In pleading the judgment of such a court it is unnecessary to aver the facts which give it jurisdiction of the parties and subject-matter of the litigation. *Wallace v. Cox*, 71 Ill. 548; *People v. Lane*, 36 Ill. App. 649; 2 *Greenleaf on Evidence*, § 279, note; 11 *Ency. of Pl. & Pr.* p. 1130.

The assignment of errors questions the action of the court in entering a judgment against the defendants below for costs. As demand was made upon them prior to the beginning of the suit, calling upon them to levy a tax with a view to satisfying the assessment, and they refused, the judgment was proper.

The judgment of the circuit court will be affirmed. Judgment affirmed.

(207 Ill. 37)

CITY OF CHICAGO, to Use of SCHOOLS,
v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—SCHOOL PROPERTY—ASSESSMENT—VALIDITY—CONSTITUTIONAL LAW.

1. Const. 1870, art. 4, § 26, provides that the state shall not be a defendant in any suit. Article 8, § 2, provides that all school lands shall be faithfully applied to school purposes. Article 12, § 6, of the school law (Hurd's Rev. St. 1901, c. 122), provides that no part of the principal of any township or county school fund shall be expended. *Held*, that lots outside of section 16, donated by Congress, the title to which is in the board of education of a city, are not specially exempted from special assessment from street improvements by such provisions.

2. Lots outside of section 16, donated by Congress, title to which are in the board of education in trust for the use of the schools of a city, do not belong to the people of the state, so as to make an application by the city for confirmation of an assessment against them for street improvements a suit against the state, forbidden by Const. art. 4, § 26, rather than against the board of education.

3. The payment of a special assessment against school property for street improvements is but a method of applying the funds of the school district for the benefit of the schools, and is not a diversion thereof from the object for which they were created.

4. Though lots, the title to which is in the board of education of a city, cannot be sold to enforce the collection of a special assessment for street improvements, it is not a valid objection to the assessment that there is no method under the law by means of which the payment of the assessment can be enforced in case the board of education refuses payment.

5. The fact that lots outside of section 16, donated by Congress, the title to which is in the board of education of a city, are vacant and unoccupied, does not exempt them from liability to special assessment for street improvements.

Appeal from Cook County Court; R. A. Russell, Judge.

Application by the city of Chicago for the confirmation of special assessment for street improvements. From a judgment confirming the assessment, the city of Chicago, in trust for the use of the schools, appeals. Affirmed.

James Maher and Angus Roy Shannon, for appellant. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

WILKIN, J. The city of Chicago sought to improve by special assessment California avenue, in said city, from Washington Boulevard to a point 378.8 feet north of the north line of Fulton street, by curbing, grading, and paving the same with asphalt. The board of education of said city was the owner of 10 lots abutting on the line of the improvement, and at the time of the application for a confirmation of said special assessment against said lots the board of education appeared in the county court of Cook county and objected to such confirmation upon the ground that said property was in fact

the property of the state of Illinois, and a confirmation of the assessment would in fact be a judgment against the state of Illinois; also for the further reason that said property was exempt from general taxation and from special assessment, and that said board had no funds out of which to pay such special assessment, and that the same could not be enforced by a sale of the land assessed. A hearing was had as to these objections upon an agreed state of facts, and the objections were each overruled, and a judgment rendered confirming said assessment. From this judgment the board of education has appealed.

Upon the hearing in the county court it was agreed that of the 10 pieces of property six were actually occupied by said board of education for school purposes. Two pieces were vacant and unoccupied, and from them the board received no rents and profits. The other two were occupied by buildings from which rents and profits were received, which were used for the benefit of the schools. It was also agreed that none of the lots were a part of section 16, or acquired in any way from funds derived from that source. Upon the hearing many propositions of law were submitted to the court, some of which were given and others refused. We do not deem it necessary to pass upon each of these propositions, because the decision of the case, stripped of all technicalities, involves the sole question whether or not the lots assessed were subject to special assessment.

The right of taxation is essential to the very existence of the government, and all property, of every description, in the state, is subject to taxation, unless it has been specifically exempted. All laws exempting property must be subjected by the courts to a strict construction, and hence nothing will be held to be within the exemption which does not clearly appear so to be. *People v. City of Chicago*, 124 Ill. 636, 17 N. E. 56; *In re Swigert*, 119 Ill. 83, 6 N. E. 469. In the case of *People v. Trustees of Schools*, 118 Ill. 52, 7 N. E. 262, we were called upon to determine whether school property being a part of section 16, or derived therefrom, was subject to special assessment, and we there held as follows: "By the sixth section of the act of Congress enabling the people of Illinois to form a state constitution (Act April 18, 1818, c. 67 [5 Stat. 423]), it was enacted that 'the section numbered 16 in every township shall be granted to the state, for the use of the inhabitants of such township, for the use of schools.' Article 3, § 2, of the Constitution of 1870, provides that 'all land, moneys or other property donated, granted or received for school, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made.'" And we there held that the property, being a part of section 16, was

exempt from special assessment for local improvements. We have also held that there is a distinction between general taxation and special assessment, and that property which was exempt from general taxation was not necessarily exempt from special assessment. See *Canal Trustees v. City of Chicago*, 12 Ill. 403; *Higgins v. City of Chicago*, 18 Ill. 276; *County of McLean v. City of Bloomington*, 106 Ill. 209; *County of Adams v. City of Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155.

In the case of *Bloomington Cemetery Ass'n v. People*, 139 Ill. 16, 28 N. E. 1076, we held that a clause in a charter of a cemetery association that the ground held for a burial place shall be exempt from general taxation and execution will not protect the lands so held against a special assessment or a special tax for local improvements. In the case of *County of McLean v. City of Bloomington*, supra, we said with reference to a special assessment for paving the courthouse square (page 213, 106 Ill.): "The contention is, such property is expressly exempt from taxation, and special assessments are included within the meaning of the word 'taxation.' We have been too long and too firmly committed to the doctrine that exemption from taxation does not exempt from special assessments to now admit that it is even debatable"—citing the cases.

The distinction between taxation and special assessment is also clearly made in our present constitution. Art. 9, §§ 1, 5, 9. While providing that the General Assembly may exempt the property of the state, county, and municipality from the former, section 8 makes no such provision in regard to the latter, but, on the contrary, by section 9 the General Assembly is authorized to vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, without any restrictions as to the property to be assessed.

It is claimed, however, that this property is specially exempt under section 26 of article 4 of the Constitution of 1870, and section 2 of article 8 of that Constitution, and section 6 of article 12 of the act to establish and maintain a system of free schools (*Hurd's Rev. St. 1901, c. 122*). Section 26 of article 4 provides that the state shall not be a defendant in any suit. Section 2 of article 8 provides that all lands, moneys, or other property donated, granted, or received for school, college, seminary, or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made. Section 6 of article 12 of the school law provides that the funds derived from the sale of section 16, "or from the sale of any real estate or other property taken on any judgment or for any debt due to the principal of any township or county fund, and all other funds of every other description," are declared to be a part of the principal of the township or county fund,

and no such part shall be distributed or expended for any purpose whatever, but shall be loaned, etc., and that the rents, interest, issues, and profits arising from said principal shall be distributed as provided by law, and that said rents and profits shall not be carried to the principal of the fund except it appear on the first Monday in October that there are rents or profits which are not required for distribution, etc. From a careful examination of these sections, and the construction placed upon them by the former decisions of this court, we do not think they specifically exempt the property in question in this case from special assessment.

It is contended, however, that this suit is in fact a suit against the state of Illinois, as the lands in question are the property of the people of the state of Illinois, and therefore this action cannot be maintained. We do not think this is a suit against the people of the state of Illinois, nor do the lands belong to the people of the state of Illinois. The title thereto is in the board of education of the city of Chicago, in trust for the use of the schools in that city, and any interest which the people may have in the lots is confined to the people of the city of Chicago, rather than to the whole state of Illinois. Our statute expressly provides that boards of education may sue and be sued, and, while it is contended that there is no such express provision with reference to the board of education of the city of Chicago, yet we think the power to sue and be sued may be implied from the act, and that the suit in question is in reality a suit against said board of education, rather than against the people of the state of Illinois.

It is also insisted by appellant that the payment of this special assessment out of the school funds would be a diverting of said funds from the object for which they were created. We do not see how that position can be maintained. A special assessment may be levied for the purpose of paving streets, putting down sidewalks, putting in curbing, or for sewer purposes, all of which are, in theory, for the benefit of the property abutting on the line of the improvement. Undenably all of these improvements are of great benefit, if not of actual necessity, to a public school, and from the most of them no property derives more benefit than does that of the board of education. They are as necessary to the practical use of the property as the furnishing of heat, light, and air. Special assessment for such improvements is but a method of applying the funds of the school district for the benefit of its schools, and is legal and proper.

It is also insisted that there is no method under the law by means of which the property in question can be sold to enforce the collection of this assessment. It may be conceded the property cannot be sold to pay the assessment, but there are other methods provided by law by which the payment can be

enforced in case the board of education refuses to pay the same.

It has been suggested, though not seriously insisted upon, in the briefs and arguments, that at least those lots which are vacant and unoccupied should be held exempt. We are unable to find any legal ground for such a distinction. Of course, the fact that the lots are unimproved will subject them to a less assessment, but cannot be held to exempt them from all special assessment or taxation. Our conclusion is that the county court ruled correctly on all the questions submitted to it, and its judgment will accordingly be affirmed.

Judgment affirmed.

(206 Ill. 541)

JARVIS v. BINKLEY.*

(Supreme Court of Illinois. Dec. 16, 1903.)

BENEFICIAL ASSOCIATIONS—ASSIGNMENT BY BENEFICIARY.

1. An agreement by two persons, members of the same family, each beneficiary in a benefit certificate on the life of the other, assigning to a third person, not a member of the family, all their right, title, and interest in the certificates, and empowering him to recover any sums of money which may arise therefrom, and to retain enough to satisfy any of their joint and several debt which may be due him, and to pay any surplus to them or either of them, or their legal representatives, as their interest may appear, is an assignment by each of her contingent interest as beneficiary in the certificate on the life of another; which is valid in equity, notwithstanding the provisions in the charter of the beneficial association that its object is "to aid and assist the membership and their families," and that the beneficiary fund shall be exempt from execution, and shall not be liable to be taken by legal or equitable process for the debts of the deceased or disabled member.

Appeal from Appellate Court, First District.

Suit by Monroe K. Binkley against Ada B. Jarvis. From a judgment of the Appellate Court (102 Ill. App. 59) reversing a decree dismissing the bill, defendant appeals. Affirmed.

The bill filed in this case sets up the following facts: Monroe K. Binkley, the complainant, is a grocer, doing business in Chicago. Prior to October 1, 1897, he had furnished groceries and provisions to the value of \$550 to Nancy P. Coburn and her daughter, Ada B. Jarvis, which groceries and provisions were used by them as members of one family, for their joint and separate use and sustenance, and upon their joint and several responsibility. On October 1, 1897, Mrs. Coburn and Mrs. Jarvis, being wholly insolvent, and without means to pay for the groceries already furnished, or to make provision for supplies needed in the future, represented to complainant, Binkley, that they were possessed of certain benefit certificates issued by the Royal Templars of Temperance—one for \$1,000, payable to Mrs. Jarvis on the death

of Mrs. Coburn, and the other for \$1,000, payable to Mrs. Coburn on the death of Mrs. Jarvis—and proposed to Binkley to appropriate and apply the proceeds of such certificates in any way that he might desire, to secure him for the sum already due for groceries as well as for such supplies as he might thereafter furnish them, with legal interest on the value thereof. The complainant accepted the offer thus made, and entered into a written agreement with Mrs. Coburn and Mrs. Jarvis, in which, after stating the purpose of the assignment, the parties agreed: "That the parties of the first part * * * do by these presents absolutely assign and transfer and set over unto the party of the second part all their right, title, and interest, of every name, nature and description, in and to the said benefit certificates before mentioned, and of, in and to all rights, privileges and benefits which may arise thereunder at any time or under any circumstances whatever; and the parties of the first part, and each of them, does hereby make, constitute and appoint the said party of the second part their, and each of their, attorney in fact, and do hereby vest him irrevocably with full power and authority to do and perform every act or thing which may or can be in any way necessary or appropriate to demand, collect and recover any sums of money which may in any manner arise from the said benefit certificates, and to retain so much thereof as may be necessary to pay any debt which may then be due him, with lawful interest, and render the overplus, if any, to us, or either of us, or our legal representatives, as their interest may appear, hereby ratifying all that said Monroe K. Binkley may lawfully do in the premises." This agreement was under the seal of the parties, and copies were sent to the company in New York and to the agent in Chicago. After the execution of the agreement, the complainant, in reliance upon the faith thereof, provided Mrs. Coburn and Mrs. Jarvis with groceries to the value of \$168.93. Mrs. Coburn died intestate and utterly insolvent, and the complainant then furnished the insurance company, at Buffalo, N. Y., and its agent in Chicago, with copies of the agreement, and demanded payment of the amounts due him. The company thereafter placed the \$1,000 in the hands of Alexander Whitehall, the Chicago agent, ready to be paid as the court should direct. The company and Whitehall are willing that complainant should secure the amount due him from such fund, but, having been directed by Mrs. Jarvis to withhold payment to complainant, await the judicial determination of their respective rights. The prayer is that the fund be subjected to the payment of \$804.94.

The answer of Ada B. Jarvis admits the main facts set up in the bill. She insists, however, that the agreement with Binkley is void in consequence of a certain statute of Illinois and provisions in the charter and by-laws of the company. Section 8 of the char-

*Rehearing denied February 4, 1904.

ter states the object of the corporation to be, among other things, "to aid and assist the membership and their families in cases of want, sickness, or death." The answer contends that on account of this provision "it is impossible for one not a member of the family of the insured to claim the benefit of the fund, because he does not belong to the class for whom the corporation may provide assistance, and the corporation cannot lawfully pay out any portion of the benefit to one who does not belong to such class." Section 5 of the charter states that the beneficiary fund "shall be exempt from execution, and shall not be liable to be seized, taken, or appropriated by any legal or equitable process to pay any debts of such deceased or disabled member." A similar provision is made by statute of this state. Hurd's Rev. St. 1901, c. 73, par. 266. The cause was heard on bill and answer, and a decree was entered finding that the assignment was null and void, and that the complainant's bill be dismissed for want of equity. The complainant perfected an appeal to the Appellate Court, where the decree of the circuit court was reversed, and the cause remanded to the circuit court, with directions to enter a decree in favor of complainant for the sums actually due him. From this judgment of the Appellate Court an appeal was taken to this court.

A. L. Flaningham, for appellant.

RICKS, J. (after stating the facts). The equities in this case are so clearly with the appellee, Binkley, that the determination of the rights depend upon the question whether the provisions of the charter have any effect to nullify the agreement executed by Mrs. Coburn, Mrs. Jarvis, and Binkley. It is clear that the agreement was, per se, a valid one, being made for a good and valuable consideration; that the agreement was entered into at the instance of Mrs. Coburn and Mrs. Jarvis, and that Binkley was guilty of no unconscionable act or overreaching conduct whatever. It accordingly follows that, in order to defeat the equitable rights of the appellee, it must appear that the agreement entered into between the parties was void in law and in equity.

Counsel for appellant argues that the assignment of the certificate by Mrs. Coburn, the member, to complainant, was null and void, and that her act directing the money to be paid to him was, according to all the authorities, void. This argument proceeds upon the basis that the complainant founds his rights upon an assignment to him by Mrs. Coburn, the insured member. Whether there is any merit in such an argument we are not required to determine, for the premise on which it is based is without foundation. The agreement which the complainant now seeks to enforce is one in which Ada Jarvis, the beneficiary under the certificate issued to her mother, transferred to Binkley all her interest, as beneficiary, in that certificate, and

made Binkley her attorney in fact to demand, collect, and receive any moneys arising from said benefit certificate, and, after retaining the amount due him, render the overplus to her. It is true that Mrs. Coburn did join in the agreement, but the effect of that was to provide for the contingency of Mrs. Jarvis dying before Mrs. Coburn. In other words, the effect of the agreement was that each beneficiary assigned her interest in the certificate of the other to Binkley. The assignment by Mrs. Coburn, as beneficiary, of her interest in the certificate issued to Mrs. Jarvis is now inoperative, because the interest, being contingent, is defeated by the occurrence of the death of Mrs. Coburn before the death of Mrs. Jarvis. On the other hand, the assignment by Mrs. Jarvis of her beneficial interest in the certificate issued to her mother, Mrs. Coburn, although the interest was contingent during the lifetime of Mrs. Coburn, has become vested by her death; and, if the assignment was valid in equity, there is a clear right to the equitable remedy prayed for.

The charter provides that the benefit fund was "to aid and assist the membership and their families in cases of, want, sickness, or death." It is argued that this clause renders the assignment void, because Binkley was not a member of the family of Nancy P. Coburn. This argument is specious, and introduces confusing difficulties into the case upon the assumption, first, that the assignment relied upon was made by the insured, and not by the beneficiary; and, second, that Binkley became a beneficiary. We have already shown that the written agreement was, in effect, an assignment by the beneficiary. To illustrate the transaction, let us assume that no assignment whatever had been made, and that after Mrs. Coburn's death the company had paid \$1,000 to Mrs. Jarvis. Could it be argued that because Binkley was not a member of the family, Mrs. Jarvis therefore could not make him a beneficiary to the extent of appropriating a portion of that \$1,000 for the payment of the amount due him for groceries and provisions? Then, taking another step, let us assume that no assignment had been made during the life of Mrs. Coburn, but that directly after her decease, and before the society had paid the claim to Mrs. Jarvis, she executed an agreement with Binkley, in which, for a valuable consideration, she agreed that, instead of collecting the amount herself, and paying to him what was due him, he should collect the money directly from the society, and, after deducting the amount due him, should render to her the overplus. Could it be argued that this agreement is in violation of the statutory and charter provisions to the effect that the fund should not be seized, taken, appropriated, or applied, by any legal or equitable process, to pay any debt of the member or the beneficiary? We think not. This court has held that this provision in

our statute "is not designed to protect such certificate, or the proceeds thereof, from the voluntary act of the member or the beneficiary therein named." *McGrew v. McGrew*, 190 Ill. 604, 60 N. E. 861. And it is obvious that such an agreement as we have assumed would create valid and enforceable rights. It is but one step from the assumed case, in which the assignment was made after the interest vested, to the case at bar, in which the assignment was made while the interest was contingent.

This court has repeatedly held that contingent interests and expectancies, although not assignable in law, may be transferred, so as to be binding in equity, by a contract made in good faith, and for a valuable consideration. *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *Hudnall v. Ham*, 183 Ill. 486, 56 N. E. 172, 48 L. R. A. 567, 75 Am. St. Rep. 124. And the same general doctrine has been applied to specific cases, where the beneficiary has assigned the contingent interest in a certificate of insurance. *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398; *Supreme Council Royal Arcanum v. Tracy*, 169 Ill. 123, 43 N. E. 401.

The fact that the assignee was not a member of the family does not in any way affect the question. By becoming assignee of the beneficiary, he became no more a beneficiary than he would be if, in the absence of such an assignment, Mrs. Jarvis had collected the money, and paid him the amount due him. Mrs. Jarvis was named as beneficiary in the certificate, and she has never ceased to occupy that position. She is a member of the family—a proper beneficiary—and was undoubtedly capable of transferring to Binkley her contingent interest. We conclude, therefore, that the assignment, upon a sufficient consideration, by Ada B. Jarvis, of a portion of a fund in which she had a contingent interest, was, in equity, a valid and binding agreement, and that the fact that Binkley, the assignee, was not a member of the family does not in any manner prevent him from recognition, in equity, as the assignee of the proper beneficiary, Mrs. Jarvis. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(206 Ill. 560)

GANTZER v. SCHMELTZ.*

(Supreme Court of Illinois. Dec. 16, 1903.)

MORTGAGES—TRUST DEED—USURY—BROKER'S COMMISSIONS—SOLICITOR'S FEES—SERVICES BY TRUSTEE.

1. Where a broker negotiated a loan of his client's money at the full legal rate of interest, and charged the borrower commissions for obtaining the money, which commissions were not received either in whole or in part by the lender, the loan was not thereby rendered usurious.

2. Where an attorney at law was named as trustee in a deed of trust providing for the re-

covery of attorney's fees in case of foreclosure, and he began foreclosure proceedings thereunder, he was not entitled to attorney fees for such services.

3. A trust deed provided that in case of foreclosure the amount of attorney's fees should be fixed by the court, and that the sum allowed for fees in case of foreclosure should be 5 per cent. of the amount of the principal indebtedness secured. Held, that where the trustee, who was an attorney, began foreclosure proceedings, and then another attorney was employed to conduct the same after the suit had been referred to a master, such latter attorney was only entitled to such part of the fee as the value of his services bore to the services of both.

Appeal from Appellate Court, First District.

Bill by John Schmeltz against Charles C. Gantzer. From a decree in favor of plaintiff, affirmed by the Appellate Court (107 Ill. App. 641), defendant appeals. Affirmed in part.

This is a bill, filed June 21, 1901, to foreclose a trust deed dated October 1, 1900, from Charles C. Gantzer and wife to Will H. Moore, trustee, conveying a lot in Cook county to secure payment of two notes of even date therewith, one for \$5,500 and the other for \$500, due in one year after date, with interest at 6 per cent. per annum, payable semiannually, the installments of interest being evidenced by four coupon notes, two being for \$165 each, due April 1, 1901, and October 1, 1901, respectively, for interest on the \$5,500 note, and two for \$15 each, due April 1, 1901, and October 1, 1901, respectively, for interest on said \$500 note. Complainant in the bill, John Schmeltz, was the owner of the notes, and alleged default for the payment of the interest coupon due April 1, 1901, for \$165; that the coupon for \$15 due April 1, 1901, was paid, and that \$30 had been paid on account of the coupon for \$165. There was a provision in the trust deed and in the principal notes that, if default should be made in the payment of interest on the principal, or any portion thereof should remain due and payable after the same should become due, then the principal sum and all arrearages should, at the option of the legal holder, become due and payable, without notice, etc., and that, by reason of said default, complainant had elected to and had declared the entire principal and interest due and collectible; that there was due the sum of \$6,000, principal indebtedness, \$135 interest, due April 1, 1901, with interest thereon at 7 per cent. per annum after maturity, and interest at 6 per cent. per annum on said \$6,000 from April 1, 1901. The trust deed provided that, in case of foreclosure, the reasonable fees and charges of the holder of the notes, his attorneys and solicitors, for services in the suit, should be a further lien upon said premises, and paid out of the proceeds of sale, if not otherwise paid by appellant, and that in case of foreclosure the fees of complainant's solicitor should be 5 per cent. of the amount of the principal indebtedness secured by said trust deed. The de-

*Rehearing denied February 4, 1904.

¶ 2. See *Mortgages*, vol. 35, Cent. Dig. § 1672.

defendants to the bill were Charles C. Gantzer, his wife, Bothella G. J. Gantzer, and Will H. Moore, trustee. The prayer was that the defendants, or one of them, be decreed to pay whatever sum should be found due, together with \$300 solicitor's fees, and that in default of such payment the premises be sold. A joint and several answer was filed by Gantzer and his wife.

The cause was referred to a master, who made a report finding that the amount due the complainant was \$6,343.58. Default was entered against Will H. Moore, the trustee, who entered his appearance, waiving service, and consenting to a default. The usual decree of foreclosure was entered for the amount found due by the master, approving his report, and ordering sale of the property. An appeal was taken from the decree of foreclosure to the Appellate Court, and was there affirmed. The present appeal is prosecuted from the judgment of affirmance entered by the Appellate Court.

Morton T. Culver, for appellant. Thomas J. Holmes and Robert R. Baldwin, for appellee.

MAGRUDER, J. (after stating the facts). The answer filed in this foreclosure proceeding set up the defense of usury. This defense was based upon the fact that appellant paid the sum of \$75 to Moore for commissions in procuring the loan of the money and for services in drawing the trust deed and notes. No testimony was introduced before the master by the appellant. All the testimony introduced before the master was taken by the complainant below, the appellee here. The only witnesses were the trustee, Moore, and appellee's solicitor. It is claimed on the part of appellant that the commissions paid to Moore, added to the interest on the loan, amounted to more than legal interest, and constituted usury. Appellant contends that Moore, the trustee, acted as the agent of appellee, and that the commissions received by him were for the benefit of appellee. The commissions received by Moore were not in pursuance of any arrangement with the appellee or with appellee's knowledge. The evidence does not show that appellee received any part of the commission, or received any more, or was to receive any more, than legal interest on the money loaned. It has been held by this court that brokers negotiating loans of other people's money may charge the borrower commissions without thereby making a loan at the full rate of legal interest usurious. *Hoyt v. Pawtucket Institution for Savings*, 110 Ill. 390. As the appellant alleged usury in his answer, the burden was on him to prove it, and it was his duty to establish it by a preponderance of the evidence. He failed to do so. *Telford v. Garrels*, 132 Ill. 550, 24 N. E. 578.

The court below allowed \$300 for solicitor's fees. The trust deed provides that in case

of a foreclosure the amount "of said fees and charges may be fixed by the court, * * * but it is agreed that the sum allowed and decreed for complainant's solicitor's fees in case of foreclosure shall be five per cent. of the amount of the principal indebtedness hereby secured," etc. Five per cent. of the \$6,000 loan to appellant amounted to \$300. But this amount was to be the fee for conducting the foreclosure proceeding from its inception to its termination. It appears that Will H. Moore, the trustee, is a lawyer by profession, and he filed the bill as solicitor for complainant, making himself a defendant, as trustee. After the bill had been filed, summons issued and returned, appearance of defendants entered, demurrer filed and withdrawn, and answer filed, the appearance of another solicitor was substituted for that of Will H. Moore as complainant's solicitor. It has been held by this court that a trustee in a trust deed who is also an attorney at law is not entitled to an allowance for professional services rendered in foreclosing the deed in his own behalf and for his co-complainant, the holder of the note, although the deed provides for a reasonable sum for complainant's solicitor's fee. This holding has been based upon the doctrine that a trustee in a trust deed is the representative of both parties to the instrument, and he must act fairly and impartially, and not in the exclusive interest of either. *Gray v. Robertson*, 174 Ill. 242, 51 N. E. 248.

Therefore, whatever services in the foreclosure proceeding were performed by Moore, the trustee, as solicitor for the complainant below, the appellee here, were performed voluntarily, and without the right on the part of Moore to make any charge therefor. All the services in the foreclosure suit up to the time of the reference to the master were performed by Moore. He is not entitled to an allowance for such services. The services of the solicitor who was substituted in Moore's place did not begin until the time of the entry of the order referring the case to the master. The proof, showing that \$300 was a reasonable attorney's fee, established it as such a reasonable fee for the conduct of the whole proceeding from its inception to its end. Therefore the solicitor who was substituted for the trustee as complainant's solicitor is only entitled to such proportion of the fee of \$300 as remains after deducting the value of the services performed by the trustee before such substitution. We are therefore of the opinion that it was error to allow the full fee of \$300 to the substituted solicitor.

The decree is affirmed in all respects, except as to the allowance of the solicitor's fee. For the error in the allowance of this fee, the decree of the court below is reversed, and the cause is remanded to the superior court of Cook county with directions to ascertain the value of the legal services performed from the time of the entry of the order of

reference to the time of the final decree. That is to say, an account must be stated, showing the value of the services performed by the trustee as solicitor before the substitution, and such value must be deducted from the total amount of the fee, and decree entered for the balance.

Decree affirmed in part.

(206 Ill. 557)

KILGALLEN et al. v. CITY OF CHICAGO.*

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS—SPECIAL ASSESSMENT—RESOLUTION—INCORPORATION OF ENGINEER'S REPORT.

1. Under Laws 1897, p. 104, § 7, providing that the board of local improvements shall make the estimate of the public engineer a part of the record of the first resolution for such improvement, a mere reference to the report in the resolution is insufficient.

Appeal from Cook County Court; L. O. Ruth, Judge.

Proceedings for the confirmation of a special assessment for the improvement of a system of streets in the city of Chicago. From a judgment of confirmation, Martin H. Kilgallen and others appeal. Reversed.

Joseph H. Fitch, for appellants. William M. Pindell and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for appellee.

HAND, O. J. This is an appeal from a judgment entered by the county court of Cook county confirming a special assessment for the improvement of a system of streets in the city of Chicago, known as the "West Montrose Avenue System."

It was contended on the hearing, which contention is renewed here, that the estimate of the engineer of the cost of the improvement was not made a part of the record of the first resolution of the board of local improvements, and that by reason of such fact the ordinance providing for the improvement was void, and that a judgment of confirmation could not be properly entered, confirming an assessment based thereon, against objector's property. The first resolution is, in part, as follows: "Be it resolved by the board of local improvements of the city of Chicago, that a local improvement be and the same is hereby originated, to be made within the city of Chicago, * * * the estimate of the cost of such improvement made by the engineer of the board being \$112,000, which said estimate is hereby referred to and made a part of this resolution by reference."

In *Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 161, it was held that the provision of section 7 of the local improvement act of 1897 (Laws 1897, p. 104) that the board should cause an estimate of the cost of the improvement to be made in writing by the public engineer, over his signature, which

shall be itemized to the satisfaction of the board, and which shall be made a part of the record of the first resolution, is mandatory, and that no valid ordinance could be passed or valid assessment for a local improvement be made without complying with said provision of the statute. An attempt has been made here to comply with section 7 of said act by making the estimate of the cost of the improvement a part of the record of the first resolution by reference to the estimate, and the question here presented for decision is, can the estimate of the cost of the improvement be made a part of the "record of such resolution" by that method? We are of the opinion the engineer's estimate of the cost of the improvement cannot thus be made a part of the record of said resolution. The statute, in express terms, provides that the resolution shall be at once transcribed into the records of the board, and that the engineer's estimate shall be made a part of the record of the resolution. The statute is to be strictly construed, as it is intended for the protection of the property owner (*Clarke v. City of Chicago*, 185 Ill. 354, 57 N. E. 15; *Bass v. City of Chicago*, 195 Ill. 109, 62 N. E. 913), and can only be complied with by incorporating in the record the estimate as a part of the record of such resolution, and not by a mere reference to the estimate on file, as the record is the source of information upon which the property owner may rely. In *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471, it was held that a reference to specifications on file in the city clerk's office was not a compliance with the provisions of the statute to the effect that an ordinance for a local improvement must specify therein the nature, character, locality, and description of the improvement. The court, after stating that such requirement of the statute was mandatory, on page 20, 117 Ill., page 474, 7 N. E., said: "The fact that specifications are referred to as being in the city clerk's office cannot alter the case. That is not a source of information which the law recognizes in these matters. The statute, whether for wise or unwise purposes, has required this information to be inserted in the ordinance itself." To the same effect are *Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846, and *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034. In the *Bickerdike Case*, in commenting on the failure to make the engineer's estimate a part of the record of the resolution, on page 639, 203 Ill., page 162, 68 N. E., it was said: "The proceedings prior to the adoption of the ordinance required by the statute are jurisdictional, without which no valid ordinance can be passed, and consequently no valid assessment be made. The requirement of the statute is plain and reasonable. Failure to comply with it cannot be excused."

The judgment of the county court will be reversed, and the cause remanded. Reversed and remanded.

*Rehearing denied February 4, 1904.

(207 Ill. 46)

DUQUOIN WATERWORKS CO. et al. v. PARKS.*

(Supreme Court of Illinois. Dec. 16, 1903.)

APPEAL—RECORD—AFFIDAVIT FOR CONTINUANCE—CHANGE OF VENUE—WAIVER.

1. The refusal of a continuance cannot be reviewed where the affidavit in support of the motion is not made a part of the record by a certificate of evidence signed by the judge; and the fact that the affidavit is copied by the clerk into the record, and that a certificate of the judge is attached to the record, reciting that it contains all the evidence, is insufficient.

2. A party who obtains a change of venue from one judge of the court, and afterwards goes to trial before him without objection, waives disqualification of the judge resulting from the change.

Error to Circuit Court, Perry County; Wm. Hartzell, Judge.

Suit by Sample G. Parks against the Duquoin Waterworks Company and others. Decree for plaintiff, and defendants bring error. Affirmed.

Edward S. Robert, John H. Overall, and Franklin A. McConaughy, for plaintiffs in error. Geo. W. Wall and B. W. Pope, for defendant in error.

RICKS, J. This case comes to this court on a writ of error to review the record made in the circuit court of Perry county, where in a decree was entered granting an injunction pursuant to the prayer of a bill filed by Sample G. Parks against the plaintiffs in error, praying for an injunction and that a certain ordinance be held to be void.

The bill was filed by Sample G. Parks, a taxpayer, etc., on the 8th day of July, 1899, and was brought to the November term, 1899, of the circuit court of said county, making the city of Duquoin, Henry A. Keith, James H. Tompson, and the Duquoin Waterworks Company parties defendant. The bill was afterwards amended, making the other plaintiffs in error, Breckenridge Jones, the Mississippi Valley Trust Company, and the unknown holders of bonds and coupons of the Duquoin Waterworks Company, parties defendant. The purpose of the bill was to set aside and declare void an ordinance of the city of Duquoin, and enjoin the collection of bonds issued thereunder, on the ground that it imposed upon the city an indebtedness in the sum of over \$113,000, when the city was already indebted in excess of 5 per cent. of the assessed valuation of its taxable property. The bill alleged that the value of the taxable property within the limits of the city, as fixed by the last assessment previous to the passage of the ordinance, was \$248,264, and that it was unlawful for the city to incur any indebtedness in excess of 5 per cent. of said amount, to wit, \$12,413.20, and that the existing indebtedness of the city at the time of the passage of the ordinance was more than 5 per cent.; that the

sum fixed in the said ordinance was greatly in excess of a fair price for the work to be done, which would be more than \$35,000. An amendment to the bill, filed by leave of court on November 6, 1899, alleged that there had been no compliance with section 267a, c. 24, Hurd's Rev. St. 1899, which provides that in case of the purchase or leasing of waterworks the question must be first submitted to a vote of the people. The bill prayed for appropriate relief.

At the November term, 1899, the defendants filed their demurrer to the bill. Later, and while the demurrer was pending, a petition for a change of venue from presiding Judge Hartzell was presented on behalf of defendants, which petition the judge granted, and entered an order changing the venue to some other judge of the circuit. At the May term, 1900, Judge Burroughs presiding, the demurrer was partially argued, leave was given to file written arguments, and the matter was taken under advisement. At the November term, 1900, an order was entered overruling the demurrer, with leave to answer by January 1, 1901. The defendants answered within the time fixed, admitting the passage of the ordinance; alleged that it was valid; denied that it involved any indebtedness prohibited by the Constitution; and alleged an amendatory ordinance, etc. At the May term following, the amended bill was filed making the new parties defendants, and on November 14th a general answer was filed by all the defendants, except the city, to the bill as amended. The plaintiff withdrew his exceptions and filed a general replication. On November 19th the defendants, except the city, moved for a continuance. The motion was denied, and the cause heard on the following day, November 20th. After hearing the proofs and arguments the court took the case under advisement, and on December 21, 1901, the decree was rendered granting the relief prayed. A petition for a rehearing was filed by defendants, setting forth their reasons in writing, and said petition was denied by the court.

Numerous errors, 14 in number, are assigned of record, but only two of the errors assigned are argued by counsel for plaintiffs in error, one being as to the refusal of the court to grant the continuance upon motion and affidavit filed in support of the said motion, and the other error argued being that the court, after granting the change of venue, proceeded to hear the cause and entered its decree. The other errors, not being argued, are therefore considered abandoned.

As to the first of the errors above mentioned, being as to the refusal of the court to grant a continuance upon the motion and affidavit in support thereof, it cannot be considered by us, for the reason that the affidavit is not made a part of the record by a certificate of evidence, and it is not, therefore, before us for consideration. The plain-

*Rehearing denied February 4, 1904.

tiffs in error, in order to obtain the benefit of the affidavit in this court, should have made the same a part of the record by the certificate of the judge who heard the cause in the circuit court. This was not done. The affidavit supporting the motion for a continuance is copied by the clerk in the record proper, but is not included in the certificate of evidence signed by the judge, and is not, therefore, properly part of the record. The certificate of the judge attached to the record, that it contained all the evidence, is not sufficient to make the affidavit for a continuance a part of the record simply because such affidavit was copied into the record by the clerk. *Heacock v. Hosmer*, 109 Ill. 245; *Lange v. Heyer*, 195 Ill. 420, 63 N. E. 173.

As to the other error relied upon by plaintiffs in error, namely, the fact that the court, after granting a change of venue, proceeded to hear the cause and entered his decree therein, it may be said the plaintiffs in error, when the cause was finally tried, did not urge the disqualification of the trial judge because of the change of venue that had previously been granted, and, as frequently held, if a party seeks or obtains a change of venue from one of the judges of the court, and afterwards goes to trial before the same judge without objecting that the judge is disqualified, he waives the point, and cannot urge it as a ground of reversal on appeal or writ of error. *Johnson v. Von Kettler*, 66 Ill. 63; *Flagg v. Roberts*, 67 Ill. 485; *Noyes v. Kern*, 94 Ill. 521; *Sampson v. People*, 188 Ill. 592, 59 N. E. 427; 11 Ency. of Pl. & Pr. 782.

There is no index to the abstract, as required under rule 14 of this court (47 N. E. vi), which requires the abstract to contain a complete index, alphabetically arranged, giving the page where each paper or exhibit may be found, etc. This is a matter of importance to this court, especially where the abstract is of any size, as in this case, and should not be overlooked.

After full consideration of this case, we find no error which would justify us in reversing the decree of the circuit court, and that decree is accordingly affirmed. Decree affirmed.

(207 Ill. 56)

GAGE v. CITY OF CHICAGO.*

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ORIGIN—PETITION—BOARD OF PUBLIC IMPROVEMENTS—ACTS OF COUNCIL—MATERIAL—QUALITY—ORDINANCE—RESOLUTION—DESCRIPTION OF IMPROVEMENT.

1. Since the board of local improvements of the city of Chicago has exclusive jurisdiction to originate a scheme for local improvements without petition, and the recommendation of an ordinance to the city council for an improvement creates a conclusive presumption that the board acted on its own motion, the fact that the city council ordered the board to submit an

ordinance for the paving of a street between certain limits with asphalt, after which the board submitted such a resolution with the recommendation that the improvement be made, did not show that the improvement originated with the city council instead of the board of local improvements.

2. An ordinance providing that the asphaltum to be used for paving a street, if other than that obtained from Pitch Lake, should be equal in quality to that from Pitch Lake for paving purposes, was sufficiently specific as to quality of material to be used.

3. An ordinance for the improvement of a street provided that the curb and gutter should be back-filled with earth, the filling to be 4 feet wide at the top of the curb, and even therewith, and to slope down at the rate of 1½ feet horizontal to every vertical foot; that the upper surface of the gutter flags should conform to the surface of the finished roadway, and the top edge of the curb should coincide with the grade of the street, which was fixed by the ordinance. Held, that the ordinance contained the necessary data for determining the depth of the back-filling, and the earth necessary to be used therefor.

4. 4 Starr & C. Ann. St. 1902, pp. 151-153, c. 24, pars. 43, 44, provide that an ordinance for public improvement must prescribe the nature, character, locality, and description of the improvement, and declare that the resolution of the board of public improvements shall prescribe the extent, nature, kind, character, and estimated cost thereof. Held that, where a resolution stated the improvement as required, it was not objectionable for failure to describe the same with the minuteness of description contained in the ordinance.

Appeal from Cook County Court; O. N. Carter, Judge.

Action by the city of Chicago against Henry H. Gage. From a judgment confirming a special assessment, defendant appeals. Affirmed.

F. W. Becker, for appellant. William M. Pindell (Charles M. Walker, Corp. Counsel, and Edgar Bronson Tolman, of counsel), for appellee.

BOGGS, J. This is an appeal from a judgment confirming a special assessment levied under the provisions of an ordinance of the city of Chicago providing for plastering sub-walls, constructing granite concrete gutters, a granite concrete combined curb and gutter, grading, and paving with asphalt, North Wood street from Kinzie street to West North avenue.

It is insisted that the scheme for the improvement of the street was not originated by the board of local improvements. In November, 1900, the board of local improvements had under consideration the advisability of recommending to the city council, for adoption, an ordinance providing for paving North Wood street from Chicago avenue to Milwaukee avenue with paving brick. The board of local improvements had ordered that an estimate be made of the cost of improving that portion of the street with brick. While the board of local improvements were awaiting the estimate of the cost of paving with brick, the city council of the city adopted the following order: "Council Order Nov. 12, 1900. Ordered that the board of local improvements

*Rehearing denied February 4, 1904.

be and they are hereby directed to prepare and submit to this council an ordinance for paving with asphalt North Wood street from Kinzie street to North avenue. Presented by Messrs. Bulpus, and Maypole, Strauss, Leininger, Kunz, aldermen 14th, 15th and 16th wards. Wm. Loefer, City Clerk." On the 13th day of August, 1901, the board of local improvements entered the following order: "On the recommendation of the secretary the previous order for an estimate for paving with brick Wood street from Chicago avenue to Milwaukee avenue was rescinded, and an estimate ordered, in compliance with the order of council, for paving said street with asphalt, from Kinzie street to North avenue." Afterwards, on the 15th day of April, 1902, the city council adopted an ordinance presented by the board of local improvements providing for the paving of North Wood street for the distances as prescribed in the order of the city council, and with asphalt, as prescribed in said order.

In *Walker v. City of Chicago*, 202 Ill. 531, 67 N. E. 869, we held the board of local improvements possessed the sole power to originate a scheme for a local improvement, without petition and of its own motion; that the city council had no power to direct or in any way control the board, and that any order or resolution of the city council ordering the board of local improvements to prepare and present an ordinance for an improvement was absolutely void; and that out of the official action of the board of local improvements in preparing and recommending an ordinance to the city council for an improvement arose a conclusive presumption that the board acted upon its own motion, or treated the resolution of the city council as a mere petition. That ruling is applicable to the contention here presented, and decides it adversely to the appellant.

The ordinance provided that all asphaltum required to be used in the improvement "shall be asphaltum obtained from Pitch Lake, in the Island of Trinidad, or asphaltum which shall be equal in quality for paving purposes to that obtained from Pitch Lake, in the Island of Trinidad." It is objected that the ordinance is in this respect uncertain, in that it, to quote from appellant's brief, "gives some one (not named) the discretion to substitute for the asphalt specified another and different asphalt, not specified, and clothes him with authority to judge whether it is equal in quality for paving purposes—a debatable question, upon which minds might differ according to their interests." This objection is without force. The provision in the ordinance was, no doubt, incorporated therein for the purpose of obviating the objection which was found fatal to an ordinance under consideration in *Fishburn v. City of Chicago*, 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. Rep. 236. The ordinance under consideration in the case cited required that "the cementing material

shall be a paving cement prepared from refined Trinidad asphaltum obtained from Pitch Lake, in the Island of Trinidad"; the effect being, as we there pointed out, to create a monopoly in favor of the corporation which had the absolute control of the asphaltum obtained from Pitch Lake, and to restrict competition in bidding for contracts for the construction of the improvement. We there said (page 343, 171 Ill., page 533, 49 N. E., 39 L. R. A. 482, 63 Am. St. Rep. 236): "If it be the judgment of the city council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance, or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed." It is urged, however, that the ordinance under consideration here does not provide that the asphaltum, if other than that obtained from Pitch Lake is used, shall be equal in all respects to that from Pitch Lake, but only that it shall be "equal in quality for paving purposes." As the asphaltum was to be used for no other than paving purposes, its quality and fitness for such purpose was all that need be considered. The ordinance did not vest in the contractor or any other person power or discretion to determine the quality of asphaltum to be used. The ordinance fixed the standard of quality, and required that the material to be used should be equal to that standard. In *Hintze v. City of Elgin*, 186 Ill. 251, 57 N. E. 856, an ordinance which provided, "All brick to be used shall be made of pure shale, of equal quality to that found in Galesburg, Glen Carbon and Streator, in the state of Illinois, and Canton, in the state of Ohio," was held to be sufficiently specific.

Nor is the ordinance uncertain as to the depth and quantity of earth with which the combined curb and gutter flags were required to be "back-filled." The ordinance provided that the curb and gutter should be back-filled with earth; the filling to be of the width of 4 feet at the top of the curb, and even therewith, and to slope down at the rate of $1\frac{1}{2}$ feet horizontal to each vertical foot. The ordinance further provided that the upper surface of the gutter flags should conform to the surface of the finished roadway, and the top edge of the curb should coincide with the grade of said Wood street. The ordinance also fixed the grade of the street, from which the level of the surface of the finished roadway, which depended, of course, upon the conformation of the ground, could be ascertained with certainty. The ordinance contained the necessary data for determining the depth of the back-filling, and the quantity of earth necessary to be used in that part of the work.

The ordinance provided that on the layer

of Portland cement concrete, 6 inches in thickness, there should be laid a binder course of broken limestone mixed with asphaltic cement, 1½ inches in thickness, and upon this a wearing surface composed of carbonate of lime and asphaltic cement. The resolution of the board does not specifically mention the binder course of broken limestone or the wearing surface. For this reason it is urged the improvement described in the ordinance is not that described in the resolution of the board. An ordinance must prescribe the nature, character, locality, and description of the improvement. It is not required that the resolution shall prescribe the "description of the improvement," but only the "extent, nature, kind, character and estimated cost" thereof. 4 Starr & C. Ann. St. 1902, pp. 151-153, c. 24, pars. 43, 44. The resolution here under consideration answered these requirements of the statute, and more minuteness in matter of mere description in the resolution was not necessary.

The judgment is affirmed. Judgment affirmed.

(206 Ill. 513)

RUMBOLD v. SUPREME COUNCIL ROYAL LEAGUE.*

(Supreme Court of Illinois. Dec. 16, 1903.)

FRATERNAL INSURANCE—ACTION ON CERTIFICATE—SUICIDE—EVIDENCE—INSTRUCTIONS—BURDEN OF PROOF—FRATERNAL SOCIETIES—EXEMPTION FROM GARNISHMENT—DUTIES WHEN GARNISHED.

1. In an action on a fraternal insurance certificate the defense was suicide, and as a motive therefor defendant assigned an indebtedness due by insured to one who had advanced him money to use as a deposit for the purpose of obtaining a contract. Defendant also proved that insured did not in fact make an application for the contract. Plaintiff then offered to show that the contract which insured was to obtain was obtained in the name of another, and that the money was deposited to obtain that contract, and when the bond therefor was given the money was returned to that other, who was a brother-in-law of the lender. Held, that the court properly refused to permit the evidence unless plaintiff would also undertake to show that the money deposited was the money obtained by insured from the lender.

2. In an action on a fraternal insurance certificate, where the defense was suicide, and the verdict of the coroner's jury was admitted in evidence in substantiation thereof, an instruction that the coroner was a public officer, acting under the sanction of an official oath, and that his inquiry was competent evidence of the cause of death, and should be considered together with all the other evidence, facts, and circumstances in the case, although it was not conclusive, was misleading, argumentative, and unfair to plaintiff, but, instead of stating that the verdict was not conclusive, the court should have instructed that it was simply evidence that might be considered with other evidence; nor did the statement that the jury should consider it in connection with the other evidence, facts, and circumstances in the case obviate the error.

3. In an action on a fraternal insurance certificate, where the defense was suicide, an instruction twice reiterating that in determining the cause of death the jury might consider all the circumstances "and the absence or presence

of any other cause of death than suicide," especially when read with the preceding instruction, which gave undue prominence to the weight of the verdict of the coroner's jury assigning suicide as the cause of death, was erroneous in at least indicating that the absence of evidence showing death from a cause other than suicide would raise a presumption in favor of suicide.

4. Under Hurd's Rev. St. 1899, p. 1033, c. 73, § 266, providing that benefits rendered by any fraternal beneficiary society shall not be liable to attachment, garnishment, or other process, or to pay any debt or liability of a certificate holder or beneficiary, it is the duty of a fraternal insurance society, when garnished, to interpose for the benefit of the beneficiary; and if it fails to do so it cannot, when sued on the certificate, set off a sum paid by it on a garnishment.

5. Hurd's Rev. St. 1899, p. 1033, c. 73, § 266, exempting fraternal benefits from liability on attachment, garnishment, or other process, was enacted for the benefit of the beneficiary, and not merely to protect the society against harassing suits, and giving it the option of interposing a defense or suffering judgment.

Error to Appellate Court, First District.

Action by Lizzie Rumbold against the Supreme Council of Royal League. From a judgment of the Appellate Court affirming a judgment for defendant (for opinion, see 103 Ill. App. 596), plaintiff brings error. Reversed.

Utt Bros., for plaintiff in error. Millard R. Powers, for defendant in error.

RICKS, J. This is an action of assumption, brought by plaintiff in error on a benefit certificate, naming her as beneficiary, insuring the life of her husband, Harry Rumbold, in the sum of \$4,000, issued by defendant in error, a fraternal beneficiary society organized under the laws of Illinois. Harry Rumbold, on the 28th day of November, 1893, obtained a certificate for \$2,000 from the defendant society, which was changed to \$4,000 on the 15th of September, 1894, and upon which this suit was brought. The insured died on the 7th day of July, 1897. The defendant, by special plea, set up the defense of suicide, and plaintiff replied traversing the plea. This was the only issue in the case, it being admitted that the plaintiff was entitled to recover \$4,000 and interest if this defense failed, and but \$2,000 if it was established. Defendant tendered to plaintiff \$2,000, and admitted its liability to that extent.

To sustain the defense of suicide, evidence was offered by the defendant in error showing that about half past 12 o'clock on the morning of July 7, 1897, Harry Rumbold, the insured, was found lying under a tree in a small park fronting the lake, at the corner of Fifty-Third street and East End avenue, in the city of Chicago. Four policemen found Rumbold lying there unconscious, and breathing heavily, and took him to the Hyde Park Police Station, where he died soon afterwards. He was taken thence to

*Rehearing denied February 4, 1904.

§ 4. See Garnishment, vol. 24, Cent. Dig. § 390, 400

the morgue, and a post-mortem examination and coroner's inquest held. The insured was 39 years of age at the time of his death. He was married, his family consisting of himself, his wife, and boy about 10 or 12 years of age. He was of sober habits, and his family relation was pleasant. He had been for a number of years connected with the garbage department of the city of Chicago, but at the time of his death was out of employment, and had recently taken the civil service examination with a view of again entering into the service of the city. He was subject to attacks of stomach trouble, which sometimes were quite severe, and unfitted him for work or business for a day or two at a time. He left his home on the 2d day of July, and went down to the city hall, ostensibly to see about the letting of certain garbage contracts; and the next that his family knew of him was the information that he was at the police station, dead.

The cause has been tried three times. Two verdicts were for the plaintiff in error for the full amount of the policy, and interest. New trials were had, and the verdict in the case from which this writ of error is prosecuted was for \$2,000. The Appellate Court for the First District affirmed the judgment of the trial court, and by writ of error the case is brought to this court.

The errors assigned relate to the rejection of evidence offered by plaintiff in error and the giving and refusal of instructions. The coroner's jury found that the insured came to his death by taking carbolic acid with suicidal intent. A post-mortem examination was made by Dr. Elijah Noel, coroner's physician. He made an autopsy, but did not make a chemical analysis of the contents of the stomach or of any of the organs. He testified that the insured died from carbolic acid, and that it was his judgment that about two ounces had been taken. He described the symptoms and the evidence that led him to the conclusion that such poison was the cause of death. He relied mainly upon the physical effects shown by the throat, stomach, heart, and alimentary canal, and the odor, for the presence of carbolic acid. Two of the policemen who found the insured lying in the park testified for defendant in error, but neither of them was inquired of concerning the odor or presence of carbolic acid, while the other two policemen testified on behalf of plaintiff in error that they did not notice any smell of carbolic acid, or any indications that such drug had been taken. No bottle was found, and no message or other writing or statement was left by the insured indicating suicide. Two physicians testified on behalf of plaintiff in error that creosol, gulacol, trisol, lysol, and salol were all substantially of the same odor as carbolic acid, and that they produced the same effect upon the stomach and gullet, and that they are remedies frequently administered to persons suffering with stomach

derangements. Both of them expressed the opinion that without a chemical analysis it could not be told whether a death was due to the use of carbolic acid or not.

The only motive attempted to be shown in support of the theory of suicide was that the insured was in debt in small sums, not to exceed \$100, and that in June before his death he had obtained from a Mrs. Shannon \$500, which he represented to her he would use as a deposit in a proposed bid with the city for certain garbage contracts, which, if obtained, would enable him to give employment to the teams of Mrs. Shannon. The contracts were let about the 2d of July, but before that time Mrs. Shannon appears to have become uneasy about her money, as it was understood that the money should be returned to her, the insured having it only for the purpose of making the preliminary deposit. If he obtained a contract, he would enter into bond, and the money would be refunded; if he did not obtain the contract, the money would be refunded, and in either event would be returned to Mrs. Shannon. Mrs. Shannon sent her brother-in-law, McAuliffe, on two occasions prior to July 2d, to see the insured, and demand of him the return of the money, but in each instance he put her off with the statement that the contracts were not yet let, but would be within a few days. Defendant in error also proved by a witness connected with the garbage department that the insured did not, in fact, make an application for a contract. The plaintiff in error then offered to show that a contract for the particular ward that the insured was to obtain for Mrs. Shannon was obtained in the name of McAuliffe, and that \$500 was deposited to obtain that contract, and when the bond was given the \$500 was returned to McAuliffe. The court refused to permit this testimony unless counsel for plaintiff in error would also undertake to show that the \$500 deposited on the McAuliffe bid was the money obtained by the insured from Mrs. Shannon. Plaintiff in error could not do this, and the evidence was excluded, and exception taken, and this ruling is now urged as error. We think it was not error to exclude this evidence. The insured was not to have the \$500 in the event that the contract was obtained, but, whether obtained or not, the \$500 was to be returned to Mrs. Shannon, and the mere fact that McAuliffe applied for a contract, and put up the deposit of \$500 and obtained the contract, and withdrew the deposit so made by him upon entering into the necessary bond, did not tend to show that the \$500 used by McAuliffe was the money received by the insured from Mrs. Shannon; and that was the whole point to the evidence, so far as it was offered by plaintiff in error. McAuliffe was a witness, and, if plaintiff in error believed he had the \$500 Rumbold received from Mrs. Shannon, he should have been asked about it on cross-examination, but was not.

Sufficient has been stated to show that upon the facts of the case it was a very close one, and it is the uniform rule that, where the evidence is conflicting, and the case close or doubtful, it is highly essential that the jury shall be accurately instructed. As we have said, the verdict of the coroner's jury was admitted in evidence, and the following instruction relating to it was given at the request of defendant in error: "The jury are instructed that the coroner is a public officer, acting under the sanction of an official oath in the discharge of a public duty enjoined by law, and that the inquisition of a coroner and jury is competent evidence tending to prove the cause of death which appears upon the face of the inquisition. If the jury believe from the evidence that the coroner of Cook county held an inquest over the remains of Harry Rumbold for the purpose of ascertaining the cause of his death, and rendered a finding and verdict as to the cause of such death, the jury are instructed that they should consider such finding and verdict of the coroner and jury, together with all the other evidence, facts, and circumstances in the case, when you are determining the question whether or not Harry Rumbold committed suicide. The finding of the coroner's jury or inquest is, however, not conclusive upon you in determining the cause of death." We regard this instruction as misleading, argumentative, and unfair to plaintiff in error. While it is true that the coroner is a public officer, and acts under the sanction of an official oath in discharging duties enjoined upon him by law, there is nothing that the coroner did that was before the jury. All that was admitted in evidence was the verdict of the coroner's jury, and, while it would have been proper to have told the jury by an instruction that the verdict of the coroner's jury could be considered by them in determining the nature and cause of death, it should have stated that in very simple language, and have coupled with it the statement, not that it was not conclusive, as is the conclusion of the instruction here, but that it was simply evidence that might be considered with other evidence. As we interpret the instruction, it in effect tells the jury that, while the verdict is not conclusive, it comes under the sanction of the official oath of an officer in the discharge of his duty, and is of a very high class of evidence. We think the court had as well said to the jury that, while the law does not make the verdict of the coroner's jury conclusive upon the question before them, the court regards it as very strong evidence of the matters contained in it. The vice of the instruction is not relieved by telling the jury that they should consider it in connection with the other evidence, facts, and circumstances in the case.

In another instruction given for defendant in error the jury were told: "When, in a case such as this, the cause of a person's death is the subject of inquiry, then whether

or not death was occasioned by suicide or some other cause need not necessarily be proven by the testimony of an eyewitness, but may be established by circumstantial evidence, such as the location and circumstances surrounding the finding of the person at or immediately before the time of death, the condition of the body and organs thereof after death, the absence or presence in any of the organs of any death-producing substance, as to whether or not sufficient to produce death, and the absence or presence of any other cause of death than suicide; and in this case it is the duty of the jury to determine whether or not the decedent, Harry H. Rumbold, died by suicide, and to consider all the testimony, facts, and circumstances in evidence, and from all such testimony, facts, and circumstances, including the absence or presence of any evidence, facts, or circumstances tending to show death from any other cause, determine whether or not the decedent came to his death by suicide; and if they believe, from the preponderance of the evidence, that he came to his death by suicide, then to render a verdict in favor of the plaintiff for \$2,000, and no more." This instruction would convey to the jury the idea, as we think, that from the finding of the insured in the condition shown by the evidence and the circumstances surrounding it the presumption of suicide followed, and that in considering the evidence the jury must take into consideration the absence or presence of any other cause of death than suicide. This last idea is twice expressed in the instruction. The law is, of course, well settled that suicide is not presumed, but that the presumption is death from natural or accidental causes rather than suicide; and an instruction that makes the test the presence or absence of some other cause than suicide would seem to be a reversal of the test. Defendant in error had the affirmative of the issue that the insured came to his death by suicide, and yet, by the instruction as given, the jury were practically told that the absence of evidence showing death from a cause other than suicide would raise a presumption in favor of suicide. The law never presumes the existence of a fact which must be affirmatively shown from the mere absence of facts showing the negative. Coupling this instruction with the instruction and comment of the court as touching the character of the coroner's verdict, it would seem that the natural effect upon the mind of the jury would be that, the verdict of the coroner's jury being of such high character, although not conclusive; in the absence of a preponderance of the evidence showing some other cause of death than suicide, they would be warranted in concluding that the insured came to his death from suicide. These instructions we regard as wholly prejudicial to the rights of plaintiff in error under the circumstances surrounding this case,

and the giving of them as such error as must work a reversal of the case.

After proof of death had been filed with defendant in error, and it had made a tender to plaintiff in error of \$2,000, which it claimed to be the limit of its liability, defendant in error was garnished by one Landon, the former attorney of plaintiff in error, and suffered judgment of garnishment to go against it to the extent of \$180; and it offered said judgment as a set-off or credit in the case at bar. This was objected to, and the hearing reserved by the court until the entering of the judgment. Upon the final hearing the trial court refused to allow defendant in error credit for the amount of this garnishment, and defendant in error assigns cross-error upon such refusal. By section 9 of the act of June 22, 1893, relating to the organization and management of fraternal beneficiary societies, it is provided: "The money or other benefit, charity, relief or aid to be paid, provided or rendered by any society authorized to do business under this act, shall not be liable to attachment by trustee, garnishee, or other process, and shall not be seised, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder, or of any beneficiary named in a certificate, or of any person who may have any right thereunder." Hurd's Rev. St. 1899, p. 1033, c. 73, § 266. The defendant in error is a fraternal insurance organization, organized under the act of which the above section is a part. The law is settled that it is the duty of a garnishee to interpose, for the benefit of the judgment debtor, any exemption of the fund that may exist in favor of the judgment debtor. *Chicago & Alton Railroad Co. v. Ragland*, 84 Ill. 375; *Chicago, Rock Island & Pacific Railway Co. v. Mason*, 11 Ill. App. 525; *Welker v. Hinze*, 16 Ill. App. 326. It was clearly the duty of defendant in error to have interposed the plea of the above statute when the fund in its hands belonging to plaintiff in error was sought to be reached by garnishment.

Defendant in error urges that the statute is only designed to protect the society against harassing suits, and that it was at the option of the society to interpose the defense or suffer judgment; that the statute is not one of general exemption for the benefit of the policy holder or a beneficiary named in the policy; and cites in support of this contention *Martin v. Martin*, 187 Ill. 200, 58 N. E. 230. We think this view of the statute entirely too narrow, and that the case cited does not support it. In *Martin v. Martin* the benefit fund had been paid by the society to the agent of the beneficiary, and while in his hands it was garnished. In the latter case we said (page 201, 187 Ill., page 231, 58 N. E.): "It is clear that such money is exempt before it is paid by the society, and that the society itself cannot be gar-

nished for such demands. The language of the statute seems to confine the exemption, so far as applicable to a case of this character, to money to be paid, and not to extend it to money after it has been paid." The court did not err in refusing to allow credit for this amount.

For the reasons stated, the judgments of the Appellate Court and the superior court of Cook county are reversed, and the cause is remanded to the superior court of Cook county for such further proceedings as to law and justice may appertain.

Reversed and remanded.

(177 N. Y. 306)

KEEFFE et al. v. THIRD NAT. BANK OF SYRACUSE et al.

(Court of Appeals of New York. Jan. 29, 1904.)

JUDGE-DISQUALIFICATION—CAUSE OR MATTER.

1. Code Civ. Proc. § 46, forbidding a judge to sit or take part in the decision of a "cause or matter" in which he has been an attorney or counsel, refers only to actions or special proceedings in which a judge might take part, the word "cause" meaning a cause of action, and the word "matter" referring to some judicial proceeding which, under the Code, is included in special proceedings for the enforcement of civil rights.

2. Where in an action on a note brought by a firm of lawyers a judgment was rendered, and the judgment was partly satisfied, and the attorneys were paid, the relation of attorney and client between them and the plaintiff was at an end, and when thereafter the firm was dissolved, and a member of the firm was appointed as judge, and retained no connection with or interest in the business of the firm, he was not disqualified from hearing the subsequent action, brought by another attorney, to enforce a resulting trust in property held for the benefit of one of the judgment debtors, on the ground that he was disqualified, under Code Civ. Proc. § 46, where, though he constructively appeared in the first action, he was never consulted in reference thereto, and performed no services therein.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Arthur J. Keefe and others against the Third National Bank of Syracuse and others. From a judgment of the Appellate Division (80 N. Y. Supp. 1138) affirming a judgment for defendants, plaintiffs appeal. Affirmed.

This action was to set aside and vacate a judgment recovered in March, 1900, wherein the defendant the Third National Bank was plaintiff and the plaintiffs in this action, with others, were defendants, entered upon a decision rendered by Mr. Justice Hiscock, after a trial before him at Special Term. 63 N. Y. Supp. 1049. In March, 1891, the Third National Bank retained the firm of Hiscock, Doheny & Hiscock to bring an action upon two promissory notes owned and held by it, made by the Syracuse Fibre Ware Company to the order of Torry, treasurer, and indorsed by John O. Keefe and Catherine L. Keefe. They caused a sum

mons and verified complaint to be served upon the defendants John C. Keefe and Catherine L. Keefe and the Syracuse Fibre Ware Company. None of the defendants appeared or answered, and on the 30th of April, 1891, judgment by default was entered against them. On that day said attorneys duly issued an execution on such judgment, which was returned unsatisfied except as to the sum of \$580 collected thereon. Thereafter, and within one year from the entry of the judgment, the bank paid said attorneys in full for their services in such action, and the relation of attorney and client ceased, and was finally terminated. When that action was brought, the justice who tried the case was a member of that firm, but was not consulted in reference thereto, or in reference to the action, judgment or proceedings had therein, and gave no advice and performed no services in respect to the same. In November, 1896, he was duly elected a justice of the Supreme Court, entered upon his duties as such January 1, 1897, and is still such justice. It was before him the action brought by the Third National Bank against Arthur J. Keefe, Lewis A. Hawley, John C. Keefe, Catherine L. Keefe, Syracuse Fibre Ware Company, Syracuse Land & Steamboat Company, and Syracuse Rapid Transit Railway Company was tried. The firm of Hiscock, Doheny & Hiscock was dissolved just prior to Justice Hiscock's entry upon his duties as such, and the latter has had no interest in said firm or its business, or any connection therewith, since its dissolution. Nor was said firm in any way connected with or interested in the second action, directly or indirectly. No question as to any disqualification on the part of the trial justice was raised upon the trial of that action, or until it reached the Court of Appeals. The plaintiffs in this case made a number of motions in that suit before the same justice, obtained several orders upon which they acted and under which they received substantial benefits, and they also have received substantial benefits under the judgment they now seek to set aside. At the time of the trial the plaintiffs in this action were fully aware of all the facts as to Justice Hiscock's relation to the firm of Hiscock, Doheny & Hiscock, as to the judgment obtained by that firm and the execution issued thereon, but in no way objected or even suggested at the Special Term that the said justice was disqualified, and in no way questioned the jurisdiction of the court as thus constituted. The judgment in that action was affirmed by the Appellate Division. There was, however, no evidence given therein as to the relation of said justice to the firm of Hiscock, Doheny & Hiscock, but the same question which is presented upon this appeal was argued in the Court of Appeals by the appellants in that case, where the judgment was affirmed. Upon the trial of this action the Special

Term dismissed the complaint, an appeal was taken to the Appellate Division, where it was unanimously affirmed, and from that judgment the plaintiffs have appealed to this court.

Louis Marshall, for appellants. George W. O'Brien, for respondents Third Nat. Bank of Syracuse and others. James S. Thorn, for respondent Syracuse Fibre Ware Co.

MARTIN, J. (after stating the facts). The only question presented upon this appeal is whether the trial justice was disqualified to hear and determine the case resulting in the judgment which this action was brought to vacate and set aside. The appellants' claim that he was thus disqualified is based solely upon the provisions of section 46 of the Code of Civil Procedure, which forbids a judge to set or take part in the decision of "a cause or matter" in which he has been attorney or counsel.

The first question arises as to the meaning which should be given to the words "cause or matter," as used in that section. When we examine the Code, we find that all judicial proceedings are divided into actions and special proceedings. An action is then defined as an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense; and "every other prosecution by a party, for either of the purposes specified," is declared to be a special proceeding. Sections 3333, 3334. In the light of these provisions it seems quite clear that the words "cause or matter," in section 46, were intended to refer only to actions or special proceedings in which a judge might sit or take part, the word "cause" meaning a cause of action, and the word "matter" referring only to some judicial matter or proceeding, and under the Code is included in special proceedings for the enforcement of civil rights. Indeed, so generally has the word "matter" been regarded as descriptive of a special proceeding, that in entitling a proceeding of that character the word "matter" is universally employed. Moreover, it is evident that a judge or justice cannot, as such, sit in or take part in the judicial decision of any matter which is not either an action or special proceeding, as all legal proceedings are included in one or the other. Hence the ultimate and precise question presented is whether the trial justice acted as attorney or counsel in the action which he heard and decided. Obviously not. First, an action was brought upon certain notes owned and held by the defendant the Third National Bank, by a firm of lawyers of which the justice was a member. Judgment was obtained by default. Execution was issued thereon, and returned partly unsatisfied. The attorneys were then paid, and the relation of attorney and client between the defendant bank and such firm was permanent.

ly dissolved. After the lapse of five or six years a second action was brought by another attorney, the purpose of which was to enforce a resulting trust in certain property held for the benefit of one of the judgment debtors. Thus when the latter action was commenced, not only had the defendant's attorneys in the first action ceased to be such, but they had also ceased to have any interest therein. The judgment in the first action was conclusive upon the parties, and the original cause of action was merged in it. That action having been terminated, it is obvious that the trial justice did not subsequently sit in or take part in its decision, as the judgment was absolutely final, and no further action of any kind was ever taken in that case. The only cause in which it is even claimed that the justice had acted as attorney or counsel, constructively or otherwise, was the first, which terminated years before he was elected. While it is true that the second action was brought in aid of the judgment obtained in the first, yet it was an entirely independent and separate action, in which the parties were not the same, and the purpose of which was different. The issues in the two actions were essentially unlike. In the first the sole question was whether the defendants were indebted to the plaintiffs in the amount stated in the complaint, and that was conclusively settled by a final judgment, and the litigation in that suit was ended. In the second the issue was whether the money or property of one of the judgment debtors had been employed in the purchase of or invested in the property, the title to which had been taken in the name of another, so that under the statute a trust resulted in favor of the judgment creditor. The first cause of action was independent of the second, although the judgment therein became an incident thereto, and its existence was necessary to its maintenance. As to the issue in the last action, it is perfectly clear that the trial justice had given no advice or counsel, either directly or by representation. Thus it is obvious that neither he nor his partners had acted as attorney or counsel in the cause or matter in which he sat, and hence this case does not fall within the provisions of section 46.

The contention of the appellants is that, as the general purpose of the first action was to collect the defendant's debt, and as the second action was in furtherance of the same purpose, they should be regarded as but one action, and as falling within the inhibition of section 46. The infirmity of that contention lies in the fact that such is not the language of the statute. The statute prohibits a judge from sitting in a case in which he has been attorney or counsel, but does not prohibit him from presiding upon the trial of an action, although its general purpose may

be similar or the same as in some case where he had acted as attorney or counsel. Certainly the language of section 46 does not justify the appellants' claim. Thus it is manifest that the facts in this case do not bring it within the literal provisions of the statute. Nor was it within its spirit and purpose. The evident object of the statute was to prevent a judge from sitting in a case in which he had previously acted as attorney or counsel. In this case it was expressly found that the justice was never consulted, even, in reference to the original action, and that he did not give any advice or perform any services therein or in relation thereto. Hence it is apparent that he did not actually act as attorney or counsel therein within the spirit of section 46. But he must be regarded as having constructively appeared in the first action, and would have been legally disqualified from sitting in or deciding it, although he had never acted as attorney or counsel therein except by representation through the firm. This disqualification was technical, and arose only under the literal provisions of the statute, although perhaps not within its spirit or purpose. But in the second action he had never appeared either by representation or otherwise, and hence was not disqualified under the letter of the statute. Nor was his action within its spirit. There was neither claim nor pretense that the trial justice gave any counsel or acted as attorney in the case actually tried before him, or that his method of trial was otherwise than eminently fair and perfectly disinterested. Upon the argument this was absolutely conceded by the appellants' counsel. Hence the claim as to his disqualification is at most purely technical, with no valid basis unless included within the letter of the statute, which it was not. This is rendered more obvious by the fact that no question as to the validity of the former judgment, the proceedings taken thereon, or as to the jurisdiction of the trial justice was ever presented, or even suggested, until long after the conclusion of the second trial, although the appellants were familiar with all the facts pertaining to the justice's relation to the case and to the firm of Hiscock, Doheny & Hiscock.

We are therefore of the opinion that this case is not brought within the letter of section 46, that no facts exist bringing it within its spirit, and that under the circumstances disclosed by the record the action of the courts below was proper, and the judgment should be affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, and CULLEN, JJ., concur. HAIGHT, J., concur in result. BARTLETT, J., not voting.

Judgment affirmed.

(177 N. Y. 296)

PEOPLE ex rel. LEHMAIER v. INTER-URBAN ST. RY. CO.(Court of Appeals of New York. Jan. 29, 1904.)
MANDAMUS—DISCRETION OF COURT—REVIEW ON APPEAL—STREET RAILROADS—TRANSFERS.

1. An application for a peremptory writ of mandamus is addressed to the sound discretion of the court, and where it does not appear from an order denying the application that the court refused it on the ground of a want of power, or upon any other question of law, the proceeding is not reviewable by the Court of Appeals.

2. A peremptory writ of mandamus will not be granted to a private citizen, having no peculiar grievance, requiring a street railroad company operating two intersecting lines of railway in the city of New York to carry, under Laws 1892, p. 1406, c. 676, § 104, any passenger desiring to make a continuous trip from any one point on one line to any other point on the other line for five cents, and to give such passenger at the intersection of such lines a transfer entitling him to such continuous trip; there being a sufficient and adequate remedy at law.

Appeal from Supreme Court, Appellate Division, First Department.

Application by the people, on the relation of James S. Lehmaier, for a writ of mandamus to the Interurban Street Railway Company. From an order of the Appellate Division (83 N. Y. Supp. 622) affirming an order of the Special Term denying the writ, relator appeals. Dismissed.

Edward B. Whitney, Henry B. B. Stapler, J. Aspinwall Hodge, George W. Kirchway, and Julius Henry Cohen, for appellant. Charles F. Brown, Charles A. Collin, Paul D. Cravath, William F. Sheehan, and Henry A. Robinson, for respondent.

O'BRIEN, J. The relator in this case does not seem to have any grievance of his own, but, in behalf of the public, he applied for a peremptory writ of mandamus requiring the defendant to do certain things which he claimed it is by law bound to do. These things are (1) to carry for one single fare of five cents any passenger desiring to make one continuous trip in either direction between any point on the 8th avenue line owned by the Eighth Avenue Railroad Company, and any point on the 125th street line, owned by the Third Avenue Railroad Company; and (2) upon demand, and without extra charge, to give to each passenger upon either of said lines, paying one single fare, a transfer at the intersection of said lines, at the corner of Eighth avenue and 125th street, entitling such passenger to make a continuous trip from any point on one line to any other point on the other line. The court at Special Term denied the application for the writ, and the order to that effect was unanimously affirmed on appeal. There are two questions presented by the record: One is whether the defendant is under legal obligation to give the transfers specified, and this depends upon the construction of certain

sections of the railroad law—particularly section 104 (Laws 1892, p. 1406, c. 676). The other question is, assuming that there is a statutory obligation on the part of the railroad company to give transfers to passengers, such as are specified in the application, whether that duty can be enforced by mandamus.

To state the case in another way, the question presented by this appeal is whether this court has the power to compel the courts below to enforce this statutory obligation, if it exists, by mandamus. That would be the plain effect of a decision of this court reversing the orders of the courts below, since these courts would be obliged to proceed upon the relator's motion and render such judgment as this court may determine should be given in the case. The writ of mandamus is issued only when there is a clear legal right to be enforced, and when there is no other adequate or legal remedy to obtain the relief sought. *People ex rel. Gaslight Co. v. Common Council of Syracuse*, 78 N. Y. 56; *People ex rel. Millard v. Chapin*, 104 N. Y. 96, 10 N. E. 141. If the right of the relator to the writ is not clear, or if there was some other adequate legal remedy more appropriate to the case, then the relator had no absolute right to the writ; and, if the courts below were of the opinion that it was inexpedient to grant it under the circumstances, then this court has no right to interfere. It should be observed here that decisions of this court are to be found, made prior to the enactment of the present Constitution, which hold, in effect, that in certain cases it would review an order of the courts below denying the application for a writ of mandamus, even where it was discretionary, or where the discretion of the court below had been abused. If these cases are carefully examined, it will doubtless be found that they were decided at a time when by statute and by the Constitution of the state the jurisdiction of this court was different from what it is now. Since the enactment of the present Constitution the jurisdiction of this court in such matters has been very much abridged. The right of review here of any judgment or order is limited to questions of law, and it has ordinarily nothing to do with questions of discretion or with questions of fact. There may be some cases where the peremptory writ of mandamus is given as a legal right, but obviously in this case the nature of the relief sought is such, and the other legal remedies available to the relator are such, that it would seem to be plain that mandamus is not the proper remedy.

In the first place, if it be true that the railroad company is violating the statute in refusing the transfers, then an action for a penalty of \$50 will lie in favor of any individual who has been refused, and also an action to recover any damages which the individual may have sustained in consequence of the illegal refusal. A vigorous application of the statutory right to recover penalties has

¶ 1. See *Mandamus*, vol. 33, Cent. Dig. § 429.

generally been found to be an adequate remedy for the grievance of which the relator complains. But in addition to that the Attorney General is authorized to bring an action against a railroad company to vacate its charter for any violation of law of which it is guilty, and a refusal to obey a statute to give transfers in certain cases would doubtless bring the defendant corporation within the scope of that statute. Code Civ. Proc. §§ 1785, 1798. Sections 157 and 162 of the railroad law (Laws 1890, pp. 1129, 1131, c. 565) prescribe remedies for a redress of the grievance of which the relator complains that would seem to be ample. It is there provided that the railroad commissioners shall have power to investigate all complaints of any neglect of duty on the part of railroad companies in the operation of their roads for the accommodation of the public, and to make report upon all complaints of the public in regard to the violation of its charter obligations, and it is provided that any decision or recommendation of the board may be enforced by mandamus. Here the writ of mandamus is expressly given as a remedy, but not in the first instance, and only after investigation of the facts by the public authorities in charge of the affairs of railroads. In the present case the relator, as has already been stated, has shown no legal right in himself. So far as the public is concerned, and so far as any individual may acquire such a right, the law gives adequate legal remedies. In this state of the case it was, as it seems to me, a matter of discretion with the Supreme Court to withhold the writ. It may have had the power to issue it, but it may have been of the opinion that such a proceeding was inexpedient or inappropriate. The practical question is whether this court in such a case can or ought to hold that the courts below committed an error of law in refusing to grant the writ. The proper function of the writ of mandamus is to compel the doing of a specific thing, based upon a legal right. It does not require much argument to show that the writ of mandamus is not, in this case, an appropriate remedy to compel a general course of official conduct or a long series of continuous acts, as it is impossible for the court to oversee the performance of such duties. The relief which is sought to be attained by this application affects a multitude of people who may become passengers upon the railroad from time to time in the future, and the act which the defendant is required to perform is to deliver to all these people transfer tickets entitling them to ride upon the defendant's cars. It is difficult to see how a return to the writ, if issued, could be enforced, or how the final judgment could be executed, under section 2073 of the Code.

It seems to me that an absolute right to a writ of mandamus by the relator, representing, as he claims, the whole public, to procure the relief demanded, is not sanctioned

by any clear authority, but, on the contrary, the more recent decisions of this court are adverse to the relator's claim. *People ex rel. Linton v. B. H. R. Co.*, 172 N. Y. 90, 64 N. E. 788; *People ex rel. Pumpyanaky v. Keating*, 168 N. Y. 390, 61 N. E. 637.

The law with respect to the right of this court to review the order of the court below refusing a writ of mandamus is now, I think, well settled upon a very fair and reasonable basis; and that is that the application for the writ is addressed to the sound discretion of the Supreme Court, and, where it appears that the facts are such as to justify the court in refusing the writ as matter of discretion, this court will not interfere, unless it affirmatively appears in the order denying the writ that the court did not refuse the writ in the exercise of its discretion. *Matter of Hart*, 159 N. Y. 284, 54 N. E. 44; *People ex rel. Durant L. I. Co. v. Jeroloman*, 139 N. Y. 14, 34 N. E. 726; *People ex rel. Jacobus v. Van Wyck*, 157 N. Y. 495, 52 N. E. 559. It does not appear from the order which is the subject of this appeal that the courts below refused to grant the application for want of power, or upon any other question of law.

It follows that the case is not reviewable in this court, and therefore the appeal must be dismissed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur.

Appeal dismissed.

(177 N. Y. 303)

CULLINAN, Excise Com'r, v. KUCH et al.
(Court of Appeals of New York. Jan. 29, 1904.)
LIQUOR TAX CERTIFICATE—ASSIGNMENT—LIABILITY ON BOND.

1. Though a liquor tax certificate has been assigned and is in the possession of an assignee, who has violated the provisions of the liquor tax law, the principal and the surety on the bond are liable, unless the certificate was presented to the proper authorities for cancellation, or the assignment was consented to as required by statute.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Patrick W. Cullinan, commissioner of excise of the state of New York, against Otto Kuch and others. From a judgment of the Appellate Division (82 N. Y. Supp. 1098) affirming a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Alfred R. Page, for appellants. William E. Schenck and Herbert H. Kellogg, for respondent.

PARKER, C. J. The violations of the liquor tax law for which the penalty of the bond was recovered in this action were committed by the assignee of the principal in the bond given in order to procure the liquor

tax certificate which, continuing in the room where it had been posted, furnished the appearance of authority to conduct the business actually in progress. And the principal and surety urge that, the former having actually assigned the certificate, both are relieved from all liability for infringement of the liquor tax law at that place. But that is not so, as we have previously held; for (construing the bond in the light of the statute which lies at the foundation of it) we conclude that liability on the bond continues during the life of the liquor tax certificate, unless it is either presented to the proper authority for cancellation, or the "original owner thereof" presents or causes "the presentation of the tax certificate to the officer who issued the same" (Laws 1896, p. 67, c. 112, § 25), in order that he may consent in the manner provided by statute to its transfer to the assignee upon his compliance with the requirements of the statute made necessary in order to accomplish a valid transfer. The defendant Kuch did neither of these things, and so both he and the surety continued bound.

The judgment should be affirmed, with costs.

GRAY, BARTLETT, MARTIN, VANN,
and WERNER, JJ., concur. O'BRIEN, J.,
not voting.

Judgment affirmed.

(177 N. Y. 293)

LEVY v. SCHREYER.

(Court of Appeals of New York. Jan. 29, 1904.)

DEED—BUILDING RESTRICTION—CONSTRUCTION.

1. Where a deed provides that the grantee will not erect or allow to be erected on the premises a tenement house, and that he will not erect any houses thereon except private dwellings, the covenant is violated where he erects a building the interior of which was divided into three floors, each finished to accommodate a separate family, so far as the interior arrangement was concerned; and on breach of such covenant the grantee may be enjoined from using it as a tenement house, or using it for any purpose other than that of a private dwelling.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Ephraim B. Levy against John Schreyer. From a judgment of the Appellate Division (76 N. Y. Supp. 1018) affirming a judgment for plaintiff, defendant appeals. Modified.

Alex. Thain and Burton Thompson Beach, for appellant. Irving Washburn, for respondent.

HAIGHT, J. This action was brought to restrain the defendant from "the continuance of and the erection of" a building upon Popham avenue, on lot 150 Undercliff Terrace, Morris Heights, in the Twenty-Fourth Ward of the city of New York, and from

violating certain covenants in defendant's deeds, to the effect that he will not erect or permit to be erected or carried on upon any part of said premises a tenement house, and that he will not erect any houses except private dwellings thereon, the front walls of which shall set back at least 10 feet from the line of the lot. The case has been twice tried. Upon the first trial it was found that the front wall encroached within 10 feet of the front line of the lot, and the plaintiff had judgment for the relief demanded upon that issue, but that the covenant with reference to the erection and maintaining of a tenement house was not violated, and upon that issue judgment was for the defendant. Both parties appealed to the Appellate Division, and that court, upon review, reversed so much of the judgment as was appealed from by the plaintiff, holding that the house erected was a tenement house, and upon that issue ordered a new trial; but as to the defendant's appeal the judgment was affirmed, the court sustaining the finding that there was an encroachment of the front wall upon the 10-foot limitation as to a portion of the swell front or the bay window. The new trial was confined to the issue as to whether the building was a tenement house. The trial took place after the building had been completed and was occupied, and the court found that the building erected was not a private residence or private dwelling, and that the erection of the building was in violation of the covenant not to erect any tenement house or any houses except private dwellings, and ordered judgment in favor of the plaintiff, enjoining and restraining the defendant from the continuance of the erection and use of the building, and that it be forthwith removed. The building erected was 20 feet in width, front and rear, 53 feet deep, and three stories high, with a basement, costing, exclusive of the lot, \$8,900. There is nothing in the external appearance of the building that distinguishes it from an ordinary private residence, unless it may be its size, and in that particular it is a matter of common knowledge that dwellings much larger than this are often occupied only by a single family. The covenants embraced in the deed are quite numerous. The evident purpose of the grantor was to restrict the use of this tract of land to that of dwellings which should cost not less than \$2,300, and thus make the territory attractive for residential purposes. The outward appearance of the buildings to be erected was one of the things provided for in the covenants. No building less than two stories in height, with a cellar underneath, was permitted to be constructed, and if the building was only two stories in height it was required to have a peaked or mansard roof of an attractive character; but the defendant's building answers the requirements of the covenants so far as outward appearances are concerned, and it does not offend in that regard. But it is

contended that this building was a tenement house because of the manner in which its interior was divided up and finished, and considerable evidence was taken tending to show that each of the three floors was finished so as to accommodate a separate family; but, accepting the finding of the trial court upon this issue as conclusive, it only violates the covenants in so far as the interior arrangement is concerned, and that, we think, may be remedied by the enjoining of its use as a tenement house, or of using it for any other purpose than that of a private residence or dwelling, without ordering a destruction of the entire building.

A question was raised upon the argument with reference to the power of the Appellate Division to divide the action and authorize two separate judgments by reversing the judgment in part and affirming in part. *Nat. Board of Marine Underwriters v. Nat. Bank of the Republic*, 148 N. Y. 64, 67, 40 N. E. 500; *Altman v. Hofeller*, 152 N. Y. 498, 507, 48 N. E. 961; *Goodsell v. W. U. Tel. Co.*, 109 N. Y. 147, 16 N. E. 324; *Wolstenholme v. Wolstenholme File Mfg. Co.*, 64 N. Y. 272. The defendant, however, did not appeal within the period allowed by the statute from the judgment affirming the judgment against him awarded upon the issue that he encroached within the 10-foot limitation. He has therefore waived his right to review that question, leaving that judgment in full force and effect. *Wilson v. Mechanical Orguette Co.*, 170 N. Y. 542, 553, 63 N. E. 550; *Kelsey v. Western*, 2 N. Y. 502; *Robertson v. Bullions*, 11 N. Y. 243; *Murphy v. Spaulding*, 46 N. Y. 556; *Matter of Davis*, 149 N. Y. 589, 44 N. E. 185.

The judgment should be modified so as to enjoin and restrain the defendant for the period named therein from using the building described in the judgment as a tenement house, or for any purpose other than that of a private dwelling, and by striking from the judgment the provision requiring the building to be forthwith removed, and, as so modified, affirmed, without costs of this appeal to either party.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur.

Judgment accordingly.

(177 N. Y. 271)

RYAN v. CITY OF NEW YORK.

(Court of Appeals of New York. Jan. 29, 1904.)
CONSTITUTIONAL LAW—LABOR LAW—EIGHT-HOUR DAY—CITY EMPLOYE—WAIVER OF CLAIM.

1. Laws 1897, p. 462, c. 415, as amended by Laws 1899, p. 1172, c. 567, providing that wages for a legal day's work to all classes of laborers on public works, or on material to be used in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade in the locality where such public work on which such labor is performed in its final or

completed form is to be situated, so far as it relates to the direct employes of the state or of the municipality, is constitutional.

2. An employé of a city, who, prior to the enactment of the labor law, was a laborer at a specified sum per day, and thereafter became entitled to receive a greater sum at the prevailing rate of wages in the locality, and who continues without protest to accept the wages at the former rate for six years, waived any claim to recover the increase for that period.

O'Brien, Bartlett, and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Pierce Ryan against the city of New York. From a judgment of the Appellate Division (79 N. Y. Supp. 599) affirming a judgment for defendant, plaintiff appeals. Affirmed.

David B. Hill, Carlos C. Alden, and Ingie Carpenter, for appellant. George L. Rives, Corp. Counsel (Edward J. McGuire, of counsel), for respondent.

PARKER, C. J. There are two questions presented by this review. The first is: Has the Legislature power to provide that its employes and those of the several municipalities shall receive "not less than the prevailing rate" of wages in the locality? In other words, has the Legislature—which possesses all the power of the sovereign not expressly withheld by the Constitution—power to provide that work done for it or its several subdivisions shall be paid for at such a rate as individuals and corporations in the same locality pay? That question was before this court some years ago in so far as it affects the right of the Legislature to fix the rate of wages of laborers upon the works of the state. *Clark v. State of New York*, 142 N. Y. 101, 36 N. E. 817. In 1889 the Legislature passed an act (Laws 1889, p. 508, c. 380) providing that the rate of wages upon the public works of the state should be \$2 a day. That was more than the then prevailing rate, and there were those who questioned the power of the state to interfere with its agents in fixing the wages of men working under them. They thought the superintendent of public works had the sole power of fixing wages of employes in that department, and therefore could defy the direction of the Legislature as to the amount of compensation to be paid, although he could disburse such moneys only as were appropriated by the Legislature; and they entreated the Attorney General to commence an action to have the court declare the impotency of the Legislature to interfere on the important subject of compensation to laborers. But when the case reached this court in 1894 the Attorney General was unable to point to the provision of the Constitution which divested the representatives of the people for all matters of legislation of this power, and vested it in the several inferior officials having charge of certain administrative duties conferred upon them in the majority of instances by acts of the same Legislature.

The court—unaffected, as was its duty, by the argument that the statute was unwise, and mindful that its duty was discharged fully, and could only be discharged by declaring whether the Legislature had the power to enact the statute complained of—unanimously held that the power belonged to it. Judge O'Brien, writing for the unanimous court, says (142 N. Y. 101, 105, 38 N. E. 817, 818): "There is no express or implied restriction to be found in the Constitution upon the power of the Legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public works of the state." The principle of that decision controls this one. There the Legislature undertakes to fix arbitrarily the sum to be paid to every employé of the state. Here the Legislature undertakes to provide for the payment of not less than the prevailing rate of wages, not only to the direct employés of the state, but also to its indirect employés working in its several subdivisions—the cities, counties, towns, and villages. In the administration of the affairs of those subdivisions, as well as in those of the state at large, the Legislature is unrestrained, unless by express provisions of the Constitution. As expressed in *Rodgers' Case*, 166 N. Y. 1, 29, 59 N. E. 716, 726, 82 Am. St. Rep. 605, 52 L. R. A. 814: "The authority of the state is supreme in every part of it, and in all of the public undertakings the state is the proprietor. For convenience of local administration the state has been divided into municipalities, in each of which there may be found local officers exercising a certain measure of authority, but in that which they do they are but the agents of the state, without power to do a single act beyond the boundary set by the state acting through its Legislature." Thus all of these agencies and employés in the several municipalities are doing the work of the state, which is the sovereign and master.

Nevertheless, we find that the argument is again made, as in 1894 in *Clark's Case*, that the Legislature is without power to interfere with the agencies it has created for the government of the municipalities. And this is said in the face of the decision in *Clark's Case*, and notwithstanding the fact that the Legislature has the power at any time to absolutely change the form of government of a municipality, to blot out of existence any municipal charter, or to consolidate several municipalities under a single charter, as it did in the creation of Greater New York. And this argument is made in spite of the many well-known illustrations of the power of the Legislature to control the affairs of municipalities. The scope of that power is illustrated by the construction of the new aqueduct by a board created by the Legislature, the expense being charged upon the city of New York, although not a single officer of the city had a voice in controlling the expenditure of the millions that its construc-

tion involved; and by the act compelling the elevation of the Harlem Railroad tracks in the city of New York, and the imposition of one-half of the expense, amounting to several millions, upon the city of New York, the work all being done through an agency created by the state.

Not only does the Legislature fix the salaries of the principal municipal officers throughout the state, but in the city of New York, where this case arises, it fixes the rate of compensation for many laborers. The street-cleaning department will serve as an illustration. The charter provides for the payment of definite sums in some cases, and for a maximum sum in others, for a force numbering over 5,000 employés in that department, and including 3,100 sweepers and 1,600 drivers, hostlers, and stable foremen. The charter in this respect has the support of *Clark's Case*, supra. Now there are a few mechanics connected with the department whose compensation is not fixed by the charter, and who, therefore, come under the prevailing rate provision of the labor law. Their compensation could be fixed, of course, at a definite sum, as that of the other employés is, but instead it is provided in effect that they shall be paid at a rate not less than that paid by others for similar services in that locality. Certainly no one can argue that the Legislature can provide that the street sweeper shall be paid, for example, \$2 a day, but cannot provide that he shall be paid the prevailing rate of wages when that happens to be \$2. But if one can be found who will attempt to make such an argument, surely it can be safely said that he cannot find a constitutional provision upon which to rest it.

Since the foregoing was written, the opinion of the United States Supreme Court in *Atkin v. State of Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. —, has been brought to our attention. It is in point, and decides the question in accordance with the views we have already expressed. A Kansas statute (Gen. St. 1901, §§ 3827-3829) provides that: "Eight hours shall constitute a day's work for all laborers, workmen, mechanics or other persons now employed, or who may hereafter be employed by or on behalf of the state of Kansas, or by or on behalf of any county, city, township or other municipality of said state. * * * Not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics and other persons employed by or on behalf of the state of Kansas, or any county, city, township or other municipality of said state. * * * All contracts hereafter made by or on behalf of the state of Kansas, or by or on behalf of any county, city, township or other municipality of said state, with any corporation, person or persons, for the performance of any work or the furnishing of any material manufactured within the state of Kansas, shall

be deemed and considered as made upon the basis of eight hours constituting a day's work." A violation of the statute is a misdemeanor. Atkin made a contract with a municipality (Kansas City) to pave a street. He was convicted under the statute, and the conviction affirmed by the Kansas Supreme Court. It was argued before the United States Supreme Court that the statute violates the fourteenth amendment, in that it deprives the contractor of his liberty and property without due process of law, and denies him the equal protection of the laws. The court holds that the statute does not violate the fourteenth amendment, and in the course of the opinion, written by Mr. Justice Harlan, says: "'If a statute,' counsel observes, 'such as the one under consideration, is justifiable, should it not apply to all persons and to all vocations whatsoever? Why should such a law be limited to contractors with the state and its municipalities? * * * Why should the law allow a contractor to agree with a laborer to shovel dirt for ten hours a day in performance of a private contract, and make exactly the same act under similar conditions a misdemeanor when done in performance of a contract for the construction of a public improvement? Why is liberty with reference to contracting restricted in one case and not in the other?' These questions—indeed, the entire argument of defendant's counsel—seem to attach too little consequence to the relation existing between a state and its municipal corporations. Such corporations are the creatures—mere political subdivisions—of the state for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn, at the will of the Legislature; the authority of the Legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed. [Citing several cases, the last being *Williams v. Eggleston*, 170 U. S. 304, 310, 18 Sup. Ct. 617, 619, 42 L. Ed. 1047.] In the last case cited we said that 'a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government; and as such it is subject to the control of the Legislature.'" The court quotes with approval from the opinion in *City of Clinton v. Cedar Rapids & Missouri River R. Co.*, 24 Iowa, 453, 475: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the Legislature. It breathes in-

to them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the Legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the state, and the corporation could not prevent it. We know of no limitation upon this right, so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the Legislature." After referring to the possible motive of the Legislature in making the statute, the court continued: "We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work for it or for one of its municipal agencies should permit or require an employé on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations upon this subject suggest only considerations of public policy, and with such considerations the courts have no concern." The case under consideration is not controlled by *Rodgers' Case*, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814. The decision in that case is that so much of the statute as, in effect, requires a contractor for municipal work to agree that he will pay his workmen not less than the prevailing rate of wages, and makes the contract void if he fails to pay at such rate at least, is unconstitutional. It is said by the court in support of that decision that the statute invades rights of liberty and property, in that it denies to the contractor the right to agree with employés as to the rate of compensation, and imposes a penalty upon the right of the contractor to agree with employés upon terms of employment. It is true that in one of the prevailing opinions argument sufficiently broad to cover this case is made, but it is not necessary for the decision, and is obiter, and therefore need not be followed. Our conclusion is that so much of the statute as is involved in this case is constitutional.

The second question presented by the record is: Did the plaintiff waive his right

to insist that his compensation should be at the prevailing rate of wages for rammers in the city of New York? Section 3 of the labor law (Laws 1897, p. 482, c. 415, as amended by Laws 1899, p. 1172, c. 567) does not attempt to fix in dollars and cents the wages to be paid to those employed on state or municipal work, but provides that such wages "shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality." The statute therefore made it the duty of the person charged with employing plaintiff to ascertain the prevailing rate of wages for similar services in the city, and then to fix the compensation at that amount, or a still greater one; and by the section following the Legislature undertook to assure such action by the officials commanded to fix wages at not less than the prevailing rate by providing that an official violating the provisions of the act would be guilty of malfeasance in office, and be suspended or removed. We must assume, in view of the fact that the question arises from a demurrer to the complaint, that all of its allegations are true, and that the officer employing the plaintiff did not obey the statute, and hence became subject to its penalties. But that fact in no wise aids the plaintiff in his present contention. He had been in the employ of the city for some time prior to May 10, 1894—when the statute went into operation—at the rate of \$3 a day, and that sum the city continued to pay and he to receive without protest for a period of six years. The prevailing rate of wages for that period was \$3.50 a day, and the employing officer should have fixed plaintiff's wages at that sum or greater. But he did not do it, and, while the plaintiff could have properly insisted that the officer should heed the command of the statute in that respect, he chose instead to continue in the service of the city without objecting to the compensation. Now, "it is well settled by authority that a man may waive any right that he has, whether secured to him by contract, conferred on him by statute, or guaranteed him by the Constitution." *People ex rel. McLaughlin v. Bd. Police Com'rs*, 174 N. Y. 450, 456, 87 N. E. 78, 79, and cases cited. And the legal effect of plaintiff's action in accepting from time to time during a period of six years, without protest, the wages paid to him by the city, was to waive any claim that he might have had at the time to insist that the employing officer should fix his rate of compensation at a greater sum than he did. It follows that plaintiff is not entitled to recover.

The judgment should be affirmed, with costs.

O'BRIEN, J. (dissenting). This was an action to recover arrears of wages claimed by the plaintiff to be due to him. The plaintiff alleges in his complaint that the defendant is indebted to him in the sum of \$600

for arrears of pay as a laborer on the streets at the rate of 50 cents per day for each work day that he was employed by the defendant during a period of about six years and paid at the rate of \$3 per day. In substance, his claim is that during all this time he was not paid enough, and, if the city had obeyed that provision of the labor law (Laws 1894, p. 1569, c. 622, § 2) requiring it to pay "the prevailing rate of wages," he would have received \$3.50 per day. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The courts below sustained the demurrer, and the plaintiff has appealed to this court from the judgment.

The complaint alleges that prior to the enactment of the labor law on May 10, 1894, the plaintiff had been in the employ of the city as a laborer on the streets, and was paid therefor at the rate of \$3 per day, but claims no arrears of pay on account of such services. It is then alleged that the labor law was enacted on May 10, 1894 (chapter 622, p. 1569, Laws 1894), and that the plaintiff from that date became entitled to receive wages at the prevailing rate, and that such rate, upon the law taking effect, became \$3.50 per day. It is then stated that after the law went into effect the plaintiff continued to work in the same capacity by the day during about six years, to the 1st of January, 1900, working in all 1,200 days, and was paid therefor at the rate of \$3 for every day, or \$3,600 in all; whereas, if the prevailing rate of wages law had been observed, he would have received \$4,200. The difference between these two amounts is the sum for which judgment is demanded. It appears, therefore, from the face of the complaint, that the plaintiff worked for the defendant before the law took effect and for six years after, receiving the same wages after the law as before. The course of dealing between the parties during such a long period of time, in the absence of some allegation of fraud, mistake, or of a right expressly reserved, justifies the legal inference that there was a contract between the parties, expressed or to be implied, that the plaintiff was to receive for his work \$3 per day, and no more, or that he has waived all claim under the statute. When a servant sues the master for wages, alleging that he worked by the day for more than six years, and was paid for each day's work at the rate of \$3 per day, and makes no claim or allegation that he ever asked any more, or ever objected on the ground that he had not been paid enough, or that he reserved the right to demand more in the future, or that there was fraud or mistake in the dealings, the legal conclusion from the facts must be that there was a full settlement between the parties or an agreement as to the rate of wages, or a waiver of any other claim. *McCarthy v. Mayor*, etc., of N. Y., 96 N. Y. 1, 48 Am. Rep. 601. I understand that there is no difference of opin-

lon in this court on this point, and, if not, then the case is decided, and it is not necessary to discuss the validity of the labor law. That question, as I think, is no longer open in this court. *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814; *People ex rel. Treat v. Coler*, 166 N. Y. 149, 59 N. E. 776; *People ex rel. Lentilhon v. Coler*, 168 N. Y. 8, 60 N. E. 1046; *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768; *People v. Orange Co. R. C. Co.*, 175 N. Y. 84, 67 N. E. 129. It is, however, supposed to be necessary or useful to reopen that controversy, and to make a fanciful distinction between the decisions already made and the case at bar. There can be no sound distinction in the application of the statute to the direct and immediate employes of a city and the case of an independent contractor who has not observed the law. The contention that in the former case the law may be held good, though it may be void as to the latter, is not based upon any sound reason, and is in conflict with the authorities cited. The defendant's charter provides that certain public work involving the expenditure of money beyond a certain designated amount must be done by contractors whose bid for the work is the lowest or most favorable to the city, and as to work below this amount it may be done by the city itself directly through its own employes. We have certainly held that as to the former class of work the statute with respect to "the prevailing rate of wages" is void, although in that case the city inserted "the prevailing rate of wages" clause in the contract. It is now earnestly contended that there is a distinction to be observed with respect to the validity of the law when applied to the same class of laborers working for a contractor and those working for the city; that as to the former the law is in conflict with the Constitution, while as to the latter it is perfectly valid. Just how the law can bind the city and not bind the contractor is difficult to conceive, since the latter is an instrument of the former in carrying out the purpose of its incorporation. The contractor has no standing to question a valid law under which the city acted when entering into a contract with him. I will only add that to my mind there is something preposterous in the proposition that this statute cannot, as we have held, bind a contractor digging a sewer on one side of a street while it can and does bind the city superintendent of streets repairing a pavement on the other side.

But, if the question was a new one, there is, I think, but little difficulty in its proper solution. The question, in its last analysis, is a very simple one, and that is whether a mandatory statute which requires a city to pay to its employes a fixed sum as compensation for their work or as wages is a constitutional exercise of legislative power.

There can be no distinction in this respect between a statute which fixes the wages of servants directly in dollars and cents at so much per day or so much per hour and a statute which fixes minimum wages by some known or ascertainable rule or standard. The statute requiring the defendant in this case to pay to its workmen a sum described as "the prevailing rate of wages" is, under the circumstances of the case, just as objectionable as if it specified the sum to be paid; since in the one case as well as in the other the city is deprived of the right to make contracts with its employes fixing the rate of wages, and of all discretion with respect to the same. Considering the power of the Legislature over this subject, the question is not always what has been done, but what may be done, if the power claimed be conceded. If, in this case, the statute had fixed the plaintiff's wages at \$5 per day, there could be no objection made to the law that cannot be made now. If the statute in that case would be bad, then the law in its present form is open to the same objection. We learn from the complaint in this case the important fact that just as soon as the statute went into operation "the prevailing rate of wages" instantly rose over 15 per cent., which is an object lesson throwing much light upon the nature of the power assumed in the passage of the law. It simply means that the Legislature has the power to raise or depress wages at pleasure under the vain hope or excuse that the changes will be confined to the boundaries of cities.

There is no attempt made, and obviously none can well be made, to bring the law within the scope of the police power. It cannot be said that it is a law to promote the public health, or public safety, or public order, and no element can possibly be injected into it to render it valid as a police regulation. There is but one ground, if I understand the argument, upon which this law is defended, and that is, when stated in the broadest way, that cities have no rights that the Legislature may not regulate and change at pleasure, since cities, it is said, are created and exist only by the will of the Legislature, and that the power to which they owe their existence is supreme over every detail of their internal affairs; that a city is but an agency of the state that the latter may command, coerce, or direct at will. Arguments that contain a considerable element of truth are often difficult to answer, even though, when considered as a whole, they may be unsound and quite misleading—as this argument certainly is. It is often said in a very general way that cities and other public municipal corporations are agencies of the state, and that is true in so far as they are invested with powers political or governmental; but surely no one will claim that the relation of principal and agent exists between the state and its several municipalities. Agency is a rela-

tion that is generally founded in contract, and the agent, within the scope of his powers, speaks and acts for his principal, and so binds him. The principal may impose his will upon the conduct of the agent by commanding him what to buy and what to sell, and he may fix the price at his pleasure. But it is scarcely necessary to argue that no such relation can possibly exist between the defendant and the state. The city of New York is not an agent of the state in the sense that the Legislature may dictate what price it must pay for property or labor that it may need in the conduct of its local affairs. If this were so, then there can be no such thing as home rule for cities, and the idea apparently so popular and so much commended is a delusion.

The precise question that we have to deal with here is whether the most important city on this continent, if not in the world, has got such a measure of autonomy and home rule as to render it independent of legislative interference, at least with respect to the price that it shall pay for common labor or other property that it may require in performing its functions as a local government. It would be of very little use to provide, as the Constitution of this state does, that local officers in cities must be either elected by the people or appointed by some local authority, if it still remained in the power of the Legislature to prescribe by statute to the officers who are elected to take charge of the streets or public works the minimum wages which the city must pay for labor, or the price it must pay for property, thus depriving the officer of all judgment and discretion in regard to his duties. If a local officer, as the representative of the city, is not left free in this respect, he cannot be said to be acting in the exercise of his own judgment or in the interest of the locality, but simply obeying the will of the central power. A corporation, whether public or private, is a person within the meaning of the constitutional guarantees for the security of liberty, property, and the equal protection of the law. If, therefore, the Legislature may not dictate, by statute, to a private person or corporation, what he or it shall pay for property, or the rate of wages to be paid to employes, I fail to see where it can get the power to dictate to the city the wages it must pay to the men it must employ in the care of its streets or other public works. If the Legislature can deprive a city of the right to hire its own laborers at such wages as they can mutually agree on, why can it not deprive every corporation of the same right? A private corporation is just as much a creature of the state as a public corporation, but no one has yet contended that a law fixing the rate of wages for a private corporation would be good. When the state creates a corporation, public or private, and sends it forth upon its mission, it becomes invested by the Constitution and the law of its

creation with certain rights and privileges that are as inviolable as those of private persons. Its property may not be confiscated or taken from it except by its consent or by due process of law. It cannot be denied the equal protection of the law. The money which a city procures by the exercise of the taxing power cannot be diverted, directly or indirectly, to any private purpose, or for the benefit of any class as such. And yet all these constitutional guaranties may be violated if the Legislature can fix the wages of laborers or the price to be paid for any property that the municipality may need.

That some or all these constitutional rights have been invaded by the statute in question is quite evident. That will appear from the facts of the present case, and by that I mean the facts stated in the complaint and those that are fairly to be inferred therefrom. The city of New York, in the exercise of its chartered powers, must purchase immense amounts of property, real and personal, and must employ a vast army of laborers, and the money to pay for the same must be procured by local taxation. The state, as such, bears no part of these expenses, and the question is whether it may prescribe by statute the price which the city must pay for such property or the wages for such labor, or must all these things be left for the city itself to settle by agreement upon such terms as may be reasonable, just as such matters are settled by private corporations or individuals? If the Legislature should pass a statute prescribing the minimum price that the defendant should pay for the carpets and furniture in the city hall, and should even name the merchant or dealer from whom alone they could be purchased, every argument adduced to uphold the statute in question would apply with equal force to such a law. If the Legislature has the power to fix the price of common labor, what objection can there be to a statute fixing the minimum or maximum price of such commodities? This case is a good illustration of the operation of a statute fixing the price of labor. We are informed by the complaint that prior to the enactment of the labor law on May 10, 1894, the plaintiff was employed by the day to work on the streets, and was paid wages at the rate of \$3 per day. There is no claim made that the wages thus paid were not fair wages, or the going wages. There is no claim that the plaintiff ever asked or expected any more; but it seems, or at least the complaint so states, that just as soon as the labor law went into effect on May 10, 1894, "the prevailing rate of wages" at once rose to \$3.50 per day, but the plaintiff was apparently oblivious of that fact, or at all events paid no attention to it, but continued to work in the same way and draw pay at the same rate for six years without, so far as appears, making any objection to the rate of wages or demanding any increase. Now it is said that the city is in arrears and is indebted to him

in the sum of \$600, being 50 cents more for each day that he worked and was paid \$3 per day. This claim has, of course, no foundation except in the statute, which, as he claims, gave him the right to the additional 50 cents. If the plaintiff can recover, so can hundreds, and possibly thousands, of other people, and such demands in the aggregate must amount to a very large sum of money that the city must raise by taxation and pay to its employes after their work has been performed. Who will assert that the money so paid out of the treasury is devoted to a legitimate city purpose? Who can deny that the millions of dollars which the city is required to raise and pay for such arrears is not in the nature of a gratuity to private persons? The position of the city is that it owes the plaintiff nothing, and, if it must pay at all, it will be under the coercion of the legislative enactment. The power of the Legislature over municipal corporations in all matters political or governmental within constitutional limits is conceded, but surely that does not include the power to interfere in every detail of its internal affairs; and the right of the city to hire its own employes who work upon the streets on such terms as can be fairly agreed upon is one of the things that does not concern the state, but is confided to the local authorities. The compensation of all city authorities and of the clerical force in the several departments may be fixed and regulated by law, since their duties are public, political or governmental, but the wages of laborers or the price of property is something that cannot be fixed and regulated by statute without undermining every principle of local autonomy. It would be a very idle ceremony to provide in the Constitution that all moneys raised by taxation in cities must be devoted to city purposes if the Legislature may enact a law which will enable the plaintiff at the end of six years, and after drawing pay all the time at the rate of \$3 per day (that being, so far as appears, all he asked or expected), to reopen the account to add over 15 per cent. more to the amount paid to him for his labor, and which it is apparent he was satisfied with at the time as his compensation. It is no part of the legitimate powers or functions of government to fix wages any more than it is to prescribe the price of bread. If a statute may be enacted to put wages up, so may one be enacted to put wages down. If wages for the employes of a city can be fixed by a statute at \$5 per day, they can be fixed at 50 cents per day; all depending upon the temper of a majority of the Legislature. Such legislation cannot be justified upon the ground that it is aimed only at a great city existing under a legislative charter. The argument in that respect embodies a fundamental error in that it fails to observe the legal character of a municipal corporation, possessed as it is of dual powers; the one governmental, legislative, or public, and the other proprie-

tary or private. When imposing taxes, enacting ordinances, and conducting public improvements the city is exercising a part of the sovereign power, but in hiring laborers and purchasing property for the corporate use it acts as a private individual entitled to all the privileges and immunities that the Constitution secures to private persons. These latter powers are conferred and exercised for the private advantage of the particular corporation as a distinct legal personality, and as to such powers and to property acquired thereunder and contracts made with reference thereto the corporation is to be regarded *quoad hoc* a private corporation. Dillon on Municipal Corporations, § 66. It is upon this principle that cities are made liable for acts or omissions under the law of negligence. The law of master and servant is applicable, just as it is applicable between private parties.

In *Conrad v. Trustees of the Village of Ithaca*, 16 N. Y. 158, it was held that where the trustees of the village were made by its charter commissioners of highways, they were to be regarded, in respect to that function, not as independent public officers, but as the agents of the corporation, so as to make the latter civilly responsible for their acts of omission, according to the law of master and servant. In a note to the case last cited is published an opinion by Judge Selden in *Weet v. Trustees of the Village of Brockport*, wherein he points out the principle that lies at the basis of the rule which makes a municipal corporation liable under the maxim of respondeat superior as follows: "That whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to inure to the benefit of every individual interested in its performance." This liability of the municipality as to the care of the streets was again recognized by this court in *Ehrgott v. Mayor, etc., of New York*, 96 N. Y. 264, 48 Am. Rep. 622. Judge Earl, after citing *Conrad v. Trustees of Village of Ithaca*, 16 N. Y. 158; *Requa v. City of Rochester*, 45 N. Y. 129, 6 Am. Rep. 52; *Hutson v. Mayor, etc., of N. Y.*, 9 N. Y. 163, 50 Am. Dec. 526; *Davenport v. Ruckman*, 37 N. Y. 568; *Hume v. Mayor, etc., of N. Y.*, 74 N. Y. 284—observed that the rule has been somewhat criticised, but that "it has the sanction of a wise public policy, the support of good reasons, and that its operation is generally just and beneficent." This principle has been recognized in many other cases in this state that need not be cited. It has also been approved by the Supreme Court of the United States in *Barnes*

v. District of Columbia, 91 U. S. 540, 23 L. Ed. 440, and by the Circuit Court of the United States in *Barney Dumping-Boat Co. v. Mayor, etc., of City of New York*, 40 Fed. 50.

In *Missano v. Mayor, etc., of N. Y.*, 160 N. Y. 123, 129, 54 N. E. 744, 745, this court held, after a review of the authorities, as follows: "It is clear upon principle and authority that the city of New York, in the ordinary and usual care of its streets, both as to repairs and cleanliness, is acting in the discharge of a special power granted to it by the Legislature, in the exercise of which it is a legal individual, as distinguished from its governmental functions when it acts as a sovereign. *Maximilian v. Mayor, etc.*, 62 N. Y. 164 [20 Am. Rep. 468]." In the present case the Legislature in enacting the labor law was dealing with the city of New York in its proprietary or private capacity, wherein it is to be regarded as a legal individual, as distinguished from its governmental functions when it acts as a sovereign. Sweeping aside all forms, and seeking to establish the real legal situation, the city in this respect is nothing more than an aggregation of private citizens who are taxpayers, and as such are entitled, acting in the combination created by the charter, to the protection, through the legal entity thereby created, of all those individual rights and privileges, precisely as if each was acting for himself. If it be true, as the foregoing authorities clearly establish, that a municipal corporation, acting as a legal individual, is liable in damages for the negligence of its servant, it must logically follow that it is entitled to all the immunities and privileges incident to that situation, and this involves the right of the city under the Constitution to hire its own laborers and servants, since it would be intolerable if their employment could be regulated and controlled by the central power, while the city alone is made liable for their negligence or mistakes. The Legislature may authorize burdens to be imposed upon them for public works or improvements, and possibly may require the same by mandatory laws in the interest of the general public; but this does not embrace the power to dictate to the city the wages it shall pay to its employes in the performance of its work, or to deprive the local authorities who act for the taxpayers of all judgment and discretion upon that subject. A taxpayer in a city has the right to have such questions decided by the judgment of the local authorities who represent him, and not by the central power at the capital of the state.

It is a curious fact that every argument in support of statutes of this character, whether proceeding from the bench or the bar, contains the broad admission that, if such laws were made applicable to private corporations or individuals, they would then be clearly in conflict with the Constitution. These arguments, like that to sustain the statute in question, entirely overlook or ignore the im-

portant distinction between these powers and functions of municipal corporations that are public or political and those that are private. This distinction has nowhere been better stated and illustrated than in the opinion of Judge Cooley in the case of *People, etc., v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 202. After stating what he considers as settled law, the proposition that cities, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities and as being entitled to exemptions distinct from those which they possess or can claim as conveniences in state government; that they possess powers and capacities which are private in contradistinction to those in which the state is concerned, and which are called public, thus putting such corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations or individuals—the learned judge then proceeds to amplify this distinction as follows: "Whoever insists upon the right of the state to interfere and control by compulsory legislation the action of the local constituency in matters exclusively of local concern should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify on principle a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the state, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase and how it shall improve and embellish a park or boulevard for the recreation and enjoyment of its citizens. The one law would rest upon the same fallacy as the other, and the reasons for opposing and contesting it would be the same in each case. And while it may be entirely possible that in any particular instance the interference would be beneficial to the person or the community whose rights are invaded, it is not to be overlooked that an interference to compel a person to submit to something for his own good may be made use of as a precedent to compel him at some future time to submit to extortion and plunder. The law very properly draws a line between that which is admissible and that which is not, and it does not allow outside dictation in matters purely of local concern, for one very good reason, among others equally good: that the motive for outside interference will very likely be something besides a desire to do good to a community in which the parties interfering have no personal interest, unless of a merely sentimental nature, and whose burdens they are not to share, or enjoyments participate in. All such matters are left to those whose interests will

prompt them to act with prudence, and who, because of their interest, and because they relate to matters that must come under their own view and observation, they are presumptively best qualified to decide upon."

It was held in the Orange County Road Constr. Co. Case, *supra*, that a statute making it a crime for a person contracting with a municipal corporation to require more than eight hours' work for a day's labor was unconstitutional and void. It was held in the Rodgers Case, *supra*, that a similar statute forfeiting a contractor's right to compensation for his work if he omitted in doing the work to pay what is called the "prevailing rate of wages," was also in conflict with the Constitution. In the Rodgers Case the city resisted the claim of the contractor for compensation. It had no other defense, and this court held that it constituted no answer to the contractor's claim to set up a violation of a statute which was invalid, and beyond the power of the Legislature to enact. What distinction, if any, there is or can be between these cases and the one at bar I confess I am unable to state. I leave that to my Brethren who now differ with me, only adding that it does not seem to me wise to introduce fanciful distinctions in the construction of statutes of this character whenever the membership of the court happens to be changed. It must be remembered that in the Rodgers Case it was the city that set up and claimed the protection of the statute, and we held that the law had no force or effect to defeat the claim of the contractor, but in the present case it is to be held that it is a good basis for a common laborer upon which to assert a valid claim against the city treasury; or, in other words, a statute held to be void as against the claim of the contractor is the very cornerstone and foundation for a claim against the city by one of its servants or employes.

I am in favor of affirming this judgment on the point first above stated, but I am not in favor of going out of our way to change the construction already given to the labor law on the basis of a distinction so frail and fanciful as that contended for by the learned counsel for the plaintiff.

HAIGHT, CULLEN, and WERNER, JJ., concur with PARKER, C. J. BARTLETT and VANN, JJ., concur with O'BRIEN, J.

Judgment affirmed.

(177 N. Y. 314)

MURPHY v. CUFF.

(Court of Appeals of New York. Jan. 29, 1904.)

ASSAULT—CIVIL ACTION—EVIDENCE.

1. In an action against a saloon keeper for an assault, the question of fact about which

the parties differed was as to whether defendant directed his son to throw plaintiff out of the saloon. The court allowed to be introduced a statement of the son—made on the trial of an action against him for the same assault, and who was insolvent—and deceased at the time of the second action to the effect that he took plaintiff's money after the assault, and said he would go and get a hack for him, but that he spent the money for beer. *Held* error authorizing a reversal.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John Murphy against Edward Cuff. From a judgment of the Appellate Division (79 N. Y. Supp. 1139) affirming a judgment for plaintiff, defendant appeals. Reversed.

John N. Carlisle, for appellant. F. B. Pitcher and George A. Lawyer, for respondent.

HAIGHT, J. This action was brought to recover damages for an alleged assault and battery. The plaintiff was a laborer, 28 years of age, residing in Watertown, N. Y., and the defendant was a saloon keeper in that city, having a son James, aged 27, who was his bartender. During the afternoon of April 20, 1899, the plaintiff, while in the defendant's saloon, claims to have been assaulted by the defendant's son, and to have been kicked and pushed out of doors, causing the fracture of the neck of one of his thigh bones. The plaintiff testified, in substance, that he was in the defendant's saloon, and had had several drinks that day with the defendant's son; that during the afternoon the defendant entered the saloon, and addressed him by asking what he was doing there, and if he had come up to get Jim drunk again, and concluded by telling him that he did not want him hanging around there. They then had some words with reference to a bill that the plaintiff owed the defendant, and thereafter the defendant walked out of the front door, but as he did so he directed his son to throw the plaintiff out, calling him a vile name. Thereupon the defendant's son, in the absence of his father, committed the assault complained of. The defendant testified, in substance, that he told the plaintiff that he did not want him hanging around there, and that he must go out, but denied positively that he said a word to his son with reference to throwing or putting the plaintiff out. It further appears from the testimony of both of the parties that the defendant was out but four or five minutes, going to the next door, and that on returning to the saloon he found the plaintiff lying upon the ground outside of the back door; that with the assistance of his son he took him inside, and placed him in a chair, and then lectured both his son and the plaintiff with reference to coming into his saloon, getting drunk, and then having a fight over it; stating that it was a pretty state of affairs, and ordered his son out of the saloon, with directions not to come back

any more. It will thus be seen that the sharp question of fact about which the parties differ is as to whether the defendant directed his son to throw the plaintiff out of the saloon. Upon this issue the testimony is confined to that of the plaintiff and defendant, who are now the only remaining living witnesses as to what took place. The jurors were therefore compelled to determine the fact on the testimony of these witnesses, aided only by the inferences which may be drawn from that which preceded and immediately followed the assault, as admitted by both parties. The issue being thus narrowed to the testimony of the parties, and they having testified positively and squarely against each other upon the one question of fact upon which the right of the plaintiff to recover depends, it became important that the trial court should avoid any incompetent testimony which might, in any considerable degree, prejudice the minds of the jurors against either of the parties to the controversy. It appears that the plaintiff first brought an action against the son, James Cuff, and that in that action he recovered a judgment. It is asserted that the son was insolvent, and that he afterwards was killed by a passing train while he was walking upon the track of a railroad; that then this action was brought, in which a recovery is sought against the father. Upon the trial the plaintiff testified in his own behalf that upon the trial of the action against James he testified that he took the plaintiff's money after he was injured, said he would go and get a hack for him, and that he forgot it, and spent the money for beer. This evidence was taken under an objection and exception by the defendant. The plaintiff was unable to get assistance to take him home for a number of hours, and in the meantime he was compelled to remain in the saloon. The evident purpose of this evidence was to create a bias in the minds of the jurors against the defendant and his son. The defendant was not bound by the statement of James, made upon a trial in another action, and it was clearly incompetent, and an error of law on the part of the court to receive it after objection. But we are urged to sustain the judgment upon the ground that the admission of the evidence did not affect the result. We might overlook the error if satisfied that such was the fact, but, under the circumstances disclosed in the case, we think it cannot be said that its reception did not affect the result.

The judgment should therefore be reversed, and a new trial ordered, with costs to abide the event.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur.

Judgment reversed, etc.

(39 Ohio St. 317)

STATE ex rel. SHEETS, Atty. Gen., v.
ÆTNA LIFE INS. CO.

(Supreme Court of Ohio. Jan. 5, 1904.)

FOREIGN LIFE INSURANCE COMPANY—INDEMNIFYING EMPLOYERS—DOING BUSINESS IN STATE—COMITY—CONFLICT OF LAWS.

1. A life insurance company incorporated and organized under the laws of another state, and authorized by its charter to engage in the business of "indemnifying employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes," may, upon complying with the statutory requirements regulating deposits by foreign corporations, be licensed and permitted, under favor of section 3596, Rev. St., to engage in and transact such employers' liability insurance in this state.

2. In the absence of any statute in Ohio prohibiting life insurance companies from doing an employers' liability insurance in this state, and the business itself being by statute expressly authorized, a life insurance company incorporated and organized under the laws of a sister state, and empowered by its charter to engage in the business of employers' liability insurance, may, by the comity that prevails between the states, be licensed and permitted to transact such business in this state, although our statute has not in express terms conferred upon domestic life insurance companies authority to engage in or transact that particular kind of insurance.

(Syllabus by the Court.)

Quo warranto by the state, on the petition of J. M. Sheets, attorney general, against the Ætna Life Insurance Company. Petition dismissed.

The petition in this case was filed in this court by the Attorney General, and is as follows: "Now comes J. M. Sheets, who is the duly elected, qualified, and acting Attorney General of the state of Ohio, and gives the court to be informed and to understand that the defendant, the Ætna Life Insurance Company, is a corporation organized under and by virtue of the laws of Connecticut for the purpose of transacting the business of life insurance, and is, and has been for many years last past, engaged in said business of life insurance. For more than ten years last past said defendant has been, and is now, duly authorized to engage in the business of life insurance within the state of Ohio, and during all of said time has been, and still is, actively engaged in the transaction of said business of life insurance within this state. Prior to the 24th day of June, 1902, said defendant procured an amendment to its charter, whereby it was authorized to engage in the business of 'indemnifying employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes,' which said business is commonly termed 'employers' liability insurance.' The said defendant thereupon deposited with the Superintendent of Insurance of the state of Ohio securities to the amount of fifty thousand dollars (\$50,000), as provided by section 3641b, Rev. St. Ohio, and made application

to him for a license to engage in the said business of employers' liability insurance within the state of Ohio. Said Superintendent of Insurance thereupon, to wit, on the 24th day of June, 1902, issued to said defendant a license purporting to authorize it to engage in the said business of employers' liability insurance. Thereupon the said defendant assumed the right and is now actively engaged in the transaction of said business of indemnifying employers against loss or damage for personal injury or death resulting from accidents to employes, or persons other than employes, within this state. Wherefore plaintiff says that by reason of the fact that the defendant is duly authorized and empowered to engage in the business of life insurance within the state of Ohio, and is now, and has been for more than ten years last past, actively engaged in said business of life insurance within this state, it has no authority under the laws of Ohio to engage in said business of indemnifying employers against loss or damage for personal injury or death resulting from accidents to employes, or persons other than employes. But on the contrary the said defendant is prohibited by the laws of the state of Ohio from engaging in said business. Wherefore the plaintiff prays the judgment of this court that the defendant be ousted and wholly prohibited from carrying on the said business of indemnifying employers against loss or damage for personal injury or death resulting from accidents to employes, or persons other than employes, within this state, and asks such further and other relief as the nature of the case may require." To this petition the defendant filed the following demurrer: "Comes now the Aetna Life Insurance Company, defendant herein, and demurs to the petition for the reason that the facts stated therein are not sufficient to constitute a cause of action against this defendant." The questions for consideration in this case are those arising upon this demurrer.

J. M. Sheets, Atty. Gen., for plaintiff. Paxton & Warrington, Gordon, Granger & De Witt, and Booth, Keating & Peters, for defendant.

CREW, J. (after stating the facts). It is admitted in this case that the defendant, the Aetna Life Insurance Company, is a corporation duly organized under the laws of the state of Connecticut; that, by its charter and the amendment thereto, it is authorized and empowered to take insurance risks on life and against accidents to persons, and to engage in the business of "indemnifying employers against loss or damage for personal injury or death resulting from accidents to employes, or persons other than employes"; and it affirmatively appears from the allegations of relator's petition that for more than 10 years last past said defendant company has been transacting in this state

the business of life insurance; that on June 24, 1902, said company having complied with the statutory requirements regulating foreign corporations doing an employers' liability insurance in this state, there was issued to it by the Superintendent of Insurance of the state of Ohio a license authorizing and empowering it to engage in such insurance in this state, and that since said 24th day of June, 1902, said defendant company has been, and now is, carrying on within this state said business of employers' liability insurance. No question is made as to the charter powers of the defendant company. These are conceded, but it is contended by the relator that said company, being a life insurance company, and being now actively engaged in transacting the business of life insurance in the state of Ohio, may not, therefore, lawfully be licensed or permitted to carry on or continue the business of employers' liability insurance within this state. In support of this contention it is argued (1) that the statutes of Ohio do not authorize life insurance companies to transact both a life and employers' liability insurance; (2) that a corporation formed under the laws of another state, and transacting the business of insurance in Ohio, is only permitted to engage in such kind of insurance in this state as a domestic corporation is authorized to transact. We shall consider these propositions in the order named.

1. Section 3596, Rev. St., prescribes and defines the kind of business that may be done and the character of risks that may be taken by a company or corporation organized or incorporated under the laws of another state, and engaged in transacting the business of life insurance in this state. That section, so far as its provisions are pertinent to the present inquiry, reads as follows: " * * * No company * * * organized or incorporated by act of Congress, or under the laws of this or any other state of the United States, or by any foreign government, transacting the business of life insurance in this state, shall be permitted or allowed to take any other kind of risks, except those connected with, or appertaining to making insurance on life or against accidents to persons. * * * " This section, substantially in its present form, was first enacted in 1888. Prior thereto life insurance companies, whether foreign or domestic, doing business in this state, were not authorized to take any other kind of risks than those connected with or appertaining to making insurance on life. By the amendment of March 27, 1888 (85 Ohio Laws, 119), the authority of such companies was so far enlarged and extended as to permit and allow them not only to make insurance on life, but to permit them to take risks and make insurance connected with or appertaining to accidents to persons. This section was again amended May 2, 1902 (95 Ohio Laws, p. 355), when it took its present form, but no change or modification was made thereby as

to the right of the companies therein named to insure against accidents to persons.

While the language of this section is that of regulation and restriction, rather than of affirmative grant, nevertheless the language therein employed, by clearest implication, recognizes the right, and would seem to confer upon and invest companies of the character of the defendant company with full authority to make insurance and take risks in any wise connected with or appertaining to accidents to persons; otherwise the Legislature would not have undertaken to designate and define the character of accidental risks that might be taken by such companies. Whether, then, the defendant company is clothed with authority to engage in the business of employers' liability insurance within this state, depends upon whether or not that particular kind of insurance is embraced and included in the authority so given and permitted, to make insurance and take risks connected with and appertaining to accidents to persons. If it is, then, admittedly, the defendant, in making such insurance, was and is acting clearly within the scope of its delegated powers. That this kind of insurance (employers' liability insurance) may, from its very nature, appropriately be classified with, and peculiarly belongs to, what is commonly known and designated as "accident insurance," must, we think, be conceded, inasmuch as such insurance has for its primary purpose indemnification against the effects of accidents resulting in bodily injury or death. It is said by Barker, J., in *Employers' Assurance Corporation v. Merrill*, 155 Mass. 406, 29 N. E. 530: "In one sense, there can be no doubt that an employers' liability policy is accident insurance. Such policies cover accidents to others than the assured, but the assured must stand in such a relation to the person accidentally injured or killed as to be legally liable for the result of the accident, and it is only an accident causing bodily injury or death which creates a right to the insurance." But it is argued by relator that this character of insurance is not within the provisions of section 3596, and could not have been within the contemplation of the Legislature at the time section 3596 was enacted, for the reason, as claimed, that such insurance was then unknown in this state. This statement is challenged by counsel for defendant, who assert that employers' liability insurance was not only known, but was extensively written, in Ohio, for several years prior to the enactment of this statute. Whatever the fact may be as to this, if the language employed in section 3596 is sufficiently comprehensive in character to include such insurance, then, under the established rules of construction, it must be held to authorize and permit it. In *Endlich on the Interpretation of Statutes*, § 112, the rule is stated thus: "Except in some few cases where a statute has fallen under the princi-

ple of excessively strict construction, the language of a statute is generally extended to new things, which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the act deals with a genus, and the thing which afterwards comes into existence is a species of it." And this rule of statutory extension has been recognized and followed by this court in numerous cases. In *Corwin's Lessee v. Benham*, 2 Ohio St. 43, Ranney, J., says: "I am aware that the usual import of words is sometimes to be restricted, when it would otherwise obviously extend beyond the subject-matter and spirit of the whole enactment. But this cannot be done because the Legislature did not foresee or contemplate every case upon which it might operate. The wisest legislators would fall far short of such foresight. If within the language, it must appear clearly to the court that the case would have been excluded from its operation if foreseen." And in *Stetson v. Bank*, 2 Ohio St. 175, speaking of this rule, it is said: "Falling within the positive provisions of the law, it is not enough to exclude this case from its operation to say it was not contemplated when the law was enacted. We must be able to see some reason to suppose it would have been excluded in positive terms if it had occurred to the minds of the assembly at the time." To the same effect are *Goshorn v. Purcell*, 11 Ohio St. 649; *Morris v. Williams*, 39 Ohio St. 558; and *Railway Co. v. Telegraph Assn.*, 48 Ohio St. 423, 27 N. E. 890, 12 L. R. A. 534, 29 Am. St. Rep. 574.

A further reason assigned by relator why foreign life insurance companies may not be permitted to do an employers' liability insurance in this state is that by section 3641b, Rev. St., insurance companies, other than life, have been specially authorized and empowered to transact this kind of business in Ohio; thereby, it is argued, manifesting a legislative intent to limit and restrict the transaction of such insurance business in this state, to companies other than life. If we are right in the conclusions above reached, this contention is sufficiently answered by the fact that employers' liability insurance is included in the provisions of section 3596, permitting insurance against accidents; and the right of life insurance companies to make such insurance is in no wise affected or modified by the provisions of said section 3641b, which was subsequently enacted. There can be no doubt as to the power of the Legislature to prescribe the terms and conditions upon which foreign corporations may be admitted to do business in this state, or of its right to define the kind of business that may be done by such corporations. It was held in *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521, that "foreign corporations can exercise none of their franchises or powers within this state, except by comity or legislative consent. That consent may be upon such terms and conditions

as the General Assembly, under its legislative power, may impose." However, a consideration of the legislation in Ohio touching the rights of life and life and accident insurance companies organized under the laws of another state, and doing business in this state, will show that it has not been, and is not, the policy of our law to discourage or prohibit such companies from engaging in or doing an accident insurance business in this state; nor can there be found any statutory inhibition whereby the right of such companies to insure against accidents is limited or restricted to risks by accident to the person assured, but, on the contrary, the right conferred is to take such risks as are in any wise connected with or appertaining to accidents to persons. It follows, therefore, that so long as the defendant company confines itself to insurance against accidents to persons, and its contract is one to indemnify the assured against loss by accidental injury to a person in whom the assured has an insurable interest because legally liable for the results of such accident, such risk is clearly one "connected with and appertaining to accidents to persons," and is therefore within the legitimate scope of the power and authority possessed by such company by virtue of section 3596, Rev. St.

2. The conclusion above reached, viz., that, under favor of section 3596, life insurance companies may rightfully be licensed and permitted to transact within this state the business of employers' liability insurance, is sufficient to determine the only question presented in this case, and renders unnecessary a consideration of relator's second proposition. However, referring to the claim made upon this proposition, we may say that inasmuch as the business of employers' liability insurance is not unauthorized or prohibited in Ohio, but such business is expressly recognized and permitted by our statutes, we incline to the view that, in the absence of affirmative statutory provision prohibiting life insurance companies from engaging in such business, a life insurance company organized under the laws of a sister state, and authorized by its charter to write employers' liability insurance, may, by the law of comity, be licensed and permitted to write such insurance in this state upon complying with the requirements of the statutes of this state as to deposits, etc., even though the right to transact that particular kind of insurance may not have been exercised by, or conferred upon, domestic life insurance companies by positive statutory grant. If the business is within the charter powers of such foreign company, it is enough that such business is not prohibited in this state, is not obnoxious to the policy of our laws, and is not against the interests of our citizens. It is said by the Supreme Court of Illinois in *People v. Fidelity & Casualty Co.*, 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295: "The rule is that, where there is no positive prohibitive statute, the presumption, under

the law of comity that prevails between the states of the Union, is that the state permits a corporation organized in a sister state to do any act authorized by its charter or the law under which it is created, except when it is manifest that such act is obnoxious to the policy of the law of this state." Again, in *Cowell v. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547, it is said: "If the policy of the state or territory does not permit the business of the foreign corporation in its limits, * * * it must be expressed in some affirmative way. It cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations," etc. The views thus expressed are in harmony with our laws, and in accord with the recognized policy of this state. As said in argument by counsel for defendant in this case, "It is not the policy of this state to repel or discourage solvent, reputable foreign corporations from doing business within its borders, and the courts will not anxiously seek an excuse in the statutes to drive them out."

We are of the opinion that the facts stated in the petition in this case are not sufficient, in law, to entitle the relator to the relief and judgment therein asked. The demurrer of defendant is therefore sustained, and the petition of relator dismissed. Judgment accordingly.

BURKET, C. J., and SPEAR, DAVIS, and SHAUCK, JJ., concur.

(69 Ohio St. 346)

LANGE v. LANGE et al.

(Supreme Court of Ohio. Jan. 5, 1904.)

ACTION FOR MONEY — JUDGMENT — APPEAL FROM COMMON PLEAS TO CIRCUIT COURT.

1. In an action for money, not requiring a decree granting some mode of equitable relief, an appeal cannot, under section 5226, Rev. St. 1892, be taken from the court of common pleas to the circuit court, although the determination of the rights of the parties may involve the application of principles which are of equitable origin and nature.

(Syllabus by the Court.)

Error to Circuit Court, Montgomery County.

Action by Mrs. Lange against the grand lodge. William F. Lange interpleaded. Judgment for Mrs. Lange. Appeal by William F. Lange to the circuit court was dismissed, and he brings error. Affirmed.

Mrs. Lange brought an action in the court of common pleas against the grand lodge for the sum of \$2,000, alleged to be due her, as the beneficiary named in its certificate, upon the death of Frederick Lange, her deceased husband. The lodge, admitting its liability in the sum claimed, brought the money into court; taking appropriate steps to have a judicial determination of the adverse claims to the fund which had been made by Mrs. Lange and the plaintiff in error, William F. Lange, each of whom was

the holder of a certificate under which a claim to the fund had been made. The claim of Mrs. Lange was founded on a certificate dated December 23, 1893; that of William, upon a certificate dated January 7, 1897—both, as is alleged, issued under the rules of the order. She alleged that the certificate under which she claimed, naming her as beneficiary, was, by her husband, delivered to her at its date, and that it was ever afterward in her possession, and that she, having no knowledge of any attempted substitution of another beneficiary, out of her own funds, paid the duties and assessments on account thereof from May, 1897, until the death of her husband, February 14, 1900. She further alleged that, by the rules of the order, the beneficiary could not be changed without the surrender of the previous certificate, or the showing by affidavit that it was lost, or its production impossible, and that, in fraud of her rights as beneficiary, William and other members of the family, when her husband was ill and mentally incapable of transacting business, induced her to absent herself from his room for a time, and that while she was absent they procured from him such affidavit, and the certificate under which he claimed was thereupon issued. In the court of common pleas, a jury being waived, the cause was tried upon the pleadings and the evidence, and a judgment was rendered in favor of Mrs. Lange. William thereupon took an appeal to the circuit court, which it dismissed upon the ground that the action was not appealable. The order of dismissal is assigned here as error.

McKemy & Belville and Young & Young, for plaintiff in error. Rowe & Shuey and John Schuster, for defendants in error.

SHAUCK, J. (after stating the facts). The appeal was taken under the supposed favor of section 5223, Rev. St. 1892, which defines generally the actions which may be appealed from the court of common pleas to the circuit court for a trial *de novo*. The section requires that a cause, to be so appealable, must present three traits: It must be a civil action, it must be within the original jurisdiction of the court of common pleas, and the right to demand a jury upon the trial of the issues of fact in that court must not exist. Whether the third of these traits appears in the present case is the question with respect to which counsel differ. The determination of that question is not aided by the consideration that interpleader is equitable in its origin and nature. However uniformly it may appear that appealable actions are equitable, the Legislature has not used appropriate terms to make all equita-

ble actions appealable. While the constitutional requirement that the right of trial by jury shall remain inviolate has been effective to continue that right in all cases which were triable to a jury at the time of the adoption of the Constitution, it has not prevented, nor was it intended to prevent, the extension of the right of trial by jury to cases which were not so triable at the time of the adoption of the Constitution; and every case included in such extension of the right of trial by jury is thereby excluded from the category of cases appealable, however clearly it may appear that the rights of the parties depend upon the application of principles which are of equitable origin and nature. Actions for money only, founded upon the principles of contribution and subrogation, are examples of those which are now included within the provisions of section 5130, Rev. St. 1892, that "Issues of act arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial be waived, or a reference be ordered as hereinafter provided." When, as in the present case, a party, admitting his indebtedness, resorts to a court for the purpose of procuring a judgment determining to which of two or more claimants payment should be made, he does not tender any issue or seek any relief not relating to the payment of money.

Conceding that one or more of the rival claimants may assert a right to the stake on grounds which call for equitable relief, do counsel for the plaintiff in error correctly assert that such grounds appear in Mrs. Lange's allegations respecting the manner and purpose of the procurement of the second certificate? It is not alleged that any instrument had been procured from her which at law would bar the assertion of her claim as holder of the prior certificate, and which she would therefore be entitled to have canceled by the decree of a court of equity. There was no prayer for relief by any of the modes peculiar to courts of equity, nor were there allegations of fact making such relief necessary or appropriate. There being no suit for equitable relief by either party, there was an "action for money only." Whether a party, plaintiff or defendant, tenders issues of fact not triable to a jury as of right, must always be determined by regarding, not the principles which the court is required to consider and apply in determining the rights of the parties, but what decree it is required to enter upon its journal.

Judgment affirmed.

BURKET, C. J., and SPEAR, DAVIS PRICE, and CREW, JJ., concur

(69 Ohio St. 351)

MONTANA COAL & COKE CO. v. CINCINNATI COAL & COKE CO. et al.

(Supreme Court of Ohio. Jan. 5, 1904.)

CONTRACT—CONSTRUCTION—LEX LOCI—PROMISSORY NOTE—INDORSERS IN KENTUCKY AND PENNSYLVANIA—LAW OF INDORSEMENT.

1. A contract made in one state or country to be performed in another is governed by the laws of the latter, which determine its validity, obligation, and effect. *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Sheppard*, 46 N. E. 61, 56 Ohio St. 68, 60 Am. St. Rep. 732, and *Kanaga v. Taylor*, 7 Ohio St. 142, approved and followed.

2. A promissory note for the payment to the payee of a certain sum of money "payable at Northern Bank, Covington, Ky.," signed by the principal debtor in Ohio, and before delivery, which was in Ohio, signed in blank on the back by another party in Kentucky and by one in Pennsylvania, is a contract by all the parties thereto that the contract shall be performed in Kentucky, and as to its nature, validity, interpretation, and obligation is governed by the laws of that state.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Action by the Montana Coal & Coke Company against the Cincinnati Coal & Coke Company and others. Judgment for defendants was affirmed in the circuit court, and plaintiff brings error. Affirmed.

On February 1, 1896, the defendant in error the Cincinnati Coal & Coke Company executed and delivered to the plaintiff in error, the Montana Coal & Coke Company, a promissory note, of which the following is a copy:

"\$1,654.89. Cincinnati, Feb. 1, 1896.

"Ninety days after date the Cinti. Coal & Coke Co. promise to pay to the order of Montana Coal & Coke Co. sixteen hundred fifty-four and thirty-nine one-hundredth dollars, payable at Northern Bank, Covington, Ky., value received.

"A. Montgomery, Pres.

"L. Stock, Sec'y & Treas."

On the back of said note appear the following indorsements:

"A. Montgomery & Co. Marshall McDonald."

The consideration for the note was coal sold by the plaintiff in error to the defendant in error the Cincinnati Coal & Coke Company, prior to its date. The Cincinnati Coal & Coke Company, when the money was due, requested an extension of time for payment, and the plaintiff in error agreed to extend the time for payment, provided that the Cincinnati Coal & Coke Company would execute and deliver to the plaintiff a 90-day note, indorsed by A. Montgomery & Co. and Marshall McDonald. A. Montgomery & Co. did so indorse said note on the back thereof at Covington, Ky., prior to the delivery of the note to the plaintiff in error. The Cincinnati Coal & Coke Company thereupon sent said note to Marshall Mc-

Donald, at Pittsburg, Pa., and he there indorsed his name on the back of said note after the indorsement of A. Montgomery & Co., and returned the said note to the Cincinnati Coal & Coke Company, at Cincinnati, Ohio, after which the Cincinnati Coal & Coke Company delivered the note to the plaintiff in error, the Montana Coal & Coke Company, at Cincinnati, Ohio. The note, on default, was not protested, nor was notice of nonpayment given to Alexander Montgomery, the surviving partner of A. Montgomery & Co., nor to Marshall McDonald or his legal representatives. The note was never discounted or negotiated at any bank in the state of Kentucky. No suit was instituted to compel the Cincinnati Coal & Coke Company to pay the note in any court prior to this suit. Each of the circuit courts of the state of Kentucky, being courts of general jurisdiction in all actions at law, held a term subsequent to May 1, 1896, at which an action might have been brought by the plaintiff in error to recover any sum that might have been due upon the note set out in the petition. The plaintiff, the Montana Coal & Coke Company, has always been the owner and holder of the note set forth in the petition. On the trial of this action in the court of common pleas of Hamilton county the court held upon these facts that the liability of Alexander Montgomery and Marshall McDonald was to be determined by the laws of the state of Kentucky, and that by the laws of that state said indorsers were to be regarded as assignors merely, and were released from all liability to the payee of the note in suit, because the payee had failed to prosecute the maker to insolvency at the next term of the circuit court in that state after the maturity of the note. The petition of the plaintiff in error was therefore dismissed as to Montgomery and McDonald, and this judgment was affirmed on error to the circuit court of Hamilton county.

Nathaniel Wright, for plaintiff in error.
A. C. Shattuck, for defendants in error.

DAVIS, J. (after stating the facts). This court has already committed itself to the doctrine that "a contract made in one state or country to be performed in another is governed by the laws of the latter, which determine its validity, obligation, and effect." *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Sheppard*, 56 Ohio St. 68; 46 N. E. 61, 60 Am. St. Rep. 732; *Kanaga v. Taylor*, per Bowen, J., 7 Ohio St. 142, 70 Am. Dec. 62. This rule is so well established upon reason and authority that it requires no discussion here. The note which is the subject of controversy in this case was signed by one of the parties in Ohio, and before delivery by another in Kentucky and by another in Pennsylvania; but it was delivered to the agent of the payee in Ohio. The contract was within the control of the

† 2. See Bills and Notes, vol. 7, Cent. Dig. §§ 243, 249.

parties who are bound by it, and did not become effective until it was delivered. Therefore the *loci contractus* is Ohio. But the place of performance, the *loci solutionis*, is Kentucky, because the note is expressly made "payable at Northern Bank, Covington, Ky." The plaintiff in error insists that this stipulation binds only the principal debtor, the Cincinnati Coal & Coke Company, which signed underneath the note and upon the face of it; and that the contract of the parties who signed in blank on the back of the note, although before its delivery, is like the engagement of an indorser, an independent contract which contains no stipulation as to the place of performance. Hence it is argued that as to these parties the case is controlled by the *lex loci contractus*; that is, the law of Ohio. From our point of view, Montgomery & Co. and McDonald were not indorsers in the regular way and in the course of business as the owners or holders of the note. All of the defendants were original parties to the note, having signed it before it came into the possession of the first owner, the payee. The facts are undisputed, and the obvious deduction therefrom is that the parties to the note at the time of its utterance all understood, and meant to be governed by, its terms; for at the time Montgomery & Co. and McDonald put their signatures on the back of the note the stipulation that the money should be "payable at Northern Bank, Covington, Ky.," was as much a part of the original contract as the promise to pay to the order of plaintiff the sum of money which is stated. There was, in short, no separate contract after the making of the note; but the note came to the payee signed by all of the defendants, and with the place of performance distinctly expressed.

There was therefore no error in the judgments of the courts below, and the judgment of the circuit court is affirmed.

BURKET, C. J., and SPEAR, SHAUCK, PRICE, and CREW, JJ., concur.

(69 Ohio St. 339)

KINNER et al. v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Ohio, Jan. 5, 1904.)

EQUITY—CLEAN HANDS—SALE OF NONTRANSFERABLE RAILWAY TICKETS—PURCHASE FOR PURPOSE OF RESELLING—INJUNCTION.

1. The maxim, "He who comes into equity must come with clean hands," requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject-matter of his suit.

2. A railroad company, having sold tickets with return coupons to a large number of persons who desired to attend a convention, the tickets, by their terms, being nontransferable, and the purchasers being required, on returning, to show their identity as the original purchasers, the contract resting upon a substantial reduction in the price of carriage, is entitled to an injunction against persons acquiring the re-

turn portions of such tickets from the original purchasers and selling them to others, to be used by them in violation of the terms of such contract; and the maxim referred to will not justify a denial of that relief because the plaintiff had agreed with other carriers with respect to the reduction of rates and the conditions of tickets for such occasion.

(Syllabus by the Court.)

Error to Circuit Court, Cuyahoga County.

Suit by the Lake Shore & Michigan Southern Railway Company against Kinner and others. Decree for plaintiff was affirmed by the circuit court, and defendants bring error. Affirmed.

The railway company filed its petition in the court of common pleas September 10, 1901, against Kinner and numerous others, for an injunction, alleging facts of which the following is a condensed statement: The company is a common carrier of passengers, operating a line of railroad between Chicago, Ill., and Buffalo, N. Y., passing through the city of Cleveland, Ohio, and making numerous connections with other roads reaching all parts of the United States. The Grand Army of the Republic is a patriotic organization which, for a number of years, had been accustomed to hold national encampments, that for the year 1901 being fixed at Cleveland, Ohio, and in progress at the time of filing the petition. Some months prior to the meeting of the encampment, officials of the Grand Army and a committee of citizens of Cleveland, desirous of securing a large attendance at said encampment, entered into an arrangement with said company, and it agreed with said committee and with the companies operating the connecting lines to make special low rates from different points on its line and connecting lines for tickets to and from Cleveland, such tickets not to be transferable, and to be limited to the time of the meeting of said encampment, the original purchasers to identify themselves by subscribing their names whenever required for the purpose of identification; and tickets containing such conditions were sold in great numbers by said companies to persons visiting said encampment, the purchasers expressly agreeing, in consideration of such reduced fare, to comply with all of said conditions, and such agreement being indicated by the terms of the ticket. The defendants (scalpers) were engaged in obtaining from persons who had traveled to Cleveland on such tickets the return portions thereof, and selling them to other persons at a price far below the fare which said company was accustomed to charge and legally entitled to receive, so that the purchasers of such return portions of said tickets might, by falsely personating the original purchasers, practice fraud and deception upon the company, to its great detriment, and from which it would be unable to protect itself. The defendants were financially insolvent, and were engaged in said traffic in tickets with full knowledge of the

terms of said tickets and of the fraud and deception to be so practiced upon the company. The answer contains certain denials of allegations of the company, and alleged that the business of carrying passengers for hire had for a long time been conducted on a competitive basis, and that great reduction of fare upon such occasions as that referred to in the petition had been made, the reductions inuring to the benefit of all persons traveling over the competing lines, but that said companies had entered into a combination known as the "Central Passenger Association," the combination being formed by about 20 railroad companies, including the plaintiff, and for the sole purpose of suppressing competition, in contravention of the laws of the United States and of the state of Ohio; that the forms of tickets containing the conditions set forth in the petition were fixed and agreed upon by said combination for the accomplishment of such illegal purpose, and that by reason thereof the company was not entitled to the injunction for which it prayed. These allegations of the answer were denied in the reply. On the trial evidence was offered by the defendants tending to sustain their allegations respecting the organization and action of the Central Passenger Association, and the plaintiff's membership thereof. This evidence was excluded. The injunction having been granted as prayed for, with judgment for costs, a petition in error was filed in the circuit court, the exclusion of such evidence being the material assignment of error. The circuit court affirmed the judgment of the common pleas, and the reversal of both judgments is the object of the proceeding in error here.

Foran, McTighe & Baker and James R. Garfield, for plaintiffs in error. Brewer, Cook & McGowan, for defendant in error.

SHAUCK, J. (after stating the facts). Whether the courts below should have denied relief to the railway company, in obedience to the maxim that "he who comes into equity must come with clean hands," is the question presented by the record and discussed by counsel. The record does not show, nor did the rejected evidence tend to show, that the companies which formed the passenger association had pooled their earnings; and in the argument it is assumed that, although each company issued its own tickets and retained the proceeds of their sale, an agreement among them to make a stipulated reduction in passenger fares below the usual and legal rates is illegal and contrary to public policy. Upon that assumption, did the illegal contract bear such relation to the wrong whose prevention the company sought as to bar its resort to a court of equity, in view of the maxim invoked?

The maxim is more comprehensive in its results than is the kindred maxim that "he

who seeks equity must do equity." The latter, in the cases to which it applies, denies conditions which should be annexed to a decree granting equitable relief, while that which is here invoked, in the cases to which it applies, denies to the plaintiff all relief; but so similar are they and the reasons upon which they stand, in all the cases to which they apply, that in some of the earlier cases and commentaries on equity jurisprudence the entire subject is treated as comprehended within the maxim lastly stated. It is to be observed that the conditions which are annexed to the granting of equitable relief are always founded upon considerations arising out of the subject of the suit, and that a plaintiff, as a condition to equitable relief, is not required to do equity with respect to matters not involved in the subject of the suit. From the assumption that the companies composing the passenger association had entered into an unlawful combination in restraint of competition, it results that their conduct may be the subject of inquiry in the nature of a quo warranto, and that courts of equity will also refuse to aid in the enforcement of the contract under which such combination is formed. And this suggests the extent of the operation of the maxim which is invoked by the plaintiffs in error. It denies all relief to a suitor, however well founded his claim to equitable relief may otherwise be, if, in granting the relief which he seeks, the court would be required, by implication even, to affirm the validity of an unlawful agreement, or give its approval to inequitable conduct on his part. But a court of equity is not an avenger of wrongs committed at large by those who resort to it for relief, however careful it may be to withhold its approval from those which are involved in the subject-matter of the suit, and which prejudicially affect the rights of one against whom relief is sought. The numerous cases cited in the briefs show that, in the application of the maxim urged by counsel for the plaintiffs in error, the courts have consistently granted or refused relief by determining whether the reprehensible conduct of plaintiff is related to the subject of the suit. In the present case the railway company did not count upon the illegal contract, nor did it in any manner ask the court to approve the validity of that contract. The tickets against whose fraudulent use the injunction was granted were issued by the company in the usual course of the business for which it was organized; the stipulations against their transfer rested upon the consideration of a reduction of the rates of carriage; they contained no stipulation contrary to any statute either of the United States or of the state of Ohio, or in contravention of public policy; nor was there anything in the conduct of the company by which any right of the original defendants was prejudiced. The judgments below are therefore in accordance with the

uniform test as to the application of the maxim invoked.

Judgment affirmed.

BURKET, C. J., and SPEAR, DAVIS, PRICE, and CREW, JJ., concur.

(69 Ohio St. 359)

RICHARDS v. LOUIS LIPP CO.

SAME v. AMERICAN FIRE BRICK & CLAY CO.

(Supreme Court of Ohio. Jan. 5, 1904.)

MUTUAL PROTECTIVE ASSOCIATION POLICY—INDEMNITY—ESTOPPEL—MEMBERSHIP OF ASSOCIATION—FAILURE TO SIGN CONSTITUTION.

1. Where a policy has been issued by a mutual protective association which is organized and doing business under sections 3686-3690, Rev. St. 1892, and said policy has been held in good faith as an indemnity, and premiums have been paid and received under it, such association is estopped from asserting by way of defense to an action to recover for a loss under said policy that the plaintiff is not a member of the association because he has not signed the constitution of the association.

2. Where a policy has been issued in good faith by such association, and has been received and held by the assured as an indemnity upon the condition, set out in said policy, that such policy is made and accepted subject to the express agreement by the assured that he will pay such further assessments, within 30 days from notice thereof, as might be made under the by-laws adopted for the government of said association, and in accordance with the laws of Ohio, the assured, in an action to recover assessments on such policy, is estopped to deny that he is a member of said association because he had not signed the constitution thereof.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Error to Circuit Court, Tuscarawas County.

Action by the Louis Lipp Company against one Richards, receiver, and by the receiver against the American Fire Brick & Clay Company. From the judgments of the circuit court affirming judgments of the common pleas the receiver brings error. Affirmed in the case of the Louis Lipp Company and dismissed in the case of the American Fire Brick & Clay Company.

The case against the Louis Lipp Company was begun in the common pleas court of Hamilton county on a policy issued by the Aetna Fire Association, which was duly organized under sections 3686-3690, Rev. St. 1892. The cause of action was a loss by fire sustained by the holder of a policy. The plaintiff in error (defendant below) defended upon the ground that the policy was void for the reason that the constitution of said association was never signed by this policy holder. The plaintiff replied, setting up the issuing of the policy and the receiving and holding of the premium as a waiver of the signing of the constitution, and claimed an estoppel because of the waiver. The court of common pleas rendered judgment

for the plaintiff, and that judgment was affirmed by the circuit court.

The case of the American Fire Brick & Clay Company was begun in the court of common pleas of Tuscarawas county by the receiver of the Aetna Fire Association to recover an assessment decreed by the court of common pleas of Hamilton county in the matter of the dissolution of said association. The petition sets out the ordinary allegations showing the authority of the receiver to bring the action; setting up the decree of the court which made the assessment; stating that proper notice was given, giving the time and amount in which the defendant was insured; and alleging that during the time when the policy was running the defendant held the same, and that one of the conditions of the policy was that it was made and accepted subject to the express agreement by the assured that he would pay such further assessments, within 30 days from notice thereof, as might be made under the by-laws adopted for the government of said association, and in accordance with the laws of the state of Ohio; and alleging that by the accepting and holding of the policy aforesaid the defendant the American Fire Brick & Clay Company effected insurance in, and became and continued to be a member of, said association between said dates, and in said amount, and received the contingent benefits arising from said insurance, and thereby agreed to and became liable for its proportion of all losses and expenses incurred by the association between said dates, and to pay such assessments on the amount of the defendant's policy as should be required by law and the orders of the directors of the association. The defendant demurred to the petition. The demurrer was sustained by the court of common pleas upon the ground that it was necessary for the assured, the American Fire Brick & Clay Company, to sign the constitution of the association; otherwise, that its policy would be void. The circuit court affirmed the judgment of the court of common pleas.

Patterson A. Reece, Smith W. Bennett, and J. W. Yeagley, for plaintiff in error. Peck, Shaffer & Peck and Neely & Patrick, for defendants in error.

DAVIS, J. (after stating the facts). The Aetna Fire Association was duly organized under sections 3686-3690, Rev. St. 1892. The first of these cases is an action by the holder of a policy issued by this association to recover for a loss sustained by fire. In the other case the cause of action set out in the petition is an assessment by the court of common pleas of Hamilton county in the matter of the dissolution of the said fire association. In both cases resistance is made to recovery on the ground that a policy issued by such an association is void unless

the assured shall have signed the constitution of the association. In contending for this proposition some reliance is placed on the following language, which appears in the opinion in *State ex rel. v. Manufacturers' Mutual Fire Association*, 50 Ohio St. 149, 33 N. E. 402, 24 L. R. A. 252, viz.: "To become a member, the person must sign his name to the constitution." This is merely a construction of the language of the statute (section 3690, Rev. St. 1892), which is that: "All persons who sign such constitution shall be considered and held to be members of the association, and shall be held in law to comply with all the provisions and requirements of the association." In that case the question which is before us in these cases did not arise and was not considered, viz., whether the assured, on the one hand, might not be estopped by his conduct, when sued for assessments, from asserting that he had not complied with the law, or that he was not legally a member; and whether, on the other hand, the association might not be estopped by its conduct, when sued on its policy, from asserting that it had not required and obtained the signature of the assured to the constitution. The remark in the opinion in *State ex rel. v. Manufacturers' Mutual Fire Association*, while it is strictly correct, was made with reference to a wholly different controversy, and is not pertinent here.

There is no provision in the statute that a policy issued by a mutual protective association shall be void if the assured does not sign the constitution. It is only by inference that it can be said that it even would be voidable. To allow either party to the policy to set up his own wrong as a defense to an obligation incurred under the policy, where the policy has been issued and held in good faith as an indemnity, and where premiums have been paid and received under it, is not only manifestly unjust, but contrary to settled rules of law. It was held in *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438, that "want of power in the corporation may be waived, or an estoppel may arise from failure to assert it at the proper time." And in *Matt v. R. C. Mutual Protective Society*, 70 Iowa, 455, 30 N. W. 799, it was held that "a religious society, formed under the auspices of a church, which includes a mutual life insurance scheme as one of its features, cannot defend against a suit on one of its policies upon the plea of ultra vires, when it has been receiving the assessments on the policy." In an action upon a bond and mortgage given to a "loan and fund association," reciting in the bond that the signer is a member of such association, and recognizing the obligation of the by-laws, it was held that in the absence of fraud the signer was estopped to deny that he was a member of the association. *Howard Mut. Loan & Fund Association v. McIntyre*, 3 Allen, 571. In *Parker v. U. S.*

Building, Land & Loan Association, 19 W. Va. 744, it was held that "the failure of a member to sign the constitution of such association, if he has for a long time acted as a member of the association, will not prevent the association from enforcing the performance of a contract made with such member, though it be a contract which the association was not authorized to make with any but a member." Finally, it was held by this court in *Trumbull County Mut. Fire Ins. Co. v. Horner*, 17 Ohio, 407, that a member of a mutual fire insurance company, when sued upon an assessment upon his deposit note to pay a loss occasioned by fire, cannot set up a defense that he and his associate corporators have neglected to comply with the provisions of their charter.

It is our opinion, therefore, that the judgment of the circuit court of Hamilton county and that of the court of common pleas in the case of the Louis Lipp Company should be and are hereby affirmed, and that in the case of the American Fire Brick & Clay Company the judgments of the circuit court of Tuscarawas county and of the court of common pleas were erroneous; but on authority of *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N. E. 574, and *Gompf v. Wolfinger et al.*, 67 Ohio St. 144, 65 N. E. 878, the case is dismissed for want of jurisdiction.

BURKET, C. J., and SPEAR, SHAUCK, and PRICE, JJ., concur.

(69 Ohio St. 328)

MOORMAN v. SCHMIDT et al.

(Supreme Court of Ohio. Jan. 5, 1904.)

ACTION AGAINST PARTNERSHIP—PURCHASE OF LANDS—EQUITABLE LIEN—PLEADING—PROMISE TO REFUND—SUMMONS—AMENDMENT TO PETITION—JUDGMENT AGAINST ONE PARTNER.

1. S. commenced an action in the court of common pleas against J. R. and E. M., as partners, doing business under the firm name of Moorman Bros., alleging as his cause of action that said firm is the owner of certain lands in Wyandot county, Ohio, describing them, and that he furnished the money with which to purchase said lands, with an agreement and understanding with the firm that he should have an equitable lien on said lands until the money so furnished should be refunded and fully paid to him; but the petition contains no allegation of a promise by either partner to refund or pay the plaintiff any part of said money, nor does it pray for a personal judgment against the firm or either of its members. The prayer is for the marshaling of liens and an order of sale. A summons for J. R. was issued and served upon him, fixing the 20th day of April, 1901, as answer day, but which was not indorsed with any amount claimed to be due. On the 16th day of April, 1901, without leave of court, and without notice to J. R. or his counsel, the plaintiff filed an amendment to his petition, stating the exact amount of money he furnished said firm for the purchase of the lands, and praying for a personal judgment against the partnership and each of its members. J. R. did not answer or demur, or in any manner enter his appearance in the action. On the 3d day of June, 1901,

the court ordered a sale of the lands, and also rendered a personal judgment against J. R. for the amount set out in the amendment to the petition. *Held*, that the amendment was not legally before the court as a part of the plaintiff's petition, and that the personal judgment against J. R. is erroneous.

(Syllabus by the Court.)

Error to Circuit Court, Wyandot County.

Action by George F. Schmidt against James R. Moorman and others. Judgment for plaintiff, and from a judgment of the circuit court affirming the judgment James R. Moorman brings error. Reversed.

On the 2d day of February, 1901, the defendant in error, George F. Schmidt, filed in the court of common pleas of Wyandot county his petition, naming therein, as defendants, James R. Moorman, now plaintiff in error, and Eli Moorman, partners doing business under the firm name of Moorman Bros., and Levi H. Troup and May Foster. As the averments of the petition and an amendment filed thereto are important to the determination of the questions involved, a copy of the petition and amendment is made part of this statement, as follows, omitting the description of the real estate: "George Schmidt, Plaintiff, vs. James R. Moorman and Eli Moorman, partners doing business under the firm name of Moorman Brothers, Levi H. Troup and May Foster, Defendants. Petition. Filed Feb. 2, 1901. The plaintiff says that the defendants, James R. Moorman and Eli H. Moorman, are partners doing business under the firm name and style of Moorman Brothers, and that said partnership was organized under the laws of the state of Ohio. And that the said partnership firm of Moorman Brothers are the owners of the following described real estate situate in the county of Wyandot and state of Ohio, to wit: [Here follows a description of the real estate.] And the plaintiff says that the said real estate was bought with the said partnership's money and for its use, and that it always has been actually used in said partnership business, although the legal title thereto is in the name of one of the partners, to wit, the defendant James R. Moorman, and he has always and still is holding the same as the trustee for said partnership firm. And the plaintiff further says that all of the money used by said firm in the purchase of said premises was furnished by the plaintiff, and that said premises was purchased with the plaintiff's money with the agreement and understanding with the plaintiff that he, the plaintiff, should have and hold an equitable lien upon such premises until the purchase money so furnished by him should be refunded and fully paid to him. The plaintiff says that said money was furnished by him to the said Moorman Brothers in different amounts and at different times, and that there is interest due and unpaid upon the amounts so furnished by him, so that the plaintiff is not in possession of sufficient facts to determine the

exact amount due to him, but he says that said amount so furnished by him to said partnership firm is the sum of fourteen thousand dollars and more. And the plaintiff further says that said partnership firm of Moorman Brothers was formerly located in the village of Carey, in said county of Wyandot, and carried on the business of manufacturing boat oars, said manufactory being carried on upon the premises herein described. And that the said partnership firm for one year and more last past have ceased to do business or to manufacture any of the goods theretofore manufactured on said premises, and have removed their business therefrom, and out of the jurisdiction of this court and out of the state of Ohio, and have abandoned said premises for manufacturing purposes, and the said premises are now being used for no purpose whatever, so that the value of said premises is continually being lessened, and the claim of the plaintiff is being materially injured, and there is great danger that his said claim may be lost, there being no other property of said partnership firm known to this plaintiff within the jurisdiction of this court or in the state of Ohio. And said firm have allowed said property to be sold for the taxes due thereon. And that the defendant Henry F. Graves, and May Foster and Levi H. Troup, claim to have some lien or interest in said property adverse to that of the plaintiff. And he asks that said parties be required to set forth the nature of their said asserted liens and claims or be forever barred, and that the court will take into account the amount due from the said defendants Moorman Brothers to the plaintiff, that the said amount so found due will be declared to be a lien on said property, that the liens against the same be marshaled and determined by the court, and that said property may be sold to satisfy the claim so found due to the plaintiff, and that in the meantime a receiver be appointed by the court to take charge of said property during the pendency of this cause, and for all further and proper relief in the premises." On the 19th day of March, 1901, a summons for James R. Moorman, plaintiff in error, was issued to the sheriff of Lucas county, fixing the 20th day of April, 1901, as answer day. This summons was served by leaving a certified copy thereof, with the indorsements thereon, at his usual place of residence. Neither the original summons nor the copy contained any indorsement of the amount due, or that a personal judgment would be demanded. On the 16th day of April, 1901, the plaintiff, without leave of court, and without notice to plaintiff in error, filed the following as an amendment to his petition: "The plaintiff, for his amendment to his petition, herein says that the amount due to him from the said defendants James R. Moorman and Eli Moorman and the partnership firm of Moorman Brothers is the sum of \$13,906.60; that the same has been due to

him from said defendants since the said first day of December, A. D. 1899; and, in addition to the prayer as set forth in his petition in this cause, he prays that he may have judgment against said defendants for said sum of \$13,906.60, with interest from the first day of December, A. D. 1899."

The plaintiff in error did not answer or otherwise appear in the case, either in person or by counsel. The defendants Henry F. Graves, May Foster, and Levi H. Troup were creditors of the firm of Moorman Bros., and they answered and set up their claims and liens on the real estate. Alonzo Emerine was made a party as having an interest in said real estate. But these creditors and Emerine have no interest in the controversy in this court. A receiver was appointed for the real estate, and it was sold by order of court and the proceeds distributed. On the same day the order of sale was made, to wit, on the 3d day of June, 1901, the record shows that the cause came on to be heard on the petition and the amendment thereto and the evidence; and the court found that all the defendants, except Moorman Bros. and Eli S. Moorman, had been duly served with summons, and that Moorman Bros., and Eli Moorman had waived the issuance and service of summons and entered their appearance; and the court further found that James R. Moorman, Eli S. Moorman, and Moorman Bros. were in default for answer or demurrer; and further found that there was due to the plaintiff from James R. Moorman, Eli S. Moorman, and Moorman Bros. the sum of \$15,158.20, and rendered judgment against them for said sum. Afterwards, the plaintiff in error, James R. Moorman, prosecuted error in the circuit court to reverse the personal judgment so rendered against him, but that court affirmed the judgment, and he prosecutes error in this court to obtain a reversal of the judgments of both courts.

Seney & Johnson, for plaintiff in error. M. B. Smith, Carey & Barker, and Chittenden & Chittenden, for defendants in error.

PRICE, J. (after stating the facts). It is our unanimous opinion that the circuit court erred in affirming the judgment of the court of common pleas, and for this opinion several reasons may be assigned.

1. The petition upon which summons was issued and served on the plaintiff in error does not state a case for personal judgment against him. While the names of James R. Moorman and Eli Moorman appear in the style of the case as partners doing business under the firm name of Moorman Bros., the averments of the petition are directed specifically against the firm, and in none of them is there alleged any primary liability of the individuals composing the partnership. The first allegation is that James R. and Eli H. Moorman are partners doing business un-

der the firm name and style of Moorman Bros., and that the partnership under that name are the owners of the real estate described in the petition. The next allegation is that the real estate was purchased with partnership money and for its use, and that it had always been used in the partnership business, although the legal title thereto was in James R. Moorman, who held such title as trustee for the firm. The plaintiff then says that he furnished all the money used in the purchase of the real estate, with the agreement and understanding that he should have an equitable lien on the premises until the purchase money so furnished should be refunded to him. He then avers that the money was furnished by him at different times, and in different amounts, on which interest is due, but that he is not in possession of sufficient facts to determine the exact amount due him, but that the amount so furnished is the sum of \$14,000 or more. It is further alleged that the firm business had been located and carried on at Carey, Wyandot county, which consisted in the manufacturing of boat oars on the premises described, but that the partnership had ceased business for a year or more, and that the firm had removed its business out of the jurisdiction of the court, and has abandoned the premises for manufacturing purposes, which depreciated the same in value, and that the partnership has no other known property within the jurisdiction of the court. The appointment of a receiver is prayed for, and a statement of the account taken with Moorman Bros. as to the money furnished by the plaintiff for the purchase of the real estate, and that the sum so ascertained be declared a lien thereon, the liens marshaled, and order of sale issued. There is no prayer for judgment against the firm or either of its members. The foregoing is the character of the petition the plaintiff in error was summoned to answer. It is destitute of a promise even of the firm to pay the plaintiff any sum of money, and it is surely destitute of any promise of either partner to repay any part of the money furnished, unless such promise may be implied from the fact that plaintiff furnished the means to purchase the lands. But he says the means of purchase were furnished with an agreement and understanding that he should have a lien on the premises purchased therewith, and to perfect such lien is the gist of his petition. It seems quite clear that while there may be an ultimate liability against the members of the firm as individuals, to be established in a proper proceeding after the real estate is exhausted, there is no case stated for a personal judgment, because the individual members are not charged with any contract or promise to pay, without which they cannot be held as primarily liable. It is not even alleged that the money was furnished by plaintiff at the instance

and request of the firm or either of its members, and, so construing his petition, the plaintiff does not pray for personal judgment. He did not then know how much money he had furnished.

2. But the record reminds us that an amendment was filed to the petition. It is true an amendment was filed. What is it? The plaintiff, after filing his petition, ascertained in some way the amount he had furnished to buy the land, and by the amendment he states the sum at \$13,906.60, which he says is "due to him from the defendants James R. Moorman and Eli Moorman and the partnership firm of Moorman Brothers; that the same has been due him from said defendants since said first day of December, 1899; and, in addition to the prayer as set forth in his petition in this cause, he prays that he may have judgment against said defendants for said sum of \$13,906.60, with interest from the first day of December, 1899." There are no facts in this amendment to show how or why said amount is due from James R. and Eli Moorman. That there is such amount due from them to plaintiff is but the opinion of the plaintiff, without any facts stated for its support. The Code provision for simple pleadings in actions founded on book accounts and instruments for the unconditional payment of money, only, does not apply to the plaintiff's cause of action, because it is not within that class. Hence more must be pleaded than a mere conclusion that a certain sum is due from defendants to the plaintiff. He must set out sufficient facts to show that a liability exists which can be enforced by the court. The amendment contains no such facts, and is of no aid to the petition, except that a definite sum has been arrived at. *Knox County Bank v. Lloyd's Adm'rs*, 18 Ohio St. 353; *Larimore v. Wells*, 29 Ohio St. 13; *Railroad v. Wilson*, 31 Ohio St. 555. However, the above is not the full history of this amendment. It was filed without leave of court, and four days before James R. Moorman was required to answer. Section 5111, Rev. St., provides: "That plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceeding; but notice of such amendment shall be served upon the defendant, or his attorney; and the defendant shall have the same time to answer or demur thereto as to the original petition." No notice of the amendment was served upon the plaintiff in error or his counsel, nor did he at any time answer or demur, or in any manner appear in the case. No summons issued on the amendment. It never was legally before the court, because it did not become a legitimate pleading. The plaintiff was not entitled to any relief upon it, and its prayer should have been disregarded. It should have been stricken from the files.

Counsel for defendant in error regard the

claims of plaintiff in error as purely technical, and say the case was heard on the evidence, and the court found the amount due from a consideration of the evidence, which would cure the defective petition. We think the hearing the case on evidence would give no new authority to render a personal judgment. The summons served on plaintiff in error contained no indorsement of any amount claimed to be due. The petition does not contain facts which warrant a personal judgment against plaintiff in error, and none is prayed for. The so-called "amendment" was illegally on file, and therefore constituted no part of the pleading. It would seem, therefore, that a personal judgment rendered on a petition which states no case for the same and which asks no personal judgment is certainly erroneous.

The judgments of the circuit court and of the court of common pleas are reversed, and the cause is remanded to the court of common pleas for such proceedings as may be authorized by law. Judgment reversed.

BURKET, C. J., and SPEAR, DAVIS, and CREW, JJ., concur. SHAUCK, J., concurs in the judgment.

(207 Ill. 3)

CHICAGO & E. I. R. CO. v. DRISCOLL.*

(Supreme Court of Illinois. Dec. 16, 1903.)

MASTER AND SERVANT — RAILROADS — NEGLIGENCE — EVIDENCE — FELLOW SERVANT — QUESTION FOR JURY — DAMAGES.

1. In an action for the death of a member of a switching crew while moving cars from a switch, evidence examined, and *held* sufficient to support a finding that the assistant yardmaster was guilty of negligence in not ascertaining that one of the cars was off the track when he ordered the train to be moved.

2. The question whether an assistant railroad yardmaster, while giving an order to a switching crew for the movement of a train on a stub switch, is a fellow servant with the members of the crew, or is a vice principal, is for the jury.

3. In an action by a wife to recover for the wrongful killing of her husband, the remarriage of the wife cannot be considered in mitigation of damages.

4. In an action for the negligent killing of plaintiff's decedent, a member of a switching crew in defendant's railroad yards, occasioned by the assistant yardmaster directing the movement of a train on a stub switch with the last car off the track, evidence that the assistant yardmaster often looked the cars over and reported their condition to the crew before they were moved, and that then the crew did not examine the cars before moving them, was admissible.

Appeal from Appellate Court, First District.

Action by Clara C. Driscoll, administratrix of John Driscoll, deceased, against the Chicago & Eastern Illinois Railroad Company. From a judgment of the Appellate

*Rehearing denied February 5, 1904.

¶ 1. See *Death*, vol. 15, Cent. Dig. § 88.

Court (107 Ill. App. 615) affirming a judgment for plaintiff, defendant appeals. Affirmed.'

W. H. Lyford (Albert M. Cross, of counsel), for appellant. James O. McShane, for appellee.

HAND, C. J. This is an appeal to review the action of the Appellate Court for the First District in affirming a judgment for \$5,000, recovered in an action on the case brought by the appellee, as administratrix, against the appellant, in the circuit court of Cook county, for damages alleged to have been sustained by her by reason of the death of her husband. The case was before this court at a former term (176 Ill. 330, 52 N. E. 921), when a judgment in favor of plaintiff for a like amount was reversed, and the cause remanded for a new trial.

It appears from the evidence that appellant had two switching crews engaged in handling cars in its yard in the city of Chicago. Each crew consisted of five men—an engineer, a fireman, a foreman, and two helpers. One crew was known as "Ward's crew" and the other as "Hurd's crew." The deceased was a helper with Ward's crew. The appellant had three stub tracks in its yard, upon which cars were placed while being repaired, and were designated as tracks No. 1, No. 2, and No. 3. These stub tracks had no butt posts, but were left open, so that cars, when pushed too far thereon, would run off onto the ground. On the evening of the injury Hurd's crew went in on track No. 1 with their engine, and pushed the cars, 11 in number, standing upon that track, together. The car at the end of the track was an empty flat car, and was left with the brake set, with the rear wheels about 10 inches from the end of the rails. They then pushed the cars, 6 in number, upon track No. 2, together. They then went in on track No. 3, coupled together the cars on that track, 7 in number, pulled up, and backed in on track No. 2, and coupled to the cars on that track, and then pulled up and backed in on track No. 1, and coupled to the cars standing upon that track; the result of which was they had a train of 24 cars. Without going to the rear of the train to see whether the wheels of the rear car were upon the track, the crew were ordered by Blake, the assistant night yardmaster of appellant, to go to another part of the yard to do some switching, and Ward's crew, which was at work in the yards some distance from track No. 1, were ordered by him to take out the train left by Hurd's crew on track No. 1, and break it up. In going to that track Ward's engine was taken too far south. When Ward discovered this, he sent the deceased to bring it back. Blake, who had gone to that part of the yard before the arrival of the deceased, stopped the engine, and he and Jordan, the other helper in Ward's crew, got on the north end of the engine, which was proceeding in the direction of track No.

1. On their way to that track they passed the deceased. Whether he got on the south end of the engine is not shown. When deceased started to bring back the engine, Ward started to look over the train on track No. 1. When the engine arrived, it hitched onto the south end of the train. Ward was then about eight car lengths from its south end. The train filled track No. 1 and extended onto track No. 19, with which tracks No. 1, No. 2, and No. 3, connected. Blake went to where Ward was standing, and said to him the train was all right; to go ahead; and then gave the signal to the engineer to go ahead. The deceased was not seen by Blake or any of the crew, so far as the evidence shows, after the engine passed him, until the train started. It was customary for one helper to go ahead of the engine to open switches, give signals, etc., and for one to go in the rear to close switches, give signals, etc. A number of cars were standing on a track near where track No. 1 joined track No. 19. The rear truck on the car at the end of track No. 1 had run off the rails onto the ground. When the train was pulled forward, the truck ran on the ties until it came to track No. 19, when the car collided with the cars standing on the adjoining track, and the deceased, being between the standing and moving cars, was thrown down and run over and killed.

A right of recovery upon the first trial was predicated upon three grounds: First, the negligence of the appellant in failing to place a butt post at the end of track No. 1; second, the negligence of the crew of Hurd in leaving the train with the rear truck of the last car upon track No. 1 off of the rails; and, third, the negligence of Blake, the appellant's assistant yardmaster (who, it was averred, knew, or by the exercise of ordinary care might have known, the car was off the track, and knew, or ought to have known, that the deceased and his crew were ignorant thereof), in ordering the crew of which deceased was a member to attach the engine to and move the train without notifying them of the position of the car on track No. 1, which was off of the rails, or giving them time to make an examination of the train with the view to obtain that information for themselves.

In the former opinion of this court it was held that the failure to have a butt post at the end of track No. 1 was not negligence on the part of appellant, and that the members of the Hurd and Ward crews were fellow servants as a matter of law, and that there could be no recovery by reason of the negligence of the Hurd crew. It was also held there could be no recovery by reason of the negligence of Blake, as assistant night yardmaster, unless the evidence showed—which it did not—that he had actual notice that the car was off the track, or that said car had been off the track for so long a time that in the exercise of ordinary care he was bound to know such car was off the track at the time he ordered the train to be mov-

ed. On the last trial the first two grounds of recovery were abandoned, and the appellee relied solely for a recovery upon the negligence of Blake, and endeavored to supply the proof which the court had held was wanting on the first trial. No claim is made that Blake had actual notice that the car was off the track when he ordered the train to be pulled out. The question, therefore, arising for our determination upon this record is, does the proof, with all the inferences that may legitimately be drawn therefrom, fairly tend to show that the car had been off the track for so long a time before Blake gave the order to move the train that he, in the exercise of ordinary diligence, ought to have known that the car was off the track? On the first trial it did not appear which crew pushed the car off the track, or how long it had been off before the order was given by Blake to move the train. The evidence in the last trial shows that when the 11 cars on track No. 1 were pushed together by Hurd's crew the brake was set, and the wheels of the last car were left within 10 inches of the ends of the rails; that afterwards a train of 13 cars was pushed in on track No. 1 against the cars standing on that track; and that, while the coupling was carefully made, the cars were moved somewhat. One witness states they were moved six or eight inches at the point of coupling, and that there was more or less slack between the cars. No other engine came in contact with said train until Ward's crew took hold of it with their engine, with the view of pulling it out and breaking it up. The car was therefore pushed off the rails either by the engine of the Hurd or the engine of the Ward crew. The evidence tends to show that when Ward's engine was attached the train was not moved. When Ward's engine went in on track No. 1, it had hold of 13 cars. When the Ward engine took hold of the train no cars were attached to it. An examination of the ground after the accident occurred showed the wheels of the last car on track No. 1 were off the rails, on the ground, several feet. This could be accounted for in part by reason of the fact that the ends of the rails were several inches higher than the ground. In view of this evidence, which engine pushed the car off the track was a question of fact to be determined by the jury. If it be conceded that the engine of the Hurd crew pushed the car off, then the evidence fairly tends to show that it was off the track at least 40 minutes before the order was given by Blake to pull out the train, which the jury might reasonably have found, from the evidence, was ample time within which Blake should have learned the fact that the car was off the track; and that, if he did not ascertain that fact within that time, but ordered the train moved without knowing the condition of the train, he would, as to the deceased, be deemed to know its condition, and that

the rear car was off the track. We think that the court properly submitted to the jury the question whether Blake ought to have known the car was off the track at the time he gave the order to pull out the train, and that the court did not err in declining to peremptorily instruct the jury to find in favor of the defendant. Furthermore, while the evidence shows it was the duty of Ward's crew, according to their ordinary course of doing their work, to have examined the train to see that it was in proper condition to be moved before starting to pull it out, the evidence tended to show they did not have time to make such examination before Blake gave the signal to the engineer to go forward. At that time Ward or Jordan had not examined the train, and the evidence tends to show that while the deceased was on the way to the rear of the train he had not, at the time the order was given by Blake, reached the rear of the train, but was seen by Blake, at about the time the train started, in the vicinity of the junction of track No. 1 and track No. 19, which was the point at which he was killed within a few seconds thereafter. It would be a harsh rule of law that would permit no recovery because the deceased did not examine the rear car to ascertain whether it was in shape to be moved, unless he was given an opportunity to make the examination. It was also shown that Blake frequently, when the work was pressing, examined the trains, and informed the crews if they were in shape to be moved, in which case they were moved without further examination. In this case Blake said to Ward the cars were in shape to go forward, and gave the signal to the engineer to pull them out.

It is urged, however, there can be no recovery because Blake, in giving the order to move the train, was not performing the act of a vice principal, but the act of a fellow servant of the deceased. The question whether Blake at that time was a vice principal or a fellow servant was a question of fact for the jury (*Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95), and, although he was acting in a dual character, the question whether the particular act of signaling the engine to start was the act of a vice principal or the act of a fellow servant of the deceased was also a question of fact for the jury (*Mobile & Ohio Railroad Co. v. Massey*, 152 Ill. 144, 38 N. E. 787); and, if the train was started by Blake by reason of the authority which he exercised as vice principal, the fact that he gave the signal to start in the same manner that similar signals were given by the members of the switching crews would not relieve appellant from liability (*Graver Tank Works v. O'Donnell*, 191 Ill. 236, 60 N. E. 831). See, also, *Norton Bros. v. Nadebok*, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842.

The court instructed the jury that they should not take into consideration, in mitiga-

tion of damages, the fact that plaintiff had remarried subsequently to the death of her intestate. We are of the opinion the court did not err in so instructing the jury. Chicago, Peoria & St. Louis Railroad Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701. In volume 8 of the American and English Encyclopedia of Law (2d Ed.) p. 937, it is said: "In an action by a husband to recover for the wrongful killing of his wife, in which one of the principal elements of damage is the loss to him of his wife's services, the defendant cannot show, in reduction of damages, that the plaintiff has married a second wife, who performs for him all the services rendered by his deceased wife." And in Philpott v. Pennsylvania Railroad Co., 175 Pa. 570, 34 Atl. 856, the same rule was held to apply where the suit was by a wife, who had married since the death of her husband, for whose wrongful death the suit was brought.

We find no reversible error in the other instructions given on behalf of the appellee. Nor do we think it was error to permit the appellee to prove that Blake often looked the cars over and reported their condition to the crew before they were moved, and that under such circumstances the crew did not examine the cars before moving them.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed. Judgment affirmed.

(207 Ill. 79)

PEOPLE ex rel. SULLIVAN, County Collector, v. FLORVILLE.*

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—TAXATION—ORDINANCES—AMENDMENT—CONSENT OF VOTERS—APPROPRIATIONS—LEVY OF TAXES—LIBRARY APPROPRIATIONS.

1. Hurd's Rev. St. 1899, c. 24, par. 89, provides that the city council of certain cities shall, within the first quarter of each fiscal year, pass an ordinance termed the "Annual Appropriation Bill," in which the corporate authorities may appropriate such sum of money as may be deemed necessary to defray all necessary expenses and liabilities of the corporation. Paragraph 111 declares that the council shall annually, before the third Tuesday in September of each year, ascertain the total amount of appropriations legally made for that fiscal year, and pass an ordinance levying a tax for such appropriations. Paragraph 64 provides that all appropriation ordinances shall be published at least once, and that no ordinance shall take effect until 10 days after it is so published. *Held*, that where a city appropriation ordinance was passed, and signed by the mayor, and immediately after its passage, on the same night, and before any publication thereof, an ordinance levying taxes for such appropriations was passed, such levy was void.

2. Under the library act (Hurd's Rev. St. 1899, c. 81, § 13), providing that appropriations for library purposes in cities shall be included by the city council in its appropriation bill, and section 1, providing that certain taxes shall be levied as other taxes for city purposes, appropriations for library purposes included in a tax levy which was void by reason of the fact that

the appropriation ordinance had not been published at the time the tax levy was made were also invalid.

3. Under Hurd's Rev. St. 1899, c. 24, par. 89, providing that after a city appropriation ordinance has been made, during the first quarter of the fiscal year, no further appropriations shall be made within such year unless the proposition has been first sanctioned by a majority of the legal voters of the city, after an appropriation ordinance has been passed it cannot be amended so as to insert further appropriations without the consent of a majority of the voters of the city.

Appeal from Sangamon County Court; Geo. W. Murray, Judge.

Application by the people, on relation of the county collector of Sangamon county, against William L. Florville, for judgment against defendant's property for taxes. From a judgment sustaining defendant's objections to the judgment applied for, relator appeals. Affirmed.

Albert Salzenstein and Arthur Fitzgerald, for appellant. Charles P. Kane, Philip Barton Warren, Henry L. Child, and Shutt & Graham (Scholes & Barber and Bluford Wilson, of counsel), for appellee.

WILKIN, J. This was an application made at the June term, 1903, of the county court of Sangamon county, by the county collector of that county, for judgment against delinquent lands and lots in said county for the year 1902. Appellee filed objections to the rendition of judgment against his property for the corporation taxes of the city of Springfield. The county court sustained the objections, and refused judgment against his property as to the taxes objected to, and thereupon this appeal was taken by the people.

The city of Springfield is organized under the general law, and its fiscal year begins March 1st. On March 3, 1902, its city council passed an annual appropriation bill or ordinance, appropriating for the various items of city government and expenses the sum of \$271,914, and also \$8,000 for library expenses, and \$6,000 in payment of the first installment on library site. After this ordinance was passed, it was signed by the mayor; and immediately after its passage, on the same night, the city council passed a tax levy ordinance, levying for city government and expenses the sum of \$133,511, together with the \$8,000 for library expenses and \$6,000 for library site. The appropriation ordinance, as passed, was published for the first time on March 5, 1902, and thus became in full force and effect on March 15, 1902. On March 17, 1902, the city clerk of the city of Springfield filed with the county clerk of Sangamon county a certified copy of said tax levy ordinance, as provided by statute. On August 11, 1902, the city council passed an amendment to the appropriation ordinance of March, appropriating the sum of \$7,000 for the purpose of rebuilding the town branch sewer, and on September 8, 1902, an amend-

*Rehearing denied February 4, 1904.

ment to the tax levy ordinance, levying the sum of \$7,000 as a special sewer fund for the purpose of rebuilding the town branch sewer. This amendment to the tax levy ordinance was also duly certified by the city clerk to the county clerk. The county clerk duly extended all of the taxes, as above levied, against the property of appellee; but when they became due and payable he refused to pay the same, and, upon this application of the county collector for judgment, filed his objections to said taxes, which, as stated above, were sustained by the court, and this appeal was prayed.

The first objection made by appellee is to the appropriation ordinance and tax levy passed on March 3, 1902. His objection is that at the time of the passage of said tax levy ordinance there was no appropriation ordinance in full force and effect, as the one passed March 3d had not been published at that time as required by statute, and that this was a condition precedent, and therefore the tax levy ordinance was void. The validity of this objection must depend upon the construction of paragraphs 64, 89, and 111 of chapter 24 of our statutes (Hurd's Rev. St. 1899, pp. 279, 282, 286). Paragraph 89 provides that the city council "shall, within the first quarter of each fiscal year, pass an ordinance, to be termed the 'Annual Appropriation Bill,' in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation." Paragraph 111 provides that the city council "shall, annually, on or before the third Tuesday in September in each year, ascertain the total amount of appropriations for all corporate purposes legally made and to be collected from the tax levy of that fiscal year; and, by an ordinance specifying in detail the purposes for which such appropriations are made and the sum or amount appropriated for each purpose, respectively, levy the amount so ascertained upon all the property subject to taxation within" said city. Paragraph 64 provides that "all ordinances of cities * * * making any appropriation, shall, within one month after they are passed, be published at least once in a newspaper published in the city or village, or, if no such newspaper is published therein, by posting copies of the same in three public places in the city or village; and no such ordinance shall take effect until ten days after it is so published."

The construction of these three paragraphs has been before this court in other cases, and, while the facts were not exactly similar in those cases to the one at bar, yet the decisions therein, we think, give the proper interpretation or construction of said three paragraphs. In the case of *Riverside Co. v. Howell*, 113 Ill. 256, it was said (page 261), speaking of paragraphs 89 and 111: "It will thus be seen that there is here, in the interest of the taxpayer, most careful provision

made against extravagance of expenditure and abuse of the power of taxation. There is to be passed within the first quarter of each fiscal year the annual appropriation bill, wherein is to be appropriated such money as may be deemed necessary for all expenses and liabilities of the corporation, specifying the objects and purposes of the appropriations, and the amount for each object and purpose, which is to be published. * * * The power given to the city council to levy taxes is with a restriction as to the manner in which the power is to be exercised—that the city council shall ascertain the total amount of appropriations legally made, and, by ordinance, levy and assess such amount so ascertained. The act requires the annual appropriations to be first made within the first quarter of the fiscal year, and their amount to be ascertained, and then that the levy and assessment should be made by ordinance for the amount. These requirements of the statute we regard as for the protection of the citizen, and not directory, but mandatory. The power of the taxing authority in such a case is limited by the manner and conditions prescribed for its exercise. * * * We view the requisite of the appropriation ordinance as a limitation upon the power of the city council to levy the tax. The failure to pass such ordinance is not a mere formal defect, and so is not cured by section 191 of the revenue law. * * * The want of an appropriation ordinance we look upon as a defect in the proceedings which makes the city tax illegal—which surely affects the substantial justice of the tax." In the case of *People ex rel. v. Peoria, Decatur & Evansville Railroad Co.*, 116 Ill. 410, 6 N. E. 459, it was again held (page 414, 116 Ill., page 461, 6 N. E.): "The law certainly contemplated the passage of two separate ordinances at different times. Section 111 directs the city council to ascertain 'the total amount of appropriations for all corporate purposes legally made.' The appropriations which they are to ascertain are those which have been already legally made at the time they are required to ascertain the total amount of them. This imports and implies a previous making of such appropriation in a lawful way. Section 64 of the city incorporation act provides that all ordinances of cities and villages 'making any appropriation' shall, within one month after they are passed, be published, * * * and no such ordinance shall take effect until ten days after it is so published. Hence the appropriation ordinance required by section 89 * * * does not take effect until ten days after it is published. Until that time has passed, the appropriations which it specifies do not become legal and valid, and cannot be said to have been legally made. * * * The publication of the appropriation ordinance, and the delay of ten days before its going into effect, were intended to give taxpayers notice of its provisions, and in many cases might lead to

changes in the amounts specified before final adoption. In such event, any steps taken for the levying of the tax before the expiration of the ten days would be premature."

It is insisted, however, by appellant, that a part of these decisions is mere dictum, and not necessary to a proper consideration and decision of the case in hand. Even if this be true, yet we are of the opinion that the decisions lay down the correct rule with reference to the requirements of said section. Judge Cooley, in his work on Taxation (2d Ed.) 276, says: "Where the power is found to have been conferred upon municipal corporations to levy a tax, if any question arises upon its extent or application the rule is that the power must be strictly construed. Municipal authorities, therefore, when they assume to tax, must be able to show warrant thereunder in the words of the grant, which alone can justify their action. They are to assume that they can tax only as the state, in its wisdom, has thought proper to permit."

A method is provided by statute by which the city council may levy its taxes. This method is clearly laid down in the statute, and it is the duty of the city council to follow it strictly. These provisions are made for the benefit and protection of the taxpayers. If no appropriation ordinance had been passed at all, or if it were fatally defective in any of its provisions or in the method of its passage, there can be no question but that a tax levy ordinance following it would be void; and we are of the opinion that the same result must be reached here. At the date of the passage of the tax levy ordinance the appropriation ordinance had been passed and signed, but it had not been published, and was not in full force and effect. In other words, the amount of tax necessary for the corporate purposes had not been legally ascertained. This appropriation ordinance was not in full force and effect until March 15, 1902, or 12 days after the passage of the said tax levy ordinance; and as no subsequent tax levy ordinance was passed after said appropriation ordinance took effect, by means of which said tax levy ordinance of March 8, 1902, was ratified and confirmed, we are forced to the conclusion that said tax levy ordinance was void. We have carefully considered the question whether it might not be held that the appropriation ordinance, after being duly published, would relate back to the date of its passage and approval, but have been unable to find authority for the position, and it seems diametrically opposed to our previous decisions above cited.

It is contended, however, by appellant, that the appropriations for library purposes are not governed by the law with reference to general appropriations, and sections 1 and 18 of the library act (Hurd's Rev. St. 1899, pp. 1096, 1097, c. 81) are cited in support of the contention. A careful examination of these sections will show that the construction insisted upon is not warranted. Section 13 ex-

pressly provides that the appropriation for library purposes shall be included by the city council in its appropriation bill, and section 1 provides that said tax shall be levied as other taxes for city purposes. We are of the opinion that the county court properly sustained the objections to that tax also.

The second objection made by the appellee is to the amendment to the appropriation ordinance made on August 11, 1902, and the tax levy ordinance passed on September 8, 1902, in pursuance thereof. He insists said tax levy ordinance was void because the city had no power on August 11, 1902, to pass an appropriation ordinance. Paragraph 89 of chapter 24 provides that after the appropriation ordinance has been made, during the first quarter of the fiscal year, no further appropriations shall be made at any other time within such fiscal year, unless the proposition to make such appropriation has been first sanctioned by a majority of the legal voters of such city, either by a petition signed by them, or at a general or special election duly called therefor. There is no claim in this case that the appropriation as made on August 11, 1902, was sanctioned by a majority of the legal voters of said city in either of the modes pointed out by the statute. As this appropriation was not made during the first quarter of the fiscal year, we are of the opinion that under the foregoing section the city had no power to pass the amended appropriation ordinance or tax levy ordinance, and therefore both were void, and the county court committed no error in sustaining that objection.

For the reasons given, the order of the county court sustaining said objections will be affirmed. Judgment affirmed.

(206 Ill. 584)

MADISON v. MADISON et al.*

(Supreme Court of Illinois. Dec. 16, 1903.)

REAL ESTATE—WHAT CONSTITUTES—SECOND STORY OF BUILDING—DIVERSE OWNERSHIP—CONSTRUCTIVE TRUST—EVIDENCE—LACHES.

1. The first story of a building was constructed by the owner of the land, and the next story by an opera house association. Afterwards the owner of the land conveyed to the association, by deed, all his interest in the second story, with the right to use the hallways and stairways leading thereto, together with the box office, and the ground in the rear, occupied by outhouses belonging to the building. The deed contained no reservation or limitation, and no time was stated when the right of the grantee should expire. No provision was made allowing the owner of the second story to remove it. Held, that the second story was real estate.

2. A husband and wife being desirous of purchasing real estate, the wife conveyed land to her father on an understanding that in consideration thereof he should buy the desired property for her. The deed to the latter property was made to the husband without the consent of the wife or her father. They demanded a conveyance to the wife, but he neglected to make it, though he repeatedly acknowledged her

*Rehearing denied February 4, 1904.

to be the owner. *Held* to establish a resulting trust in favor of the wife.

3. The mere fact that a wife, acting as conservatrix of the estate of her insane husband, inventories certain lots as a part of her husband's estate, does not estop her from claiming after his death a resulting trust in her favor as to such lots.

4. Laches is not to be imputed to a wife for failing to sue to establish a resulting trust in her favor in land held by her husband, where there is positive evidence that he always recognized her rights.

5. The conservatrix of the estate of her insane husband having obtained an order for sale of real estate, and sold the same, made a written agreement with the purchaser for the borrowing of a sum of money, and with reference to the land being reconveyed to the estate. *Held*, that a contention that the sale was merely colorable, and hence conveyed no title to the purchaser, was of no merit.

Appeal from Circuit Court, Douglas County; W. G. Cochrane, Judge.

Bill for partition by Mary F. Madison against John Tyler Madison and others. From the decree, petitioner appeals, and defendants file cross-errors. Affirmed.

Eckhart & Moore, for appellant. James W. Craig, John H. Chadwick, and Edward C. Craig, for infant appellees.

WILKIN, J. This is a bill for partition, filed in the circuit court of Douglas county by the appellant, as the widow of Harry Madison, deceased. The bill alleges that said Harry Madison died intestate, leaving no child or children, nor descendants of a child or children, but leaving the appellant, Mary F. Madison, his widow, John Tyler Madison, a nephew, and Jennie Loose, a niece, as his sole heirs at law. The bill then describes certain real estate of which he died seised, and prays that the title to lots 9 and 10 in block 19 in the original town (now city) of Tuscola, Ill., be declared in appellant, although the title was at the time of his death in said Harry Madison, and assigns as a reason for said prayer that the property was bought with the money of appellant, and that she has a resulting trust therein. The appellees John Tyler Madison and Jennie Loose, by their guardians ad litem, filed an answer to said bill, in which they deny that the said Harry Madison held this property in block 19 in said city in trust for appellant, and further aver that before the death of the said Harry Madison he was adjudged insane, and appellant was appointed conservatrix of his estate, and that she inventoried said property in block 19 as a part of his estate. The answer further avers that at the date of his death the said Harry Madison was, in addition to the property described in complainant's bill, seised in fee simple of the second and third stories of the brick building in Tuscola known as the "Tuscola Opera House," and that the same was real estate, and prays that said real estate be partitioned between appellant and said appellees. Said answer further set forth that the said Harry

Madison, during his lifetime, was seised in fee simple of the west half of lot 4 in block 25 in the original town (now city) of Tuscola, except all that part lying west of the center line of the west wall of a certain building now standing on the west half of said lot, and that appellant, as conservatrix of the said Harry Madison, made a colorable sale of said last-described piece of property, and that the same was, in truth and in fact, at the date of the death of the said Harry Madison, his property, and prays that the same be partitioned among his heirs. A cross-bill was filed by said appellees, by their guardians ad litem, setting forth the above facts, substantially as stated in the answer, and asking affirmative relief in reference to the same. The case was referred to the master in chancery to take the evidence and report his conclusions. He filed his report, in which he recommended that a decree be entered in accordance with the appellant's bill. Upon a hearing the chancellor overruled all of the exceptions to said report as filed by appellees, except as to the property known as the "Opera House." The master, in reference to that property, found that it was personal property, and not real estate; and the chancellor held that it was real estate, and was subject to be partitioned among the said heirs. The chancellor sustained the findings of the master in reference to all other matters, and entered a decree accordingly. Appellant has appealed to this court, and assigns as error that part of the decree which holds that said opera house property is real estate, and not personal property. Appellees, by their guardians ad litem, have filed cross-errors, which involve the property appellant contends was held in trust for her by the said Harry Madison at the date of his death, and also the property that appellees contend was sold by her as conservatrix.

The first question in the foregoing order to be determined is whether the opera house is real estate or personal property. The evidence shows that structure is a three-story brick building, built in a very substantial and permanent manner. The first story was built by the owners of the fee in the lots, and the second and third stories by the Tuscola Opera House Association. After the building was completed, the owners of the fee conveyed, by deed, to said association, all of their right, title, and interest in said second and third stories, with the right to use the hallways and stairways leading thereto, together with the box office, and the ground in the rear, occupied by outhouses belonging to said building. In this deed there is no reservation or limitation, and no time stated when the rights of the grantee shall expire; nor are the rights of the respective parties otherwise specifically set forth than in and by said deed. Subsequently all of the right, title, and interest of said opera house association was conveyed by deed to said Harry Madison.

Cases similar to the case at bar have been

before this court, and, while the facts are not exactly the same, yet we think the rules of law laid down in those cases correctly state the law applicable here. In the case of *Catlin Coal Co. v. Lloyd*, 176 Ill. 275, 52 N. E. 144, we held that coal and minerals in place, where the title thereto had been severed from the title to the surface, constitute land, and the owner thereof has all the rights of an owner of an interest in land. In the case of *Gilliam v. Bird*, 49 Am. Dec. 381, it is decided, in conformity with the elementary principle, that the ownership of land is not confined to its surface, but extends indefinitely downwards and upwards. It includes not only the ground or soil, but everything which is attached to the earth, whether by course of nature, as trees and herbage, or by the hand of man, as houses and other buildings. A house, or even the upper chamber of a house, may be held separately from the soil on which it stands, and an action of ejectment will lie to recover it. In the case of *Knapp v. Jones*, 143 Ill. 375, 32 N. E. 382, we held, where an elevator was built upon the right of way of a railroad company under a lease for years, with a provision therein that the lessor might terminate such lease at any time upon 60 days' notice, and that the lessee might remove the building by him erected thereon at any time before the lease expired, that such building was a chattel real, and under our statute is classed as real estate; and we there cited *Bouvier's Law Dic. tit. "Chattels Real;"* 2 *Blackstone's Com.* 387; 2 *Kent's Com.* 245; 1 *Washburn on Real Prop. c. 1, § 17*; *Griffin v. Marine Co.*, 52 Ill. 130; *Conklin v. Foster*, 57 Ill. 104; *Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 28 Ill. App. 371; 13 Am. & Eng. Ency. of Law (2d Ed.) 594; *Dobschuetz v. Holliday*, 82 Ill. 371; *Willoughby v. Lawrence*, 116 Ill. 11, 4 N. E. 856, 56 Am. Rep. 758.

From the above authorities, it will be found that, in determining the character or kind of property, we must take into consideration all the facts and circumstances surrounding the transaction, the intention of the parties, the size and kind of building, the manner in which it is attached to the realty, and whether or not it can be removed without injury to the fee. In the case at bar the building was a substantial brick structure of three stories. It was evidently built with no intention of removing the two upper stories, and they could not be removed without greatly injuring, if not destroying, the building. No provision was contained in the deeds allowing the owners of said stories to remove them at any time. They were several times conveyed by deed, and were certainly subject to all the tests of real property, and none of the tests applicable to personal property. The fee and the first story were charged with the support of the second and third stories, and we are of the opinion that said second and third stories were not personal property, but were real estate, and

that said chancellor was not in error in so holding.

The next question is whether there was a resulting trust in favor of appellant as to lots 9 and 10 in block 19, known in this record as the "Daggett Property." The evidence shows that in November, 1888, appellant and her husband were desirous of purchasing said property in controversy, but were financially unable to do so. Appellant was the owner of certain property in Camargo, which she had received from her father, Joseph Connelly. Arrangements were made by which her father was to take the property in Camargo, and in return buy for her the property in controversy. At the time this exchange was made, the deed to the Daggett property was made to the said Harry Madison, husband of appellant, without her knowledge or consent, or without the knowledge or consent of her father. Afterwards they learned that the deed was made to the husband, and demand was made upon him to transfer it to appellant. This he neglected to do, but from time to time admitted that the property belonged to his wife, and that her money had bought it; and he further stated that he would build her a modern, up to date house on the lot, and then make her a deed for the whole thing. He never claimed adversely to her, but always acknowledged her as the owner, and started to carry out his intention to build a house on the lot; but before the plans were consummated he became insane, and shortly afterwards died. We think the facts in this record bring the case clearly within the doctrine of resulting trusts. See *Corder v. Corder*, 124 Ill. 229, 16 N. E. 107; *Stephenson v. McClintock*, 141 Ill. 604, 31 N. E. 310; *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182; *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383.

Appellees, however, contend that appellant, by her long delay, has been guilty of laches, and that she is also estopped for the reason that she inventoried said lots as the estate of her husband. We do not think either of these contentions can be sustained. The mere fact that the lots were inventoried as a part of her husband's estate while he was still living should not bar her right to assert her claim to the property, the rights of no third party being thereby prejudiced. The evidence does not show that she has been guilty of laches. During all the time of her alleged laches there was positive evidence in existence that her husband at all times recognized her rights. Laches is governed largely by the facts and circumstances surrounding each case. The rule is that, where positive evidence exists which proves that defendant has always recognized the plaintiff's rights, delay in bringing suit will be excused; and the relationship of the parties, and the fact that they are members of the same family, has an important bearing on the question of laches, and a delay under such circumstances is not so strictly regard-

ed as where they are strangers. See 18 Am. & Eng. Ency. of Law (2d Ed.) 111; Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383.

The final question is whether the alleged sale by appellant, as conservatrix, was colorable only, or whether it conveyed the title to the purchaser, Rice. The evidence shows that the husband of appellant was insane for some years prior to his death, and that appellant was without ready money to properly care for him. She applied to the county court for an order of sale of the west half of lot 4 in block 25, as above described. An order of sale was entered, and the lot in question was sold at public auction, and purchased by the defendant Rice. A report of sale was made to the county court. Said sale was approved, and a deed made to the purchaser. Afterwards a written agreement was entered into between the purchaser and appellant for the borrowing of \$1,000, and with reference to said lot being reconveyed to the estate. It is contended by appellees that this agreement shows the sale was made for the benefit of appellant or the estate, and that the sale to Rice was only colorable. We do not think the contention is sustained by the evidence. The sale was made under an order of the county court. All of the proceedings were regular in form. The defendant Rice, by bidding at said sale, subjected himself to the jurisdiction of the court, and the court could have compelled him to have completed his sale, and by refusing so to do he would have been in contempt. See *Chandler v. Morey*, 195 Ill. 596, 63 N. E. 512. The mere fact that an agreement was subsequently entered into had no effect upon the sale. Said agreement was void, and if the appellant, as conservatrix of the estate, took security for the purchase price, she is liable to said estate for the amount of the sale. See *McCluskey v. McNeely*, 3 Gilman, 578. For these reasons, the sale was valid, and the title to said lot is vested in the purchaser, Rice.

We are of the opinion that the decree of the circuit court is correct in all of its findings, and the same is therefore affirmed. Decree affirmed.

(206 Ill. 565)

CINCINNATI, I. & W. RY. CO. v. PEOPLE
ex rel. MYERS, County Collector.*

(Supreme Court of Illinois. Dec. 16, 1903.)

TOWNS — TAXATION — LEVY — ASSESSMENT — SUFFICIENCY — SPECIFICATION OF PURPOSE — TOWN RECORDS — AMENDMENT — VALIDITY OF LEVY — PRESUMPTION — OBJECTIONS — BURDEN OF PROOF — ROADS — PETITION — DESCRIPTION — COMMISSIONERS OF HIGHWAYS — TIME OF MEETING — EVIDENCE.

1. Under 3 Starr & C. Ann. St. 1896, p. 3925, c. 139, art. 4, § 3, conferring power on town meetings to levy taxes for the several purposes therein mentioned, the third of which is "for any other purpose required by law," the general declaration of the town meeting for "town

purposes" and "town expenses," in the levy of taxes, without specifying the purposes, is not sufficient.

2. Under 3 Starr & C. Ann. St. 1896, p. 3471, c. 120 (Revenue Law, § 191), providing for the correction of irregularities and omissions in proceedings of officers connected with the assessment and levying of taxes which do not affect the substantial justice of the tax itself, if, as a matter of fact, a levy was for a specified purpose or purposes, and the officer whose duty it was to keep the record of the proceedings of the town meeting, failed or neglected to make a proper record of the same, so that the levy appeared to be generally for "town purposes" and "town expenses," the record may be amended to correspond with the facts upon sufficient parol proof.

3. Where it appeared that, though certain witnesses present at a town meeting understood that the town taxes in question were levied for the purpose of raising funds to pay town officers, yet the resolution, as put to the meeting, was in one case for "town purposes," and in the other for "town expenses," the testimony failed to show that the levy was for a specific purpose.

4. The presumption is in favor of the legality of a tax levy, and the burden is on an objector to show its illegality.

5. Where, on the hearing of proceedings to enforce the payment of delinquent town-road and ditch-damage taxes, the town clerk, when asked by objector's counsel if there was any record of the commissioners or instrument in writing relating to the awarding of damages, stated that he did not know; that counsel could examine the record; that he did not think he had any record of damages being awarded, but had made no search for any such paper—the testimony did not sustain the objection that there was no record evidence of allowance of such damages, though the people proved by one of the commissioners that damages to a certain amount had been allowed.

6. Under 3 Starr & C. Ann. St. 1896, p. 3599, c. 121, § 1, providing that the petition of land-owners in a township for the construction and maintenance of gravel, rock, macadam, or other hard roads shall "state the location and route of the proposed road or roads, not exceeding two," etc., no specific description by monuments or courses and distances is required, and a petition reading: "Road No. 1. Beginning at the west edge of Ross township, and running directly east to the northeast part of Chrisman, and northward to the county line. Road No. 2. Beginning at Cherry Point Cemetery, and running north through Cherry Point to end of road just north of Mt. Olive Church"—sufficiently described the proposed roads.

7. The objection that the petition attempted to describe three roads, because of the language as to the first, "running directly east to the northeast part of Chrisman, and northward to the county line, was not sustainable.

8. Under the road and bridge law (Rev. St. 1901, c. 121, § 119), providing that highway commissioners "shall annually ascertain, as near as practicable, how much money shall be raised by tax on real, personal and railroad property for the making and repairing of bridges," etc., and shall give the township supervisor a statement of such amount, and the rate per cent. of taxation, etc., "on or before the Tuesday next preceding the annual September meeting of the board of supervisors," etc., the commissioners are not required to meet, for the purpose of ascertaining what amount shall be levied for the purposes named, on any particular day.

Appeal from Edgar County Court; Walter S. Lamon, Judge.

Application by county collector of Edgar county for judgment and order of sale of certain property of the Cincinnati, Indianapolis

*Rehearing denied February 4, 1904.

lis & Western Railway Company to satisfy delinquent town taxes. From a judgment sustaining the railroad's objections to part of said taxes, and rendering judgment against it as to the balance, it appeals. Affirmed in part, and reversed in part.

George W. Fisher, for appellant. John W. Murphy, State's Atty. (J. W. Shepherd and F. C. Van Sellar, of counsel), for appellee.

WILKIN, J. The appellant railroad company owns and operates its railroad through the townships of Prairie, Ross, and Young America, in the county of Edgar, which was duly assessed for taxation for the year 1902 by the State Board of Equalization, and taxes extended thereon by the county clerk according to the several certificates of levy for taxes filed with him for that year. It paid a part of such taxes, but refused to pay the balance; and the county collector applied to the June term of the county court for judgment and order of sale of its property for the delinquent taxes, together with interest and costs. Appellant appeared by counsel and filed numerous objections to the rendition of judgment, and the case was heard by the court on the 12th day of June, 1903, and taken under advisement until the 6th day of July, when judgment was rendered sustaining the objections to a part of the taxes objected to, as to which there is no further controversy, but overruled those to other levies, and rendered judgment of sale for the same. To reverse that judgment, this appeal is prosecuted.

The taxes to which objections were overruled were as follows: "Prairie township town tax, \$50.85; Young America township town tax (main line), \$47.48; Young America township town tax (O. R. div.), \$14.75; Prairie township road and ditch damage tax, \$67.13; Ross township hard-road tax, \$313.41; Young America township road and bridge tax, \$189.93; Young America township road and bridge tax (O. R. div.), \$53.98."

The substantial objection to the Prairie township and Young America township town taxes is that the purposes for which they were levied are not shown by the record of the annual town meeting in said township. It appeared upon the hearing that the records of those townships showed that the town tax in the former was for "town purposes," and in the latter for "town expenses." Section 3 of article 4 of the township organization act (3 Starr & C. Ann. St. 1896, p. 3925, c. 139) confers power upon town meetings to levy taxes for the several purposes mentioned therein, the third of which is "for any other purpose required by law." It is under this delegation of power that the people seek to justify the levy of said tax, and the question is whether or not the general declaration of the town meeting for "town purposes" and "town expenses" is a lawful exercise of such power. This question we have expressly decided in the negative. *People v.*

Chicago & Alton Railroad Co., 194 Ill. 51, 61 N. E. 1064. We there said (page 55, 194 Ill., and page 1068, 61 N. E.): "The taxpayer is not to be concluded by the opinion of the electors as to what are the legal purposes to forward which he may be required by the town to part with his money by way of taxation upon his property. He has the right to know and be informed by the proposition adopted by an annual town meeting directing that money be raised by taxation, the purpose for which the exaction of the tax is ordered." The above proposition does not seem to have been controverted by counsel for the people on the trial, and oral testimony was introduced, over the objection of appellant, to show the specific purpose for which the taxes were levied, and on that testimony a motion was made on behalf of the appellee to amend the record of the town meeting. The competency of the oral testimony is challenged, and it is insisted that the trial court erred in permitting the record to be amended. The action of the trial court is justified by counsel for appellee under section 191 of the revenue law of this state (3 Starr & C. Ann. St. 1896, p. 3471, c. 120). That section makes liberal provision for the correction of irregularities and omissions in proceedings of officers connected with the assessment and levying of taxes which do not affect the substantial justice of the tax itself, and those provisions are broad enough to justify the admission of the parol testimony introduced in this case. That is, if, as a matter of fact, the levy was for a specific purpose or purposes, and the officer whose duty it was to keep the record of the proceedings of the town meeting failed or neglected to make a proper record of the same, the omission or neglect would be one as contemplated by this section of the statute, and the record might be amended to correspond with the facts upon sufficient parol proof. *Chicago & Northwestern Railway Co. v. People*, 184 Ill. 240, 56 N. E. 367, citing *Same v. Same*, 174 Ill. 80, 50 N. E. 1057. The evidence, however, upon which the amendment would in such case be proper, should be clear and satisfactory. Here it falls far short of being of that character. The witness in each case who testified to the purpose for which the town taxes were levied stated that the levy was for the purpose of raising funds out of which to pay the compensation of town officers, and, while their testimony sufficiently shows that they understood that to be the purpose, they each substantially admit that the motion, as put to the town meeting by the moderator, was in the one case for "town purposes," and in the other for "town expenses." Their evidence does not show that the resolution put to the town meeting was so stated as to inform the taxpayers present what the money was to be used for. The amendment of the record doubtless conformed to the understanding of the witnesses as to the purpose of the levy,

but their testimony fails to satisfactorily show that it conformed to the understanding of a majority of the electors present at the meeting.

It is also objected that the town meeting could not lawfully levy a tax for the payment of the future unearned compensation of town officers not audited against the town. In view of the foregoing, the question need not be decided at this time, and we therefore decline to pass upon it.

The objection to the road and ditch damage tax of Prairie township is that the record of the action of the commissioners of highways of that township did not show the levy of that tax, and that the parol testimony admitted for the purpose of proving the levy was incompetent. The presumption being in favor of the legality of the levy, the burden was upon objector to show that it was illegal. It attempted to do so by proving that there was no record of the levy, but the testimony offered for that purpose did not establish the fact. Albert J. Ingram, the town clerk, stated: "I have the record of the commissioners of highways of Prairie township." He was then asked by counsel for objector if there was any record of the commissioners or instrument in writing relating to the awarding of damages by reason of the construction of roads prior to September 2, 1902, and answered: "I cannot say. The record is here. You can look for yourself. Q. Did you bring all the records you had? A. All the road and town records; that is, commissioners' records. Q. Have you any papers or documents relating to that subject? A. I have here what I had filed away. Q. What is it? A. There is the tax levy. Q. I am only asking for the records and files relating to the awarding of road and ditch damages. I am asking if you brought them. A. Twenty per cent. levy. (Counsel for objector here suggests to the court that subpoena duces tecum was duly served on this witness for the production of these records and documents.) A. I don't think I have any record of damages being awarded. Q. Did you search for any such paper? A. No, sir." This was all the testimony offered by the objector in support of its objection. It does not sustain the objection. It is true, the people proved by one of the commissioners that the road damages had been allowed to the amount of \$314.85, which testimony was objected to, but there was no satisfactory affirmative proof that there was no record evidence of allowance of such damages.

The objection to the Ross township hard-road tax was that the petition upon which the vote was taken did not comply with the law in describing the roads intended to be improved. That tax was levied on a petition for a tax of \$1 on the \$100 for roads therein attempted to be described. Section 1 of "An act to authorize the construction and maintenance of gravel, rock, macadam or other hard roads" (3 Starr & C. Ann. St. 1898, p.

3599, c. 121) provides that on the petition of 50 landowners, legal voters of any township, to the town clerk, in counties under township organization, he shall, when giving notice of the time and place for holding the next annual town meeting, also give notice that a vote will be taken at such election for or against levying a tax not exceeding \$1 on each \$100 assessed value of all the taxable property, including railroads in the township, for the purpose of constructing and maintaining gravel, rock, macadam, or other hard roads, and that "said petition shall state the location and route of the proposed road or roads, not exceeding two," etc. Does this petition comply with the requirement, "shall state the location and route of the proposed road?" The language of the petition is: "Road No. 1. Beginning at the west edge of Ross township, and running directly east to the northeast part of Chrisman, and northward to the county line. Road No. 2. Beginning at Cherry Point Cemetery, and running north through Cherry Point to end of road just north of Mt. Olive Church." Clearly, these descriptions of the roads to be improved are indefinite, but the statute does not require a specific description of the location and route by monuments or courses and distances. The petition must "state the location and route," etc. A statement that "a road leading from point to point," or "a road running due west from a point in the north part of Chrisman to the west line of the township," would undoubtedly be a sufficient statement of the location and route of the road, within the meaning of this statute. It would not be a sufficient description for the location of a new road, but the statute does not require that. Manifestly, the object of the requirement that the location and route must be stated in the petition is that the voters of the township may be informed as to what roads they are voting at the election. Therefore any statement or designation of such location or route will answer the spirit of the statute, and we are inclined to think that, in that view, the petition in this case was sufficient. While to parties living remote from the township the statement would be very indefinite, still, as to the voters of the township, there can be little doubt that they would understand just what roads were intended.

The contention that the petition describes, or attempts to describe, three roads (only two being authorized), because of the language as to the first, "running directly east to the northeast part of Chrisman, and northward to the county line," cannot be sustained. The position of counsel seems to be that the road running east and west is necessarily one road; that running north and south to the county line, another and different one. But the petition does not bear that construction. It clearly attempts to state the location and route of a single road.

The objection to the road and bridge tax

of Young America township is that the commissioners of highways failed to meet at the time and place and levy and certify the tax as required by law. It was agreed by counsel, upon the hearing, that the township is under the labor system, and that the only evidence before the court was the record of the commissioners of highways of that township, which shows on its face that the commissioners met on August 23, 1902, and on that day levied the taxes; their certificate being dated September 2, 1902. It is conceded that the tax was levied under section 119 of the road and bridge law (Rev. St. 1901, c. 121), applicable to townships under the labor system, and that the first Tuesday of September, 1902, was the 2d day of that month. Section 119, *supra*, provides that the commissioners "shall annually ascertain, as near as practicable, how much money must be raised by tax on real, personal and railroad property for the making and repairing of bridges," etc., and requires them to give the supervisor of the township "a statement of the amount necessary to be raised, and the rate per cent. of taxation, signed by said commissioners, or a majority of them, on or before the Tuesday next preceding the annual September meeting of the board of supervisors, * * * who shall cause the same to be submitted to said board for their action at such September meeting of said board," etc. This section does not require the commissioners to meet, for the purpose of ascertaining what amount shall be levied for the purposes named, on any particular day. The certificate of the levy was presented to the supervisor at the proper time, but, as we understand counsel for the objector, it is insisted that the commissioners could not meet and make the levy at a time prior to said first Tuesday in September. In support of the contention a number of decisions of this court are cited, but upon examination they will be found to apply to section 13 of the road and bridge law, except the case of *Commissioners of Highways v. Newell*, 80 Ill. 587, and have no application whatever to the question here raised. For instance, in *Chicago & Northwestern Railway Co. v. People*, 197 Ill. 411, 64 N. E. 380, we said, "The statute requires the commissioners of highways to meet on the same day and at the same place of the meeting of the board of town auditors;" citing section 13 of chapter 121 of *Starr & Curtis' Annotated Statutes of 1896*. And again, on page 413, 197 Ill., and page 380, 64 N. E.: "It is well settled that the commissioners of highways can only act in the manner and

at the time specified in the statute, and the tax levied at a time other than that specified by statute is void when objected to by the taxpayer." Clearly, these decisions can have no application to a statute which fixes no time at which the tax shall be levied. We think, under section 119, the essential thing is, after the ascertainment of the amount necessary to be levied, that a statement of such amount shall be given to the supervisor of the township on or before the Tuesday next preceding the annual September meeting of the board of supervisors, and in this case the fact that the commissioners met on the 23d of August and ascertained the amount to be raised did not render the tax void.

But it is said that in *Commissioners of Highways v. Newell*, *supra*, we held, in construing this section (then section 120), that the fiscal year commenced with the Tuesday preceding the annual September meeting of the county board, and used the language: "It is at that time they are required to make their estimates and levy of the tax to meet the expense of keeping in repair the roads and bridges until the corresponding period of the next year." The question as to the particular time at which the estimate and levy should be made was not material in that case, and the language of the opinion is to be understood simply as requiring the commissioners to make their levy for the fiscal year to commence with the Tuesday preceding the annual September meeting of the county board until the corresponding period of the next year. The opinion would have been just as decisive of the question then under discussion if it had simply said, "The commissioners are required to make their estimate and levy of the tax," etc.

The judgment of the county court will be reversed as to the town taxes of Prairie and Young America townships, and as to all other taxes affirmed. In pursuance of section 192 of the revenue act (3 *Starr & C. Ann. St.* p. 3478, c. 120), a judgment will be rendered in this court for the sum of \$629.45, the amount of said taxes affirmed, with 10 per cent. damages on that amount; and it is ordered that so much of the amount deposited by appellant with the collector upon the taking of this appeal as shall be necessary to pay and satisfy said judgment be credited upon the same, and that execution issue for any balance remaining unpaid. The clerk of this court will enter judgment accordingly, and transmit to the county collector a certified copy of the same.

Judgment in this court.

(207 Ill. 26)

GLOS v. KINGMAN & CO.

(Supreme Court of Illinois. Feb. 5, 1904.)

TITLES—REGISTRATION—BURDEN OF PROOF—EVIDENCE.

1. The complainant in a bill in equity to remove a tax deed as a cloud on his title to land must allege the invalidity which he claims exists in defendant's title or claim, and establish such invalidity on the trial.

2. On an application to register a fee-simple title to certain land under the land register act, and to remove certain tax deeds as a cloud on complainant's title, mere proof of a prima facie title in the applicant is insufficient to require the defendant to establish the validity of his title alleged to be a cloud on that of complainant, but the burden is on the latter to establish a fee-simple title, and that defendant's claim is invalid.

3. On an application to register a fee-simple title to certain lands, proof of certain deeds of the land to the applicant, not connected with the title, which emanated from the general government, and the payment of taxes not covering seven consecutive years, and certain acts of possession, were insufficient to make out a prima facie case of title for the applicant, so as to require a defendant claiming title under a tax deed to prove the validity of such deed.

Appeal from Circuit Court, Cook County; R. W. Clifford, Judge.

Application by Kingman & Co. against Jacob Glos for the registration of title to certain lots. From a decree in favor of plaintiff, defendant appeals. Reversed.

Jacob Glos (John R. O'Connor, of counsel), pro se. Victor M. Harding, for appellee.

BOGGS, J. The appellee company on the last day of April, 1903, filed in the circuit court of Cook county its application, under the provisions of an act entitled "An act concerning land titles," approved and in force May 1, 1899 (4 Starr & C. St. 1896, p. 259, c. 30), commonly known as the "Land Registration Act," for a decree declaring the title in fee simple in and to lots Nos. 191 and 192, in block 2 in Young & Clarkson's Second Addition to Kensington, Ill., to be vested in it. The appellant and others were personally named as defendants, and he filed a sworn answer to the application. The cause was referred to the examiner of titles. Proof was taken, and the report of the examiner of titles filed, and a decree was entered finding and declaring the appellee company to be the owner in fee simple of the title to the said lots, subject only to the payment to the appellant, Jacob Glos, and Emma J. Glos, and D. Arnold, as their respective interests may appear, of the sum of \$6.73, "and that upon the payment as aforesaid of said sum to said defendants, Jacob Glos, Emma J. Glos, and D. Arnold, or to the clerk of this court for their respective use, to be made within thirty days from this date, together with interest, as aforesaid, the tax deed to Jacob Glos dated November 11, 1902, recorded November 13, 1902, as document No. 3,320,258, and the quitclaim deed from Jacob Glos to the defend-

ants Emma J. Glos and D. Arnold, dated March 11, 1903, recorded March 16, 1903, as document No. 3,363,014, be held and taken to be null and void and of no effect, in so far as either of said deeds conveys or affects said lots 191 and 192 in block 2 in Young & Clarkson's Second Addition to Kensington, and that, upon the failure to pay said above specified sum and interest within said time, this application and this proceeding stand vacated and dismissed at applicant's costs." This is an appeal to bring the decree into review in this court.

The appellant, among other grounds urged for reversal, insists, first, that the proofs of title produced in behalf of the appellee company were wholly insufficient to establish title in fee simple in it for registration, as declared by the decree; second, that no proof was produced to show that the tax deed to himself was in any wise defective or invalid. The appellee, in response to the first of these complaints, insists that the appellant's position in the proceeding is the same as that of a defendant in a proceeding in equity to remove a tax deed as a cloud on the title of the complainant in the bill, and that in cases of that character no proof of complainant's title is required, other than the prima facie proof of title arising from the production of a deed purporting to convey title to the complainant, and proof of possession of the premises under such claim of title; and, as to the second of the complaints of appellant, the appellee insists that in proceedings under the act for the registration of land titles the applicant is not required to attack and overturn the title held by a party named as defendant in the application for a decree of registration, but such defendant must produce proof to establish the validity of his title, if any he claims or appears to have in the premises.

The complainant in a bill in equity to remove a tax deed as a cloud on his title to land, to entitle him to that relief, must allege in his bill the invalidity which he claims exists in the title or claim of the defendant (Gage v. McLaughlin, 101 Ill. 155; Gage v. Reid, 104 Ill. 509), and on the hearing must establish that allegation, and show the invalidity of the title of his adversary. 6 Am. & Eng. Ency. of Law (2d Ed.) p. 157. If the nature of the claim of title which is alleged to constitute a cloud is unknown, the complainant may allege such want of knowledge, and make the holder of the claim a defendant, and he may be required to discover the nature and extent of his claim; and on the discovery the bill may be amended as to allege the invalidity of such claim of title, and entitle the complainant to the desired relief, if he can prove the allegations of the bill as amended. Gage v. Reid, supra. In the case last cited we said (page 513, 104 Ill.): "It would be anomalous to find titles invalid, or enjoin their assertion, without any pleadings or allegations upon

which to base the relief. It would be an innovation on long, well-established, and familiar practice. It has been held, in cases almost without number, that a complainant can only have such relief as he entitles himself to by the allegations of his bill, supported by proof."

In cases to remove clouds from titles, we have held that the complainant's title may be sufficiently proved by establishing a *prima facie* case of ownership in fee—this for the reason it is essential to the right of the complainant to a decree in such cases that he shall establish that his adversary's title is invalid, and but a cloud on the title of the complainant. *Prima facie* proof of title in fee in the complainant in a bill to remove a cloud would not, of itself, entitle the complainant to a decree declaring the tax deed or other apparent title held by the defendant to be invalid, but, in addition to such *prima facie* case, the complainant, to entitle himself to a decree canceling the deed of the defendant, must allege and prove the defendant's claim of title is but a mere cloud. The proceeding at bar is not a bill in equity to remove a cloud, but is an application, under the statute, for the initial registration of the title to the lots. The principal object to be subserved by this statute is to provide a system of registration whereby it shall be possible for an intending purchaser of land to ascertain by an inspection of the register who may convey to him the title. A proceeding under this statute, if it shall result in a decree of registration of the title of the applicant as the title in fee, should subject the titles of all parties to the proceeding, and every other title or claim to the land, to judicial investigation, in order that the true state of the title in fee should be ascertained and declared. The applicant for registration in the case at bar must therefore establish that the true title in fee is in him, before he can have relief, or require those whom he has brought before the court as defendants to bring their titles before the court for adjudication. If the applicant does not prove such a title as is entitled to be registered as a title in fee, he cannot have relief, either in the way of the registration of his own title, or a declaration finding that the adverse claimants have no title, or that the claims are but clouds on such *prima facie* title as the applicant may be able to show. If the applicant in a proceeding under the statute for the registration of his title produces evidence establishing title in him, then those who had been brought in, under the application, as holders of claims to the title, may be required to produce proof to establish the validity of their claims to the title, or to a lien on the title, as the case may be. Defendants to the proceeding may therefore be heard in the trial court to urge that the applicant has not shown a title of the nature proper to be registered, for if that be true the appli-

cation should be dismissed, and that without any regard whatever to the question whether the title or claims of the defendants to the title are but mere clouds. While one who has shown a title entitled to be registered may not only have a decree to that effect, and may also have the claims of others who are defendants to his application decreed to be but clouds on his title, yet such applicant, if he fails to establish title in himself of the nature and character to be registered, cannot have a decree removing the defendants' claims as mere clouds on a mere *prima facie* case of ownership in himself, but his application should be dismissed. The appellant may therefore be heard to insist that the proofs as to title in fee of the appellee company were insufficient to support the decree.

The documentary evidence offered by the appellee company to support the findings of the decree that it possessed title in fee to the premises in question was the following: Sheriff's deed from the sheriff of Cook county to Kingman & Co., dated November 21, 1893, and recorded November 28, 1893; warranty deed, dated May 6, 1890, from James C. Young and wife and Michael Clarkson and wife to Laurence Morrissey, recorded March 25, 1891; quitclaim deed, dated May 23, 1902, from Laurence Morrissey and wife to Kingman & Co., recorded May 23, 1902; receipts showing payment of general taxes for the year 1895, special assessment paid in 1896, the general taxes for 1897, redemption and general taxes paid in 1898, the general taxes for 1898 paid in 1899, special assessment paid by Victor M. Harding in 1902. These deeds were in no wise shown to be connected with the title which emanated from the general government, and, within themselves, did not prove title in the appellee company. Such deeds constituted color of title, merely. The payment of taxes did not cover seven consecutive years, and did not operate to aid the deeds, as color of title, to ripen into title under any of our limitation laws. It cannot be conceived that any one would deliberately contend that the production of these deeds and of the tax receipts entitled the appellee company to a decree finding it to be the owner in fee of the lots, and decreeing that its title as such owner in fee should be registered. Counsel for appellee does not so contend, but his insistence, as before stated, is that the deeds and tax receipts, together with the proof of possession hereafter referred to, were sufficient to establish a *prima facie* case of ownership in fee, and that, the appellant having produced no proof in support of his tax title, a *prima facie* case of ownership was sufficient to uphold a decree canceling his deed as a cloud, and he could not be heard to assign as for error that proof necessary to base a finding and decree that the appellee held title in fee had not been produced. The appellee is in error in

that contention. The only proof as to possession was, in substance, as follows: The application of the appellee company for the registration of the lots was prepared, signed, and sworn to by its secretary on the 18th day of March, 1903. The application alleged the lots were unoccupied. The application was filed on the 1st day of April, 1903. In the time intervening between the signing and verification of the application, and before filing it, the attorney who prepared and subsequently filed it went to the lots, caused a fence to be built around them, and put up a sign giving notice that the lots belonged to the appellee company, and were for sale by it. The application as previously prepared was then placed on file.

We need not consider whether, in a bill in equity by the appellee company to remove appellant's tax deed as a cloud because of invalidity set forth in the bill and proven on the hearing, these deeds, tax payments, and acts of the attorney of appellee in connection with the possession of the lots relied upon to constitute possession would be sufficient proof of ownership to give the complainant standing to ask a decree as owner, for the reason that, as before explained, the applicant for initial registration, under the statute, of a title as a title in fee, must produce proof that he is possessed of such title, either by the production of a regular chain of conveyances from the general government, or by proof of the creation of a title by adverse, actual, open, continuous, and hostile possession under claim of title for the period of 20 years, or by payment of taxes and possession of the premises under color of title, or payment of taxes alone, the premises being vacant, for the period necessary, under our statute of limitations, to the perfection of a title of that character. Evidence establishing title good against all the world is essential to warrant a decree awarding initial registration of a title. The claim of ownership of the appellee company was not entitled to be registered, and the application should have been dismissed. Evidence establishing title good as against the world is essential to warrant a decree awarding initial registration of a title. The decree is reversed, and the cause will be remanded, for further proceeding not inconsistent with this opinion. Reversed and remanded

(207 Ill. 63)

GLOS v. CESSNA.*

(Supreme Court of Illinois. Dec. 16, 1903.)

LAND TITLES—REGISTRATION—CLOUD—REMOVAL—SECONDARY EVIDENCE.

1. Where there is no evidence on an application for the registration of title to certain land that the original deeds had been lost or destroyed, or that an abstract book offered in evidence was on file in the office of the recorder, a book of abstracts which was not identified

or shown to be a public record, and an abstract of title to the land in question, were inadmissible.

2. Where the only proof of title offered by an applicant to register title to certain lots in fee, and to remove a tax deed as a cloud on title, was a warranty deed from applicant's grantors to herself, without any evidence tending to show title in such grantors, the proof was insufficient.

3. On an application to register title to certain land, and to remove a cloud on such title, the proof must warrant the registration of the applicant's title, in order to enable the court to grant a removal of the cloud as incidental relief.

Appeal from Circuit Court, Cook County; E. F. Dunne, Judge.

Application by Sarah Louise Cessna against Jacob Glos for the registration of title to certain land. From a decree in favor of applicant, defendant appeals. Reversed.

Jacob Glos (John R. O'Connor, of counsel), pro se. T. F. Monahan and Wm. S. Newburger, for appellee.

CARTWRIGHT, J. On December 6, 1902, appellee, Sarah Louise Cessna, filed in the office of the clerk of the circuit court of Cook county her application to the court to register her title to a lot in Chicago pursuant to an act concerning land titles in force May 1, 1897. The application stated that her estate in the lot was in fee simple, subject to a certain trust deed; that no other person claimed any interest in the lot, except appellant, Jacob Glos, and Emma J. Glos, whose claim was an alleged tax deed; and that the premises were unoccupied, which latter averment the court afterward allowed to be amended so as to show that she was in possession. She prayed the court to find and declare her title or interest in the lot, to decree the same, and order the registrar of titles to register the same, and to grant such other and further relief as should be according to equity. The appellant, Jacob Glos, and Emma J. Glos, appeared and answered. The answer of appellant stated that he was not informed as to the title of the applicant, and alleged that the lot was delinquent for the general taxes of 1896; that judgment was entered against it; that he purchased it at a tax sale; and, after setting out the various steps to entitle him to a tax deed, averred that such deed was delivered to him and recorded, and that he paid subsequent taxes on the lot, and had title in fee simple thereto. The application was referred to the examiner of titles, who proceeded to hear the evidence and prepared his report, finding that the applicant was the owner in fee simple of the lot; that it was not occupied, but was in the possession of the applicant; and that the tax deed of appellant, and a quitclaim deed from him to Emma J. Glos, were void and of no effect. Appellant objected to the findings, and, his objections being overruled, they were allowed to stand as exceptions in the circuit court. The exceptions were overruled by the court, the re-

*Rehearing denied February 5, 1904.

port was approved, and a decree was entered finding the applicant to be the owner in fee simple of the lot, subject to said trust deed, and that the tax deed was void, and confirming title in the applicant in fee simple upon payment to the appellant and Emma J. Glos of the amount due them for taxes, costs, and interest.

On the hearing before the examiner the applicant offered in evidence an abstract of title, and also a book of abstracts, both of which were objected to by appellant. According to the report of the examiner, he stated, in reply to the objections, that the abstract was good for the purpose of satisfying him as to the applicant's title, but not as proof of title against the objection of appellant, and that the book of abstracts was the property of the recorder of deeds, and the reference was made to him as examiner in order that he might have at his disposal the public records in the office of the recorder, and he would let the book go in, subject to the objection. There was no evidence whatever to authorize the admission of abstracts or a book of abstracts in evidence. There was no evidence that the original deeds which appeared in the alleged abstract were lost or destroyed, or that the abstract book was on file in the office of the recorder. The book was not identified in any way, and there was nothing to show that it was a public record, if it would have been admissible when so proved. The act for registering title may be of a progressive nature, but not to the extent of abrogating rules of evidence, and permitting the introduction of abstracts without proper foundation being laid. *Glos v. Hollowell*, 190 Ill. 85, 60 N. E. 62. But we understand that in the end the abstract and book of abstracts were not admitted in evidence—at least, they were not considered by the court. Appellant made a motion to strike from the files the abstracts referred to in the examiner's report, and the court denied the motion, with a finding that no abstracts of title or record of abstracts of title had been considered by the examiner or made a part of his report, and that none were presented to or considered by the court.

Leaving out the abstracts, the only evidence of title offered or received was a warranty deed, dated March 1, 1897, from Julius Jeske, and Pauline, his wife, to the applicant, subject to the trust deed, together with testimony of applicant's husband tending to show possession of the lot by applicant. There was no evidence tending to show title in Jeske, and appellant insists that the decree was erroneous because it found fee-simple title in the applicant, without proof that she had such title. The purpose of the act is to establish the title, and give certainty to it, so that the public, or any one dealing with the land, may ascertain the true state of the title by inspection of the register. By the act all persons are to be deemed defendants by the designation

of "all whom it may concern," and the decree, with certain limitations, is to be forever binding and conclusive upon the whole world. It was not the design of the act that a mere prima facie title should be registered as an absolute title in fee simple, and, to entitle an owner to registration with such a title, it should be proved. The applicant for initial registration of title in fee simple asserts that he is the owner of such title as against all the world, and undertakes to establish it, and not merely such a title as would be sufficient to remove a tax deed as a cloud. The court could not order registration of title in fee simple in the applicant in this case without removing the tax deed which was alleged to be a cloud upon such title, but the court could not remove the cloud, and then dismiss the petition for failure to prove the title alleged. The proof must warrant the registration of the title, to enable the court to grant the incidental relief of removing a cloud. The act was not intended to substitute a new proceeding for a bill in equity to remove a cloud, and accordingly we have decided in the case of *Glos v. Kingman & Co.*, 69 N. E. 632, that where the proof does not authorize the registration of title the application should be dismissed.

The decree is reversed and the cause remanded, with directions to dismiss the application. Reversed and remanded, with directions.

(207 Ill. 61)

GAGE v. PEOPLE ex rel. HANBERG, County Treasurer.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—INVALID CLAUSES—OBJECTIONS—TIME FOR MAKING—CONFIRMATION OF ASSESSMENT—COLLATERAL ATTACK—JUDGMENT—SUFFICIENCY—APPEAL—RES JUDICATA—RECORD.

1. Where, on petition for a judgment for delinquent special assessments, an appeal was taken, and errors assigned involving the merits, as well as one on the ground that the judgment entered was not signed by the judge, and the latter assignment was confessed, whereupon the judgment was reversed by the Supreme Court without considering the other assignments, such reversal was not res judicata as to the sufficiency of all the other assignments of error.

2. Where it did not appear from the abstract on appeal that there were two applications pending for judgments against the same property for the same installments of special assessments at the same time, and the notice of application by the collector for judgment which was set out in the transcript appeared to be an application for judgment for the third installment, defendant's contention that the proceedings appealed from were based on a different application from those in which a previous judgment had been rendered for the first and second installments, which was reversed, and that such application was still pending, was without merit.

3. Where an objection that no itemized estimate of the cost of a local improvement was

¶ 1. See *Municipal Corporations*, vol. 26, Cent. Dig. § 1180.

made a part of the record of the first resolution of the board of public improvements, as required by law, was not made to the confirmation of the assessment for the improvement, such objection, made for the first time in resistance of the application for judgment for delinquent installments, was in the nature of a collateral attack on the judgment of the court confirming the assessment, and was unavailable, unless the record of the proceedings to confirm the assessment showed on its face that the court had no jurisdiction to confirm the same.

4. Where the specifications for the work of a public improvement and the contract contained the eight-hour and alien labor clauses, but the city, in a suit to recover assessments for the improvement, proved that, by reason of a prior decision of the Supreme Court holding such clauses invalid, they had been invariably disregarded both by the city and the contractors, the presumption that such clauses entered into the competition for the contract, and increased the bids, was overcome.

5. Where a judgment for assessments for local improvements failed to refer to the list of delinquent assessments which preceded it, or to anything else in the record from which a description of the real estate against which the judgment was intended to be entered could be obtained, and it was impossible to tell what property of the objector the judgment was against, it was invalid.

Appeal from Cook County Court; L. C. Ruth, Judge.

Application by the people, on relation of John J. Hanberg, against Henry H. Gage, for a judgment for delinquent special assessments. From a judgment in favor of relator, defendant appeals. Reversed.

F. W. Becker, for appellant. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

SCOTT, J. This is an appeal from a judgment of the county court of Cook county against the property of appellant for the first and second installments of a special assessment made for paving Turner avenue, in the city of Chicago, which installments had been returned as delinquent. At the July term, 1902, the county collector made application to the county court of that county for judgment against the same real estate for the same installments of this special assessment. The objections then made were: First, that the contracts for making said improvement were not let to the lowest responsible bidder; second, that said contract provided that, in the prosecution of said work, eight hours should constitute a day's labor, and that said contractor should not employ, or permit to be employed, any persons other than citizens of the United States, which contract was so drawn in accordance with an ordinance of the city of Chicago; third, that the proposal or bid for said work was based, in part, upon said provisions; fourth, that the entry of judgment herein would deprive the objector of property without due process of law, etc. The court overruled these objections, and entered judgment on July 28, 1902, against the property for

the delinquent installments. Gage appealed from that judgment to this court, and assigned as error the overruling of each of said objections, and also the fact that the judgment entered did not conform to the statute, and the further fact that the judgment was not signed by the judge. Appellee filed in this court a confession that there was error in the record, in that the judgment and order of sale were not signed by the judge; and upon that confession, without considering the other errors assigned, this court reversed the judgment (69 N. E. 80), and remanded the cause to the county court of Cook county for further proceedings, where the cause was redocketed on April 25, 1903. The matter was again presented to the county court at its July term, 1903, when Gage again presented objections in substance the same as those presented at the former hearing, and in addition he objected that the issues involved were res judicata by the decision and mandate of this court on the appeal from the judgment of July, 1902, and that upon remandment the former application was redocketed, and is still pending in said county court.

In support of the contention that this matter is res judicata, it is argued that because the same errors were assigned on overruling the same objections on the former appeal, and inasmuch as the judgment was then reversed, it must be presumed that the judgment of this court was that all the errors which were assigned were well assigned, and reliance is placed upon *Johnson v. VonKetter*, 84 Ill. 315. In that case, which was then in this court for the third time, appellant reargued a question which had been decided by this court upon an earlier appeal, and this court held that it would not again consider the point; that, if the appellant had desired to reargue the proposition, he should have presented his petition for a modification of the former opinion in apt time. In *Smyth v. Neff*, 123 Ill. 310, 17 N. E. 702, the validity of a tax deed was involved. The case had been before in this court on an appeal from a judgment in an action of ejectment, in which the court below had held a certain tax deed involved in the suit invalid. This court on the first appeal had reversed that judgment and remanded the cause; holding that the objections made against the tax deed were not sufficient to invalidate it, and that it should have been held good. When the case came the second time to this court, this court said: "Concerning the points considered by the court in its former opinion, the discussion must now be regarded as forever closed, and the decision adverse to the defendant must stand." It is said that the additional testimony heard on the second trial in the court below was as to a matter of no consequence, and that to consider again the question of the validity of the tax deed "would simply be to reconsider the case upon exactly the same record. That is not al-

lowable under any practice that has ever obtained in this state." To the same effect are the other cases cited by appellant. We think the present case plainly distinguishable from those above referred to. The assignments of error, other than that calling attention to the fact that the judgment lacked the signature of the judge, were not considered by this court at all, and the fact that this court, on confession by appellee, held that assignment good, does not mean that all other errors assigned were meritorious.

It is said that this application is a different application from the one upon which judgment was entered in July, 1902; that the former application is still pending, and it was therefore error to enter judgment in this second application for the same installments of the special assessment that were covered by the first application. It does not certainly appear that there were two independent applications. The bill of exceptions, in reciting the evidence offered by objector, after showing the final order of this court filed in the county court on April 11, 1903, contains this language: "Also the order of this court entered April 25, 1903, redocketing said cause, which, it was shown, is the final order entered." If this order, which does not appear elsewhere in the transcript of the record, was introduced in evidence, it should have been set out in full in the bill of exceptions, so that this court could see what the order was. What is meant by the recital that this was the final order, we are unable to determine, because it appears from the transcript that thereafter the judgment appealed from was entered by the county court on August 3, 1903, overruling the objections and directing a sale, and it does not appear from the abstract that there were two applications pending for judgments against the same property for the same installments at the same time. The notice of application by the collector for judgment, which is set out in the transcript, appears to be a notice of application for judgment for the third installment of this special assessment, and in no wise supports appellant's contention that there was a second independent proceeding instituted for the collection of the first and second installments. We therefore conclude, notwithstanding the recital in the bill of exceptions in reference to the order entered April 25, 1903, that, upon a consideration of the entire record, it does not appear that there were two separate proceedings pending at the same time for the collection of these two installments.

On the trial below, appellant offered evidence to show that no itemized estimate of the cost of this improvement was made a part of the record of the first resolution of the board of local improvements. Under the authority of *Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 161, this objection would have been a good objection, had it been

made to the confirmation of the assessment. Not being made, however, until the time of the application for judgment for delinquent installments of that assessment, it is in the nature of a collateral attack upon the judgment of the county court confirming the assessment. We have frequently held that no defense which existed at the time the judgment of confirmation was entered, and which might have been interposed in that proceeding, can be made upon an application for judgment for the sale of real estate to satisfy the special assessment, unless it be shown that the county court did not have jurisdiction of the proceeding to confirm the assessment (*Leitch v. People*, 183 Ill. 569, 56 N. E. 127; *Pipher v. People*, 183 Ill. 436, 56 N. E. 84; *Perisho v. People*, 185 Ill. 334, 56 N. E. 1134; *People v. Talmadge*, 194 Ill. 67, 61 N. E. 1049), and that lack of jurisdiction must be made to appear from the record of the county court itself; otherwise such lack of jurisdiction cannot be taken advantage of in a collateral proceeding, such as this is (*Dickey v. People*, 160 Ill. 633, 43 N. E. 606; *Young v. People*, 171 Ill. 299, 49 N. E. 503; *Casey v. People*, 165 Ill. 49, 46 N. E. 7). The evidence offered was therefore properly excluded.

Appellant refers to *City of Chicago v. No-deck*, 202 Ill. 257, 67 N. E. 39, where it was held that the court had been without jurisdiction to enter a judgment of confirmation in a special assessment proceeding, for the reason that the ordinance providing for the improvement included, as a part of such improvement, certain paving which the city was without power to do by special assessment; and it was there held that the objection that the lack of jurisdiction must appear from the record of the county court would not be considered, for the reason that the party seeking to sustain such judgment had entered into a stipulation which showed that the county court was without jurisdiction, and, having so stipulated, he would not be heard to say that such lack of jurisdiction must appear from the record. Whether the absence of the itemized statement in the record of the first resolution of the board of local improvements would affect the jurisdiction of the county court to enter the judgment of confirmation, even if such absence appeared from the record of that court, or whether it is merely a defense to the proceeding for confirmation, which is waived if not interposed before judgment, is a question which does not arise here, for the reason that appellant has not shown, or sought to show, and presumably cannot show, by the record of that court, such absence of the itemized estimate under discussion.

The specifications for the work necessary to carry out this improvement contained the eight-hour and the so-called alien labor clauses, referred to in the objections above set forth, and these specifications were referred to in the advertisements for bids, the bid,

and the contract, and a copy of such specifications were attached to and made a part of the contract; these two provisions being the same provisions as those on these subjects which are fully set out in *McChesney v. People*, 200 Ill. 146, 65 N. E. 626. As the specifications contained these provisions, and they were referred to in the advertisement and the bid, and made a part of the contract, the presumption would thereby arise that they actually entered into the competition for the contract. This presumption, however, is one which may be rebutted. Appellee introduced evidence which shows that contractors in the city of Chicago engaged in the business of constructing improvements of the character here involved make their bids on the basis that such provisions are inoperative and void, and which shows that such provisions, when contained in such contracts, have been invariably disregarded both by the city and the contractors—a course which is not surprising, perhaps, in view of the holding of this court as to the legality of such provisions found in the case of *Fiske v. People*, 188 Ill. 208, 58 N. E. 985, 52 L. R. A. 291. Upon the entire record, it is apparent to us that these provisions of the specifications did not actually enter into the competition for the contract. In *McChesney v. People*, 200 Ill. 146, 65 N. E. 626, the conclusion reached by this court at page 152, 200 Ill., page 628, 65 N. E., was that the property owner, to sustain his objection, must show that such provisions "actually entered into the competition in some way." There was no error in overruling the objections based upon these provisions of the specifications.

The judgment of the county court in this case is in the following words: "And thereupon it is considered by the court that judgment of sale be, and is hereby, entered, against the property of said objector, in favor of the people of the state of Illinois, for the amount of special assessment, interest, penalties, and costs due thereon. It is further ordered that the property of said objector be sold, as the law directs, to satisfy the amount of special assessments, interests, penalties, and costs due thereon, as aforesaid." We do not think this judgment complies with the law. It is substantially the same as that disapproved in *McChesney v. People*, 174 Ill. 46, 50 N. E. 1110; the only material difference being that in that case the judgment was, "It is ordered that judgment of sale" be entered, while here the language is, "thereupon it is considered by the court that judgment of sale" be entered, and, while the record is thus given the language characteristic of a judgment, it still fails to comply with section 191 of chapter 120 of Hurd's Revised Statutes of 1901, where a form for a judgment for delinquent taxes or special assessments is set out, with which the judgment in cases of this character must substantially comply. Following that form, the judgment should be entered "against the

aforesaid tract or tracts * * * in favor of the people of the state of Illinois for the sum annexed to each." The word "aforesaid," as used here, has reference to the descriptions of real estate on which the special assessments or taxes are delinquent, which descriptions are contained in a list which precedes the judgment, and are contained in the application for judgment, and which list, with the judgment, should be found in the "judgment, sale, and redemption record" of the county court. From the judgment in the case at bar, it is impossible to tell what property of the objector the judgment is against. Appellee insists that the judgment should be read in connection with the application and list which precede it in the last-mentioned record. This does not help it, as it fails to refer to the list which precedes it, or to anything else in the record from which a description of the real estate against which the judgment is intended to be entered can be obtained. The form given in this section of the statute should be followed, modifying it so that it will apply to special assessments alone; and, if the judgment be not entered against all of the tracts contained in the delinquent list which precedes the judgment, then the tracts against which the judgment is entered should be particularly specified, which may be done by referring to them as appearing opposite the name of the objector on that list, or, if tracts appear opposite his name on that list against which judgment is not entered, then it may be done by setting out in the judgment a particular description of the tracts against which the judgment is entered, and reference, by apt words, may be had to the list for the amount of the special assessment, interest, penalties, and costs due thereon.

As no error intervened in this proceeding prior to the entry of the judgment, a new trial will not be awarded, but the judgment of the county court will be reversed, and the cause remanded, with leave to the attorney for appellee to move for, and with directions to the county court to enter, a judgment in compliance with section 191 of chapter 120 of Hurd's Revised Statutes of 1901. Reversed and remanded, with directions.

(207 Ill. 74)

RYAN v. PEOPLE ex rel. HANBERG, County Treasurer.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT—APPLICATION FOR JUDGMENT—EVIDENCE.

1. On application for judgment against abutting property for a delinquent special assessment, evidence that the engineer's estimate of the cost of the improvement was not made a part of the record of the preliminary resolution of the board of local improvements is inadmissible, because such objection could have been made upon application for a judgment confirming the assessment.

Appeal from Cook County Court; L. C. Ruth, Judge.

Application by the people, on relation of John J. Hanberg, county treasurer, against Thomas J. Ryan, for a judgment of sale for a delinquent special assessment. From a judgment granting the application, respondent appeals. Affirmed.

William J. Donlin and Charles D. Richards, for appellant. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

PER CURIAM. This is an appeal from a judgment of sale rendered by the county court of Cook county upon a delinquent assessment levied by the city of Chicago to defray the cost of constructing a sewer in West 120th street, in said city. The lands of the appellant were returned delinquent for a failure to pay the assessment, and the relator applied for judgment of sale at the July term, 1903, of said court. The appellant appeared and filed objections to the application, which were overruled, and judgment of sale rendered.

The only ground of reversal insisted upon on this appeal is that the court below refused to admit evidence for the purpose of showing that the engineer's estimate of the cost of the improvement was not made a part of the record of the preliminary resolution of the board of local improvements. The evidence was objected to by the relator upon the ground that it was incompetent upon this application. The case is in all respects like that of *Gage v. People ex rel. Hanberg* (No. 3,296) 69 N. E. 635, in which we sustained the contention of counsel for the relator, holding that the objection was one which could have been made upon the application for judgment confirming the assessment, but was not available in the collateral proceeding for a judgment and order of sale for delinquent taxes. For the reasons given in the opinion in that case, and upon the authorities there cited, this judgment must be affirmed.

Judgment affirmed.

(207 Ill. 75)

DOYLE et al. v. PEOPLE ex rel. HANBERG,
County Treasurer.

(Supreme Court of Illinois. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—VALIDITY—ALIEN LABOR CLAUSE—PUBLIC POLICY.

1. Where the specifications for the work of a public improvement and the contract contained an alien labor clause, but the city, in a suit to recover assessments for the improvement, proved that by reason of a prior decision of the Supreme Court holding such clause invalid it had been invariably disregarded both by the city and the contractors, the presumption that such clause entered into the competition for the contract and increased the bids was overcome.

2. Where a contract for municipal improvements contained an invalid clause prohibiting the employment of alien labor, which clause was

disregarded both by the city and the contractors generally, it did not render the contract void in toto, as against public policy.

Appeal from Cook County Court; L. C. Ruth, Judge.

Application by the people, on relation of John J. Hanberg, County Treasurer, against William A. Doyle and others, for the recovery of a judgment of sale of certain real estate for the payment of delinquent special assessments. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

George W. Wilbur, for appellants. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

SCOTT, J. This is an appeal from a judgment of sale entered on August 3, 1903, in the county court of Cook county, for the first installment of a special assessment for paving Van Buren street from Paulina street to Kedzie avenue, in the city of Chicago.

It is urged on behalf of the appellants that the court erred in not admitting in evidence the record of the first resolution of the board of local improvements originating this improvement, which was offered for the purpose of showing that it did not contain an itemized estimate of the cost of the proposed improvement, as required by the law. The record in this case, so far as this matter is concerned, is in precisely the same condition as the record in the case of *Gage v. People ex rel.* (No. 3,296) 69 N. E. 635, appealed from a judgment entered on the same day, in the same county court, as is the case before us. In that case the appellant made precisely the same point in this regard as is made by appellants in the case now before us, and in considering this point we have availed ourselves of the briefs filed in both cases, and we have in the *Gage* Case fully stated our reasons for holding the offered evidence to have been properly excluded. It is unnecessary to repeat those reasons here.

The specifications providing for the improvement involved in the case at bar contain this provision: "It is hereby understood and agreed that said contractor or contractors shall not employ, nor permit to be employed by his or their subcontractors, any person or persons other than native born or naturalized citizens of the United States." In the advertisement for bids, and in the proposal of the successful bidder, reference was made to these specifications, and in the proposal it was stated that it was in accordance with such specifications, and a copy of such specifications was appended to the contract and made a part thereof. For the apparent purpose of showing that this provision restricted competition among possible bidders, or actually entered into the competition in some way, appellants took the testimony of two witnesses, John A. May and Joseph Downey. May testified that he had been

superintendent of special assessments of the city of Chicago continuously since January, 1899, and that he was, at the time of testifying, a member of the board of local improvements of that city; that the specifications used were partly written and partly printed; that the printed part was a printed blank of a kind which had been used by the city for several years on which to prepare specifications for improvements of this character; that in the printed part of these specifications was contained this alien labor clause, and also a clause providing that men employed in making the improvement should not work more than eight hours per day, which is commonly known as the "eight-hour clause"; that in preparing specifications for this improvement the eight-hour clause was stricken out, and that the alien labor clause was left in the specifications by an error or oversight of the engineer, the purpose being to strike out both clauses because of a reference to them made by this court. The witness further stated that this so-called "alien labor clause" had never been in any way enforced by the city, although it had been found in the specifications for many improvements; that it had been absolutely ignored by the city; and that this fact was known generally among contractors engaged in constructing local improvements in the city of Chicago. It appeared from the testimony of Joseph Downey that he had been commissioner of public works of the city of Chicago, and, as such, was at the head of the improvements department of the city, and had been engaged in the business of contracting for public improvements other than street paving. He stated that in his judgment, if the alien labor clause was enforced, the cost of making the improvement would be somewhat increased; that he did not know whether in contracts of this character the alien labor clause had any effect upon the bidding. On the part of appellee the testimony of a number of witnesses engaged in the business of street paving, by contract, in the city of Chicago, was taken, and this testimony shows that shortly after this alien labor clause first appeared in specifications used by the city of Chicago for the

construction of local improvements, which was about 1896, the matter was discussed at a meeting of a number of contractors, at which Mr. Moody, then deputy commissioner of public works of the city of Chicago, was present; that the conclusion there reached was that the provision was one which could not be enforced; that similar provisions had been found in specifications for local improvements made by the city of Chicago from that time down to the present, but had never been enforced, and had been uniformly disregarded both by the city and the contractors, and were not taken into consideration by the contractors in bidding for the contracts for constructing local improvements, and that the amount of such bids would be the same, under existing circumstances, whether such provision was contained in the specifications or not. Upon consideration of all the testimony offered on this subject, we are of opinion that the objector failed to show that this provision entered into the competition for the contract in any way, and, following the reasoning adopted by us in *Gage v. People ex rel.*, supra, we therefore hold that the provision was not the basis for a meritorious objection.

Appellants regard this contract as obnoxious to public policy on account of this provision, and have referred us to a number of authorities where courts of last resort have refused to enforce contracts for the construction of local improvements, which were being made by special assessment, for the reason that such contracts were invalid, either because they contained some provision that was against public policy, or because the law had not been strictly followed by the city in taking the steps preliminary to the execution of the contract itself. We do not consider these cases as of importance in this litigation, for the reason, among others, that we regard ourselves committed by the case of *McCheaney v. People* (Ill.) 65 N. E. 626, to the doctrine there announced, which we have followed in *Gage v. People*, supra, and which leads us to the conclusion on the question here presented which we have above stated.

The judgment of the county court of Cook county will be affirmed. Judgment affirmed.

(177 N. Y. 344)

STILLINGS v. METROPOLITAN ST. RY. CO.

(Court of Appeals of New York. Feb. 9, 1904.)

STREET RAILROADS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

1. Where plaintiff's decedent was killed by a street railway car, running at a high rate of speed, while crossing a track to catch a car waiting for him, the conductor of which called upon him to hurry if he wanted to get the car, the question whether decedent was guilty of contributory negligence in passing diagonally across the street, facing the approaching car, is a question for the jury; it presenting a question of fact, rather than one of law.

Appeal from Supreme Court, Appellate Division, First Department.*

Action by William E. Stillings, executor of Isaac I. Stillings, against the Metropolitan Street Railway Company. From a judgment of the Appellate Division (82 N. Y. Supp. 726) modifying, and affirming as modified, a judgment for plaintiff, defendant appeals. Affirmed.

Charles F. Brown, Bayard H. Ames, and Henry A. Robinson, for appellant. Archibald C. Shenstone, for respondent.

HAIGHT, J. This action was brought to recover damages for the alleged negligent killing of the plaintiff's testator. On January 7, 1899, at about midnight, the decedent, a man 73 years of age, with a companion, was at the southwest corner of Central Park West and Sixty-Ninth street, intending to take a north-bound car on the defendant's road. The car was then approaching from Sixty-Eighth street, and was signaled to stop by the decedent's companion; and they started diagonally across the street towards the northeast corner, where the cars stopped to receive and discharge passengers. They had proceeded as far as the south-bound track when the north-bound car passed them, and stopped at the crosswalk. The conductor then called to them to hurry up, if they wanted to get on that car. An instant later a south-bound car, running at a speed of from 20 to 25 miles per hour, struck and killed the decedent. His companion testified, in substance, that they saw the south-bound car approaching from Seventy-First street before leaving the southwest corner of Sixty-Ninth street; that, in proceeding diagonally across the street, he led the way, the decedent walking four or five feet behind him, and that, as the decedent stepped upon the south-bound track, he called to him to look out for the car; and that he attempted to avoid it by a backward movement, but was struck and killed.

The defense interposed is that of contributory negligence, and the contention of the appellant is that such negligence appears, as a matter of law, and that a verdict should have been directed for the defendant. It must be conceded that the question presented is upon the border line, and that ordi-

69 N.E.—41

narly a person could not walk diagonally across a street, facing an approaching car, and colliding therewith, without becoming chargeable with contributory negligence; but in this case we have finally concluded to sustain the trial court in submitting the case to the jury, not, however, upon the theory that the call of the conductor to hurry up was such an invitation as would justify the decedent in, the belief that his access to the car was thereby rendered safe, and that he was excused from looking out for the approaching south-bound car, but upon the ground that the call of the conductor may have momentarily diverted his attention therefrom, and that the loss of time occasioned thereby prevented his escape, and resulted in his death. This, taken in connection with the other circumstances disclosed in the case, including the decedent's probable deception as to the speed of the south-bound car, and his right to suppose that the motor-man would have it under control as he approached the crossing, we think, presented a question of fact, rather than one of law.

The judgment should be affirmed, with costs.

BARTLETT and VANN, JJ., concur in the result, upon the ground that the call of the conductor, while engaged in the discharge of his duty to look out for passengers and take them on board his car, was an invitation by the company, and an assurance of safety to the deceased.

PARKER, C. J., and **CULLEN** and **WERNER, JJ.**, concur. **GRAY, J.**, not sitting.

Judgment affirmed.

(177 N. Y. 362)

BLUMENBERG PRESS v. MUTUAL MERCANTILE AGENCY.

(Court of Appeals of New York. Feb. 9, 1904.)

APPEAL—REVIEW—REVERSAL ON THE LAW.

1. Under Code Civ. Proc. § 1338, where the question whether or not an artisan's lien has been waived is one of fact, and the trial court, in a short decision, finds that the lien existed, and must be assumed to have decided that there was no waiver on the part of the plaintiff, the appellate court, in the absence of error at the trial, cannot reverse on the law on the ground that there was a waiver.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Blumenberg Press against the Mutual Mercantile Agency. From an order of the Appellate Division (78 N. Y. Supp. 1085) affirming in part and reversing in part a judgment of the Special Term in an action to foreclose a lien, plaintiff appeals. Reversed.

Joseph N. Goldbacher, for appellant. Henry Schoenherr and Arthur J. Baldwin, for respondent.

HAIGHT, J. This action was brought to recover a judgment for the balance due the plaintiff upon a contract with the defendant to print for it a reference book, including the manufacture of the linotype slugs, plates, etc., at prices stipulated in the contract, and to have it adjudged that the plaintiff has an artisan's lien on the linotype slugs, paper, etc., in plaintiff's possession, and for a foreclosure of such lien. The balance due the plaintiff upon the contract is undisputed, and amounted, at the time of the entry of the judgment, to the sum of \$9,879.62, including interest. The only controversy in the case arises over the right of the plaintiff to an artisan's lien. Upon this issue the trial court made what is commonly denominated a "short decision"; holding that as to the work performed by the plaintiff prior to the 8th day of February, 1901, it had been fully paid for by the defendant, who was entitled to the possession of the property, and that it had been left with the plaintiff as bailee merely, and that no lien attached thereto, but, as to the material thereafter manufactured by the plaintiff, it had not been paid for, was still in the possession of the plaintiff, and that its lien attached thereto; and judgment was ordered accordingly. Both parties having appealed, the case came up for review in the Appellate Division, and that court held, as stated in the opinion, that "the contract was one, and not several, for the printing of the first edition of the defendant's reference book. It shows upon its face that the intention of the parties was that the plaintiff should do all the work required in the way of making the type, printing, and correcting the proof—in fine, everything necessary up to the binding and publication of the book. Although the contract provided for weekly payments for work performed, this did not effect a change, as there was but one contract for the entire work. That being so, a lien for the total amount due attached to the goods manufactured by the plaintiff and not delivered to the defendant, and the plaintiff waived its lien only as to such of the goods as were delivered to the defendant." This is a clear, concise, and correct statement of the law governing contracts of this character, and to this extent we fully concur with that learned court. It then proceeded to discuss the facts with reference to that part of the goods manufactured prior to February 8, 1901, and reached the opinion that the plaintiff had no lien thereon, and concluded by unanimously affirming the judgment of the trial court, in so far as the plaintiff's appeal was concerned. Inasmuch as this conclusion was reached upon a review of the facts, we are concluded from a review thereof by the Constitution and the Code. The learned Appellate Division then proceeds to discuss the facts with reference to the lien of the plaintiff upon the goods manufactured after the 8th day of February, 1901, and refers to two transactions, from which it reaches the con-

clusion that the plaintiff had waived its lien upon the property manufactured by it. The contract provided that the defendant should pay weekly for the work performed. The defendant, however, had neglected to do so; and, upon application to the plaintiff, it had consented to defer payment until the amount of \$5,000 had become due, and then it had accepted notes therefor, which it surrendered up upon the trial. This, the Appellate Division concludes, was a waiver of the plaintiff's lien. Under the contract, however, the plaintiff was under no obligation to deliver the goods during the time for which payments had been deferred. It, in the meantime, had retained possession of the goods manufactured by it; and the question of waiver by the plaintiff depended upon the intent of the parties, to be drawn from the surrounding circumstances. Again, storage had been charged by the plaintiff, and allowed by the defendant, upon the linotype slugs left in its custody, and the learned Appellate Division was of the opinion that this constituted a waiver. The amount of work performed under the contract aggregated upwards of \$60,000, and it will be recalled that upwards of \$51,000 thereof had been paid for, and the lien thereon discharged by the judgment of the trial court, upon the theory that the linotype slugs had been left in the custody of the plaintiff for the purpose of revision and change, rendered necessary from time to time by the changes, deaths, and failures of merchants and others throughout the country. The charge for storage upon this property was proper, and did not affect the question of waiver as to the other property manufactured thereafter, unless it was the intention of the parties to include such property, and to charge storage thereon; and, in case they did, there was still a question as to whether there was an intent to waive the lien by reason thereof. We have thus referred to the facts discussed by the Appellate Division, not for the purpose of reviewing the same, but merely to show that the intention of the parties was involved, and that the question as to whether there was a waiver on the part of the plaintiff was one of fact, and not of law. The decision of the trial court is to be treated the same as a verdict by a jury, and we are to assume that the court found the facts warranted by the evidence necessary to sustain the conclusions of law. *Dr. Kennedy Corp'n v. Kennedy*, 165 N. Y. 853; 360, 59 N. E. 138. The Appellate Division, in reversing this part of the judgment, has not stated in its order or judgment that the reversal was upon the facts; and we must, therefore, under section 1338 of the Code of Civil Procedure, assume that the reversal was upon the law. The facts, therefore, as found by the trial court, must be assumed to remain undisturbed by the Appellate Division; and the trial court, having found that the plaintiff had a lien upon the goods manufactured by it after the 8th day

of February, 1901, which remained in its possession, must be assumed to have found that there was no waiver of such lien by the plaintiff. The Appellate Division could not, therefore, in the absence of errors arising upon the trial, properly reverse upon the law.

The order of the Appellate Division, in so far as it has reversed the judgment appealed from and granted a new trial, should be reversed, and the judgment entered upon the decision of the trial court should in all respects be affirmed, without costs of this appeal to either party.

PARKER, C. J., and GRAY, BARTLETT, VANN, CULLEN, and WERNER, JJ., concur.

Order reversed.

(177 N. Y. 347)

YOUNG et al. v. VALENTINE.

(Court of Appeals of New York. Feb. 9, 1904.)

HUSBAND AND WIFE—SUPPORT OF FAMILY—LIABILITY OF HUSBAND—ACCOUNTING TO WIFE—REFERENCE—EVIDENCE.

1. Where, by reason of a valid agreement between a husband and wife, the wife applies her separate estate to the support of the family, equity will not reimburse her.

2. Where a referee is appointed to determine the issues in an accounting, he can state the account between the parties without an interlocutory judgment that an account is necessary.

3. In an action for an accounting, brought against a husband by his wife, who had supported the family, evidence as to the manner of paying the household expenses before and after the death of the wife's father, from whom she derived her separate estate, is admissible.

4. Where, after action brought by a wife for an accounting against her husband for moneys expended by the wife for family expenses, the wife died, evidence of a statement by her at the taking of her deposition that her husband did not support her, and that she was obliged to pay all the household bills, which was stricken out and became no part of the evidence before the referee, is inadmissible either at common law or under Code Civ. Proc. § 830, as evidence taken at a former trial.

Parker, C. J., and O'Brien and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by William B. Young and others, executors of Marie A. Valentine, deceased, against Benjamin E. Valentine. From a judgment of the Appellate Division (79 N. Y. Supp. 536) affirming a judgment for plaintiffs, defendant appeals. Affirmed.

David B. Hill and B. E. Valentine, for appellant. Charles E. Hughes and George D. Beatty, for respondents.

MARTIN, J. While other relief was demanded in this action when commenced, after the death of Mrs. Valentine it was continued and tried as an action for an accounting by the defendant for the moneys, securities, and property which came into his hands as her attorney or fiduciary agent; all other matters being practically withdrawn. Al-

though a great number of transactions were investigated on the trial and passed upon by the referee, but a single question remains open, as all others have been finally disposed of by the unanimous affirmance of the judgment entered upon the referee's report, and by the stipulation of the parties that his decision should be and remain final, except that portion which related to the payments to Mrs. Valentine or to her bank account by the checks of the defendant. The decision of the referee, being in the short form, is to be treated as a general verdict; and we are bound to assume, not only that all the facts alleged by the plaintiffs bearing upon the question involved were sustained by the evidence, but also that all facts alleged by the defendant and not found by the referee have been rejected or expressly negated. *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 231, 63 N. E. 969, 57 L. R. A. 529; *Hutton v. Smith*, 175 N. Y. 375, 378, 67 N. E. 633; *Marden v. Dorthy*, 160 N. Y. 39, 45, 54 N. E. 723, 46 L. R. A. 694.

The defendant was a lawyer, practicing his profession in the city of Brooklyn. His family consisted of himself, his wife, and four daughters, who lived with their parents, and were being educated at some of the best available schools; and the family was maintained without extravagance, and in a manner befitting their position in the community. The defendant's wife had no separate estate until 1892. The defendant, from 1888, drew his checks and deposited them in the Brooklyn Trust Company to the credit of his wife, to furnish her the money with which to pay the necessary household and family expenses. His wife drew her checks against such deposits, and used them to pay the various persons with whom she dealt in supplying the necessities for the household, and this practice continued until the commencement of this action. The defendant well knew that the family expenses were paid out of the checks and funds thus turned over to his wife, and that he was not to keep accounts with or directly pay the various tradesmen who supplied the family with necessities. The amount of such checks from March, 1892, to December, 1898, was more than \$30,000. The defendant had several bank accounts—one as administrator, another as individual, and still another as attorney; the last, however, containing his individual funds. The defendant drew 75 checks in all on these accounts for household expenses, of which 10 were as administrator, 12 as attorney, and the remainder as an individual; and several of the amounts paid by the 10 checks were carried into the account presented by the defendant as "cash deposited," thus raising the presumption that such checks were not drawn or delivered to Mrs. Valentine, but were drawn to "cash" or "self," and the proceeds deposited to her credit. There is no evidence showing that Mrs. Valentine knew the source of any such funds, nor in what manner her

own funds were deposited. When such deposits were made, the family were all living together at 21 Monroe Place, sometimes on the Storrs farm, and occasionally at Woodsburg, L. I. Mrs. Valentine owned the Storrs farm and the house at 21 Monroe Place, and the defendant owned the place at Woodsburg. On the accounting the defendant presented a schedule of accounts showing his dealings with his wife's estate, in which he charged her and credited himself with all the funds and checks deposited in the Brooklyn Trust Company and used in paying the necessary living expenses of the family, thereby casting upon her the entire burden of maintaining the whole family out of her separate estate. There was no contract, agreement, or understanding between the defendant and his wife whereby she agreed to relieve him from his legal obligation to support his family during any portion of the time covered by the accounting, and the funds and checks turned over by the defendant to pay household expenses were his own, and were furnished by him to discharge his obligation to furnish his family with proper support becoming their situation and condition in life, and he knew that they were for that purpose.

Briefly stated, the foregoing were the facts found by the learned referee as to the matters referred to and included in the plaintiffs' sixteenth exception to the defendant's account, as set forth in the referee's memorandum of opinion. The effect of the stipulation between the parties was to make the memorandum opinion a part of the record, so far as the questions involved in the sixteenth exception are concerned. That the checks and cash furnished by the defendant were actually used in paying the household and family expenses of the defendant and his family, including himself, his wife, and four daughters, and that the same methods had been employed since 1888, is conclusively established, and not denied. The chief issue between the parties in relation to that question was whether, under the proof, it was the duty of the defendant to support his own family, or whether that obligation devolved upon his wife. There is no doubt that in this state, as between husband and wife, the primary obligation to provide for the support of his wife and their children rests upon the husband, and that the wife is not bound to maintain her husband and children, even though she may have a separate estate. Yet, if the income of the wife has, under and by virtue of a sufficient and valid agreement, been applied to the maintenance of the family, in equity she cannot make a claim for reimbursement out of her husband's estate; but to bar such a claim the agreement between the husband and wife must be plainly and definitely established, and must be fair, reasonable, and just, or it will not be enforced.

As we have seen, the learned referee found that there was no contract, arrangement, or

conduct with or on the part of Mrs. Valentine by which she became liable to bear or pay the household expenses with which she was sought to be charged by the defendant. The evidence plainly discloses that she repeatedly and continuously refused to assume any such liability, and there is little, if any, reliable evidence to the contrary. The record in this case will be examined in vain to find, even in the great volume of testimony given by the defendant himself, any direct or sufficient proof of a valid and binding agreement or understanding which would relieve him from the legal obligation to support himself, his wife, and family. The defendant's testimony relating to this subject was somewhat evasive and contradictory. Substantially all the evidence from which it is claimed that the liability of Mrs. Valentine arose related to transactions testified to by the defendant which were entirely within his knowledge, and discloses that many, if not most, of his dealings with her property were hidden from her, were devious, and well calculated to keep from her any knowledge as to her property, or the disposition made of it by him, and were not such as an agent or trustee should perform as to the property of his principal or cestui que trust. If, upon the whole record, the transactions of the defendant as to his wife's property were not disclosed with desirable certainty, it can be attributed only to his conduct and the nature of his testimony. His account of his stewardship and of the property which came into his hands as such agent or trustee is not of a character to elicit the fullest credence, or from which it can be fairly implied or understood that his wife ever agreed or knowingly consented to the use of her estate for the support of her husband and his family. From the evidence the learned referee was clearly justified in finding that the defendant was under legal obligation to support his own family, and that his wife did not consent to the application of her property to that purpose, or thus apply it with a knowledge that the checks and cash furnished therefor by her husband were a part of her own property, and that she never intended to apply any part of her own estate to that purpose. No one can read the record in this case without reaching the conclusion that the learned referee treated the defendant with the utmost fairness, if not with undue liberality. He, as the agent of his wife, had received the moneys, property, and securities of a large estate belonging to her, which he had transferred, dealt with, and manipulated in an improper manner, transferring portions of it to himself, to his sister, to his mother, and to others, without any consent of or consultation with Mrs. Valentine. When he was called upon to account for her property and the manner in which he had used and disposed of it, instead of making a fair, ingenuous, and proper account, he declined to make any account whatever; and it was only when he

had been placed upon the witness stand, and subjected to the most rigid and searching examination, that any knowledge as to his wife's estate or as to his dealings with it could be obtained. Moreover, the history which he gave as to his dealings with her estate was not calculated to inspire confidence in his methods, the truthfulness of his statements, or the accuracy of his accounts. His testimony was evasive, and evinced a plain intent to suppress in every way possible the facts as to his dealings with her estate, its amount, and in what invested. There is nothing in this case calling for an undue consideration of the technical claims of the defendant, or requiring us to give an exaggerated effect to any inequitable technicality presented.

With this condition of the record, it is obvious that the findings of the referee that there was no agreement, arrangement, or understanding which justified the defendant in charging his wife's estate with the family or household expenses are final, and cannot be reviewed by this court. Therefore, the only questions we have jurisdiction to review are those relating to the admission or rejection of evidence, or some material ruling of the referee to which an exception was taken, and which related to the matters included in the sixteenth exception to the defendant's account as set forth in the referee's memorandum of opinion.

The first exception upon which the defendant relies is to the refusal of the referee to make and enter an interlocutory judgment to the effect that the taking of an account was necessary before proceeding to take the account between the parties. The practice adopted by the referee was proper, is justified by the decisions of this court, and constituted no error. *Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498, 33 Am. St. Rep. 807; *Canton Brick Co. v. Howlett*, 169 N. Y. 293, 297, 62 N. E. 347.

The appellant likewise contends that the referee erred in denying his motion to amend his pleadings so as to demand judgment for certain securities which had come into the possession of the plaintiffs, and to permit him to recover therefor in this action. That question was not reserved by the stipulation of the parties, and hence the determination of the referee must be regarded as final, and is not subject to review by this court. Besides, no such answer was necessary, as that relief was demanded in his original pleadings, and the facts were all before the referee, and were settled by his report, apparently to the satisfaction of the appellant.

Upon the trial one of the defendant's daughters was called as a witness, and permitted, under his objection and exception, to testify to the manner of paying the household expenses before her grandfather's death, and that they were paid in the same manner before as they were afterwards. This evidence was admissible as proof of a fact which

bore upon the issues involved in the case. But, if it was inadmissible, it was harmless, as the same fact had already been proved without objection, and as to it there was practically no dispute.

The next exception discussed by counsel arose as to the admission in evidence of the deposition of Mrs. Valentine, which purported to have been taken before a referee appointed to take proof upon a motion to show cause why she should not intervene in a special proceeding to require the city of New York to pay to the defendant an award made in the matter of the opening of Melrose avenue, and why such award should not be paid to her. This evidence was objected to by the plaintiffs, their objection was overruled, and the evidence was admitted so far as it bore upon the question of *res adjudicata*. The defendant excepted to that ruling to the extent that it limited its admission to that purpose. The counsel for the plaintiffs then admitted that the deposition bore the signature of Mrs. Valentine, who had previously died. The only additional purpose for which the defendant sought to introduce the deposition was to show what Mrs. Valentine said on that occasion, although it was no part of the evidence received by the referee. Her statement in that respect was immediately stricken out on the defendant's own motion and before the deposition was signed by her. In that proceeding the defendant cross-examined his wife, and propounded to her this question: "Q. Did you ever undertake, from the time your husband qualified as administrator to your father's estate and took charge of your property as your agent, did you ever impose any limitations on his authority to act up to December 8, 1898, when you revoked the letter of attorney? A. Well, I told you that I did not think you were doing right, and I asked you for an accounting, but you did not give it. Q. That was within the last year or two? A. Oh, no; I told you that some years ago. You did not support me. I had to support myself—pay all the bills. Mr. Valentine: 'I move to strike out the answer. (Stricken out.)'" The defendant now insists that, although this evidence was stricken out, and properly formed no part of the record or of the deposition when signed by Mrs. Valentine, still that it was admissible as proof to sustain his claim that he did not support Mrs. Valentine and the other members of his family, but that they were supported by her. It is extremely difficult to understand how, after this evidence had, upon the defendant's own application, been properly removed from, and hence ceased to be a part of, the deposition, he may now insist that it remains a part of it, and consequently is evidence against Mrs. Valentine, with no proof whatsoever showing its admissibility except the mere admission of counsel that the deposition bore her signature. When this evidence was eliminated from the deposition by the order of the referee, it was as though it had never been given.

en, and after the defendant had procured it to be stricken out it cannot be properly used by him for any purpose whatsoever. If it had been permitted to remain, Mrs. Valentine might not have signed the deposition, or it might have been explained by her upon her cross-examination. But when it ceased to be a part of her evidence then she could not be cross-examined in relation thereto, as she would not have been allowed to explain that which formed no part of her deposition. When this deposition was offered in evidence she was dead, so that no opportunity could then be given her to explain a statement which it is evident was hastily and petulantly made, and which was immediately eliminated.

Nor was it admissible as the testimony of a deceased witness, taken upon a former trial, either under section 830 of the Code of Civil Procedure or at common law. The fundamental ground upon which evidence given by a witness who afterwards dies may be read in evidence on a subsequent trial is that it was taken in an action or proceeding where the parties against whom it is offered or their privies have had both the right and the opportunity to cross-examine the witness as to the statement offered. "The principle on which, chiefly, this evidence is admitted, namely, the right of cross-examination, requires that its admission be carefully restricted to the extent of that right; and that, where the witness incidentally stated matter as to which the party was not permitted by the law of trials to cross-examine him, his statement as to that matter ought not afterwards to be received in evidence against such party." 1 Greenleaf on Evidence, § 164; Chase's Stephen's Digest (2d Ed.) art. 32, p. 107 et seq.; Varnum v. Hart, 47 Hun, 18, 25. Under this general principle, which prohibits the reception in evidence of a statement or deposition made by a deceased witness unless the party against whom it is offered has had the right to cross-examine the witness as to the statement made, it is clear that the deposition offered in this case was not admissible, especially as to the particular statement which was immediately stricken out, so that Mrs. Valentine or her counsel had no right or opportunity to explain it, or to cross-examine her in relation thereto. Hence it follows that the referee committed no error in rejecting the portion of the deposition which the defendant sought to introduce, and his exception cannot be sustained.

Moreover, if it were admitted that the ruling of the referee was erroneous in this respect, we think it would not justify a reversal. This action was in equity, and the rule which is applicable to errors in the rejection or reception of evidence in equity cases is essentially different from that in actions at law. In the former a new trial is granted or refused, not upon the principles applicable to a

strict bill of exceptions, but upon those which governed a court of equity; and unless the errors are such as to render the trial unfair or substantially affect the decision a new trial will be denied. *Forrest v. Forrest*, 25 N. Y. 501; *Colle v. Tift*, 47 N. Y. 119, 121; *McGean v. Manhattan Ry. Co.*, 117 N. Y. 219, 224, 22 N. E. 957. Obviously, the judgment should not be disturbed upon the ground of the rejection of this evidence, as its rejection was entirely proper.

On the trial the defendant offered in evidence the bank book of Mrs. Valentine, showing her deposits in the Brooklyn Trust Company, which was objected to by the plaintiffs as immaterial and incompetent. The referee received it in evidence, but held that he would not consider any portion of the entries covering a period prior to 1892, nor subsequent to the commencement of the action. This ruling was excepted to by the defendant. In it we find no error. Anterior to 1892 Mrs. Valentine had no separate estate, and upon the accounting that which had previously occurred was not within the issue between the parties. Besides, under the stipulation of the parties, it was agreed by the defendant, and upon his motion, that for the purpose of this appeal and for expediting the settlement of the case on appeal and eliminating unnecessary matter from the record the evidence submitted to the referee, his action and decision as set forth in his memorandum of opinion were proper, and warranted by the facts, except his action under the head of "Sixteenth Exception," which was to his account as to checks furnished by him for the years 1892 to 1898, inclusive. Under that stipulation the exception of the defendant to the rejection of the evidence as to Mrs. Valentine's deposits anterior to 1892 seems to be excluded from the questions reserved on this appeal.

The only remaining contention is that the referee erred in refusing to allow the defendant the payments made by him to his wife, amounting to more than \$30,000, and in holding that such payments should be regarded as money furnished her for the payment of the household expenses. That question is foreclosed by the unanimous decision, as upon the evidence it was at most a mere question of fact, and under the Constitution and statutes it cannot be reviewed by us.

These considerations lead to the conclusion that the referee committed no error which would justify us in reversing the judgment entered upon his report, and that the judgment of the Appellate Division should be affirmed, with costs.

GRAY, BARTLETT, and WERNER, JJ.,
concur. PARKER, C. J., and O'BRIEN and
VANN, JJ., dissent.

Judgment affirmed.

(177 N. Y. 359)

CLARK v. BROOKLYN HEIGHTS R. CO.

(Court of Appeals of New York. Feb. 9, 1904.)

TRIAL—EXAMINATION OF PLAINTIFF—DISCRETION OF TRIAL COURT.

1. Allowing plaintiff, as a witness in an action for personal injuries, to take a glass of water in both hands, in order to show a nervous affection causing him to spill the water through the trembling of his hands, and to use his handkerchief in the same manner, being under the sole control of the witness himself, is beyond the ordinary tests of examination, and tends to prejudice the jury, but, being within the discretion of the court, is not ground for reversal by the court of appeals.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Patrick Clark against the Brooklyn Heights Railroad Company. From a judgment of the Appellate Division affirming a judgment for plaintiff (79 N. Y. Supp. 811), and an order denying a new trial, defendant appeals. Affirmed.

I. R. Oeland and George D. Yeomans, for appellant. Isaac M. Kapper and Thomas E. Pearshall, for respondent.

GRAY, J. In this action, brought to recover damages for personal injuries sustained by the plaintiff as the result of a collision between his wagon and a car, he was allowed by the court to leave the witness stand, assisted, and, at the request of his counsel, to exhibit himself to the jury in the act of writing his name and of taking a drink of water. The record represents him, through the stenographer's notes, as taking a glass of water with both hands, and as spilling the water, through the trembling of his hands, and as using his handkerchief in the same manner. The point of this exhibition was to illustrate or to emphasize his testimony that he could use his hands with difficulty, either to hold things, or to drink a glass of water. The injuries received at the time of the collision consisted in the fracture of two ribs, and in various minor contusions, which did not prevent his leaving the hospital the day after. He was a man of 57 years of age, and it was his claim that, about 2 months after the accident, he was affected by tremor, or a muscular twitching; and medical testimony was given to that effect, and of tests similar to the one described as made upon the trial. He recovered a verdict of \$10,000, and the Appellate Division has affirmed the recovery. Upon this appeal, the only question for our consideration arises upon the exception of the defendant to the plaintiff's being permitted to go through his performances before the jury.

We think that the court should not have stretched its discretion to such an extent, and that, while it may not have been an abuse of judicial discretion, it was on the border line of such an error. The object of all evidence is to inform the trial tribunal of the material facts which are relevant as bearing

upon the issue, in order that the truth may be elicited, and that a just determination of the controversy may be reached. It is not objectionable, in these cases, that the evidence may go beyond the oral narrative, and may be addressed to the senses, provided that it be kept within reasonable limits by the exercise of a fair judicial discretion. It should be only of a nature to assist the jurors to an understanding of a situation or of an act, or to comprehend objective symptoms resulting from an injury. Examples of this class of evidence are frequent—in the viewing of the place of an occurrence, in the production of some article relevant to the issue, or in the exhibition of the person, and of the marks or obvious evidences of injuries sustained. Personal injuries may be simulated and deception may be practiced in such exhibitions, but that can no more be prevented, than can perjury in testimony. When, however, proof is attempted to be made by allowing the plaintiff to act out upon a judicial stage before the jurors what he or his physicians have testified to be some nervous affection resulting from an injury, the exhibition is improper, because unfair. As something under the sole control of the witness himself, it is beyond the ordinary tests of examination. Nor does such evidence allow of any record, beyond the reporter's notes of what he saw upon the trial. It is intended to prejudice the minds of the jurors, and it is calculated to affect the calm judicial atmosphere of a court of justice. The plaintiff in such cases has sufficient advantages without adding to them a spectacular illustration of his symptoms. The Appellate Division, in its general jurisdiction to review the proceedings upon trials, might well have ordered a new trial, in the interests of justice. As it is, we are compelled to affirm the judgment, with costs, because the matter was discretionary.

PARKER, C. J., and BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

Judgment affirmed.

(177 N. Y. 327)

HOLLAND TRUST CO. v. SUTHERLAND.

(Court of Appeals of New York. Jan. 29, 1904.)

TRUSTEE—EQUITY—INSTRUCTIONS AS TO DUTIES—ATTACHMENT OF TRUST FUND.

1. A nonresident corporation deposited with a domestic trust company money to pay coupons maturing in a few days. A creditor of the nonresident corporation levied an attachment on such deposit as the property of a nonresident defendant, before the coupons were due. Held, that the title of such deposit was changed from the corporation to the trust company, in whose possession it constituted a fund for the benefit of the coupon holders, and the trust company could maintain an action in equity for

the benefit of the coupon holders against the attaching creditor as the only person claiming the fund in hostility to the trust to determine its duties as trustee in the matter.

Cullen, Haight, and Martin, J.J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Holland Trust Company against George R. Sutherland. From a judgment of the Appellate Division (72 N. Y. Supp. 584) reversing an interlocutory judgment of the Special Term overruling a demurrer to the complaint, plaintiff appeals. Reversed.

George M. Van Hoesen, for appellant. Edward Hassett, for respondent.

BARTLETT, J. It is, of course, clear that interpleader is not the appropriate remedy. If the action of interpleader is brought under the Code or the old equity practice, it is essential that the plaintiff should be a mere stakeholder, and that the parties whose claims are conflicting for the funds in his hands should be parties defendant. That is not this case. Nor do I think this case falls within any of the cases cited as authorities against the maintenance of this action. It is well settled that, where the trust instrument is plain in its terms, and the duty of the trustee clear, he is not justified in coming into a court of equity asking for instructions. It is equally clear that, where he is called upon by the nature of his trust to exercise discretionary power, the court will not instruct him in such an emergency. In this case the Delaware Water Company, an Ohio corporation, made a special deposit with the plaintiff trust company of a certain sum of money to pay coupons maturing a few days subsequent to said payment. The effect of that transaction was to make the plaintiff trust company a trustee for the coupon holders whose claims were to be paid out of the fund so deposited. Before the coupons were due, a creditor of the Delaware Water Company levied an attachment on said moneys as the property of a nonresident defendant. The legal effect of that special deposit not only created the plaintiff trust company a trustee for the coupon holders, but it changed the title to said moneys from the water company to the trust company, in whose possession it constituted a trust fund for the benefit of coupon holders as cestuis que trustent. The trust company adopts this view of the law, and in its complaint expressed its desire to pay these coupon holders the moneys in question, and asks a court of equity for instruction in the premises, based on special reasons.

The complaint contains this allegation: "Twelfth. That said coupon holders are very numerous, and are unknown to plaintiff; many of them, as plaintiff is informed and believes, residents of some of the New England states, and their coupons have been deposited for collection with banks and bank-

ing houses beyond the limits of the state of New York." This feature of the case distinguishes it from any of the cases to which we have been referred in either of the briefs. It is stated in the dissenting opinion that, if the coupon holders were too numerous to be joined as defendants, certain of them should have been selected as representing the class. If this practice exists, where it is feasible, I am of opinion that it would be quite impossible under the circumstances set forth in the complaint. I see no reason why the plaintiff trust company should be compelled in the action between a resident of the state of New York and this Ohio corporation to litigate either the validity of the plaintiff's attachment or of the execution which may follow if the action results in final judgment. That litigation might extend over a period of several years, and meanwhile the coupon holders would be deprived of their moneys. It would seem to be a very harsh rule that the trust company should be compelled to pay out this money on the legal advice of its counsel, as it is entitled to a judgment of the court that will protect it in making such payment.

We have here a case where the trustee comes into court as the representative of his cestuis que trustent, residents of different states, and many of them unknown, and brings before the court as a defendant the only person claiming this fund in hostility to the trust.

I am of the opinion that the action is well brought, and that the judgment appealed from should be reversed, and that of Special Term affirmed, with costs.

GRAY, J. I concur with my Brother **BARTLETT'S** views, and I may only add to what he says that this is a peculiar case, where the facts differentiate it from cases under the general rule spoken of by Judge **CULLEN**. The situation of this trustee is the result of action taken by the defendant against the trust fund, and its primary liability is actually impeded or imperilled in its discharge by reason thereof.

CULLEN, J. (dissenting). The complaint alleged that the plaintiff was trustee under a mortgage executed by a water company in the state of Ohio to secure the payment of certain coupon bonds, and, as such, assignee of certain water rents receivable by the water company; that the water company remitted to the plaintiff certain moneys, nearly all of which were the proceeds of such water rents, for the payment of the coupons on said bonds, which were then about to fall due; that before the actual payment of the coupons to the holders thereof the defendant brought an action against the water company, in which he obtained a warrant of attachment; that under such warrant the sheriff assumed to levy on said moneys; that an order for an examination of the officers of said

company was made, and under it such officers made affidavit of the circumstances and terms under which the plaintiff had received the moneys; that the holders of the coupons, when they fell due, demanded payment of the same, which the plaintiff declined to pay on account of the attachment in defendant's suit; that the plaintiff requested the defendant to bring suit against it for the moneys, with which request the defendant refused to comply. The details of these matters are related at length, but are immaterial to the disposition of this appeal. The complaint further declared that the coupon holders alone were entitled to the money so deposited with the plaintiff. The relief demanded was that the court instruct the plaintiff as to its duties as trustee, and whether it ought to pay over the moneys to the coupon holders, or whether they are subject to the claim or lien of the defendant. The sole party defendant in the action is Sutherland, the attaching creditor. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action against him, and because there was a defect of parties, in that none of the holders of said coupons were parties defendant to the action. The Special Term overruled this demurrer. The Appellate Division reversed the judgment of the Special Term, and awarded final judgment on the demurrer to the defendant.

We do not see any theory on which the present action can be successfully maintained. It cannot be upheld as an action for interpleader, for to such an action the rival claimants must be parties. If the coupon holders were too numerous to be all joined as defendants, certain of them should have been selected as representing the class. The judgment in an action for interpleader, so far as it affects the plaintiff, goes only to the extent of directing that the rival claimants interplead, that the plaintiff pay the fund into court, and on such payment be discharged from liability. On making payment the plaintiff retires from the action. No such judgment could be awarded here, for there would be no one left with whom the defendant could contend for the fund. Further, it is an elementary principle that in an action for interpleader the plaintiff must stand indifferent between the hostile claimants, while in this complaint the plaintiff champions the rights of the bondholders. *Pomeroy's Equity Jurisprudence*, §§ 1319, 1329.

The main contention of the appellant is that, being a trustee, it was entitled to have the validity of the defendant's claim determined by the court, in order that it might be protected in the discharge of its duties as such trustee. The administration of trusts is exclusively of equitable cognizance, and, "as trustees hold the legal title for the benefit of third persons, and the law forbids them from making any profit themselves from their management of or dealing with the trust fund, so

the law protects them from loss if they act according to law in good faith. And in all cases of doubt as to what the law is, and what their conduct ought to be under it, they are entitled to instruction and direction from the court." 2 *Perry on Trusts*, § 476a. But, as I understand this rule, the protection granted is between the trustee and persons claiming under the trust, not as against strangers, unless the claim of such strangers be of equitable cognizance. The legal title to the trust estate is in the trustee, and in litigations concerning the trust estate by or against strangers to the trust he stands the same as any other claimant or owner of property. If the claims are of legal character, they must be asserted or defended in a court of law. The adverse parties cannot be deprived of their rights to a trial at law by the fact that the trustee holds or claims the property, not in his own right, but for the benefit of others. The reason that equity has exclusive jurisdiction over the administration of trusts is that the courts of law look solely to the legal title, but in claims by or against strangers to the trust the legal title is ordinarily the only question presented. Doubtless, a trustee may bring an action in equity in the nature of a bill *quia timet* or of a bill of peace under the same circumstances and upon the same grounds that any other party might maintain such a suit. But the fact that he is a trustee gives him no additional grounds of action in that respect. Where he is threatened with claims or suits, he may apply to a court of equity for instructions as to his course in defending the same, and, to enable him to get such direction, may have the prosecution of the actions temporarily stayed. *Hill on Trustees*, p. 542, marg. The object of such an application is to protect the trustee against subsequent claims by his cestui que trust, either that he has improperly defended the suit or has wasted the estate in the defense of a case that should not have been defended, not to decide the suit itself.

We know of no well-considered authority for the proposition that a court of equity will assume to determine claims of a legal character against a trustee simply because he is such. In all but one of the cases cited by the learned counsel for the respondent from the courts in this country the controversy arose between the trustee and his cestui que trust or between rival claimants among the cestuis que trustent. Hence they have no application to the case before us. The exception referred to is *Coe v. Beckwith*, 31 Barb. 339. That action was brought by a trustee against the bondholders as a class and one of their number, who had obtained an attachment in an action on other coupons, to determine whether the moneys held by the plaintiff were applicable to the payment of the coupons or to the claim of the attachment creditor. It was held that the action could be maintained. It was a Special Term decision, and the

ground on which it proceeded was that the trustee had a right to apply to the court for instruction as to its conduct. The proposition is assumed without discussion. It may, however, be that in that case the action could be maintained as one of interpleader, for the bondholders were parties to the suit. It would also seem that the court looked upon the defendant, because he was a holder of bonds and coupons, as claiming under the trust. If, however, the case is claimed to be an authority for the proposition that an action in equity can be maintained against a party claiming in hostility to the trust for the determination of his claim, it need only be said that neither principle nor authority is found in the opinion for such a ruling. Three English cases are also cited by the appellant to support the action. The first is *Talbot v. Radnor*, 3 Mylne & K. 252. There trustees under a will filed a bill for the administration of their testator's real and personal estate. They made as a party to the bill a claimant to part of the testator's realty, who had brought an action in ejectment to recover the same. The Master of the Rolls held that such claimant was properly made a party, and required him to elect whether he would proceed in his ejectment suit or have his title determined by such inquiry as the court might direct to be made. On the claimant's election to proceed in ejectment, the court required him to stipulate to try the cause at the next assizes. The case doubtless would be an authority for the maintenance of the present action, and I cannot find any appeal was taken from the decision of the Master of the Rolls. But in *Attorney General v. Portreeve, etc., of Avon*, 2 New Rep. 564, on appeal from the Master of the Rolls it was distinctly held that in an action in equity for the administration of a trust parties claiming adversely to the trust could not be made parties to the suit. It was there said that "the only approach to an authority to the contrary was the case of *Talbot v. Lord Radnor*, 3 Mylne & K. 252, which had been constantly disapproved of and never followed." *Edgecomb v. Carpenter*, 1 Beavan, 171, is an authority only for the proposition stated in *Hill on Trustees* that actions at law by hostile claimants will be temporarily stayed pending instructions to the trustee, whether he shall defend or not. In that case there was the further element, apparently, of bad faith referred to by the Master of the Rolls. The solicitors for the trustee in his action to establish the will were also the solicitors for the heir at law in the ejectment suits to overthrow it. In 2 *Perry on Trusts*, 928, it is stated: "If a third person makes a claim, or if he refuses to state whether he has a claim, where the trustee has a right to know, the trustee may bring such person before the court by bill; and, if he claims improperly, or has improperly refused to answer, he will be charged with the costs."

The only authority given for this proposition is *Re Primrose*, 23 Beavan, 590. Of this case it is first to be observed that it arose under the trustee acts of 10 & 11 Vict. and of 13 & 14 Vict., which gave the court certain summary jurisdiction in the administration of trusts; and that the application was made in both proceedings, the bankruptcy and the appointment of a new trustee. The facts were these: A trustee under a marriage settlement had become a bankrupt, and been transported for life for forgery. A new trustee was appointed, and, in order to effect a transfer of certain trust funds, it was requisite to have a disclaimer from the assignees in bankruptcy, which they refused to give, though they made no claim to the fund. The Master of the Rolls directed them to make the disclaimer. As to the question of costs, he held that he had no power under the act to award costs against them. This case has no application to the one before us. The adjudication in bankruptcy created a cloud on the title of the new trustee to the trust securities, and an action would have been well brought in equity against the old trustee and his assignee to remove the cloud and to effect the transfer. The trustee acts enabled the court to do the same thing by summary application. The case of *Attorney General v. Portreeve, etc., of Avon* is subsequent to the other cases, and I cannot find that its authority has been in any way impaired. Therefore no solid foundation for the plaintiff's position is to be found in the English authorities. If I am correct as to the general rule that a person claiming in hostility to the trust cannot be made a party to the action for the administration of a trust, I can see nothing in the circumstances of this case to take it without that rule. Surely it is not the fact that the defendant makes a hostile claim to what the plaintiff claims to be a portion of the trust estate, for that is a necessary element in all cases of this class. What, then, is the distinguishing feature of this particular case? In fact, the present action, treated as one to obtain the direction of the court as to the administration of the plaintiff's trust, is as fatally defective as if regarded as an action of interpleader, and for the same reason that none of the bondholders are parties to it. To such a suit the *cestui que trustent* must be parties, unless they are so numerous as to make that impossible or inconvenient, in which case a small number may be made defendants as representing all. *Perry on Trusts*, §§ 875, 885.

As no one contends that the plaintiff has stated a case which, if it were not a trustee, would fall under the ordinary grounds of equitable intervention, to remove a cloud upon title or to cancel contracts or securities, it is unnecessary to discuss the action from that point of view.

The judgment appealed from should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, J. (and GRAY, J., in memorandum), concur with BARTLETT, J. HAIGHT and MARTIN, JJ., concur with CULLEN, J.

Judgment reversed, etc.

(177 N. Y. 337)

**PEOPLE ex rel. TOWN OF COLESVILLE
v. DELAWARE & H. CO.**

(Court of Appeals of New York. Jan. 29, 1904.)

**RAILROADS—GRADE CROSSINGS—EXPENSE—
RESTORATION OF HIGHWAY—FIND-
ING OF COURT.**

1. The railroad law (Laws 1890, p. 1088, c. 565, § 13) authorizes a railroad corporation to change the grade of any part of its road to avoid accidents and facilitate the use of the road. The grade crossing act (Laws 1897, p. 794, c. 754, as amended by Laws 1898, p. 1252, c. 520, § 2, and Laws 1899, p. 770, c. 359), relating to alterations in crossings, requires a railroad company to carry across its road, and at its own expense, any new street or highway that a municipality may lay out, and provides that the railroad commissioners, when the public safety requires it, may compel an alteration in the manner of such crossing; the expense to be apportioned. Held not to apply to changes made to avoid accidents and facilitate the use of the road, but such change is governed by Railroad Law 1850, p. 224, c. 140, § 28, subd. 5, re-enacted in the Railroad Law 1890, p. 1087, c. 565, § 11, requiring the railroad company, at its own expense, to restore the highway to its former state, or to such state as not to have unnecessarily impaired its usefulness.

2. While a railway company may carry the highway over or under its track, in its discretion, subject to its duty to restore the highway to such a state as not to impair its usefulness, the company cannot be said to have restored the highway to such a state as not to have unnecessarily impaired its use, where the restoration seriously affects its use, though it may be practicable to use it, while by restoration in another manner the use would be wholly unimpaired.

3. Where the trial court has found, on mandamus to compel a railroad company to restore a highway to its former state, or such a state as not to unnecessarily impair its usefulness, by the construction of an underground crossing, that it was not "convinced that the highway could be restored to a reasonable state of usefulness only by the construction of an undercrossing," which is equivalent to a finding that it could be restored "to a state as not to have unnecessarily impaired its usefulness," such finding, when affirmed by the Appellate Division, and supported by some evidence, is conclusive upon the Court of Appeals.

Appeal from Supreme Court, Appellate Division, Third Department.

Application by the people, on the relation of the town of Colesville, for a writ of mandamus against the Delaware & Hudson Company. From an order of the Appellate Division (81 N. Y. Supp. 478), affirming an order of the Special Term granting a peremptory writ requiring defendant to restore a certain highway, where crossed by the railroad, or to such a condition as not to unnecessarily impair its usefulness, relator appealed, in that the order did not require respondent to make an underground crossing. Affirmed.

A. D. Wales, for appellant. Lewis E. Carr, for respondent.

CULLEN, J. For more than 20 years prior to the year 1900 the respondent railroad company had operated a steam railroad through the town of Colesville, in Broome county, intersecting a certain highway in that town. As originally built, the railroad crossed the highway on grade, but the highway was raised some feet to bring it to the level of the railroad. In September, 1900, the respondent, for the purpose of improving its road-bed, and for the better operation of its railroad, raised the grade of the railroad at the intersection of the highway $6\frac{1}{2}$ feet. Thereupon the relator brought an action in the Supreme Court to restrain the respondent from raising such grade unless it should construct an undercrossing for the highway. A temporary injunction was granted in the action. Then the respondent, under section 62 of the railroad law (Laws 1897, p. 796, c. 752), applied to the board of railroad commissioners to change the highway crossing in question from a grade crossing to an undergrade crossing. Under the provisions of this section, the cost of any change would be apportioned between the railroad company and the public; one-half of the expense falling on the railroad company, one-quarter on the state, and one-quarter on the town. The relator resisted the application; contending that a change of the crossing under this section could be directed by the railroad commissioners, and a share of the cost thereof imposed on the town, only when public safety required the alteration, not when the alteration was made by the company for the improvement of its railroad. In this claim the commissioners seem to have acquiesced, for they denied the application. During the pendency of this proceeding, the respondent, the defendant in the equity action (which still remains untried), was partially relieved from the effect of the injunction by a stipulation between the parties that any crossing which might be put in by the defendant, except an undergrade crossing, should be deemed temporary, and should not affect the rights of either party. The intention of this stipulation was to permit the railroad company to construct, without violating the injunction, a crossing other than undergrade, provided that such crossing should be deemed only a temporary expedient. Acting on this, the respondent raised the highway to the new grade of the railroad. Subsequently the relator applied for a writ of mandamus to compel the respondent to restore the highway to its former state, or such state as not to have unnecessarily impaired its usefulness, by the construction of an undergrade crossing. An alternative writ was issued, to which the respondent made return. Upon a trial of the issues the court found that the respondent had unnecessarily impaired the usefulness of the highway by raising the

grade of the railroad, but it also found that it was not convinced that the highway could be restored to a reasonable state of usefulness only by the construction of an undercrossing. It ordered that a mandamus issue, requiring the respondent "to restore the highway at the crossing to its former state, or such state as not to have unnecessarily impaired its usefulness." The relator appealed from this final order because it did not require respondent to make an undergrade crossing. The order was affirmed by the Appellate Division (81 App. Div. 335, 81 N. Y. Supp. 478), and from the judgment of that court this appeal is taken.

While the disposition of this appeal is necessarily controlled by a finding of fact made by the trial court, the claims of the respective parties as to the scope and effect of chapter 754, p. 794, of the Laws of 1897, amending the railroad law, and commonly known as the "Grade Crossing Act," are in such conflict, and the learned courts below seem to have so misconstrued the opinion of this court in *People ex rel. City of Niagara Falls v. N. Y. C. & H. R. R. Co.*, 158 N. Y. 410, 53 N. E. 166, that we feel required to state our judgment on those matters. The great extent of the railroads in this state was constructed long prior to the enactment of any general law on the subject of grade crossings. Except where special charters were granted, railroads were built under the provisions of the general act of 1850, p. 211, c. 140, substantially reproduced in the present railroad law. That statute authorized a railroad company formed under it to construct its road across, along, or upon any highway; upon city streets with consent of the municipality; and upon other highways, after the amendment of the year 1864, upon obtaining an order to that effect from the Supreme Court of the district in which the highway was situated. But the company was required to restore the highway "to its former state or to such state as not to have unnecessarily impaired its usefulness." Railroad Law, § 4, subd. 4, and section 11 (Laws 1890, pp. 1084, 1087, c. 565). The grade crossing act provides for three separate cases in which action is to be had by the board of railroad commissioners: First. Section 60 deals with the case of a new steam railroad crossing existing highways. The manner of such crossing must be determined by that board. Second. Section 61 deals with the case of a new street or highway being laid out across an existing steam railroad. Then, also, the manner of crossing must be determined by the railroad commissioners. Prior to the statute under discussion, by the provisions of chapter 62, p. 86, of the Laws of 1853, a railroad company was required to carry across its road, and at its own expense, any new street or highway that a municipality might lay out. *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345. It is the statute of 1853 that this court held,

through Parker, C. J., in *People ex rel. City of Niagara Falls v. N. Y. C. & H. R. R. Co.*, supra, to have been repealed by section 61 of the grade crossing act, but there is no warrant in the opinion there rendered for the proposition that the section affects any but new highways. Third. Section 62 deals with the case of existing grade crossings, and is the only section relating to that subject. But it deals with such crossings only to a limited extent. It provides that the municipal authorities or the railroad company may petition the board of railroad commissioners for the closing or discontinuance of a grade crossing, "alleging that public safety requires an alteration in the manner of such crossing," in which event the expense of the change is to be apportioned. But on no other ground is the board given jurisdiction to order a change in the crossing. By section 13 of the railroad law (Laws 1890, p. 1088, c. 565), a railroad corporation may change the grade of any part of its road as it may deem necessary to avoid accidents and to facilitate the use of the road. If the exercise of this power affects a highway crossing, the case does not fall within section 62 of the grade crossing law (Laws 1897, p. 796, c. 754), but the obligation resting on the corporation is that prescribed by the old law—i. e., to restore the highway as far as practicable—and of such restoration the corporation must bear the expense. This duty can be enforced by mandamus, and the town is a proper relator. *People ex rel. Green v. Dutchess & Columbia R. Co.*, 58 N. Y. 152. It is true that as the statute directs the highway to be carried over or under the track, "as may be found most expedient," the election is with the company. *People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 302. But the exercise of such election is qualified by the obligation to restore the highway to its former state, or to such a state as not to have unnecessarily impaired its usefulness. Chief Judge Church, in the last case cited, said that, if a case were presented where it is impracticable to restore a highway to any reasonable state of usefulness by a particular mode of crossing, that mode would not, perhaps, be permitted. Though undoubtedly a large measure of discretion rests with the railroad company, still, if it be made to appear that the restoration of the highway, in one manner seriously affects its use, though it still remains practicable to use it, while by restoration in another manner the use would be wholly unimpaired, we do not see how the company, in adopting the first method, can be said to have restored the highway to such a state as not to have unnecessarily impaired its use.

In the present case the learned trial judge has found that he "was not convinced that the highway could be restored to a reasonable state of usefulness only by the construction of an undercrossing." We regard the term "reasonable state" as equivalent to "a

state as not to have unnecessarily impaired its usefulness." Though the affirmance by the Appellate Division was not unanimous, the finding is conclusive on this court, unless it is entirely devoid of support in the evidence. While the evidence would have amply justified a finding that the restoration of the highway could only be properly effected by an undercrossing, there was testimony given by an expert that a safe and proper crossing could be made on grade. The finding of fact is therefore controlling, and the order appealed from must be affirmed, with costs.

PARKER, C. J., and BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. GRAY, J., absent.

Order affirmed.

(69 Ohio St. 384)

LAKE SHORE & M. S. RY. CO. v. LIIDTKE.

(Supreme Court of Ohio. Jan. 5, 1904.)

RAILROADS—FENCES—SUFFICIENCY—BOY ON TRACK—PROXIMATE CAUSE.

1. The fence required by section 3324, Rev. St. 1892, is one sufficient to turn stock, and said section does not require railroad companies to fence against persons.

2. What was the proximate cause of an injury, is usually a mixed question of law and fact; but, where the controlling facts are conceded or found, it is a question of law for the court.

3. A boy of six years of age, having passed with several of his companions, through an opening in a wire fence inclosing a railroad, sat down away from the tracks, in a place of safety, then suddenly arose and ran across one track to another, upon which a freight train was passing, and in attempting to grab or touch a passing car, slipped and fell, and got his leg under a wheel, and it was crushed. *Held*, that the opening in the fence was not the proximate cause of the injury.

(Syllabus by the Court.)

Error to Circuit Court, Erie County.

Action by Eddie Liidtke, by his father, Edward Liidtke, against the Lake Shore & Michigan Southern Railway Company. From a judgment of the circuit court reversing a judgment for plaintiff, defendant brings error. Reversed.

The petition of the said Eddie Liidtke, plaintiff in the court of common pleas, is as follows, omitting the caption, signature, and verification:

"The plaintiff says: That he is an infant under the age of twenty-one years, and brings this action by his father, Edward Liidtke, his next friend. The defendant is a railroad corporation organized and operating a railroad running through the city of Sandusky, Erie county, Ohio, and having control and management of the same. That the defendant's railroad and right of way runs nearly east and west through the city of Sandusky, Erie county, Ohio. That the line of the defend-

ant's lands, right of way, and main railroad tracks runs by and is located in front of and near the south end of Clinton street in said city. That the defendant was by law required to construct and maintain a good and sufficient fence along the lines of its lands of its said right of way and said railroad track. That along the north line of the lands of said defendant and along the north side of said defendant's road and right of way, in front of and near the south end of Clinton street in said city, the defendant many years ago constructed or caused to be constructed a fence. That for one year and more prior to the 16th day of August, 1900, the defendant negligently permitted said fence to become and remain badly out of repair, and insufficient to such an extent that a section of said fence—the distance between two posts—in front of and near the south end of Clinton street in said city was broken down, open, and unobstructed, and persons had been accustomed for one year and more prior to the date above named to pass onto and from said defendant's right of way and railroad tracks through said fence where the same was broken down, unobstructed, and out of repair as aforesaid. That for one year and more prior to the date above named the defendant had knowledge that said fence was out of repair in the manner aforesaid, and had knowledge that for more than one year prior to the date last named persons were accustomed to pass onto and from said right of way, and said railroad track through said fence where the same was insufficient and out of repair as aforesaid. That on said 16th day of August, 1900, a train of the defendant, consisting of engine and cars, was negligently run over said right of way and said railroad track at the place herein before mentioned, to wit, in front of and near the south end of Clinton street, at a very dangerous and high rate of speed, to wit, more than six miles per hour, in violation of the ordinances of the city of Sandusky. That the bell was not rung nor the whistle blown on said engine at or near the south end of said Clinton street when said train was approaching the same, although the defendant, its servants and agents employed in the running of its said trains, knew, and had known for more than one year prior to the 16th day of August, 1900, that said fence was badly out of repair as aforesaid, and that persons were accustomed to enter upon said railroad track and right of way through the same where the same was insufficient and out of repair as aforesaid, and that by reason thereof it was very dangerous to run said train on said track at said point at such a high rate of speed without blowing the whistle and ringing the bell. That the defendant negligently failed to have any watchman or other person at said point to look out for or give warning to persons, especially children, about to go upon said railroad, and negligently failed to have any con-

¶ 2. See Negligence, vol. 57, Cent. Dig. § 232.

trivance at or near the point named to give the alarm or warning to persons in the vicinity of said track and about to go upon the same of the approach of trains, although the south part of said Clinton street and vicinity was and is thickly settled and inhabited, and a great number of small children of tender years and immature judgment and experience reside there; all of which the defendant well knew, and had known for more than one year prior to the date hereinbefore mentioned. That on the 16th day of August, 1900, the plaintiff, a child of six years of age, wandered, strayed, and went upon said railroad track when said train was passing over the same, through said defective and insufficient fence as aforesaid, and was run over by said train, and one of his legs, a short distance below the knee, was cut off, and he was otherwise severely bruised and injured. That the injuries sustained by the plaintiff as aforesaid are due entirely to the negligence of the defendant as hereinbefore stated, and would not have happened were it not for the negligence of said defendant. That the injury so caused and sustained by the plaintiff caused him to be confined to his bed for a long period of time, to suffer intense pain, and to incur great expense for medical aid and attendance, and to undergo painful surgical operations, and that by reason of said injuries he will be forever crippled and disabled. Wherefore plaintiff says he has sustained damages by reason of said injuries so caused by the defendant the sum of twenty-five thousand dollars (\$25,000), for which sum he asks judgment."

The answer of the railway company is as follows, omitting caption, signature, and verification:

"Defendant admits that it is a corporation duly organized and existing under the laws of the state of Ohio, as in the petition alleged, and that its railroad passes through the city of Sandusky, Ohio, and that the south end of Clinton street is near the north line of its right of way. It admits that a train consisting of an engine and cars passed over its railway upon the 16th of August, 1900, and that said Eddie Liddtke was injured upon said date. And, further answering, denies each and every allegation, statement, and averment in said petition contained not herein expressly admitted to be true.

"Second Defense. And, further answering, and by way of a second defense to petition of plaintiff filed herein, defendant says that said accident by which Eddie Liddtke was injured was brought about and caused by carelessness, negligence, default, and want of care of said Eddie Liddtke, his parents, guardians, and those having him in charge, and not by any fault, negligence, default, or want of care upon the part of defendant, its servants, agents, or employes.

"Wherefore defendant prays that, having fully answered, it may go hence without day, and recover its costs herein."

The reply is, in legal effect, a general denial of the answer, except in so far as it admits some of the averments of the petition.

The cause was tried upon the pleadings and evidence, and at the close of the plaintiff's evidence, the jury having viewed the premises, the court, on motion of defendant below, arrested the cause from the jury, and rendered judgment in favor of the railway company. A motion for a new trial was made by the plaintiff, and overruled by the court, and proper exceptions saved. The circuit court reversed the judgment, and remanded the cause for a new trial. Thereupon the railway company filed its petition in error in this court, seeking to reverse the judgment of the circuit court, and for an affirmance of the court of common pleas.

Geo. E. Reiter, George C. Greene, and Frank J. Jerome, for plaintiff in error. E. B. King and John F. McCrystal, for defendant in error.

BURKET, C. J. (after stating the facts). Counsel for defendant in error makes the following statement of facts in his brief:

"Facts.

"The testimony shows that the Lake Shore & Michigan Southern Railway Company runs through the city of Sandusky in a substantially east and west direction; that about 400 feet east of Camp street is the Lake Shore & Michigan Southern passenger station, and its freight depot is some distance farther east; that Camp street, running north and south, crosses the Lake Shore & Michigan Southern Railway tracks; that no other street does cross the tracks west of Camp street until Mills street is reached, which is 1,985 feet west of Camp street. Between Camp street and Mills street are the streets of, in the order named from east to west, Pearl, Clinton, Harrison, and Putnam. None of these cross the railway company's right of way. Clinton street, running north and south, is sixty-six feet wide, and runs to the north line of the railway company's right of way. In the vicinity of Clinton street, and in this section, there are a good many houses, and a great many people live there. It is quite thickly settled. The plaintiff, at the time of his injury, lived with his parents and brothers and sisters at number 903 Clinton street, which was one square and the second house in the second square from the railroad. The plaintiff's father and older brother were common laborers. Ida, his sister, was thirteen years of age at the time of the accident; Otto, his brother, was eight; and Eddie, the plaintiff, was six on the 11th day of April, 1900. A neighbor had been injured while working, and Mrs. Liddtke, after eating breakfast and leaving the children at the table, went over to find out what was the matter. This was about 8 o'clock, sun time. The mother left these children at the breakfast table when she went away. She told

them to stay in the house. While she was gone, Ida and her brother Otto went out into Clinton street and up towards the railroad to play with some children there, and Eddie came out afterwards and joined them. While they were up there, some of the other children proposed to go over across the track, where there was a coal chute, then known as the 'Lake Erie and Western coal chute.' The children had a basket, and the older ones, including this brother and sister, went across the tracks, leaving Eddie playing with some small children and a little express wagon north of the right of way. There had been and was a fence along that line of the right of way across Clinton street, and extending all the way from Camp street to Mills street; but near the center of Clinton street this fence had been broken down or cut away. It was made of wires running horizontally and perpendicularly, and these had been cut near one of the fence posts and swung or bent back, leaving an opening from the ground up to the top wire, which was not connected with the others, and was left on the posts. This opening was about six feet in width and about the same height above the bottom of a path worn in the street. This opening had been used by all who had occasion to cross the track, and especially by railroad employes, for a long time. The children picked up coal on the ground, and filled a small basket, and carried it across the track, and put it in the express wagon. Eddie remained with the other little children, playing in the street. Eddie did not cross the railroad track with his older brother and sister, but after they had come back and were playing about Eddie ran through the opening in the fence and up near the track, and the sister ran after him. They stopped when they came to the embankment, which is several feet high at this point, and sat down, so the witness Ida testifies, when Eddie jumped up and ran up to the track, crossing one track to the other track. A freight train was going west, which attracted his attention, and he evidently ran up and tried to grab a car or touch it as it passed, when in some way he slipped or fell and got his leg under the wheel.

"Here, let me say, there is no evidence to sustain the statement in brief for the plaintiff in error that Eddie, the defendant in error, went there to pick up coal; on the contrary, the evidence is that his older brother and sister went together, and left him in the house, but that he followed them out; but he remained on the north side of the track—that is, the side towards his home—while Ida and Otto went across the track and picked up, not several baskets, but one, and brought it across, and set it in the express wagon. It was a basket perhaps twelve inches long and six or eight inches wide, and the coal they got was loose coal lying on the ground—a common and usual thing, and which does not warrant the heated statements that Eddie

was out there stealing coal. It was coal that any one who saw might pick up and carry away, and nobody objected to it. If the children of these poor people did not get it, the railroad employes did, or their children, and no one objected to their picking up this coal.

"Again, in plaintiff's brief is the statement that the fence was admitted to be a suitable one, and the only defect was a hole which the railway company had not repaired. It is claimed by us that the fence where maintained and kept up was suitable, but it was not suitable at the place where this opening was, which was not a small hole in the fence, but an opening that permitted men of ordinary height to travel through backwards and forwards, without any difficulty; an opening through which, if it had been necessary, a team of horses and wagon could have been driven without any difficulty whatever. No negligence is claimed for the manner in which the train was run."

Much of this statement of facts is immaterial, but the whole is here given, so that defendant in error may have the full benefit of all he claims. The record does not disclose that any fact was proved favorable to the defendant in error which is not included in this statement of facts by his able counsel, and therefore this statement, as to him, must be taken as the conceded facts of his case.

Upon the petition, and this statement of conceded facts, the question as to the proper construction of section 3324, Rev. St. 1892, arises, and the further question as to whether the defect in the fence was the direct or proximate cause of the injury to the boy. So much of said section 3324 as is applicable here, reads as follows: "A company or person having control or management of a railroad shall construct, or cause to be constructed, and maintain in good repair on each side of such road, along the line of the lands of the company owning or operating the same, a fence sufficient to turn stock; and when such fence is constructed out of barbed wire, or separate lateral strands not connected by interwoven wire, or cross perpendicular wire not more than fifteen inches apart, there shall be securely fastened to the posts, at the top of the same, at right angles thereto, at least one board, not less than one and one-eighth inches thick and five inches wide, and extending the entire length thereof; and before operating such road shall cause to be maintained at every point where any public road, street, lane or highway used by the public, crosses such railroad, safe and sufficient crossings, and on each side of such crossings cattle guards sufficient to prevent domestic animals from going upon such railroad; and such company or person shall be liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of any such fence, crossing or cattle guard, or any neglect or care-

lessness in the construction thereof, or in keeping the same in repair." The burden, duty, or obligation imposed by this statute upon railroad companies is to construct and maintain in good repair on each side of the railroad along the lines thereof "a fence sufficient to turn stock," and to cause to be maintained at public roads, streets, lanes, or highway crossings "safe and sufficient crossings," and on each side of such crossings "cattle guards sufficient to prevent domestic animals from going upon such railroad." It will be noticed that the fence must be sufficient to turn stock, and the cattle guards sufficient to prevent domestic animals from going upon the railroad, but that the crossings at highways must be simply "safe and sufficient"—that is, safe and sufficient without limitation; that is, for all purposes, persons as well as property. The fences and cattle guards are therefore only for the purpose of keeping stock and domestic animals off the railroad, and the "safe and sufficient crossing" at highways, etc., is for the purpose of affording safe passage for persons and property across the railroad. It is therefore clear that the fences and cattle guards are not for the purpose of keeping persons off the railroad, but only stock and domestic animals. This is made clear by both the words and purpose of the statute. Stock and domestic animals only are mentioned, and these words do not include persons. If the General Assembly had intended to cause railroads to fence against persons, it would have used words clearly showing that intent. Another reason why this construction should prevail is that it is impracticable, if not substantially impossible, for a railroad company to fence against persons. While a fence "pig-tight, horse-high, and bull-strong," as put by a Western judge, might impede the progress of some persons, others—as, for instance, young men, boys, and even some girls—would scale such a fence with the nimbleness of a squirrel. The General Assembly has not required the impossible from railroad companies, nor that they should fence against the aged and children, and not against the youthful and athletic. In *Railroad Co. v. Schultz*, 43 Ohio St. 278, 1 N. E. 324, 54 Am. Rep. 805, this court held that this section should receive a reasonable construction; and it would be a strained and unreasonable construction to hold that the words "stock" and "domestic animals" include persons. Again, railroad companies, as to passengers and property in their care for transportation, are required to exercise the greatest care, but as to other persons only ordinary care. To construct and maintain fences so as to keep persons off the railroad would not be ordinary, but extraordinary care; in effect, insurance against injury; and, as the General Assembly has not required such extraordinary care in other matters, it cannot be presumed that it intended to require it in this section, without plain and explicit words showing such intent.

We therefore conclude that the railroad company was under no obligation to fence against persons, and that it was guilty of no negligence, of which this little boy could complain, in failing to keep its fence in repair at the head of Clinton street. Such failure did not in any manner violate any of his legal rights, and where no legal rights are infringed there can be no remedy in damages. *Railroad Company v. Bingham*, 29 Ohio St. 364, 369; *Letts v. Kessler*, 54 Ohio St. 73, 85, 42 N. E. 765, 40 L. R. A. 177.

But our attention is called by counsel for defendant in error to the following part of the section as creating a liability on part of the company: "And such company or person shall be liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of any such fence, crossing or cattle guard, or any neglect or carelessness in the construction thereof, or in keeping the same in repair." This part of the section provides a remedy for the violation of the duty or obligation imposed in the fore part of the section, and can be no broader than the duty or obligation there imposed; and as the duty or obligation to fence was not to fence against persons, but against stock, the remedy in damages must be for a breach of duty or obligation arising from stock getting onto the railroad by reason of a defective fence. The crossing at a highway may be defective or insufficient, and thereby damages to person or property, or both, may be sustained, and for such the railroad company would be liable. A cattle guard may be defective, and domestic animals may, by reason of such defect, get upon the railroad, and cause damage to person or property, or both, and for such the company would be liable. So a fence may be defective, and by reason thereof stock may get upon the railroad, and cause damage to person or property, or both, and for such the railroad company would be liable; but, if a person uninvited goes upon a railroad through or over a defective fence or cattle guard, and suffers injury to person or property while so on the railroad, the defect in the fence or cattle guard is no ground for recovery of damages. If he can recover at all, his recovery must be based upon what occurs after he gets upon the railroad, and not upon the defect in the fence or cattle guard through or over which he reached the railroad.

The case of *Nickolson v. Railroad*, 80 Minn. 508, 83 N. W. 454, and other like Minnesota cases, are cited and relied upon by counsel for defendant in error as showing that the want of a fence, or a defective one, may be shown to prove negligence on part of the company in an action for damages for killing or injuring a trespassing child. But all those cases are founded upon a statute of that state which is much broader than ours, and therefore they throw no light upon the construction of our statute.

The case of *Hayes v. Railroad Company*, 111 U. S. 223, 4 Sup. Ct. 369, 28 L. Ed. 410, is also cited and relied upon; but the obligation imposed upon the company in that case was to build a suitable wall, fence, or other sufficient work as would prevent animals from straying upon the tracks, and secure persons and property from damage. Persons being included in the ordinance, so broadened the obligation as to warrant the ruling there made. In the case of *Railroad Company v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, also cited and relied upon by counsel for defendant in error, the railroad company owned and operated a coal mine a short distance from its station, and deposited the slack between the mine and the station, and a path ran along the edge of the slack leading to and from the mine. The slack caught fire and burned underneath, emitting no smoke or other evidence of the fire, there being ashes and a crust over the fire. A statute of the state required such slack piles to be fenced in such manner as to prevent loose cattle and horses from having access to such slack piles. A boy of 12 years, and his mother, arrived at the station, and with her permission he visited the coal mine in company with another boy, and, becoming frightened, started to run along said path to where his mother was, and, meeting another person in this narrow path, stepped upon the ashes and crust covering the fire underneath, broke through, and was badly burned and injured. He brought an action against the railroad company for damages, and proved the above facts, and was allowed to prove that the company failed to fence said pile of slack as required by statute. The plaintiff below recovered a judgment, and the railroad company took the case on error to the Supreme Court, where the judgment was affirmed. The judgment of affirmance is based upon the doctrine of dangerous and unprotected pits near a traveled way, and *Railroad Company v. Stout*, 17 Wall. 657, 21 L. Ed. 745, which was a turntable case, is cited and approved as applicable to the case. True, the court say in the opinion: "Primarily, that statute was intended for the protection of cattle and horses. But it was not for that reason wholly inapplicable to the present case upon the issue of negligence." It is negligence to have an unprotected, unfenced, dangerous pit near a traveled path, without a statute requiring it to be fenced, and it is no less negligent where there is a statute requiring such fencing. The court therefore well said that the statute was not wholly inapplicable upon the issue as to negligence. But that is far from holding that the failure to fence the pile of slack, irrespective of its surroundings, was in and of itself actionable negligence. The failure to fence in that case was properly received as an element aiding the proof of negligence in retaining a dangerous pit in an unprotected condition near a traveled path,

and not for the purpose of establishing negligence by the mere proof of a failure to fence. In the case at bar no negligence is claimed, other than the defect in the fence, and that defect could not aid the proof of other negligence when no such other negligence existed. The two cases are therefore not in conflict, but perfectly consistent, and the slack pile case is not an authority sustaining the doctrine that railroad companies are required to fence against persons.

There is another reason why the common pleas was right and the circuit court wrong. The defect in the fence was not the proximate cause of the injury. The little boy passed through the fence upon the railroad grounds to an embankment several feet high, and north of all the railroad tracks, and sat down, being then with his companions in a place of safety. A freight train was going west, which attracted his attention, when he jumped up and ran across one track to the next one south, and ran up and tried to grab or touch a car as it passed, when he slipped or fell, and got his leg under the wheel. The injury was caused directly and proximately by his slipping and falling, and was the result of an inevitable accident. The injury was not even remotely caused by the defect in the fence, else why were not his companions also injured, they having passed through the same defective fence?

But it is urged that the question as to what was the proximate cause was one for the jury, and not the court. The question as to proximate cause is usually a mixed question of law and fact, and is for the jury under proper instructions. But when the facts are conceded, as in this case, it becomes a pure question of law for the court. In this regard the question of proximate cause is not different from the question of negligence, or contributory negligence, in all of which, when the facts are conceded or found, the question is one of law. The province of the jury is to find the facts, but, the facts being found or conceded, it is the duty of the court to declare the law applicable to such facts. It is under this rule that the sufficiency of the facts in a pleading are tested by a demurrer. *Minnear v. Holloway*, 56 Ohio St. 148, 46 N. E. 636; *Penn. Co. v. Rathgeb*, 32 Ohio St. 63; *Kistner v. Indianapolis*, 100 Ind. 210; *Henry v. St. L., K. C. & N. Ry. Co.*, 76 Mo. 293, 48 Am. Rep. 762. As the railroad company was under no obligation or duty to fence its road against persons, and as the defect in the fence was not the proximate cause of the injury to the little boy, he had no cause of action against the company, and the errors, if any, in the admission or exclusion of evidence, were immaterial, and not prejudicial.

Applying the law as to fences and proximate cause, as above laid down, to the petition, it fails to state a cause of action against the railroad company, and, taking the defective petition in connection with the facts conceded to have been proved on the trial, and in

the absence of a motion to amend, the court of common pleas was clearly right in directing a verdict for the defendant below. The judgment of the circuit court will be reversed, and that of the common pleas affirmed.

Judgment reversed.

DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(69 Ohio St. 386)

McCAMMON et al. v. COOPER et al.

(Supreme Court of Ohio. Jan. 5, 1904.)

FREEHOLD ESTATE—GROUND RENT—DESCENT AND DISTRIBUTION—INHERITANCE BY MINOR.

1. A "ground rent," being an estate of inheritance in the rent of lands, is a freehold estate, and is a right to and interest in the lands within the meaning of section 4158, Rev. St. 1892, relating to descent and distribution.

2. Where the owner of such ground rent dies intestate and without issue, the right descends under the provisions of the sections of the Revised Statutes which control the descent of real estate, and is not within the purview of section 4163, which relates to personal property.

3. Where a minor inherits from her father lands which came to him by deed of gift, and the same are sold under the order of the probate court, and the proceeds invested in government bonds, and subsequently the bonds are sold, and the proceeds invested in a ground rent, and afterwards that ground rent is redeemed, and the proceeds invested in another ground rent, and the minor dies while the owner thereof, intestate and without issue, the estate will descend, by virtue of section 4159, Rev. St. 1892, to the next of kin of the deceased, and not to the heirs at law of the ancestor.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

In the matter of the estate of Leora McCammon. From an order on the settlement of the estate of Harry L. Cooper, trustee, William McCammon brings error. Affirmed.

In the year 1885 George McCammon died intestate, leaving an only child, Leora McCammon, an infant, and a widow, Ida Leora McCammon. He left a large personal estate, also real estate situate in Cincinnati, which descended to his daughter, Leora. All this he had derived by deed of gift from his father. In 1897 the guardian of Leora applied to the probate court of Hamilton for authority to sell certain of the real estate, under favor of section 6280, Rev. St. 1892, on the ground that a better investment could be made in government bonds or ground rents. The court made the order prayed for directing the sale. The net proceeds amounted to \$8,253.14. Prior to this the guardian had received \$5,000, the proceeds of certain policies of fire insurance upon buildings belonging to his ward and inherited by her from her father. The guardian invested this entire fund in government bonds, and subsequently sold the bonds, and, in pursuance of the order of the probate court, invested the proceeds, together with the proceeds of the real estate, in a ground rent. October 3, 1898, the guardian resigned, and the defend-

ant in error, Harry L. Cooper, was by the probate court appointed trustee. The privilege of purchase being exercised as to the above-named ground rent, \$20,000, the proceeds, were received by the trustee, and that amount was thereupon by him reinvested in other ground rents. Subsequently, in 1900, Leora McCammon died, aged 15, intestate and unmarried. The trustee settled his account in the probate court, and was ordered, on motion of the mother, now Ida Leora Olmstead, to convey to her the said real estate or ground rents in his name as trustee, in fee simple, and to turn over to the administrator of Leora, deceased, the money and personal property in his hands. From this order plaintiffs in error, Wm. McCammon, the brother of George McCammon, and John L. McCammon, the nephew of George McCammon, his only heirs at law, having theretofore appeared in the probate court to resist the motion, and having filed their claim to said two funds, \$8,253.14 and \$5,000, appealed the case to the court of common pleas. In that court, upon hearing, the same order was made as that of the probate court. That judgment was affirmed by the circuit court, and the McCammons bring error.

Harlan Cleveland, John E. Bruce, and Jacob H. Bromwell, for plaintiffs in error. Judson Harmon and Harmon, Colston, Goldsmith & Hoadly, for defendants in error.

SPEAR, J. (after stating the facts). The claim of plaintiffs in error is that the property inherited by Leora McCammon from her father, having been ancestral property, and the plaintiffs in error, being the only heirs at law of the ancestor, they are entitled, by force of our statute of descent and distribution, to the inheritance. Not that the precise estate which was owned by Leora McCammon at her decease came to her by inheritance, for without question it did not, but that that property was purchased by the proceeds of the real estate which she did inherit, and which had been sold by her guardian; and that, by applying the rule of equitable conversion, the funds derived from the sale continued during the life of Leora, in whatever form they were invested, to be impressed with the character of ancestral property for purposes of descent and distribution. We think the proposition cannot be maintained. It is conceded that under the authority of *Armstrong v. Miller*, 6 Ohio, 119, and *Pence v. Pence's Adm'r*, 11 Ohio St. 290, the proceeds of the sale of land would have become personal property, with all the incidents of such property as to distribution, in the event of the death of Leora, but for the act of March 18, 1890 (Laws 1890, p. 66), which added a proviso to section 4163, Rev. St. 1892 (the section which directs the distribution of personal property), which proviso is: "Provided, that any fund in the hands of any administrator, guardian, assignee or oth-

er trustee which has arisen from the sale of real estate, which real estate came to such intestate by descent, devise or deed of gift from an ancestor, shall descend according to the course of descent described by section 4158 for ancestral real estate." And the contention with respect to this proviso is that the term "any fund in the hands of any * * * guardian * * * or other trustee" means the proceeds of the sale so long as held by the guardian or trustee under his trust and unexpended, into whatsoever form he may in fact change them by investment; thus seeking by construction to ingraft upon our statute the equitable rule, enforced in many jurisdictions, that when, for any reason, the court changes the character of the property belonging to infants, it will not permit the change to alter its devolution. The proposition, as applied to this case, is open to many answers. One is that the proviso, in its language and apparent intent, is dealing with present conditions. It does not deal with the past, except that, if the fund which then exists has arisen from the sale of ancestral real estate, its devolution is controlled by this proviso. But the proviso cannot be aided or enlarged by the application of any equitable rule. As held in *Patterson v. Lamson*, 45 Ohio St. 77, 12 N. E. 531, "The statutes of descent and distribution are not to be construed and administered upon equitable principles, but by rules of law;" and in *Hutchings v. Davis*, 68 Ohio St. 160, 67 N. E. 251, "Courts cannot, by reason of any real or imagined equities limit, qualify or annul rights granted by legislative enactment." In other words, the General Assembly must be held to have intended to express its entire meaning by the natural import of the words used. The natural import of the term "fund which has arisen from the sale of real estate" implies a fund which has directly arisen from that source. The principle of *Brower v. Hunt*, 18 Ohio St. 311, is applicable here. It is there held that: "The title to real estate which must have come to an intestate by devise or deed of gift from an ancestor to constitute ancestral property, is the title under which the intestate immediately held." Not that the word "directly" is found in this proviso, but neither was the word "immediately" found in the statute under review in the case above cited. If the intention had been by this proviso to give ancestral heirs any right to the proceeds of the sale of infants' real estate inherited from the ancestor in any form it may be made to assume in the future, such intention would have been expressed in apt language. It is not, we think, reasonable to assume that the Legislature intended to go farther in the adoption of the doctrine of equitable conversion than the ordinary meaning of the words used imports.

But it seems hardly worth while to pursue this line further. Another answer fully covers the case. The proviso does not apply,

because the property in question was not a fund in the hands of the trustee. A fund is well defined as money or its equivalent gathered for, or to be appropriated to, a specific object. The property in controversy is not personal property of any kind. It is a right to real estate; and it is not of consequence what form the inheritance of the minor assumed from time to time after her father's decease and before her own. At the time of the latter event the inheritance had taken the form of real estate to which she had a right. And this applies as well to the insurance money as to the other; so that no different rule of law is involved. The descent of real estate as to which the owner dies intestate is controlled by either section 4158 or 4159, Rev. St. 1892, depending upon whether the estate thus left came to the deceased by descent, devise, or deed of gift, or by purchase. If by purchase—and that is the character of this estate—then the latter section controls, and the estate in controversy would, under the fifth clause of that section, and by force of the ruling in *Armstrong v. Miller*, supra, and *Pence v. Pence*, supra, pass to the mother.

There is no error in the judgment of the circuit court affirming that of the common pleas, and it will be affirmed.

BURKET, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(69 Ohio St. 372)

STATE ex rel. COVINGTON & C. BRIDGE CO. v. JUDGES OF COURT OF COMMON PLEAS OF HAMILTON COUNTY.

(Supreme Court of Ohio. Jan. 5, 1904.)

EMINENT DOMAIN—REVERSAL OF PROBATE COURT—PROCEDURE—REVIEW ON ERROR—MANDAMUS.

1. Where, on a petition in error, the court of common pleas reverses the judgment of the probate court in appropriation proceedings brought under chapter 8, tit. 2, Rev. St. 1892, it is the duty of that court, by force of section 6438, Rev. St., to proceed to hearing and trial as though it had original jurisdiction thereof.

2. Such judgment of reversal finally disposes of the judgment of the probate court, but is not, within the meaning of the statute, a final judgment which may be reviewed on error. And although the ground of reversal is found by this court to be erroneous, mandamus will not lie to compel the judges of the court of common pleas to again hear and pass upon the petition in error.

(Syllabus by the Court.)

Application by the state, on the relation of the Covington & Cincinnati Bridge Company, for writ of mandamus to George A. Magruder and others, judges of the court of common pleas of Hamilton county. Writ refused.

By its petition the relator, the Covington & Cincinnati Bridge Company, makes known to the court that on March 5, 1896, the relator commenced a proceeding in eminent domain in the probate court of Hamilton county

against one George A. Magruder and others, and such further proceedings were had therein that a preliminary hearing was had, and an order entered for the plaintiff, followed by a jury trial, resulting in a verdict for damages, and a judgment thereon, which was paid into court. Error by the defendants to the common pleas of Hamilton resulted in a final judgment in that court dismissing the proceedings in eminent domain upon the ground that the plaintiff did not have the legal right to condemn as against the defendants. Said judgment being affirmed by the circuit court, error was prosecuted to this court, where the judgment of the circuit court was reversed, the judgment of the court of common pleas vacated, and the cause remanded to that court for further proceedings in accordance with the opinion. The judgment of this court left the judgments of the probate court in full force and effect, and required the court of common pleas to consider and pass upon the petition in error as originally filed therein. But that court, over the objection of the relator herein, summoned a jury to assess damages, and denied, and still denies, the application of the relator for a hearing upon the petition in error in that court. Relator is without adequate remedy at law, and prays that a writ of mandamus shall issue, directed to the judges of said court of common pleas, requiring them to set aside the summons for a jury, and to consider and determine the issues presented by the petition in error originally filed in that court. Copy of the record of all the proceedings, the opinion of this court, and of its journal entry and mandate, accompany the petition as exhibits.

The answer by the respondents takes issue with some of the statements of the petition as to the exact text and legal effect of the journal entry in the court of common pleas and the opinion and judgment of this court, but otherwise generally admits the allegations of the petition. It also avers that the court of common pleas, acting on the mandate from this court, held that the force and effect of the proceedings hereinbefore taken were to vacate the judgment of the probate court fixing the compensation, and to remand the case to the common pleas for trial and final judgment as to compensation, and therefore overruled the application of the company for a hearing upon the petition in error, and ordered the drawing of a jury; excusing the jury, however, until further order. It is, and at all times has been, the purpose and desire of respondents to proceed according to the command of the mandate and opinion of this court, and they pray the judgment and direction of the court in the premises.

Pertinent parts of the record necessary to a full understanding of the controversy show that the court of common pleas, in the appropriation case pending in that court on error, found and adjudged "that there was

error in the judgment and rulings of the probate court in finding that the taking of the premises and interests of the plaintiffs in error in the premises set forth in the * * * petition was necessary, and thereupon ordering a jury to be impaneled to assess compensation, and in overruling the motion of plaintiffs in error to set aside the finding and order aforesaid; that it further erred in overruling the motion of plaintiffs in error, after hearing the testimony, to withdraw the case from the jury, and to dismiss the * * * petition as to the said plaintiffs in error, and in overruling the motion of plaintiffs in error to set aside the verdict of the jury, and for new trial. Whereupon it is ordered and adjudged that the proceedings and judgment of the probate court * * * be, and the same are hereby, reversed and set aside, and that the * * * company is adjudged to pay the costs of plaintiff in error. And the court, having further heard and considered the premises, finds that there is on the part of said corporation no right nor necessity for the appropriation. * * * It is therefore ordered and adjudged that the * * * petitions herein be dismissed, and that plaintiffs in error go hence without day." Also that the journal entry of this court reversing the judgments of the circuit court and of the court of common pleas ordered and adjudged "that the judgment of the court of common pleas be, and the same is hereby, reversed; and it is further ordered and adjudged that this cause be remanded to the court of common pleas for further proceedings in accordance with opinion herein." Also that the opinion shows that this court did neither affirm nor reverse the judgment of the probate court, and shows further that the case would be remanded to the court of common pleas for trial as provided by law. It (the opinion) does also state that "the judgment of the common pleas court, in reversing the judgment of the probate court and dismissing the * * * petitions herein, and that of the circuit court affirming the judgment of the common pleas court, should be reversed." The syllabus is to the effect that "where, on a petition in error, the court of common pleas reverses the judgment of the probate court in appropriation proceedings, it is made its duty by Rev. St. 1892, § 6438, to retain the cause for trial and final judgment; and when, without a trial by jury, as in the probate court, the court proceeds at once to render final judgment, the judgment of the court of common pleas will be reversed."

Maxwell & Ramsey, for relator. Judson Harmon, J. C. Harper, Channing W. Richards, Wilson & Wilson, and Outcault & Foraker, for respondents.

SPEAR, J. (after stating the facts). The prayer of the petition is that a writ of mandamus shall issue, directed to the judges of the court of common pleas of Hamilton coun-

requiring them to set aside the summons a jury, and to consider and determine the issues presented by the petition in error originally filed in that court. We are of opinion that the writ should be denied. It is to be granted only where the act is specially enjoined as a duty resulting from an office, station, or position, and is not to be issued at the discretion. Especially is it not to be granted in the absence of a showing of a clear right. The power as well as duty is vested in the court of common pleas, in passing on an error proceeding from the probate court in an appropriation case, is defined by section 6438, Rev. St. 1892, which provides that "if the court of common pleas, upon the hearing of the cause * * * reverse such judgment, it shall retain the cause for trial and final judgment as in other cases." The natural and, we think, necessary implication from this language is that the judgment of reversal is not a final judgment, to which no further remedy will lie. This for the reason that the party complaining has not exhausted his remedy in the court which has jurisdiction to try the cause to final judgment; the general policy of our statute, applying to error proceedings to the court of common pleas, being that a party may not prosecute errors to orders or rulings which do not conclude the issue, but must, where that court has jurisdiction to try the cause to final issue and give full relief, exhaust his remedy there before prosecuting error to the higher court. Like provision is prescribed by section 6733, Rev. St. 1892, where error is successfully prosecuted to the judgment of a justice of the peace. *Railway Co. v. Bailey*, 39 Ohio St. 170, declares the principle, and, we think, settles the question. The judgment of reversal by the common pleas of the judgment of the probate court not being a final judgment, it follows necessarily that the effort to have it reviewed must be futile.

It is contended, however, that the action of this court in reversing the judgment of the court of common pleas, as expressed in the journal entry and mandate, completely extinguished the judgment of the court of common pleas, and left the case in that court to be proceeded with as an error case. This does not follow. It is true that this court orders and adjudges "that the judgment of the court of common pleas be, and the same is hereby, reversed." The judgment referred to, however, naturally and necessarily means the judgment which the party complaining had the right to ask to have reviewed, and that was the final judgment rendered by the court of common pleas, viz., the judgment dismissing the petition. That this was the understanding of this court at the time is shown by the language which follows, viz.: "It is further ordered and adjudged that this cause be remanded to the court of common pleas for further proceedings in accordance with opinion herein." Recurring to the opinion, it is shown that the cause is "remanded to the

court of common pleas for trial as provided by law," and the provision of law is found in the statute. Had this court intended to direct a rehearing of the error case, it would have said so. This understanding is further shown by the fact, evidenced by the opinion, that this court did not undertake to deal in any wise with the judgment of the probate court. It neither sought to affirm it nor to reverse it. We need not now inquire the reason why. It is enough to state the fact. It was treated as a judgment reversed, and was there left—the language of the syllabus being that, where the court of common pleas reverses the judgment of the probate court, the duty to "retain the cause for trial and final judgment" follows; and the error pointed out in this syllabus, and the only error, is the action of the court of common pleas in proceeding to render final judgment without trial. Other facts indicating the true intent of the entry in this court will be referred to further on. Some phases of the error case in this court may not be entirely clear, but, taking the final entry here in connection with the opinion, including the syllabus, and construing the whole in the light of the statute, there can be no warrant for the claim that the case is now in the court of common pleas as an error proceeding.

It is true that the reasons given for, and the grounds upon which the court put, its reversal of the judgment of the probate court, were, in part, the same reasons and grounds upon which the final judgment of dismissal was based. And this, probably, is the cause of the apparent confusion which has arisen. That is, the common pleas found that the probate court erred in finding that the taking of the premises was necessary; and it also found, on its own further hearing, that there is no right or necessity on the part of the corporation for the appropriation, and hence dismissed the petition. It is inferred by counsel from this that the judgment of reversal of this court was aimed at the findings. But it ought to be plain that, as a general proposition, the grounds on which a judgment of reversal is placed are not the subject of review. It is the judgment, when it is reviewable at all, that may be the subject of reversal. In legal effect, the common pleas judgment of reversal would have been just as conclusive, had no ground been stated. The judgment may be entirely sound, and the grounds upon which it is sought to be placed wholly erroneous. But this view of the case becomes of less importance when it is noted that the finding as to the preliminary inquiry was not the sole ground of reversal by the common pleas. It was founded as well upon alleged error "in overruling the motion of plaintiffs in error to set aside the verdict of the jury, and for new trial." Among the grounds for new trial alleged in the motion are error in the admission and exclusion of testimony, in the charge to the jury, and that the verdict is

against the weight of the evidence. The last ground afforded abundant reason, had there been none other, for the refusal of this court to review the judgment of the common pleas court in its reversal of the judgment of the probate court, and throws light, also, upon the understanding this court entertained of the purpose and effect of its entry reversing the judgment of the common pleas.

By a supplemental brief by the relator it is further insisted that the court of common pleas, in its reversal of the probate court, passed only upon jurisdictional questions, and that, after finding against the corporation on these questions, the court could not assume jurisdiction for the purpose of adjudicating questions which arose upon the trial to the jury in the probate court. The answer to this is implied in what has preceded, but we may add that, while at first blush this is a plausible proposition, with due respect we are clearly of opinion that it is not sound. Apparently, it rests upon the assumption that the proceeding in the probate court was divided into integral and distinct parts. It was not. It was one case. The use of the term "jurisdictional," in this connection, is at least misleading. All the parties having been brought into court by proper process, and the subject-matter of the controversy being within the cognizance of the court by authority of the statute, that court was clothed with complete jurisdiction of the whole controversy, and it was not deprived of jurisdiction at any stage of the procedure, nor could it be. Its judgment rendered therein upon hearing, or hearing and trial, would be conclusive, and would finally settle the entire controversy, unless carried higher. The question of the right to appropriate on the part of the corporation was a mixed question of law and fact, and the right to a preliminary order would depend on the evidence. A finding by a higher court that the probate court had erred as to the admission or legal effect of evidence did not in any degree affect the jurisdiction of that court or of the court of common pleas, and there would not be the slightest irregularity in the latter court, after reaching that result, going forward and considering the other assignments brought before it by the petition in error. Indeed, its duty, conformably with the spirit of section 6709, Rev. St. 1892, would not be fully performed until it had done just that. The question of jurisdiction was not involved. The question all the time was, had the corporation made a case? So it results that the legal effect of the judgment entry of the common pleas is to establish that that court passed upon all the errors assigned.

The foregoing disposes, also, of the second proposition of the supplemental brief, viz., that, "when the common pleas found against the corporation on the jurisdictional questions, the procedure was controlled by the general provisions of the Code, and not by section 6438." As already stated, there was

no jurisdictional question involved in any sense that makes the matter of jurisdiction pertinent here. We have not overlooked the case of *A. & O. R. Co. v. Sullivant*, 5 Ohio St. 276, relied upon by counsel. It is there held that where, in an appropriation case, the probate court has held that there had not been sufficient proof of organization in compliance with the requirements of the law, and dismissed the proceeding, the review of such a judgment might be had in the Supreme Court. Certainly. The corporation might have taken its case to the common pleas by certiorari. It chose to bring it directly to this court. And the court, having undoubted power to do so, entertained it, affirming the judgment. We fail to see how a ruling in a case brought directly to this court, challenging a final judgment of the probate court, in any wise affects a question relating to a judgment of the common pleas reversing the probate court, which judgment was, in legal effect, as we have already found, interlocutory only. The judgment in the *Sullivant* Case was a final judgment of the probate court, which was unaffected by section 6438. We are concerned with a judgment of the common pleas which was not final, and which is controlled by the above section. We think the argument is in no manner advanced by the ruling in the *Sullivant* Case. The same may be said respecting the late case of *Railway Co. v. Cable Co.*, 68 Ohio St. 306, 67 N. E. 890, also cited by counsel. The doctrine of these cases had pertinency as applied to the error case when in this court, but we fail to see its application to the present proceeding in mandamus.

It must be apparent, if we are correct in the conclusions already stated, that no case is made for a peremptory writ of mandamus. The record not only fails to show a clear right to the writ on the part of the relator, but it clearly shows that no right whatever exists. And here we might with propriety stop. But, while the record shows that the court of common pleas has given proper construction to the judgment of this court as the same bears upon the right of the relator to demand another hearing on the petition in error to the judgment of the probate court, it also shows that no hearing had been had in the common pleas, after the cause was remanded, with respect to the right and necessity of the appropriation. We are of opinion that, by force of the statute, it was incumbent on that court to take up the case *de novo*, and proceed as though it possessed original jurisdiction. This would require a hearing on the preliminary questions, and a jury trial to ascertain the amount of compensation and damages in case the preliminary questions were determined in favor of the company. But, of course, such hearing must precede the trial. Writ refused.

BURKET, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(58 Ohio St. 438)

CLEVELAND, P. & E. R. CO. v. PRITSCHAU.

(Supreme Court of Ohio. Jan. 19, 1904.)

TRIAL—MISCONDUCT OF COUNSEL—REVERSAL.

1. Upon the trial of issues of fact to a jury, it is the duty of the trial judge to prevent such misconduct on the part of counsel toward witnesses as tends to the suppression of the truth, all declarations of fact by counsel during the introduction of evidence, the repetition of incompetent questions to which objections have been sustained, and all comments upon the evidence until the time for argument has arrived.

2. The permission of such misconduct by counsel for the prevailing party, against objection by his adversary, is error for which a judgment should be reversed, unless it affirmatively appears that, by instructions from the court or retraction by counsel, or both, the prejudicial tendency of the misconduct has been averted.

(Syllabus by the Court.)

Error to Circuit Court, Cuyahoga County.

Action by Mrs. Pritschau against the Cleveland, Painesville & Eastern Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Mrs. Pritschau brought suit in the court of common pleas against the railroad company to recover on account of personal injuries which she sustained while a passenger on one of its cars, the injury resulting from collision with another car, alleged to be caused by the negligence of the company. Upon issues joined the cause was tried to a jury, the trial resulting in a verdict in her favor for \$2,291. The company's motion for a new trial was overruled, and a judgment was rendered in her favor which, on petition in error, was affirmed by the circuit court. Her right to recover compensation for her injuries is not now disputed. The only question before us respects the amount of her recovery, which is alleged to be excessive, and a reversal is sought because of misconduct of her counsel upon the trial of the cause. The record is voluminous, and many of its pages are devoted to recounting interruptions by her counsel, protests by his adversary, and observations of the court with respect thereto. A statement of all these instances would unduly expand this report. The grounds of complaint may be regarded as represented by a few of the instances taken from the record.

The record before us was made upon the second trial of the case. While counsel for the company was cross-examining the plaintiff herself with respect to the extent of her injuries, he inquired of her whether she did not receive a caller in her parlor upon the evening of the day of her injury. She answered that she did not. Whereupon her counsel interrupted by saying, "That was all blown up before." Counsel further inquired of her whether she sent for a physician upon the day of the accident, whereupon her counsel observed: "I object; you might as

well ask her if she blew her nose." In her further cross-examination with respect to her testimony upon the former trial, her counsel interrupted; whereupon the counsel for the company objected to the interruption, and the court observed, "It seems to disturb counsel on the other side, so counsel ought not to interfere." Mr. Kerrulish: "I am interfering in the interest of economy of time and good sense." Upon her further cross-examination with respect to her occupation after the accident, she was inquired of whether she did not keep boarders during a portion of the time; and her counsel, upon re-examination, observed: "I want to clean these boarders out; wipe them out altogether. Well, we have exterminated the boarders." Having admitted upon her cross-examination that she had walked about the village of her residence, she was inquired of by adversary counsel whether she limped upon those occasions. She answered: "Why, I limped from being lame, of course; it makes a person limp." Whereupon the following colloquy occurred: Mr. Kerrulish—"I think there is a nigger in the fence about that thing myself." Mr. Henry—"I object to that." Mr. Kerrulish—"She has been limping ever since. Now he wants to know whether she limped."

Another witness for the plaintiff, upon cross-examination, was inquired of whether, in view of his former relation, he did not feel particularly kind toward the plaintiff. Whereupon her counsel interrupted, "Well, isn't it creditable to her?" Upon the direct examination of a witness for the plaintiff, her counsel propounded a question, assuming a state of facts here which no evidence tended to establish, and further assuming that the witness had knowledge thereof. Adversary counsel objected, and asked the court to rebuke counsel for propounding a question of that character. Whereupon the court said: "Well, I think I will administer the rebuke to counsel, because you are assuming that this witness knows things; there is no evidence as yet tending to show any such thing, and I think you are very much out of order." Mr. Kerrulish: "Just a word on that point. Nobody knows better than I how to deport myself, but, inasmuch as this gentleman imputed to me an improper motive, I thought I might inquire of him the things I know he knows." Upon the cross-examination of another witness, who had been called on behalf of the defendant, inquiry was made respecting the professional standing of one of the physicians who had attended the plaintiff. Mr. Kerrulish interrupted as follows: "Now, it is perfectly evident what kind of business they have been in down at Irondale, peeking into things of that sort."

Upon the examination of a medical witness who had been called by the defendant, plaintiff's counsel inquired of him why he had been selected to make an examination to which he had testified. He answered:

"Well, don't ask me why he selected me; ask him." Whereupon plaintiff's counsel observed: "Well, I know, and so does everybody else; I don't care much, I simply wanted you to acknowledge it, that is all." Upon the cross-examination of a very young lady who had been called as a witness by the defendant, plaintiff's counsel saw fit to examine her upon the subject of her familiarity with the city of Cleveland. She answered that she had been there about a month, and was sick during the entire time. Whereupon counsel interrupted: "I don't care about your sickness; the least said about that the better." An objection by defendant's counsel was sustained by the court, and plaintiff's counsel interposed: "We will pass over the sickness charitably. I put it upon charitable grounds." Upon the cross-examination of another physician who had been called by the defendant, plaintiff's counsel inquired of him as to the mode of ascertaining differences in the lengths of injured limbs. Upon receiving the answer of the witness, counsel interposed, "By gracious, that was done splendidly." Upon objection the counsel further said, "I thought it was complimentary to the witness." Upon the cross-examination of another witness, a woman, who had been called by the defendant, plaintiff's counsel interrupted his own cross-examination to say, "Now, you are getting into tangles here of the worst kind." Upon objection by counsel for the defendant, plaintiff's counsel observed: "I guess your woman isn't telling the truth, and you know it." Upon the cross-examination of another witness respecting a supposed conversation with another person, the witness said she had no recollection of it. Whereupon plaintiff's counsel interrupted his own cross-examination to say, "I will have to fix the time and place and blow you up on that." Upon the cross-examination of the same witness he inquired of her as to her failure to recognize the plaintiff upon an occasion referred to, and then inquired whether it was in consequence of a failure of the witness' observation or a change in the appearance of the plaintiff. The witness answered, "I think, perhaps, it was a little of both." Counsel thereupon interrupted himself to say: "Now, that is sensible; I like your style first-rate; that is nice." Upon objection by adversary counsel, plaintiff's counsel observed, "Won't you let me compliment your witness when she is deserving of it?" Upon the examination of another witness called by the defendant, she was inquired of as to the origin of a written statement which she had signed, the inquiry being whether it was written in her presence. Counsel for the plaintiff objected, and, upon the suggestion of his adversary, "It is in your favor," he replied: "I don't want any of her favors. I think, your honor, that they should be reprimanded for bringing a witness like this into court. If it was two hundred years ago it would be punished." Upon the cross-ex-

amination of another witness called by the defendant, no evidence of any improper conduct on its part having appeared, counsel for the plaintiff inquired, "Well, do you know any of the crowd that have been trying to defeat this woman of her rights?" Upon the calling of Mr. F. A. Henry as a witness for the defendant, before any testimony had been given by him, plaintiff's counsel interrupted to say, "I am willing to admit that Mr. Henry will swear to anything that is necessary here."

In response to objections to the numerous interruptions and improprieties of counsel for the plaintiff, of which a few are embraced in the foregoing statement, the court made many observations, whose nature and effect are indicated by the following selections. Upon being called upon by counsel for the defendant to sustain an objection to an improper question, and to require counsel to desist from an improper course of examination, the court said: "Oh, I think I have done all I can do; I sustain the objection." Again: "I think counsel is in fault in indulging in too many statements, a habit that counsel has got into in thirty years of practice, to interject in your arguments for the purpose of getting advantage with the jury. You are not conscious of it, but others notice it, and I notice it, and it is that the other side object to." "That was wholly out of order, Mr. Kerruish; it is not prompted by any desire to gain advantage, but by force of inveterate habit." Mr. Kerruish: "I think it is a good habit." Court: "No, I think it is a bad habit." "The jury will disregard the statements of counsel as to whether the witness is telling the truth or not. I think we ought to have no interruptions and no comments at all." "Well, it doesn't seem to have any effect; I have endeavored to rebuke counsel several times." "I have repeatedly admonished counsel, but it don't avail very much against the habits of forty years." "I have said a great many times there ought not to be any interference at all; the only thing to do is to object, if you do object." Another time, when called upon to admonish counsel, the court said: "I have done that so much, I am getting tired of doing the same thing over and over again. Now repeat the question." Upon a similar request the court said: "I do not think I will do that; I have done that so much that I am getting tired of it."

Ford, Snyder, Henry & McGraw, for plaintiff in error. W. S. Kerruish, for defendant in error.

SHAUCK, J. (after stating the facts). The record before us contains the solemn assurance that the repeated and prolonged scenes of disorder which it describes occurred upon "the trial of this cause." Adopting the euphemism, the trial was made to last through more than two weeks, obvious-

ly to the waste of most of the time so employed, and to the great discredit of the administration of justice. But these evils are accomplished and irremediable, and we have only to determine whether the law requires the plaintiff in error to submit to a result so reached. The determination of that question will not only justify, but require, some observations which might seem too obvious to be entitled to a place in a treatise on the conduct of trials. It is the requirement of the law that issues of fact, in so far as they depend on oral testimony, shall be determined upon the testimony of witnesses who speak under the obligations of an oath, and who are subject to cross-examination. It is also required by established general rules, to which the issues of this case present no exceptions, that statements of fact, to influence the verdicts of juries, must be from the personal knowledge of the witnesses, and that mere hearsay and inference must be excluded. All of these requirements were disregarded in numerous instances presented by the record. On the trial, counsel for the prevailing party, during that portion of the trial which in orderly inquiry is devoted to the introduction of evidence, made statements purporting to present facts, some of the statements being in corroboration of the testimony of witnesses, some of them being of matters which were not otherwise suggested in the case. The instances in which statements of facts were followed by questions, not for the purpose of eliciting such facts as were in the knowledge of the witnesses, but to mislead the jury as to the facts in evidence, are subject to the same criticism.

The order of trial prescribed by section 5190, Rev. St. 1892, does not differ in any respect which is here material from that which had been pursued before the enactment of the statute. But since the General Assembly has thought the order of sufficient importance to be a proper subject for legislation, there is added reason for adhering to the order which it prescribes. The section definitely provides that counsel shall not be heard in argument until all the evidence has been introduced. Manifest disregard of this order of trial appears in some of the comments of counsel which were made during the introduction of evidence, and which are presented in the statement of the case, and in many others which are not included in the statement. Not only were these comments untimely, but some of them were of such character that they should not have been permitted at any time. Certainly there is, and must be, much latitude allowed to counsel in argument when the time for argument has arrived; but the ridiculing of uneducated witnesses because of their ungrammatical speech, and the offering of insults to others without cause afforded in the case, should be forbidden as tending to the suppression of the truth. The repeti-

tion of incompetent inquiries, to which objection had been sustained, was for the obvious purpose of eliciting a repetition of the objection, and to prejudice the case in the estimation of the jury. It should need no comment to show that the purpose which prompted such conduct called for its complete and immediate suppression.

It is suggested that the conduct of counsel was so grossly violative of propriety and decorum that it probably had the effect to offend the jury, and to secure for his client a smaller verdict than would otherwise have been returned. That suggestion should not be permitted to control our judgment. If it be assumed that the orderly administration of justice is not to be insisted upon, and that the truth may by accident be evolved from such scenes as were here enacted, it is sufficient that the misconduct of counsel was in its natural effect prejudicial to the rights of the plaintiff in error, and it does not appear from the record that it did not in fact result in such prejudice. An examination of the cases cited, and others, justifies the conclusion that for such misconduct, and even for that which is less flagrant, judgments are always reversed, unless it is made to appear that its natural effect has been averted by court or counsel, or both. It is due to differences in the character of the misconduct rather than to differences of opinion in reviewing courts that it has in some cases been held that the effect of the misconduct may be eliminated by instructions, and in others that it cannot be. In this case the final instructions to the jury were silent upon the subject. Throughout the record a trial judge, personally distinguished for learning and probity, appears as a grieved observer of continued improprieties which he thought himself powerless to suppress. It is entirely clear that he was unable to end them by admonition and entreaty, but he was clothed with ample power to suppress them inexorably. The county in which he sat has the complement of county buildings. From the body of the people a few are selected as members of the bar because their qualities are supposed to authorize the expectation that they will render important aid in the administration of justice. Some prime mistakes in the selection are remediable.

If the court had sustained the motion for a new trial, it would have been a too long deferred recognition of the rights of the plaintiff in error, though it would have made this proceeding in error unnecessary. That it should have been sustained is obvious. But it is much more important to observe that the trial judge should not have permitted such conduct on the part of counsel as would result in a mistrial. This was due not only to the parties to the suit, but to the public. But few pages of this record had unfolded when there was a manifest occasion for continuing the cause and dealing with offending counsel according to his de-

serts. The observations of the trial judge, from time to time, show that he had an intelligent appreciation of the gravity of the offenses which were committed before him. Why he thought it less important to suppress them than to give correct instructions to the jury as to the law of the case does not appear. In a comparison of causes, a mistrial because of an erroneous view of the legal rights of the parties would be entitled to more charitable consideration. The suggestion by the trial judge that a cause of toleration was chosen because of the inveteracy of counsel's habit acquired in 40 years of similar practice was most unfortunate. It is necessary to say that there can be no prescriptive right to hinder the administration of justice by conduct which squanders time and leads to mistrials. Can the suggested discrimination against younger members of the bar be justified or even tolerated?

It is required by the reasons involved, and by the decided cases, that the judgments of the court of common pleas and the circuit court be reversed, and the cause remanded to the former court for a trial according to law. Reversed.

BURKET, C. J., and SPEAR, DAVIS, PRICE, and CREW, JJ., concur.

(69 Ohio St. 448)

PUMP v. LUCAS COUNTY COM'RS et al.

(Supreme Court of Ohio. Jan. 19, 1904.)

TAXATION—LEVY FOR COUNTY PURPOSES—CONSTITUTIONAL LAW.

1. So much of section 2823, Rev. St. 1892, as purports to authorize the commissioners of Lucas county to levy taxes for county purposes, etc., at a rate not exceeding five mills on the dollar of valuation of the taxable property within said county, is a law of a general nature which does not have a uniform operation throughout the state, and it is therefore unconstitutional and void.

2. So much of the remaining part of section 2823, Rev. St. 1892, as was independently and constitutionally enacted, and is complete within itself, stands, and should be enforced. *State ex rel. Wilmot et al. v. Buckley et al.*, 54 N. E. 272, 60 Ohio St. 273, distinguished.

(Syllabus by the Court.)

Error to Circuit Court, Lucas County.

Action by one Pump against the commissioners of Lucas county and others. Judgment for defendants, and plaintiff brings error. Reversed.

B. A. Hayes, for plaintiff in error. Wm. G. Ulery and Jas. S. Martin, for defendants in error.

DAVIS, J. This action was begun in the court of common pleas to enjoin the levy of taxes in excess of the rates prescribed in the first clause of section 2823, Rev. St. 1892, and to enjoin any levy whatever under and by virtue of that clause of said section which reads as follows: "The commissioners of Lu-

cas county shall, at their June session, annually, levy such amount as shall be necessary to provide for the ordinary or general expenses of the county, the building and repair of bridges and culverts, the maintenance of the poor, the repair of county buildings, and all other purposes which are paid out of the county treasury by order of the commissioners, the courts, or the auditor, and including any levy authorized by vote of the people, designating at the time of making said levy the amount for each separate fund; provided, that not exceeding five mills on the dollar of the valuation of taxable property within said county, shall be levied in any one year." It is claimed that this clause of section 2823 is unconstitutional, for the reason that it contravenes section 26, art. 2, of the Constitution. A demurrer to the petition was sustained by the court of common pleas, and judgment was rendered in favor of the defendants. The judgment of the court of common pleas was affirmed by the circuit court.

The clause of section 2823 which is here attacked was embodied in the Revised Statutes from an act of the General Assembly passed May 5, 1877, entitled "An act to limit taxation in certain counties in this state." 74 Ohio Laws, 180. This act was not intended to have a uniform operation throughout the state, for by its title it only applies to "certain counties in this state," and in the body of the act is limited to counties "having, at the last federal census, a population of more than forty-five thousand and less than fifty thousand inhabitants," and this is conceded to have been applicable to Lucas county alone. Hence, when this special act was incorporated in section 2823, Rev. St. 1892, the codifiers disregarded the subterfuge of describing the county by population, and substituted the name of the only county to which the statute applied, or was intended to apply. This being a law of special or local application, if it is a law "of a general nature" it is obvious that it violates section 26, art. 2, of the Constitution.

It was laid down in *Kelley v. State*, 6 Ohio St. 269, in general terms, that "the character of a law as general or local depends on the character of its subject-matter"; and it is now the settled law of this state that, whenever the subject-matter of legislation either does or may exist in or affect every part of the state, such legislation is a "law of a general nature," and must, in conformity with section 26, art. 2, of the Constitution, be made to operate uniformly throughout the state. Not only is the subject of taxation, in its broadest sense, one which affects every part of the state and every individual therein, but the limitation of the taxing power vitally concerns every individual of the state. Indeed, it is difficult to conceive of a subject of legislation of more general and far-reaching nature than that of setting a limit to the power of

¶ 1. See Statutes, vol. 44, Cent. Dig. § 106; Taxation, vol. 45, Cent. Dig. § 96.

taxation. Whether the rate of taxation for general county purposes shall be limited in proportion to the amount of taxable property shown on the grand duplicate of the county, as provided in one part of section 2823, or whether, with a like amount of taxable property, the commissioners of a certain county or counties, as provided in the clause in question, may, in their discretion, levy taxes for general county purposes at any rate not to exceed five mills on each dollar of taxable property, is a matter of public policy, which concerns not only every taxpayer, but every voter, in the state. The subject-matter of taxation for county purposes is not only a subject-matter of a general nature, which, in obedience to the Constitution, should be regulated by laws operating throughout the state, but it is so regulated in the section before us. The attempt to confer upon the commissioners of Lucas county such an extraordinary and special privilege and power in respect to matters affecting every county and individual in the state—a privilege and power denied as to all other counties in the state—is therefore null and void.

The clause of section 2823 which is under consideration was an independent act of the General Assembly, and has been incorporated in the section with another independent act, which is complete in itself and constitutional, and section 1 of another act which is complete in itself, and, excepting, perhaps, a single clause thereof, is constitutional. The remainder of the revised section 2823, not including the clause relating to the commissioners of Hamilton county, may therefore stand and be enforced, although the other part is unconstitutional. So much of the section as relates to the commissioners of Lucas county only is not an exception to that part of the section which was constitutionally enacted. This case does not, therefore, come within the rule laid down in *State ex rel. Wilmot et al. v. Buckley et al.*, 60 Ohio St. 273, 54 N. E. 272.

Judgment reversed, demurrer to petition overruled, and cause remanded to the court of common pleas for further proceedings.

BURKET, C. J., and SPEAR, SHAUCK, PRICE, and CREW, JJ., concur.

(162 Ind. 32)

RECHT v. GLICKSTEIN.

(Supreme Court of Indiana. Jan. 26, 1904.)

CONVERSION—OWNERSHIP OF PROPERTY—VALUE—COMPLAINT.

1. A complaint in an action for damages for conversion averring that the plaintiff was the owner and in possession of the property in controversy on "or before" a certain date, and that on "and about" that date defendant converted it to his own use, sufficiently shows that the plaintiff was the owner of the property at the time it was converted by defendant.

2. A complaint in an action for damages for conversion averring that property "to the value of \$600" belonging to plaintiff was converted by

defendant, whereby plaintiff was damaged in the sum of \$600, sufficiently shows that the property converted was of some value.

Appeal from Superior Court, Lake County; H. B. Tuthill, Judge.

Action by Charles Glickstein against Solomon Recht. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under section 1337u, Burns' Rev. St. 1901. Affirmed.

F. N. Gavit, for appellant. Epstein & Johnson and A. F. Knotts, for appellee.

JORDAN, J. Appellee successfully prosecuted this action in the lower court for damages arising out of the unlawful conversion of certain goods and chattels. The only matter in controversy between the parties in this appeal relates to the sufficiency of the amended complaint on demurrer for want of facts. Omitting the formal parts, the pleading in question is as follows: "The plaintiff complains of the defendant, and says that on or before the 5th day of March, 1902, the plaintiff was the owner and in possession of, as of his own right and property, a certain lot of goods, wares, and merchandise, and store fixtures, consisting of gent's furnishing goods, clothing, dry goods, boots, shoes, hats, caps, cigars, tobacco, and other goods, wares, merchandise, and effects too numerous to mention, in the city of East Chicago, Lake county, Indiana, then and there to the value of \$600, and certain store fixtures then and there to the value of \$5; that on and about said date the defendant took and carried away each and all and every part and portion of said property, and unlawfully converted and disposed of the same to his own use, whereby the plaintiff was damaged in the sum of \$600, for which he demands judgment, and for all other proper relief."

The principal objections urged against the sufficiency of the complaint are (1) that it does not show that the plaintiff was the owner of the property at the time it was converted by the defendant; (2) that it does not disclose that the property, when converted, was of any value.

While it may be said that the pleader, in drafting the complaint, has employed therein such superfluous phrases or words as "or before" and "or about," still, in considering the sufficiency of the complaint on demurrer, the words "or before" and "or about" may be disregarded or rejected as surplusage without vitiating the pleading, if otherwise sufficient. 21 Encyc. Pl. & Prac. § 1069; *Hampton v. State*, 8 Ind. 336; *Hardebeck v. State*, 10 Ind. 459. Rejecting these words, as we may, and the complaint, in substance, at least, is sufficient to constitute a cause of action, for it then expressly discloses that the plaintiff on the 5th day of March, 1902, was the owner and in possession of the goods and chattels in controversy, and that they were of the value of \$600, and that the defendant on said day "took and carried away * * * said

property, and unlawfully converted * * * the same to his own use, whereby the plaintiff was damaged in the sum of \$600."

The averments sufficiently show the value of the property, and that the plaintiff was the owner thereof, and also in the possession of the same, at the time of the unlawful conversion. The gist of the action was the wrongful conversion of the goods and chattels, and while in such actions it is necessary, as a matter of pleading, to allege the date when the act of conversion was committed, nevertheless on the trial the plaintiff is not confined to the precise time, as alleged, but may prove that the conversion was committed at any time previous to the commencement of the action, within the statute of limitation. In an action for conversion, the complaint must either show that the property was of some value, or that the plaintiff has been damaged by reason of the unlawful conversion. *Ryan v. Hurley*, 119 Ind. 115, 21 N. E. 463. The pleading in dispute, by its averments, fully discloses both of these facts, and certainly is sufficient in this respect.

It is lastly insisted that the complaint is bad because the words "to the value," etc., instead of "of the value," are employed. There is no merit in this contention. The words "of the value" would certainly have been the better expression; still the word "to," as used in connection with the value of the property, was sufficient for the purpose intended by the pleader.

No error was committed by the trial court, either in overruling the demurrer to the complaint, or in denying a motion in arrest of judgment. The judgment is therefore affirmed.

GILLETT, J., did not participate.

(162 Ind. 362)

BRANSTRATOR et al. v. CROW et al.*

(Supreme Court of Indiana. Jan. 26, 1904.)
WILLS — CAPACITY OF TESTATOR — UNSOUNDNESS OF MIND — PRESUMPTIONS — BURDEN OF PROOF — INSTRUCTIONS.

1. In an action to contest a will, where the complaint tendered merely the issue as to the validity of the purported will, plaintiffs claiming no rights thereunder, an answer setting up a forfeiture of plaintiffs' rights under the will by virtue of provisions therein for such a forfeiture in case of a contest was not responsive to the complaint, and a demurrer thereto was properly sustained for want of facts.

2. It is only where mental unsoundness is of a character to appear permanent, and to forbid the reasonable expectation of recovery, that a presumption of continuance of such unsoundness will be indulged. It does not arise from intermittent temporary unsoundness, resulting from sickness, injury, intoxication, or other transitory cause, so that an instruction stating that, where it has been established that a person is of unsound mind, the presumption is that that state of unsoundness continues until the contrary is shown, is too broad.

3. In a suit to contest a will on the ground of insanity of testator the burden was on plaintiffs to establish unsoundness by a preponderance of the whole evidence, and the establishment of unsoundness only created a prima facie case, and only imposed on defendants the necessity of overthrowing the presumption; and hence a charge that the establishment of insanity would raise a presumption that the testator continued of unsound mind, unless the evidence should further satisfactorily establish the fact that testator's mind afterwards became sound, exacts of defendants more than the law requires.

Appeal from Circuit Court, Allen County; E. O'Rourke, Judge.

Action by Frances E. Crow and others against Charles W. Branstrator, administrator of William Branstrator, deceased, and others. From a judgment for plaintiffs, defendants appeal. Reversed.

W. G. Colerick, Henry Colerick, Gilbert Berghoff & Wood, W. and E. Leonard, and Robert Lowry, for appellants. Breen & Morris, for appellees.

HADLEY, J. Appellees, being two sons and two daughters, brought this action to contest the will of their father, William Branstrator, deceased, on the grounds of unsoundness of mind, undue influence, and fraud. The administrator with the will annexed, the widow, four other children, and divers grandchildren were made defendants. All the answering defendants rested on the general denial, except Anna C. Wellbaum and William McNair; and, in addition to the general denial, they filed an affirmative second paragraph, setting forth therein as an answer in bar that by the twelfth item of his will the testator expressly provided that each bequest made by said will was made upon the condition that the beneficiary should be content with his devise or legacy, and should not bring any suit in any court to set said will aside, or in any way hinder or delay its execution, or in any way prevent the distribution of the testator's property under and in accordance with the provisions thereof; and upon a violation of said condition the bequest of the offending devisee or legatee should thereby be forfeited to the estate, to be applied in the payment of debts, etc.; that the plaintiffs are devisees and legatees under said will, and by virtue of this suit to contest the validity of said testament the plaintiffs thereby cease to have any interest in the subject-matter, by reason whereof they are not entitled to maintain this action. To this answer a demurrer for insufficiency of facts was sustained. There was a trial by jury, and a verdict and judgment for the contestants. Motions by the contestees to modify the judgment, for a venire de novo, and for a new trial were severally overruled.

The first assignment of error calls in question the action of the court on the demurrer to the second paragraph of answer. The ruling was clearly right. The answer was not responsive to the complaint. The com-

* 2. See Evidence, vol. 20, Cent. Dig. § 87; Insane Persons, vol. 27, Cent. Dig. § 6.
* Rehearing denied.

plaint tendered a single issue, namely, the validity of the instrument purporting to be the will of William Branstrator. The plaintiffs claim no rights under the will, and an answer setting up a forfeiture of rights not claimed is no answer at all. The court instructed the jury as follows: "The law presumes that every person is of sound mind until the contrary is proven. But when it has been established that a person is of unsound mind the presumption is that that state of unsoundness continues until the contrary is shown. If the evidence in this case establishes to your satisfaction that the testator, William Branstrator, was of unsound mind at any particular time, then the presumption would be that he continued to be of unsound mind, unless the evidence further establishes to your satisfaction the fact that his mind afterwards became sound." There are two vices in this instruction: First. The statement that, when unsoundness is established, the presumption is that that condition continues until the contrary is shown, is erroneous. The language is too broad, because comprehensive enough to embrace every type of mental unsoundness. It is only when the unsoundness is of a character to appear permanent, and to forbid the reasonable expectation of recovery, that a presumption of continuance will be indulged. No presumption of any kind will arise from intermittent, temporary unsoundness, such as may result from sickness, injury, intoxication, or other transitory cause. *Blough v. Parry*, 144 Ind. 463, 492, 40 N. E. 70, 43 N. E. 560; *Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815. It is said in this last case (page 370, 142 Ind., and page 816, 41 N. E.) that "the rule does not apply to occasional or intermittent insanity, but it does in all cases where insanity is apparently confirmed." Second. It was incorrect to charge the jury that, if the testator was shown to be of unsound mind at any particular time, the presumption would be that he continued of unsound mind, "unless the evidence further establishes to your satisfaction the fact that his mind afterwards became sound." Of all contested matters of fact it is the weight—the preponderance—of the evidence that satisfies the mind as to what the fact truly is. Hence the quoted language of the court is equivalent to directing the jury that, if the mind of the testator has been shown to be unsound at any time prior to the execution of the will, such condition will be presumed to have continued, unless it has been established by a preponderance of the evidence that his mind afterwards became sound. It will be observed that the charge is that the presumption shall prevail until contrary evidence not only overcomes the presumption, but satisfactorily establishes the soundness of the testator's mind. This was exacting more of the defendants than the law requires. The plaintiffs had undertaken to establish the testamentary incapacity of the testator at the time he executed

the contested will. This they could do only by maintaining incapacity by a preponderance of the whole evidence. Nothing short of a preponderance would avail them anything. If it turned out that the evidence was equally balanced, the plaintiffs should have failed. So, when the plaintiffs established unsoundness, and set the presumption of incapacity going, that only served to create a *prima facie* case, which would entitle them to a verdict if the defendants introduced no evidence sufficient to overcome it. But if the defendants, by their evidence, overthrew the presumption, it was not necessary for them to go further to defeat the plaintiffs. All that was important for the defendants to do was to prevent the plaintiffs from delivering a preponderance of the evidence. *Young v. Miller*, 145 Ind. 652, 656, 44 N. E. 757; *Roller v. Kling*, 150 Ind. 159, 162, 49 N. E. 948; *Merriman v. Merriman*, 153 Ind. 631, 55 N. E. 734; *Morell v. Morell*, 157 Ind. 179, 186, 60 N. E. 1092. The evidence discloses that the testator for many years became occasionally intoxicated, and when in that condition his speech and conduct were often irrational; and the real controversy at the trial seems to have been whether the unnatural and unreasonable things he said and did were the result of transient intoxication or the offspring of mental perversion. Whether the jury was or was not misled to the injury of the appellants is beyond our power to determine, and we must therefore hold that the giving of the instruction constitutes reversible error.

There are a large number of questions presented, which have been ably and elaborately argued, but since they almost entirely arise under the motion for a new trial, and are not likely to come up again on a retrial of the cause, we have not considered them.

Judgment reversed, with instructions to grant appellants a new trial.

(162 Ind. 85)

INDIANAPOLIS & G. R. T. CO. v. FOREMAN.

(Supreme Court of Indiana. Jan. 20, 1904.)

MASTER — INJURIES TO SERVANT — FELLOW SERVANTS — NEGLIGENCE — COMPLAINT — EMPLOYER'S LIABILITY ACT — CONSTRUCTION.

1. Where several defendants file joint and separate demurrers to a complaint, which are overruled, and they then jointly and separately except to the ruling of the court, an assignment of error by one of the defendants, predicated on the exception, raises the question of the sufficiency of the complaint.

2. An employé of an interurban railroad engaged in the construction of track, who is injured while in a work car of the company for the purpose of being carried to his home from his work, is a fellow servant of employé of the company operating a passenger car which caused the injuries.

3. Allegations in a complaint by a servant against his master for damages for personal in-

¶ 2. See *Master and Servant*, vol. 24, Cent. Dig. § 324.

juries that the work plaintiff was engaged in doing had no connection with, and was not in any way incident to or a part of the work or employment of the motorman or servants in charge of a passenger car of defendant which ran into the work car in which plaintiff was seated; that he was simply a passenger on the work car; that defendant owed him a duty, and was bound to carry him safely, are mere conclusions of the pleader, not admitted by demurrer.

4. An allegation in a complaint for damages for personal injuries received by an employé that he was injured without any fault or negligence on his part does not take the place of averments showing that the risk of incompetency of the person in charge of a switch, whose negligence is alleged to have caused the injuries, was not knowingly assumed by plaintiff as an incident of his service.

5. Under Burns' Rev. St. 1901, § 7083, subd. 2 (Horner's Rev. St. 1901, § 5206a), providing that every railroad corporation shall be liable for damages for personal injuries suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, where such injury resulted from the negligence of any person in the service of such corporation to whose order or direction the injured employé at the time of the injury was bound to conform, no recovery can be had where the employé is injured while conforming to the order or direction of one employé and his injury is caused by the negligence of another employé, who had no such authority.

6. Under Burns' Rev. St. 1901, § 7083, subd. 4, providing that every railroad corporation shall be liable for damages for personal injuries suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine or train upon a railway, an injury due to the negligence of a person in charge of a switch does not render the corporation liable.

7. In an action by a servant against his master for personal injuries, predicated upon the common-law liability of the master, where the injury was caused by the negligence of a fellow servant, known by the master to be reckless and incompetent, the complaint must allege that plaintiff had no knowledge of the recklessness and incompetency of the negligent fellow servant.

8. In a complaint by a servant against his master for personal injuries, predicated upon the common-law liability of the master for injury caused by the negligence of a fellow servant, known by the master to be reckless and incompetent, an allegation that plaintiff was without any knowledge of the careless and reckless conduct of "said motorman in operating said car" which caused plaintiff's injuries is not equivalent to an allegation that plaintiff at and before the time of his injury had no knowledge of the recklessness and incompetency of the motorman.

9. In a complaint by a servant against his master for personal injuries, allegations that the injuries were received by reason of the master's negligent and defective rules and mode of keeping knowledge of and directing its cars are mere conclusions of the pleader, stated by way of recital, and will be disregarded in determining the sufficiency of the pleading.

10. In an action by a servant against his master for personal injuries alleged to have been received as the result of negligence of fellow servants, proof of plaintiff's knowledge of the recklessness and incompetency of his fellow servant who caused the injury is not limited to actual knowledge, but he is bound by implied knowledge such as he could have acquired by the exercise of ordinary care.

Appeal from Circuit Court, Henry County; W. A. Barnard, Judge.

Action by Marion S. Foreman against the Indianapolis & Greenfield Rapid Transit Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901 (Acts 1901, p. 590, c. 259). Reversed.

W. A. Brown and Binford & Walker, for appellant. Marsh & Cook, Forkner & Forkner, and E. T. Glasscock, for appellee.

MONKS, J. Appellee brought this action against appellant and the Kirkpatrick Construction Company, a corporation, to recover for a personal injury alleged to have been caused by the negligence of said corporations. The defendants jointly filed a demurrer to each paragraph of the amended complaint, and each defendant filed a separate demurrer to each paragraph of the complaint. These demurrers, which challenged each paragraph of the complaint for want of facts, were overruled by the court, to which ruling the defendants "jointly and separately excepted." A trial of said cause resulted in a general verdict against appellee as to the Kirkpatrick Company and in favor of appellee against appellant. Appellant filed a motion for a new trial, which was overruled, and judgment was rendered on the verdict in favor of appellee. The errors assigned call in question the action of the court in overruling (1) the joint demurrer of appellant and said construction company to the amended complaint, (2) the separate demurrer of appellant to each paragraph of the amended complaint, and (3) appellant's motion for a new trial. The amended complaint is also challenged by an assignment that the same "does not state facts sufficient to constitute a cause of action."

Appellee insists that appellant's assignment of error predicated upon the exception taken by appellant to the rulings on the demurrers to each paragraph of the complaint presents no question as to the sufficiency of the paragraphs thereof; citing *City of South Bend v. Turner*, 156 Ind. 418, 421, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200. It will be observed that in the case cited the exception was joint, while in this case the defendants "jointly and separately excepted." It is clear, therefore, that the case cited is not in point here. The first paragraph of the amended complaint proceeds upon a common-law liability. Appellant was, on May 27, 1901, "a corporation owning and operating an interurban street railway extending from Irvington to Greenfield, in this state, and was a common carrier of passengers for hire. On said day appellee was an employé of appellant as a common laborer, and was engaged with divers others in constructing a spur from appellant's track to Spring Lake, a distance of three-fourths of a mile. Appellant had in use on said day a car known as a 'work car,' which had been and was used in

carrying its employes to divers points along said road where they were engaged and employed by appellant in building, maintaining, and repairing its said line of road. After said day's work had been finished, at about 6:30 p. m., appellee, with divers other employes of appellant, entered said work car on said spur for the purpose of being carried to Greenfield, where he resided. While he was in said car, and the same was standing on a switch of appellant's road, one of appellant's passenger cars in charge of its employes approached said switch from the west at a high and dangerous rate of speed, to wit, 30 miles per hour, and ran into and upon said switch and collided with said work car and injured appellee." In addition to the averments in the first paragraph of the amended complaint showing the above facts, there are other allegations showing that the collision and consequent injury of appellee were caused by the negligence and carelessness of appellant's employes in charge of said passenger car in not obeying the rules of appellant.

It is also alleged in said first paragraph that "the work in which appellee was engaged was common labor upon the tracks of appellant, and had no connection with, nor was the same in any manner incident to or a part of the work or employment of, said motorman or servants in charge of the passenger car; nor were the squad of laborers with whom said appellee was working as aforesaid, and who were with him in said work car, in any manner connected or associated with the said servants of appellant in charge of said work car or said passenger car which collided with it; that appellee had no charge of said work car or the operation thereof, but was simply a passenger thereon at the time of the accident." Appellee says that this "paragraph of the complaint proceeds upon a common-law liability," and that the same is sufficient, because it is alleged that his injury was occasioned by the negligence of other servants of the company, whose duties were not common nor in the same department with those of the appellee; citing *Fitzpatrick v. New Albany, etc., R. Co.*, 7 Ind. 436. It was held in the case cited and in *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339, 61 Am. Dec. 101, that a railroad company is liable to an employe for an injury occasioned by the negligence of other employes of the company where the duties of the latter, in connection with which the injury happens, are not common or in the same department with those of the injured servant. Those cases, however, were overruled on this point in *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174, 183, 99 Am. Dec. 615, where it was said concerning said rule: "But this limitation of the exemption of the company from liability in such cases is not recognized in any of the subsequent cases, and it is now settled in this state that the employer is not liable for an injury to one employe occasioned by

the negligence of another engaged in the same general undertaking. The *O. & M. R. Co. v. Tindall*, 18 Ind. 366, 74 Am. Dec. 259; *Wilson v. The Madison, etc., R. Co.*, 18 Ind. 226; *Slattery's Adm'r v. The Toledo & W. R. Co.*, 23 Ind. 81; *The O. & M. R. Co. v. Hammersley*, 28 Ind. 371. In *Slattery's Adm'r v. The Toledo & W. R. Co.*, supra, *Worden, J.*, quotes with approbation from the decision in *Wright v. The N. Y. Central R. Co.*, 25 N. Y. 562, as follows: 'Neither is it necessary, in order to bring a case within the general rule of exemption, that the servants, the one that suffers and the one that caused the injury, should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes, as in maintaining and operating a railroad, operating a factory, working a mine, or erecting a building. The question is whether they are under the same general control.' To the same effect is the case of *Manville v. The Cleveland, etc., R. Co.*, 11 Ohio St. 417, where it is said that 'those employed in facilitating the running of the trains by ballasting the track, removing obstructions, and those employed at stations attending to switches and other duties of a like nature upon the road, as well as those upon the trains operating, may all be well regarded as fellow servants in the common service.'" In *Gormley v. Ohio, etc., R. Co.*, 72 Ind. 31, a laborer, whose duty was to assist in repairing the track, etc., while being carried to his work on a hand car, was killed by a collision with a freight train. His death was occasioned by the negligence of the engineer in charge of the engine and said train. The court's attention was called to the cases of *Gillenwater v. Madison, etc., R. Co.*, supra, and *Fitzpatrick v. New Albany, etc., R. Co.*, supra, and on page 33 it was said: "The cases cited by counsel were not overlooked, but were referred to and explained or disapproved in the later cases. *Slattery's Adm'r v. The T. & W. R. Co.*, 23 Ind. 81; *The Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174; *Wilson v. The Madison, etc., R. Co.*, 18 Ind. 226; *The Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294 [10 Am. Rep. 111]; *Sullivan v. The T. W. & W. R. Co.*, 58 Ind. 26. These later cases are certainly not consistent with the ground on which it is sought to have a right of recovery in the appellant. If a hardship results from the application of the rule that an employer is not liable to one employe for an injury caused by another employe engaged in the same general undertaking, it is more fitting that the Legislature be invoked to give a remedy than that this court should undertake to introduce doubtful exceptions to a rule so clearly established." In *Evansville, etc., R. Co. v. Barnes*, 137 Ind. 306, 310, 36 N. E. 1092, the rule as stated in *Cleveland, etc., R. Co. v. Arnold*, supra, is quoted with

approval. The following cases are to the same effect: *Thacker v. Chicago, etc.*, R. Co., 159 Ind. 82, 85, 64 N. E. 605, 59 L. R. A. 792, and cases cited; *Thompson v. Citizens' Street R. Co.*, 152 Ind. 461, 469, 53 N. E. 462, and cases cited; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Spencer v. Ohio, etc.*, R. Co., 130 Ind. 181, 184, 29 N. E. 915, and cases cited; *Clark v. Pennsylvania Co.*, 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811, and cases cited; *Capper v. Louisville, etc.*, R. Co., 103 Ind. 305, 2 N. E. 749; *Indiana Ry. Co. v. Dailey*, 110 Ind. 75, 79, 80, 10 N. E. 631, and cases cited; *Sullivan v. Toledo, etc.*, R. Co., 58 Ind. 26, 27, 28; 1 *Woollen's Trial Proc.* §§ 350, 351; *Beach on Contributory Neg.* § 331. It is clear under the cases cited that appellee, an employé of appellant, engaged in common labor upon its track, was a fellow servant with those in charge of the passenger car.

It is a general rule in this state that employés, while being transported to and from their work on the cars of trains of their employers, are fellow servants of those engaged in the same general undertaking, and, if injured while being so carried by the negligence of a fellow servant, the employer is not liable therefor. *Bailey on M. & S.* pp. 283, 360, 361, and cases cited; *Ohio, etc.*, R. Co. v. *Hammersley*, 28 Ind. 371; *Wilson v. Madison, etc.*, R. Co., 18 Ind. 226, 230, and cases cited; *Capper v. Louisville, etc.*, R. Co., 103 Ind. 305, 308, 309, 2 N. E. 749, and cases cited; *Ohio, etc.*, R. Co. v. *Tindall*, 13 Ind. 366, 369, 74 Am. Dec. 259, and cases cited; *Gormley v. Ohio, etc.*, R. Co., 72 Ind. 31; *Bowles v. Indiana Railway Co.*, 27 Ind. App. 672, 675, 62 N. E. 94, 87 Am. Rep. 279, and cases cited; *Ewald v. Railway Co.*, 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178; *Gilman v. Eastern R. Co.*, 10 Allen, 233, 87 Am. Dec. 635; *Gillshannon v. Stony, etc.*, R. Co., 10 Cush. 228; *Ryan v. Cumberland, etc.*, R. Co., 23 Pa. 384; *Vick v. New York, etc.*, R. Co., 95 N. Y. 267, 47 Am. Rep. 36. The allegation that the work appellee was engaged in doing had no connection with, nor was in any way connected with or incident to, or a part of, the work or employment of the motorman or servants in charge of the passenger car, and the allegation that he was simply a passenger on the work car, and the allegation that appellant owed him a duty, and was bound to carry him safely, are mere conclusions of the pleader, and are not admitted by the demurrer, and cannot control the special facts alleged, which show that he was a fellow servant of those in charge of the passenger car. *Woollen's Trial Proc.* § 1037. It is true that if an employé is injured by the negligence of a fellow servant who is incompetent, and this incompetency is the proximate cause of the injury, the employer is liable therefor if he knew, or could by the exercise of ordinary care have known, of such incompetency, and the injured employé was not guilty of any negligence contributing

to his injury, and did not know and could not have known of such incompetency by the exercise of ordinary care. For if an injured employé has knowledge of the incompetency of his fellow servant by whose negligence he is injured, and enters the service with such knowledge, or continues therein after he obtains or could by the exercise of ordinary care have obtained such knowledge, he assumes the risks incident to such incompetency. *Lake Shore, etc.*, R. Co. v. *Stupak*, 108 Ind. 1, 5, 6, 8 N. E. 630, and cases cited; *Louisville, etc.*, R. Co. v. *Sandford*, 117 Ind. 265, 266-269, 19 N. E. 770, and cases cited; *Indianapolis, etc.*, R. Co. v. *Watson*, 114 Ind. 20, 25, 27, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578, and cases cited; *Indiana, etc.*, R. Co. v. *Dailey*, 110 Ind. 75, 81, 82, 10 N. E. 631; *Louisville, etc.*, R. Co. v. *Kemper*, 147 Ind. 561, 565-567, 47 N. E. 214, and cases cited; *Kroy v. Chicago, etc.*, R. Co., 32 Iowa, 357; 1 *Woollen's Trial Proc.* §§ 1347, 1348, 1352. No such facts were alleged in said paragraph. It follows that the court erred in overruling the demurrer to the first paragraph of the amended complaint.

The second paragraph of the amended complaint alleges that appellee's injury was caused by the negligence of the employé in charge of the switch in opening the same so as to allow the passenger car to enter thereon and collide with the work car. Conceding, without deciding, that this paragraph sufficiently charges the incompetency of the person in charge of said switch and appellant's knowledge thereof, it is not alleged that appellee did not know of such incompetency before the injury. For want of allegations negativing such knowledge on the part of appellee the paragraph was clearly insufficient. It is alleged in said paragraph that appellee was injured "without any fault or negligence on his part," but this does not take the place of averments showing that the risk of the incompetency of the person in charge of the switch was not knowingly assumed as an incident of his service. *Louisville, etc.*, R. Co. v. *Corps*, 124 Ind. 427, 428, 24 N. E. 1046, 8 L. R. A. 636; *Peerless Stone Co. v. Wray*, 143 Ind. 574-576, 42 N. E. 927; *Cleveland, etc.*, R. Co. v. *Parker*, 154 Ind. 153, 56 N. E. 86, and cases cited; *Bowles v. Indiana R. Co.*, 27 Ind. App. 672, 676, 62 N. E. 94, 87 Am. St. Rep. 279, and cases cited; *Woollen's Trial Proc.* § 1347.

The third paragraph of the amended complaint is founded upon the second subdivision of section 7083, *Burns' Rev. St.* 1901 (section 5206a, *Horner's Rev. St.* 1901), which provides: "That every railroad * * * shall be liable for damages for personal injuries suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence. * * * Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury

was bound to conform and did conform." In order to make a good complaint under this subdivision, it is necessary to allege, among other things, that the injured employé was conforming to the order or direction of some person in the service of the corporation to whose order or direction he was bound to conform and did conform, and that while conforming to such order or direction he was injured by the negligence of the employé to whose order he was conforming. *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 82, 90-93, 64 N. E. 605, 59 L. R. A. 792; *Louisville, etc., R. Co. v. Wagner*, 153 Ind. 420, 53 N. E. 927; *American Rolling Mill Co. v. Hullinger* (No. 20,100) 69 N. E. 460. It is alleged in said paragraph that on the 27th of May, 1901, appellee was in the service of appellant as a common laborer, and was directed by appellant to enter one of its cars about one mile west of Philadelphia for the purpose of being carried by appellant to the city of Greenfield; that appellee was bound to conform to the order and direction aforesaid, and that while on said car appellant negligently and carelessly ran one of its other cars into and caused the same to collide with the car which appellee had entered, whereby he was injured, etc. This paragraph is clearly insufficient. It is not shown that the employé by whose negligence he was injured was the one to whose order or direction he was bound to conform and was conforming when injured. Proof that appellee was injured while conforming to the order or direction of one employé, to whose order and direction he was bound to conform, and that his injury was caused by the negligence of another co-employé, who had no such authority, would sustain said allegations of the third paragraph, but would not make a case under said second subdivision of section 7083, *supra*.

In the fourth paragraph it is alleged that appellee, a laborer in the service of appellant, was directed to enter said work car for the purpose of being carried to Greenfield, and was thence carried to a siding; that at the time and place "where said car was side-tracked the switch was placed by appellant in charge of one of its servants, who then and there negligently and carelessly operated said switch so that another car of appellant ran into the same and collided with great force and violence with the car on said switch in which appellee was then riding, whereby he was injured, etc. * * * That said servant of appellant in charge of said switch as aforesaid was at the time and place acting in the place and performing the duties of said appellant, and that appellee was then and there obeying and conforming to the order of appellant at the time of such injury." It is evident from what we have already said that the allegations of said paragraph are not sufficient to avoid the effect of the common-law rule that an employé cannot recover for injuries caused by the negligence of a fellow servant. It is also clear

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from what was said in regard to the third paragraph that a cause of action is not stated under the second subdivision of section 7083, *Burns' Rev. St. 1901*, a part of the employers' liability act of 1893.

Neither does the allegation concerning the negligence of the person in charge of the switch state a cause of action under the fourth subdivision of the employer's liability act, for no liability is created by said subdivision for injuries caused by the negligence of persons in charge of a switch. *Baltimore, etc., R. Co. v. Little*, 149 Ind. 167, 48 N. E. 862. It is a well-settled rule that when a party seeks the benefit of a statute he must by averment and proof bring himself within its provisions. *American Rolling Mill Co. v. Hullinger* (this term) 69 N. E. 460; *Hodges v. Standard Wheel Co.*, 152 Ind. 680, 693, 52 N. E. 391, 54 N. E. 383; *Porter v. State*, 141 Ind. 488, 490, 40 N. E. 1061; *Weir v. State ex rel. Wohl* (this term) 68 N. E. 1023, 1024; *Goodwin v. Smith*, 72 Ind. 113, 116, 37 Am. Rep. 144; *Van Sickle v. Belknap*, 129 Ind. 558, 559, 28 N. E. 305; *Jackson School Tp. v. Farlow*, 75 Ind. 118, 120, 121; *Potts v. Felton*, 70 Ind. 163, 169; *Blanchard v. Wilbur*, 153 Ind. 387, 392, 55 N. E. 99; *Massey v. Dunlap*, 146 Ind. 350, 354, 355, 44 N. E. 641; *Chicago, etc., R. Co. v. Vert*, 24 Ind. App. 78, 81, 56 N. E. 139; *Baltimore, etc., R. Co. v. Harmon* (Ind. Sup.) 68 N. E. 589; *Toledo, etc., R. Co. v. Long* (Ind. Sup.) 67 N. E. 259; *Chicago, etc., R. Co. v. Glover*, 159 Ind. 166, 169, 62 N. E. 11. Said third and fourth paragraphs wholly fail to bring appellee within any of the provisions of the employer's liability act of 1893.

The fifth paragraph of complaint is predicated upon common-law liability, and proceeds upon the theory that the injury complained of was caused by the negligence of a motorman in the service of appellant, who was a reckless and incompetent motorman, and was known to be such by appellant long before the collision in which appellee was injured. It is not alleged in said paragraph that appellee had "no knowledge of the recklessness and incompetency of the motorman." Such an allegation is essential to the sufficiency of a paragraph predicated upon the incompetency of a fellow servant. True, it is alleged that the passenger car in charge of the motorman "collided with the car in which appellee was riding, whereby appellee, without any fault or negligence on his part, and without any knowledge of the careless and reckless conduct of said motorman in operating his said car, was thrown with great force and violence forward in said car," and thereby injured. The allegation that appellee was "without any knowledge of the careless and reckless conduct of said motorman in operating said car" means only that he had no knowledge of the careless and reckless manner in which the motorman was operating his car at the time of the collision. This is not equivalent to an allegation that appellee at and before the time of his injury

had no knowledge of the recklessness and incompetency of the motorman. *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1, 5, 8 N. E. 630. The averment of the want of knowledge on the part of the injured employé must be as broad as the allegation of knowledge on the part of the employer. *The Peerless Stone Co. v. Wray*, 143 Ind. 574-577, 42 N. E. 927. We have already shown that an allegation that appellee was without any fault or negligence on his part does not supply the place of averments showing that the risk of the incompetency of the motorman was not voluntarily assumed as an incident of his service.

It is alleged as against appellant in the sixth paragraph that appellee was in the service of appellant constructing a spur track from appellant's main line to Spring Lake, "and was and had been carried by defendant [appellant] from his home in Greenfield to and from his place of employment; that for the carrying of said plaintiff and his co-laborers to and from the point aforesaid the defendant had furnished a work car propelled by electricity; that it was so old and so negligently constructed and equipped that it could not be operated on the defendant's main line without great danger of collision with the other cars of defendant running between stations, or delaying the same in making their schedule time; that at the close of plaintiff's day's work and on said day he was ordered, directed, and invited by the defendant, by and through its authorized agents and employés, to enter into and upon said work car, to be carried from his place of employment to his said home in Greenfield aforesaid; that by reason of the said order, direction, and invitation of the defendant aforesaid, and directed and induced thereby, the plaintiff entered into and upon said car for the purpose of being carried as aforesaid to his said home aforesaid; that said car proceeded upon its course upon defendant's main track for some distance towards the said town of Greenfield, whereupon (by reason of its defective construction and equipment thereof) the defendant and its employés (were compelled to and did) run said car into and upon a side track of the defendant connecting with its main line to permit an incoming car to pass the same, and while said car was standing upon said track, and while the plaintiff was lawfully and rightfully in and upon said car for the purpose of being carried to his home aforesaid, the defendant negligently and carelessly by and through the negligence of its motorman, officers, agents, and employés in the control, management, and direction of said cars and the switchman in charge of said switch, and by reason of its negligent and defective rules and mode of keeping knowledge of and directing its cars, run another car with a speed of thirty miles per hour into and upon said switch, and into and upon the said car in which the plaintiff was situated as aforesaid, and upon, into, and against the plaintiff—all without any fault or

negligence of the plaintiff in any particular whatever." It cannot be held that said paragraph shows that appellant had failed to exercise ordinary care in "establishing and promulgating its rules, or in the mode of keeping knowledge of and directing its cars." There are no direct averments to that effect. Moreover, said allegations are mere conclusions of the pleader stated by way of recital. Facts, not conclusions, must be averred; and they must be pleaded directly and positively. It avails nothing as against a demurrer to aver conclusions or to plead facts by way of recital. *Nysewander v. Bowman*, 124 Ind. 584, 590, 24 N. E. 355; *Weir v. State ex rel.* (Ind. Sup.) 68 N. E. 1023, 1024, and cases cited; *Roberts v. Lovell*, 38 Wis. 211, 215; *Bliss on Code Pleading* (3d Ed.) § 818. In determining the sufficiency of said paragraph, therefore, we must eliminate the allegation in regard to "negligent and defective rules" and "mode of keeping knowledge of and directing their cars." If the negligent construction and equipment of the work car and the alleged great danger of operating it on the main line were the proximate cause of the injury, the same would be insufficient, because it is not alleged that appellee had no knowledge of the negligent construction and equipment of said work car, and the consequent danger of collision with other cars. In other words, to be sufficient on the ground of the negligent construction, etc., of the work car, the allegations must show that he has not assumed the risks incident to the defective construction of the work car of which he complains. It is evident, however, that the proximate cause of appellee's injuries was the running of another car "into and upon said work car," and not the negligent construction and equipment of said work car. What is alleged in regard to the age and negligent construction and equipment of the work car, and the danger of operating it on the main line, may therefore be disregarded.

Disregarding the conclusions, recitals, and allegations mentioned, said amended sixth paragraph charges that appellee's injuries were caused by the negligence of those "in the control, management, and direction of" the work car and the car which ran into it. The persons in charge of said cars, as we have already shown, were, regardless of the names or titles by which they were designated, fellow servants of appellee, and, if appellee was injured by their negligence as alleged, appellant was not liable therefor. It is a well-settled rule in this state that an employé who knows, or by the exercise of ordinary care could know, of any defects or imperfections in the place, ways, machinery, appliances, tools, or other things about which he is employed, or the want of capacity or the negligent habits of a fellow servant, and continues in the service without objection and without a promise of change, is presumed to have assumed the risks resulting from such defects or imperfections or fellow

servant's want of capacity or negligent habits, and cannot recover for injuries caused thereby. The rule does not require that the employé search for latent defects in the ways, machinery, appliances, tools, or other things about or with which he works, or the hidden dangers of the place where he is engaged in the line of his duty, but it goes to the extent that he assumes the consequences resulting from such defects as are patent, and such as are known to him, and such as by the exercise of ordinary care he could discover. *Wabash R. Co. v. Ray*, 152 Ind. 392, 400, 401, 51 N. E. 920. It has been uniformly held, therefore, that in an action by an employé against his employer for injuries received while in his employment, a complaint, to be sufficient, must allege that he had no knowledge of such defects or imperfections, or fellow servant's want of capacity, or negligent habits; and if he have such knowledge he must allege facts which show a sufficient reason for continuing in such employment. 1 *Woollen's Trial Proc.* §§ 1850, 1852, and cases cited; *Stone v. Bedford Quarries Co.*, 156 Ind. 432, 60 N. E. 35; *Hall v. Bedford Quarries Co.*, 156 Ind. 460, 60 N. E. 149; *Cleveland, etc., R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86, and cases cited; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 299, 300, 53 N. E. 235; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561, 47 N. E. 214, and cases cited; *Peerless Stone Co. v. Wray*, 143 Ind. 574-577, 42 N. E. 927, and cases cited; *Boone's Code Pleading*, § 169. Under this rule none of the paragraphs of the complaint states facts sufficient to constitute a cause of action at common law.

While it is sufficient to allege in the complaint a want of knowledge on the part of the injured employé, to sustain such allegation the evidence must show that the injured employé not only had no knowledge of the defect or imperfection in the machinery, appliances, tools, or other things about which he was employed, or of the fellow servant's incompetency or recklessness complained of, but could not have had such knowledge by the exercise of ordinary care. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 299, 300, 53 N. E. 235, and cases cited. In an instruction to the jury, however, it is error to say that want of knowledge on the part of the injured employé will enable him to recover against his employer, for this limits the employé's assumption of risk to things of which he has actual knowledge. If he had such knowledge, or could have had by the exercise of ordinary care, he cannot recover. It is error, therefore, in instructions to the jury to limit the injured employé's knowledge to actual knowledge; for implied knowledge, such as could have been acquired by the exercise of ordinary care, has the same force and effect as actual knowledge. *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 533-535, 53 N. E. 763, and cases cited; *Chicago, etc.,*

R. Co. v. Glover, 159 Ind. 166, 62 N. E. 11, and cases cited. For this reason two of the instructions given to the jury were erroneous.

As none of the paragraphs of complaint states a cause of action under the employer's liability act of 1893 (section 7083, *Burns' Rev. St.* 1901), it is unnecessary to decide whether or not said act, or any part thereof, applies to street and interurban railroads. For a discussion of this question, see *Sams v. St. Louis, etc., R. Co. (Mo.)* 73 S. W. 686, 61 L. R. A. 475; *Savannah, etc., Co. v. Williams (Ga.)* 43 S. E. 751, 61 L. R. A. 249; *Dresser's Employer's Liability Act*, § 80, pp. 349, 350, and cases cited. Other questions are argued, but, as they may not arise on another trial of the cause, they are not considered.

Judgment reversed, with instructions to sustain appellant's demurrer to each paragraph of the amended complaint.

(163 Ind. 34)

SCOTT et al. v. CITY OF LA PORTE et al.
(Supreme Court of Indiana. Jan. 27, 1904.)

Petition for rehearing denied.

For former opinion, see 68 N. E. 278.

Daniel Noyes and W. B. Biddle, for appellants. E. D. Salsbury, W. O. Ransburg, Weir, Weir & Darrow, O. H. Truesdale, M. R. Sutherland, H. S. Oakley, Smith, Duncan, Hornbrook & Smith, and H. W. Worden, for appellees.

GILLETT, C. J. Appellees have petitioned for a rehearing herein, and their counsel have filed able briefs in support of the petition. Their first complaint is that the case was decided upon a ground not formally urged by appellants' counsel. We are not advised of the absence of any averment in the complaint, or of any defect of proof, which would render the conclusion reached inadmissible, assuming its abstract correctness. The matter of fact on which our decision was based stood out upon the face of the proceedings, without and beyond dispute, and the only real difference between the position of the court and that of appellants' counsel was that we held that certain elements in the transaction constituted an unauthorized undertaking to stand sponsor for the success of the enterprise, while they contended that the transaction amounted to the creating of a debt. Having reached the conclusion we did as to the nature of the transaction, it was proper to consider as to the power of the municipality in the premises, and, if it were found that there was a want of power to enter into the contract, it was our duty not to permit ourselves to drift along the current of argument found in the briefs until we were confronted with the constitutional question. In the case of *Big Creek Stone Co. v. Seward*, 144 Ind. 205, 42 N. E. 464, 43 N. E. 5, where the cause had been reversed for a defect in the complaint

not pointed out by the counsel who prosecuted the appeal, it was said on rehearing, "When an error is presented by the record, the case is decided upon the record, and not upon the argument of counsel."

Our attention has been called by appellees' counsel to a number of sections of the statutes which it is claimed contain grants of power sufficiently broad to authorize a city to buy water for its use, and for that of its inhabitants. We have no disposition to take issue with counsel on the points thus made, since they are not involved in the question in hand. Our decision rests upon the proposition that it is not competent for a city, in contracting for a supply of water for its use, and also for that of the private water consumers therein, to bind itself for a term of years to buy, at a fixed price, at least a certain number of gallons per month. The statement in the opinion that the court judicially knew that the city of La Porte would be compelled to sell a large part of the 30,000,000 gallons of water that it had contracted to buy each month, had reference, not to the needs of the city and its inhabitants, but to that of the city proper; and the purpose of the statement was to guard against the inference that we were holding that the authorities might not determine the quantity of water that the city would consume for its own purposes. We were endeavoring to show by such statement that the purchase was for the use of private consumers as well—a use that, while it might exceed the amount the city had to sell, might also be much less, depending upon the population of the city in the future, the necessities of the private consumers, and their disposition to extend or refuse their patronage to the city in the matter of the purchase of water. But the observation as to our judicial knowledge was really unnecessary, since, as before shown, the title of the grant recited that the water was to be furnished "to the city of La Porte and its inhabitants."

As the opinion affirmatively discloses, what was therein said as to the want of power in a municipality to tax for a private purpose had no reference to the power of the city to make a contract which would secure to it and its inhabitants the means of obtaining a sufficient supply of wholesome water, but to the attempted equipping of a private corporation with a credit by a means unauthorized by law. Since the case turns on this proposition, we shall examine it somewhat more at length; first considering the matter as one of statutory interpretation and construction.

As said by Judge Dillon in his authoritative work on Municipal Corporations (section 89): "When it is remembered that the charter of such a corporation is its constitution, and gives to it all the powers it possesses, unless other statutes are applicable to it, its careful study, in any given case, is indispensable to an understanding of the nature

and extent of the powers it confers, the duties it enjoins, and liabilities it creates. The construction of its various provisions, and the determination of the relation which it bears to the general statutes of the state—how far the charter controls, or how far it is controlled by other legislation—are often among the most difficult problems which perplex the lawyer and the judge. The study of a question of corporation law begins with the charter, but it must oftentimes be pursued into the Constitution, the general statutes, and legislative policy of the state, and after this into the broad field of general jurisprudence." The express or direct powers of the city relative to the obtaining of a supply of water, so far as our examination has revealed, seem to relate to the constructing and establishing of waterworks by the city, or to authorizing a private corporation so to do. We do not mean to intimate that the above courses are the limit of the powers of cities of the general class in obtaining water. To do so would be to leave out of account the implications which may flow from some of the more general grants of authority. Just the precise breadth of the legislative grant to cities of the general class in the matter of obtaining water need not now be determined, but obstacles and difficulties in exercising powers fairly to be implied cannot operate to enlarge the authority as applied to a particular instance. *Grand Rapids, etc., Co. v. Grand Rapids, etc., Co.* (C. C.) 33 Fed. 659.

As to the question whether a city can contract to buy a definite quantity of water at a fixed price, to be furnished for its use and that of its inhabitants during a term of years, it is first to be considered that such a course has no direct authorization. The maxim, "*Expressio unius exclusio alterius*," has been frequently applied in the construction of grants of power to corporations, municipal and private. *First Presbyterian Church of Ft. Wayne v. City of Ft. Wayne*, 36 Ind. 338, 10 Am. Rep. 35; *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215; *Gaslight, etc., Co. v. City of New Albany*, 156 Ind. 406, 59 N. E. 176; *Mayor of Nashville v. Ray*, 19 Wall. 475, 22 L. Ed. 164; *People v. Utica Ins. Co.*, 15 Johns. 358, 383, 8 Am. Dec. 243; *New York, etc., Co. v. Ely*, 2 Cow. 678; *City of Ft. Scott v. Eads Brokerage Co.*, 117 Fed. 51, 54 C. C. A. 437; *Farmers, etc., Bank v. School District*, 6 Dak. 255, 42 N. W. 767. And see *City of Logansport v. Dykeman*, 116 Ind. 15, 17 N. E. 587; *Woodford v. Hamilton*, 139 Ind. 481, 39 N. E. 47; *Broom's Legal Maxims*, p. *664. This rule, however, is not necessarily to be applied to the extinguishment of powers implied from general grants, in cases where the specific provision is but a grant of discretionary authority, that, upon the whole, does not appear to have been intended to exclude a power to be implied from a more general grant. *Clark v. City of South Bend*, 85 Ind. 276, 44 Am.

Rep. 13. Whether the general grant is to be treated as limited by the direct legislation, may depend upon a number of considerations—as to whether the express power is couched in such terms as to make it fairly inferable that the statute was intended to establish the only method, whether such power seems reasonably adequate to meet the necessities of cities generally, upon the language of the general grant from which another method is sought to be implied, and upon the consideration as to whether the latter method is reasonable and fairly calculated to attain an authorized municipal end. See 20 Am. & Eng. Encyc. of Law (2d Ed.) 1142. Mr. Tiedeman says: "Express provisions in a charter or statute modify the inherent or conferred power to contract, and consequently deserve the carefullest consideration in determining the scope of the general powers. And, furthermore, too much emphasis cannot be given to the rule that any power to contract, whether conferred upon or inherent in the corporation, does not authorize the making of every sort of contract, but of such only as are fit, usual, and necessary to enable the corporation to carry into effect the purposes for which it was chartered." Mun. Corp. § 163. Section 3616, Burns' Rev. St. 1901, which is sometimes referred to as the equivalent of a general welfare clause, seems to be designed to enlarge the legislative powers of cities, rather than their contractual powers, except as the contractual element may exist in general ordinances, the provisions of which have been accepted by third persons. See *Citizens', etc., Co. v. Town of Elwood*, 114 Ind. 332, 16 N. E. 624. But ordinances passed under a general welfare clause must be reasonable, and not out of accord with the charter and recognized municipal usage.

As to the question whether the power to obtain water for the use of the city and its inhabitants can be implied, we should approach the question with the supposition that the Legislature had not intended to deny to the cities of the state enough power to meet adequately the demand for an element so essential to the well-being of a municipality as water. We only refer to the grant of express powers as evincing the fact that the agreement under consideration does not amount to the same thing, in its essence, but involves a wide and unnecessary departure therefrom. In this connection, it is material to consider the matter of usage. Suppose that the city were authorized, under one or more of its grants of power, to purchase water; is it not still to be implied that it is not authorized to buy in a manner wholly contrary to general municipal practice? In *Grant on Corporations*, 41, it is stated: "A settled usage will even go a long way to control the words of a charter." Judge Dillon, writing more at length upon the subject, says: "General and long-continued usage is not without its importance,

and usage of this character may be resorted to in aid of a proper construction of the charter or statute, but no further. If the language be uncertain or doubtful, a uniform, long-established, and unquestioned usage will be regarded by the courts in determining the mode in which powers may be exercised, and, to a reasonable extent, in determining the scope of the powers themselves." Mun. Corp. § 93. See, also, *King v. Mayor and Citizens of Chester*, 1 Maule & Selw. 101; *Frazier v. Warfield*, 13 Md. 279, 303; *Opinion of the Justices*, 155 Mass. 598, 30 N. E. 1142, 5 L. R. A. 809; 20 Am. & Eng. Ency. of Law (2d Ed.) 1141.

Counsel for appellees assert that we are not authorized to review the acts of the common council of La Porte on the ground that they are unreasonable. While this may be true when the council is acting within its chartered authority, yet the limitation must exist that a contract must involve a method that is directly and immediately appropriate to the attainment of proper municipal purpose, if the right is asserted as an implied power, for otherwise the implication fails. Many illustrations under indefinite grants of power might be used in support of this—as that a municipal corporation cannot become a surety; that it cannot expend money for objects foreign to the purposes of its organization; that it can buy property only for municipal requirements, and cannot issue commercial paper. "The power to make contracts, and to sue and be sued thereon, is usually conferred in general terms in the incorporating act. But where the power is conferred in this manner, it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and usual, fit and proper, to enable the corporation to carry into effect the purposes for which it was created." Dillon, Mun. Corp. § 443. And see *City of Lafayette v. Cox*, 5 Ind. 38; *Eichles v. Evansville, etc., R. Co.*, 78 Ind. 261, 41 Am. Rep. 561. Even the Legislature cannot authorize a municipality to purchase property as a mere matter of convenience to its inhabitants. In *Opinion of the Justices*, 155 Mass. 598, 30 N. E. 1142, 5 L. R. A. 809, the constitutional authority of the Legislature to authorize cities and towns to purchase coal and wood for the purpose of resale was denied, on the ground that the conducting of such a business was not a public service which could be authorized by the Legislature. The court distinguished its earlier opinion to the Legislature (*Opinion of the Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487), in which it was held that that body might authorize municipalities to erect gas and electric light works, on the ground that such undertakings were of a public character, since it would not be practicable for the inhabitants of cities and towns to furnish gas or electric light for themselves. For its own use, a city might, perhaps, con-

tract to take a fixed quantity of water, since the extent of its use might be fairly capable of ascertainment. But how is it to be reasonably approximated in advance how much water the inhabitants of a city will buy? If the calculation as to the needs of a city and its inhabitants has been too liberal, must the city nevertheless pay for water that cannot be used? If a city admits to its streets a corporation to furnish water, to supply that element to the inhabitants, it may fix maximum rates for the latter's benefit, but the city is not at any loss if patronage is refused. It is true that a lack of patronage might occasion a loss if the city were the owner of the works, but in the latter instance, besides having express legislative authority for the undertaking, it would, as owner, have the chance of profit as compensation for such chance of loss. It would be one proposition if the city had made a contract to pay a reasonable hydrant rental, and to pay for such water as it sold to its inhabitants, but it is a very different proposition for a city to throw itself into the breach by undertaking to furnish a market for 30,000,000 gallons of water a month, whether it shall be able to sell the overplus or not. This is the matter that we especially had in mind in asserting in the principal opinion that the transaction was an assumed underwriting of a financial project by a municipal corporation on behalf of a private corporation.

Counsel for appellants suggest that our statement that by means of said contract the La Porte Water Supply Company would be able to retire its bonded indebtedness of \$65,000 is too far within the bounds of truth to convey an adequate idea of the possibilities of the transaction. They suggest that the aggregate of these installments for the whole period of 21 years is \$226,000, and that the installments for 17 years, the period required for the maturity of all the bonds, would amount to \$183,600. Of course, it is possible to make out too good a case. It is evident that if the city retires the bonds as they mature, which will require, with interest, if paid at maturity, \$95,975, it will be the owner of the plant. If however, the city should default, and the property should be lost through foreclosure, then the municipality would be burdened for a term of years with the duty (the contract being enforceable) of raising, by such means as possible, the sum of \$10,800 a year for water purchased by it. If it be said that the transaction is shown by the evidence to be one that the city, if it faithfully applies the revenue derived from water rentals, may reasonably expect to be able to meet, the answer is that the city cannot, without legislative authority, enter into speculative transactions. This is no less than a contract in the nature of a suretyship—"a contract which carries with it a lesion by its very nature." Dillon, Mun. Corp. § 471; La. State Bank v.

New Orleans Nav. Co., 3 La. Ann. 204; Greenville Waterworks Co. v. City of Greenville (Miss.) 7 South. 409.

A further objection to the undertaking under consideration is that it savors of monopoly. It has been many times held, in language strongly evincing the prejudice of the courts against monopolistic agreements, that it is not competent for a city to grant the exclusive right to furnish light or water to its inhabitants. Indianapolis, etc., Co. v. Citizens', etc., Co., 127 Ind. 370, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; Westfield, etc., Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033; Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332, 16 N. E. 624; Washington Co. v. Beaufort Co., 81 N. C. 491; Thrift v. Board, 122 N. C. 37, 30 S. E. 849, 44 L. R. A. 427; Altgelt v. City of San Antonio (Tex. Sup.) 17 S. W. 75, 13 L. R. A. 383; City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143; Birmingham, etc., Co. v. Birmingham, 79 Ala. 465, 58 Am. Rep. 615; Norwich, etc., Co. v. Norwich City Gas Co., 25 Conn. 19. Here we find that the city has entered into an undertaking which, if held valid, would morally coerce it to refuse to permit competition so long as any doubt existed as to whether, notwithstanding competition, it could dispose of the excess of water over and above its own needs. If a city has become a part stockholder in a waterworks plant, as provided by statute, it may, if it owns a majority of the stock, so regulate water rents as to make them reasonable, and, if it loses such property by foreclosure, it may still invite competition for the supply of its inhabitants; but here, without legislative authority, the contract purports to inexorably bind the city to pay three cents for each thousand gallons of water furnished, and to take 30,000,000 of gallons of water per month for the term of 21 years; and, if the corporation passes into other hands, the city must continue, as a defensive measure, under all probable circumstances, to deny to its people for the entire period the right to test the market by inviting terms less burdensome than the city is required to exact to make itself whole.

We think that appellants were entitled to maintain injunction. It was the only prompt, direct, and efficacious remedy to prevent the consummation of an ultra vires act, which contingently threatened appellants, as taxpayers. The jurisdiction of equity over cases of this general nature is a growing one in code states, where law and equity are administered in the same court. We think, too, that injunction can be maintained on a principle analogous to that involved in a stockholders' bill. Dillon, Mun. Corp. §§ 908-916. See Adams v. City of Shelbyville, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484, and cases cited.

We have given a very careful consideration

to the learned briefs submitted on behalf of appellees' counsel, but their arguments have not led us to doubt the correctness of our original opinion. The petition for a rehearing is overruled.

(162 Ind. 69)

HENDERSHOT v. STATE ex rel. BENNETT.

(Supreme Court of Indiana. Jan. 28, 1904.)

STATUTES—AMENDMENT—TITLE—PUBLICATION—HEALTH OFFICERS—ELECTION—TIME.

1. Act Feb. 19, 1891 (Acts 1891, p. 15, c. 15), entitled "An act to establish a state board of health, defining its powers and duties, providing a system of registration and report of vital and sanitary statistics in connection therewith and prescribing the duties of certain officers in relation thereto; providing for town, city and county boards of health, prescribing penalties for the violation of the provisions thereof, fixing an appropriation for the expenses of the same, repealing acts in conflict therewith and declaring an emergency," was amended by Act Feb. 7, 1899 (Acts 1899, p. 17, c. 16), entitled "An act to amend" certain specified sections of an act entitled "An act to establish a state board of health, defining its powers and duties, providing a system of registration and report of vital and sanitary statistics in connection therewith and prescribing the duties of certain officers in relation thereto; fixing an appropriation for the expenses of the same, repealing acts in conflict therewith and declaring an emergency." *Held*, that the amendatory act did not set out the title of the amended act in full in its title, as required by Const. art. 4, § 21, and was therefore void.

2. Where a county board of health commissioners did not elect a secretary at their first meeting in December of a particular year, as required by Acts 1891, p. 15, c. 15, § 8, the board did not thereby lose jurisdiction to elect a secretary thereafter, but was entitled to elect such secretary at a subsequent meeting held after the beginning of the succeeding term.

3. Where the board of health commissioners of a county did not elect a secretary at its first meeting in December for the ensuing year, as required by Acts 1891, p. 15, c. 15, § 8, but elected a secretary at its first meeting in January after the commencement of the ensuing term, the person so elected was entitled to the office for the remainder of such term, since the board had no power to elect, except to exercise the power it had failed to exercise the previous December.

Appeal from Circuit Court, Perry County; C. W. Cook, Judge.

Quo warranto by the state, on the relation of James B. Bennett, against Claude T. Hendershot. From a judgment in favor of relator, respondent appeals. Affirmed.

Zoucher & Patrick, for appellant. W. A. Land and Esarey & Ewing, for appellee.

HADLEY, J. Quo warranto for possession of the office of secretary of the board of health of Perry county. It is disclosed by the pleadings that the term of appellant, as an incumbent of the office, expired on January 1, 1903, and on January 5, 1903, the relator was by the board of commissioners of the county duly elected as appellant's successor in said office. Judgment that the relator was entitled to the office.

But two questions are argued, both of

which arise upon the pleadings, and they are the only ones decided: (1) The constitutionality of an act of the General Assembly approved February 7, 1899 (Acts 1899, p. 17, c. 16), purporting to amend sections 5, 8, 9, 10, 14, and 15 of an act approved February 19, 1891 (Acts 1891, p. 15, c. 15); (2) whether the election of a secretary to a county board of health by the board of commissioners may be had on a day subsequent to that fixed by statute.

1. The question arises in this way: The relator was not at the time of his election "a graduate of a reputable medical college, recognized by the State Board of Medical Registration and Examination," and if the amendatory act of 1899, *supra*, is valid, he is by section 8, as amended, ineligible to hold the office, and, if the amendatory act is invalid and void, he is, under the act of 1891, eligible. The amendatory act is assailed as being in violation of section 21, art. 4, of the state Constitution, which reads thus: "No act shall ever be revised, or amended by mere reference to its title; but the act revised, or section amended shall be set forth, and published at full length." It is firmly established by the decisions of this court that, under this provision of the Constitution, to amend a statute, the title of the act amended must be set out in full, and the section as amended must be set forth and published at full length. *Lingquist v. State*, 153 Ind. 542, 55 N. E. 426, and cases cited. Tested by this exposition of the Constitution, the amendatory act of 1899, *supra*, must be held invalid, because it does not identify the act to be amended by setting out in full the title thereto. The failure is better shown by comparison. The title of the act of 1891 is as follows: "An act to establish a state board of health, defining its powers and duties, providing a system of registration and report of vital and sanitary statistics in connection therewith and prescribing the duties of certain officers in relation thereto; providing for town, city and county boards of health, prescribing penalties for the violation of the provisions thereof, fixing an appropriation for the expenses of the same, repealing acts in conflict therewith and declaring an emergency." That of the amendatory act in question reads thus: "An act to amend sections 5, 8, 9, 10, 14, 15 and 16 of an act entitled 'An act to establish a state board of health, defining its powers and duties, providing a system of registration and report of vital and sanitary statistics in connection therewith and prescribing the duties of certain officers in relation thereto; fixing an appropriation for the expenses of the same, repealing acts in conflict therewith and declaring an emergency.'" It will be noted that the words "providing for town, city and county boards of health, prescribing penalties for the violation of the provisions thereof," are omitted from the title of the later act. The infirmity produced by the omission is emphasized by the facts of this case, which

relate exclusively to a county board of health, while the proposition announced in the title of the amendatory act is to amend certain sections of a law which is limited to a state board of health. It is doubtful if this title would be sufficient in an original act to support legislation concerning town, city, and county boards of health; and it is entirely clear that in the office of identifying a particular statute relating to town, city, and county boards, for purpose of amendment, under section 21, art. 4, of the Constitution, it must be held inadequate. The absence of the omitted words from the title makes such a radical restriction and change in the general import of the title of the act of 1891 that we cannot attribute it to a clerical error, as is suggested. The amendatory act of 1899 being invalid leaves the act of 1891 in full force and effect.

2. It is not claimed that the relator was ineligible to the office of secretary under the provisions of the act of 1891, but it is insisted that the board of commissioners had no power to elect him at the time it undertook to do so. The act of 1891 provides (section 8) that the board of commissioners shall annually at their first meeting in December elect a secretary, who shall be the executive officer of the board of health, and who shall serve as such health officer for one year from the 1st of January next ensuing his election. No election was had or attempted by the commissioners at their December meeting, but at their first meeting in January, to wit, January 5, 1903, the relator's election, under which he claims, was consummated. Did this election entitle him to the possession of the office on January 14, 1903, when this proceeding was begun? For a most excellent reason, it seems to be held by the courts everywhere that when a duty is imposed by statute upon public officers which affects the rights or duties of others, and the time of its performance designated, the officers will not be relieved of the duty by their failure to perform on the date specified, unless the language of the statute is such that the designated time must be accepted as a limitation of the officers' power. In the absence of words of limitation, the prescribed time of performance will be regarded as directory only, and the duty to perform a continuing one subject to mandamus, by the party in interest, within a reasonable period. *Wampler v. State*, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829, and authorities cited; *Gallup v. Schmidt*, 154 Ind. 196, 204, 56 N. E. 443; *Sackett v. Foreman*, 74 Ind. 486; *Sutherland, St. Con. § 448*; *Endlich. Int. of St. § 436*; *Black on Int. of Laws*, p. 343. There are no words of limitation in the act of 1891, and nothing to indicate a legislative intent that, if the commissioners failed to elect at their first meeting in December, they should not do so at a subsequent time, and the case falls clearly within the rule announced. To hold the statute mandatory, and that the

election of a secretary could not take place at any other time than that designated in the statute, would be to place it within the power of the commissioners to prevent an election altogether, and thus at each election period subject them to the wiles and artifices of designing persons.

But appellant further insists that if the relator was eligible to the office, and his election legal, he cannot maintain this action for possession, because, having been elected January 5, 1903, the term for which he was elected did not begin till January 1, 1904. Again we are unable to sustain appellant's contention. The language of the statute relied upon is as follows: "They [board of commissioners] shall annually at their first meeting in December, elect a secretary, who shall be the executive officer of the board, and who shall serve as such health officer for one year from the first of January next ensuing his election." It does not admit of a doubt that the Legislature, in thus fixing the time for the commencement of the term, assumed that the commissioners would do their duty, and elect at the time appointed, and that it was intended that the term should begin in about one month after election, if the person elected should so soon qualify. We must have regard for the intention of the Legislature in construing the law, and avoid giving it an effect that it clearly did not intend. Under the law, it is the duty of the commissioners to elect annually in December, and because they failed to perform that duty in December, 1902, and postponed the election to January 5, 1903, did not excuse them from electing again in December, 1903; and, under the construction contended for, we have the absurdity of two persons being legally elected to the office of secretary for the same term, beginning January 1, 1904. On January 5th the commissioners had no power to elect, except to do what they had left undone on the first Monday in December previous. That which they left undone was to elect for the term beginning January 1, 1903, and for the purpose of identifying the term, as fixed by the Legislature, we must consider the election as relating to the time designated by the statute for its accomplishment. This construction gives the statute a practical effect, evidently in harmony with legislative intent, and avoids a long-continued vacancy, and a holding over for a full term.

Judgment affirmed.

(162 Ind. 69)

BOARD OF COM'RS OF CLINTON COUNTY v. DAVIS.

(Supreme Court of Indiana. Jan. 27, 1904.)

ELECTIONS — BRIBERY — REWARD FOR FURNISHING EVIDENCE — PLEADING — ANSWER — SUFFICIENCY.

1. A complaint in an action for a reward offered by statute need not allege that the services were rendered with knowledge of the reward, or with intention to recover the same.

2. Act March 4, 1899, § 2 (Acts 1899, p. 381, c. 166; Burns' Rev. St. 1901, § 2330), relating to bribery at elections or conventions, provides that "any person or persons having knowledge or information of the violation of the provisions of this act, who shall procure or furnish or cause to be procured or furnished the testimony * * * shall be entitled to a reward." Held, that such section should be construed so as not to contravene public policy, which forbids a vote buyer or vote seller to profit by his act, whether made a crime by statute or not, and hence, in the absence therein of an express provision entitling them to the benefit thereof, neither could recover the reward thereunder.

3. The fact that a paragraph of the answer purports to be only a partial answer does not render it insufficient as to such part if it alleges facts sufficient to constitute a defense.

Appeal from Superior Court, Tippecanoe County; H. H. Vinton, Judge.

Action by Robert Davis against the board of commissioners of the county of Clinton. From a judgment for plaintiff, defendant appeals. Reversed.

H. C. Sheridan, Hanly & Wood, D. S. Holman, and Benjamin Crane, for appellant. Palmer & Palmer, Stuart, Hammond & Simms, and Finley P. Mount, for appellee.

MONKS, J. This action was brought by appellee, under section 2 of the act of March 4, 1899 (Acts 1899, p. 381, c. 166; being section 2330, Burns' Rev. St. 1901), to recover nine separate rewards for furnishing information which secured the conviction of nine persons for a violation of section 1 of said act; being section 2329, Burns' Rev. St. 1901. It is provided by section 1 of said act of 1899 (being section 2329, supra) that "any one who sells, barter or offers to sell or barter his vote or offers to refrain from voting for any candidate or candidates at any general, special or primary election or convention, * * * or who shall accept any money, property or thing of value with the promise or pretense of voting for or refraining from voting for any candidate or candidates, shall upon conviction therefor be," etc. The second section (being section 2330, supra) provides that "any person or persons having knowledge or information of the violation of the provisions of this act, who shall procure or furnish or cause to be procured or furnished the testimony necessary to secure a conviction of the person or persons violating the same shall be entitled to a reward of \$100.00 payable out of the treasury of the county in which such conviction shall be had and the right to such reward shall be a valid claim against such county." Appellant's demurrer for want of facts to each of the nine paragraphs of complaint was overruled. Appellant filed an answer in five paragraphs, the first of which was a general denial. The court sustained appellee's demurrer for want of facts to each paragraph of answer, except the first. A trial of said cause resulted in a verdict, and, over a motion for a new trial, a judgment, in favor of appellee. The

court's rulings on the demurrers, and the action of the court in overruling appellant's motion for a new trial, are called in question by the assignment of errors.

It is claimed by appellee that the pleadings are not in the record, and that for this reason the judgment must be affirmed. The reasons urged by appellee to sustain this contention are the same as those set forth in Southern, etc., R. Co. v. Martin (Ind. Sup.) 66 N. E. 886, and Perry, etc., Co. v. Wilson (Ind. Sup.) 67 N. E. 183; and, upon the authority of those cases, we hold that the pleadings are properly in the record.

The objection urged against each paragraph of the complaint is that it is not averred that appellee "rendered the services with a knowledge that the reward was offered, or with the intention to recover the same." Such allegations are unnecessary in this state—at least, when the reward is offered in a public statute. Dawkins v. Sappington, 26 Ind. 199, 200; Board, etc., v. Wood, 39 Ind. 345, 351; Everman v. Hyman, 26 Ind. App. 165, 167-169, 28 N. E. 1022, 84 Am. St. Rep. 284, and cases cited. See, also, Auditor v. Ballard, 9 Bush, 572, 15 Am. Rep. 728; Eagle v. Smith, 4 Houst. 293.

It appears from the allegations of the second, third, fourth, and fifth paragraphs of answer that appellee procured each person named in the nine paragraphs of complaint to violate section 2329, Burns' Rev. St. 1901—to sell his vote; that he induced each of said persons to commit said crime; and in some of said paragraphs of answer it is alleged that he induced them to commit said crime with the intention of furnishing the testimony necessary to secure a conviction, and, when convicted, to recover from the county the reward provided by section 2330, Burns' Rev. St. 1901. Said paragraphs of answer proceed upon the theory that while the law offers a reward to any person who shall procure and furnish, or cause to be procured or furnished, the testimony necessary to secure a conviction of the offender, it was not intended to reward the person who bought the vote, or who procured the same to be done, or in any way aided or abetted therein. Appellee insists that the vote buyer comes within the terms of the statute, and for that reason the demurrer for want of facts was properly sustained to said paragraphs of answer. Said section 2330, supra, provides that "any person or persons having knowledge or information of the violation of the provisions of this act, who shall procure or furnish or cause to be procured or furnished the testimony * * * shall be entitled to a reward." As counsel for the parties do not challenge the validity of said section, we may, without considering that question, determine its proper interpretation. Lewis v. Albertson, 152 Ind. 693, 49 N. E. 34; Williams v. Citizens' Enterprise Co., 153 Ind. 496, 55 N. E. 425; Boyd v. Brazil Block Coal Co., 152 Ind. 543, 544, 49 N. E.

† 3. See Pleading, vol. 39, Cent. Dig. § 162.

797. The language employed is broad enough to include not only the vote buyer, as contended by appellee, but also the vote seller. Was this the legislative intent? The natural import of the words of a statute according to their common use, when applied to the subject-matter, is to be considered as expressing the legislative intent, unless it is repugnant to the acknowledged principles of justice and sound public policy, in which case the words ought to be restrained or enlarged so as to comport with those principles, unless the intention of the Legislature is clearly and manifestly expressed to the contrary. This is because it will not be presumed that the Legislature will violate principles of public policy, but, if such intention is clearly expressed, and is not obnoxious to any provision of the Constitution, it must have the force of law. Opinion of the Justices, 7 Mass. 523-526; *Hittinger v. Inhabitants of Westford*, 135 Mass. 253, 259; *Dixon v. Western Union Tel. Co.*, 68 Fed. 630, 634, 635; *Maxwell v. Collins*, 8 Ind. 38; *Black on Interpretation of Laws*, pp. 107, 108.

The Constitution of Massachusetts provided that the elector of a senator must be an inhabitant of the senatorial district in which he votes, and the elector for representative must have resided one year in the town before he could there be a voter. It was held in Opinion of Justices, 7 Mass. 524-526, that, while the words "inhabitants" and "residents" may comprehend aliens, they must be restrained to such inhabitants or residents as are citizens. The justices said at page 526: "This construction of the Constitution is analogous to that given to several statutes. Creditors may levy their execution on lands of the debtors, and hold them in fee simple, unless redeemed. Although the words of the statute are general, yet they are not deemed to include alien creditors. If they were so deemed, then, under color of a judgment and execution, the rule of the common law prohibiting an alien from holding lands against the commonwealth would be defeated. So a general provision is made for dower of widows, yet it is not supposed that a woman who is an alien can claim and have assigned to her dower in lands of her deceased husband." For this reason, it is held that a statute should not be so construed as to authorize or permit a man to be a judge in his own case, or to determine his right to an office of trust or profit, unless the act so declares in express words. *Day v. Savadge*, Hob. *85; *Queen v. Owens*, 2 El. & El. (Q. B.) 86, 91-93, 105 English O. L. Rep. 85, 90-92; *The Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93, 110; *Com. v. McCloskey*, 2 Rawle, 369, 372-376; *Black on Interp. Laws*, p. 107; 1 *Blackstone's Com.* *91; *Broom's Legal Maxims*, pp. 116-121. It was said in 1 *Blackstone's Com.* *91: "Thus, if an act of Parliament gives a man power to try all causes that arise in his manor of Dale, yet, if a cause should arise

in which he himself is a party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But if we would conceive it possible for Parliament to enact that he should try as well his own cases as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words as leave no doubt whether it is the intent of the legislature or no."

It has been held, upon grounds of public policy, that public corporations, such as counties, townships, cities, towns, school corporations, and public officers, are not subject to garnishment under a law providing that "all persons and corporations are subject to garnishment." To make such corporations and officers subject to garnishment, the act must so provide in express words. *Wallace v. Lawyer*, 54 Ind. 501, 505-506, 23 Am. Rep. 661, and cases cited; *Switzer v. City of Wellington*, 40 Kan. 250, 19 Pac. 620, 10 Am. St. Rep. 196, and note; *First Nat. Bank v. Ottawa*, 43 Kan. 295, 23 Pac. 485; *School Dist. v. Gage*, 39 Mich. 484, 33 Am. Rep. 421; *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276; *Dotterer v. Bowe*, 84 Ga. 769, 11 S. E. 896; *Mayor, etc., v. Root*, 8 Md. 95, 63 Am. Dec. 696a, and note; *Rood on Garnishment*, §§ 18, 19, 25, 26, 27; 2 *Shinn on Attachment & Garnishment*, §§ 500, 505.

It is also held, upon grounds of public policy, that a law which provides that "mechanics and all persons performing labor or furnishing materials for the construction or repair of any building may have a lien separately and jointly upon the building which they may have constructed or repaired * * * and upon the interest of the owner in the lot or land on which it stands," does not authorize such lien upon public property devoted to public use. *Board, etc., v. O'Conner*, 86 Ind. 531, 535-538, 44 Am. Rep. 338, and cases cited; *Fatout v. Board, etc.*, 102 Ind. 223, 231, 232, 1 N. E. 389; *Lowe v. Board, etc.*, 94 Ind. 553, and cases cited; *Secrist v. Board, etc.*, 100 Ind. 59; 2 *Dillon on Munic. Corp.* § 577. It was said by this court in *Board, etc., v. O'Conner*, 86 Ind. 536: "It is true that the statute of this state provides, in terms, for the acquisition and enforcement of a mechanic's lien upon and against any building; but, broad and comprehensive as are the provisions of the statute, it must be construed in such manner as will not contravene settled principles of public policy. * * * There is no provision to the effect that such lien may be acquired or enforced against public property held for public use, and, in the absence of such provision, we must hold * * * that such lien can neither be acquired nor enforced upon or against such property held for such use."

Courts, in construing offers of reward made for the apprehension of persons charged with crime, have uniformly held that a

ministerial officer, who, in the performance of his duties as such, apprehends the criminal, is not entitled to the reward. And in cases where rewards have been offered for the return of stolen property, it has been held that a sheriff or other peace officer who secured the property and returned it to the owner is not entitled to the reward, even though the offer was general to all persons. This is upon the ground that it is against public policy to allow a public officer for the discharge of his duties any compensation except that fixed by law. *Davies v. Burns*, 5 Allen, 349, 353; *Pool v. City of Boston*, 5 Cush. 219, 220, 221; *Warner v. Grace*, 14 Minn. 487 (Gil. 364); *Day v. Putnam Ins. Co.*, 16 Minn. 408 (Gil. 365); *Hatch v. Mann*, 15 Wend. 44; *Smith v. Whildin*, 10 Pa. 39, 49 Am. Dec. 572; *Gilmore v. Lewis*, 12 Ohio, 281; *Hogan v. Stophlet*, 179 Ill. 150, 156-160, 53 N. E. 604, 44 L. R. A. 809, and cases cited; *Stacy v. State Bank, etc.*, 5 Ill. 91; *Ring v. Devlin*, 68 Wis. 384, 32 N. W. 121; *Brown v. Godfrey*, 33 Vt. 120; *Lees v. Colgan*, 120 Cal. 262, 52 Pac. 502, 40 L. R. A. 355, and cases cited; *St. Louis, etc., R. Co. v. Grafton*, 51 Ark. 504, 11 S. W. 702, 14 Am. St. Rep. 68; *Russell's Application*, 51 Conn. 577, 50 Am. Rep. 55; *Smith v. Gentry (Ky.)*, 45 S. W. 515, 42 L. R. A. 302; *Miller v. Hogeboom*, 56 Neb. 434, 437, 76 N. W. 888; *Morrell v. Quarles*, 35 Ala. 544; *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1, and note, pp. 5-10.

It is a maxim of the law that no man shall be permitted to profit by, or take advantage of, his own wrong, or to found any claim upon his own iniquity. *Broom's Legal Maxims*, pp. 279-297. Under this maxim it has been uniformly held that a person who is connected with an alleged theft, either as a participator in the felonious taking, or in the concealing of the stolen goods, cannot recover a reward offered for their return. *Jenkins v. Kelren*, 12 Gray, 330, 332, 74 Am. Dec. 596. It is also held that any person who aids or abets in the commission of a crime, or advises or procures it to be committed, cannot recover a reward offered for the apprehension of the person who committed the same. *Hassan v. Doe*, 38 Me. 45; *Jenkins v. Kelren*, supra. Under this maxim, it is held that one who sets fire to his own building cannot recover the insurance thereon, and that a beneficiary in a life insurance policy, who murders the person insured, cannot recover on such policy. *Schmidt v. Northern Life Association*, 112 Iowa, 41, 44, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323, and cases cited; 51 Cent. Law J. 465, and note, 469, 470; *Insurance Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997.

It is true that in this case there was no statute making the purchase of votes a crime, and that we have no crimes in this

state except those provided by statute, but bribery at elections was a crime at common law, as to the bribe giver and the bribe taker. *Rex v. Pitt*, 3 Burrows' Repts. 1335, 1338-1340; 1 Russell on Crimes (6th Ed.) 444; *Cushing's Law & Prac. of Legislative Assemblies*, p. 70, § 189; *Baum v. State*, 157 Ind. 282, 285, 286, 61 N. E. 672, 55 L. R. A. 250, and authorities cited. While the one who buys or advises, aids or abets in, vote buying, or procures the same to be done, is not guilty of the crime of bribery, under section 2329, supra, such conduct is wrong and immoral. One who buys a vote commits a wrongful, immoral, and iniquitous act—a public wrong, because it affects the whole community. Public policy forbids that the vote buyer or vote seller should profit by such wrongful act, or found any claim upon such iniquity, whether made a crime by statute or not. Broad, therefore, as are the terms of said section 2330, supra, it must be construed so as not to contravene the principles of public policy. As said section 2330, supra, contains no express provision to the effect that the vote buyer and vote seller are entitled to the benefit thereof, it is clear, from what we have said, and the authorities cited, that neither can recover said reward, although he furnished the testimony which secured the conviction of the vote seller. *State v. Schoonover*, 135 Ind. 526, 35 N. E. 119, 21 L. R. A. 767, is cited by appellee as supporting the construction of section 2330, supra—that the vote buyer comes within its provisions. In that case the vote seller brought an action, under the act of 1889 (Acts 1889, pp. 360-363, c. 200; sections 6325-6339, Burns' Rev. St. 1894), to recover \$300 and attorney's fees from the person who bought his vote. That act, however, provided in express terms that the vote buyer, and those "aiding, abetting, counseling, encouraging or advising such acts [vote buying, etc.], shall thereby become liable jointly and severally to the vote seller in the sum of three hundred dollars and reasonable attorney's fees," in an action to be brought in the name of the state on the relation of the said vote seller. Said act was held constitutional, and the recovery by the vote seller thereunder against the vote buyer was sustained. Nothing that we have said or held in this case is in conflict with what was decided in *State v. Schoonover*, supra.

It is clear that the said paragraphs of answer were sufficient to withstand the demurrer for want of facts. As the fourth paragraph of answer alleges facts sufficient to constitute a defense to the action, the mere fact that it purports to be only a partial answer does not render it insufficient as to such part.

Judgment reversed, with instructions to overrule the demurrer to the second, third, fourth, and fifth paragraphs of answer.

362 Ind. 74)

HOWE v. WHITE et al.

(Supreme Court of Indiana. Jan. 28, 1904.)

APPEAL—BILL OF EXCEPTIONS—CERTIFICATE—SUFFICIENCY—GUARDIAN'S BOND—LIABILITIES OF SURETY—RIGHT TO DISCHARGE—INDEMNITY BONDS—MORTGAGES—RELEASE BY SINGLE MORTGAGEE—ESTOPPEL.

1. A long statement by the person who took down the evidence, interposed between the conclusion of a bill of exceptions and the certificate of the judge, while unnecessary and improper, does not vitiate the bill.

2. A certificate, following a memorandum signed by the judge (which stated that on April 19, 1902, the bill of exceptions was presented to him), showing that the person who signed the bill of exceptions was the judge before whom the cause was tried, that the bill contained all the evidence given in the cause, that it was presented to the judge March, 1902, and signed by him, and dated April 19, 1902, is sufficient, it being presumed that the memorandum and certificate were signed the same day, and constitute a single certificate.

3. A statement, in the certificate of the trial judge to the bill of exceptions, that after being signed by him it was filed with the clerk of said trial court, sufficiently indicated that the judge, after signing the bill, "caused it to be filed in the cause," as required by Burns' Rev. St. 1901, § 641.

4. The trial judge is not required to certify to the filing of a bill of exceptions, and any statement on that subject in his certificate is surplusage.

5. The fact that a bill of exceptions was filed in the cause, and the date of such filing, must be shown either by an entry of record or by the certificate of the clerk.

6. A clerk's certificate stating that the certificate attached to the transcript of the evidence was the certificate of the trial judge, and that the transcript and the bill of exceptions were afterwards filed in the clerk's office, sufficiently shows that the bill of exceptions was first signed by the trial judge and afterwards filed in the cause.

7. Sureties on a guardian's bond may pay the amount for which they are liable, without waiting for judgment to be recovered against them, as soon as liability, which the principal fails to meet, is found to exist.

8. Sureties on a guardian's bond are not liable for defalcations of the guardian occurring before the execution of the bonds signed by them.

9. Where several bonds were executed by different sureties at different times, conditioned for the faithful performance of a guardian's duties, and the guardian breached his bond, the sureties could not arbitrarily apportion among themselves the amounts to be paid by each, irrespective of the breach charged or the date when it occurred, and look to the guardian or indemnifying securities given by him for the repayment of the sum, thus expended by them, but, in order to hold the guardian or securities, each surety must show his individual legal liability on his particular bond for the sum actually paid by him.

10. The release of a mortgage by one mortgagee does not affect the rights of his co-mortgagee under the instrument.

11. The settlement of the accounts and discharge of a guardian does not create an estoppel against the surety on his bond, so as to preclude him from enforcing a claim under an indemnifying mortgage given by the guardian, where the surety in fact became liable for and paid a sum as such.

¶ 7. See Principal and Surety, vol. 40, Cent. Dig. § 643.

Appeal from Superior Court, Allen County; John H. Aiken, Judge.

Action by Frances M. Howe against Edward White and others. From the judgment rendered in favor of defendant White, plaintiff appeals. Transferred from Appellate Court under Burns' Rev. St. 1901, § 13371, cl. 2. Reversed.

See 67 N. E. 203.

Thomas E. Ellison and Hugh G. Keegan, for appellant. A. A. Purman, R. R. Purman, W. G. Colerick, Kenneth C. Larwill, and Guy Colerick, for appellees.

DOWLING, J. Action by appellant against appellees to quiet her title to lots Nos. 4 and 5 in Archer's Addition to the city of Ft. Wayne. The complaint was in the common form. John W. White, one of the appellees, disclaimed all interest in the lots. Edward White, the other appellee, filed an answer in denial, and, by a cross-complaint, asserted a mortgage lien upon the lots described in the complaint, and demanded a foreclosure of the same. The appellant filed a special answer to the cross-complaint, together with a general denial. Reply in denial. A trial by the court resulted in a finding in favor of the plaintiff below against John W. White, but against her upon the cross-complaint of Edward White. Motion by appellant for a new trial because of error in the assessment of the amount of the recovery, the insufficiency of the evidence to sustain the finding, and for the reason that the finding was contrary to law. Motion for a new trial overruled, and judgment on finding. Error is assigned upon the decision of the court overruling the motion for a new trial.

The questions presented on this appeal arise upon the evidence, and counsel for appellees earnestly contend that the evidence is not in the record. Their objections are that the bill of exceptions is not properly certified by the judge who tried the cause, that it appears that the bill was filed in the clerk's office before it was signed by the judge, and that it does not show that it contains all the evidence given in the cause.

The form of certificate to the bill of exceptions adopted in this case cannot be commended. It consists, largely, of recitals which are superfluous and useless. It is divided into two parts. The essential facts to be stated in the brief and simple certificate required of the trial judge may be discovered by diligent search among the unnecessary matters with which the certificate is incumbered. A long statement by a person who took down the evidence, interposed between the conclusion of the bill and the certificate of the judge, while unnecessary and improper, does not vitiate the bill. The first memorandum signed by the judge comes next after this superfluous paper, and states that on April 19, 1902, the bill of exceptions was presented to the judge. This memo-

randum is followed by a further statement which, stripped of its verblage, shows these facts: That the person who signs the bill is the judge before whom the cause was tried; that the bill of exceptions contains all the evidence given in the cause; that it was presented to the judge March —, 1902; and that it was signed by him. The additional statement is made in this certificate that the bill, after being signed by the judge, "was filed with the clerk of said trial court." The certificate is dated April 19, 1902, and the signature of the judge of the Superior Court of Allen county is attached. This certificate must be held sufficient. The two statements signed by the judge bear the same date, and it is to be presumed that they were signed on the same day. They may be treated as constituting a single certificate.

The recital in the certificate that the bill was "afterwards filed with the clerk" cannot be interpreted to mean that the filing preceded the signing of the bill. The statute seems to make it the duty of the judge to cause the bill to be filed after signing it. The provision is as follows: "When the record does not otherwise show the decision or grounds of objection thereto, the party objecting must, within such time as may be allowed, present to the judge a proper bill of exceptions, which, if true, he shall promptly sign and cause it to be filed in the cause; if not true, the judge shall correct, sign, and cause it to be filed without delay." Section 641, Burns' Rev. St. 1901. The statement in the certificate must be understood to indicate that, after signing the bill, the judge caused it to be filed as provided in section 641, *supra*. It appears from the record that the judgment was rendered March 22, 1902, and that the plaintiff below was allowed 90 days from that date in which to file her bill of exceptions. The certificate of the judge shows that the bill was presented to him April 19, 1902, and that it was signed by him the same day. This was within the time allowed by the court. The law does not require the trial judge to certify to the filing of the bill, and any statement on that subject in his certificate is mere surplusage, and amounts to nothing. The fact that the bill was filed in the cause, and the date of such filing, must be shown either by an entry of record or by the certificate of the clerk. The former is the better practice, but the latter has sometimes received the sanction of this court. *Indiana, etc., R. R. Co. v. Lynch*, 145 Ind. 1, 43 N. E. 934; *Richwine v. Jones*, 140 Ind. 289, 39 N. E. 460; *Miller v. Evansville & I. R. Co.*, 143 Ind. 570, 41 N. E. 801, 42 N. E. 806; *Gish v. Gish*, 7 Ind. App. 104, 34 N. E. 305; *Louisville, etc., R. Co. v. Terrell*, 12 Ind. App. 328, 39 N. E. 295; *Martin v. State*, 148 Ind. 519, 47 N. E. 930. It is true that no entry on the record shows the filing of the bill of exceptions in this cause, but the certificate of the clerk to the transcript states that the "certificate at-

tached to the said transcript of the evidence by John H. Aiken, judge of the superior court of Allen county, Indiana, is the certificate of the judge who tried said cause, and that said transcript and bill of exceptions were afterwards filed in my office on the 19th day of April, 1902." *Martin v. State*, 148 Ind. 519, 47 N. E. 930. We think it is sufficiently shown by the clerk's certificate that the bill of exceptions was first signed by the trial judge, and afterwards filed in the cause.

We proceed now to an examination of the error assigned. The material allegations of the cross-complaint of the appellee Edward White were as follows: That on September 17, 1894, the said Edward White, together with one James B. White, became sureties for one John Kalbus on a bond that day given by Kalbus to the state of Indiana, in the sum of \$700, conditioned for the faithful performance of his duties as guardian of the person and property of one Charles Kalbus; that on said day the said John Kalbus was the owner of the lots described in the complaint as Nos. 4 and 5 in Archer's Addition to the city of Ft. Wayne, and that on said day he executed to the said Edward White and James B. White a mortgage in the sum of \$1,000 on said lots, with the condition that he would secure the said Edward and James B. White against loss and expense, including attorney's fees, and save them harmless as sureties on the said bond; that said John Kalbus did not perform the condition of said mortgage; that on October 17, 1898, the Allen circuit court set aside the reports of the said John Kalbus theretofore made as guardian of the said Charles Kalbus, and ordered said guardian to pay to the clerk of said court \$506.20 for the use of his said ward, together with costs, amounting to the further sum of \$46.75, within 30 days; that the said Edward White, as such surety, was afterwards compelled to pay to the clerk of the Allen circuit court \$243.80 on account of his liability on said bond, with the further sum of \$22.50 costs, which sums, with interest thereon, are now due; that afterwards the said John Kalbus executed a mortgage to the appellant, Frances M. Howe, on the same real estate, by reason of which the appellant claims an interest in said lots, but that, if any such interest exists, it is inferior to the lien of the said Edward White; that said Edward White was compelled to employ attorneys to foreclose his said mortgage, and that \$100 is a reasonable fee for such service, etc. A copy of the mortgage was filed with the cross-complaint. The appellant, Mrs. Howe, filed her answer to the cross-complaint in two paragraphs, the first being a general denial. The second admitted the execution of the mortgage by Kalbus to Edward White and James B. White, and averred: That on February 27, 1896, the said sureties appeared in the Allen circuit court, and, upon their application, were re-

leased from all liability on said bond. That, on the same day, the Fidelity, Surety & Casualty Company of Maryland became the surety for the said John Kalbus. That afterwards, on March 9, 1896, the said John Kalbus resigned his trust as such guardian, and that he was discharged therefrom. That shortly thereafter the said James B. White and Edward White caused a release to be placed on the mortgage record on the margin of the copy of the mortgage to them, in these words: "We severally acknowledge full payment and satisfaction of the annexed mortgage, this 29th day of February, 1896. James B. White." That afterwards, relying upon the release of the said guardian and his sureties, and also upon the release of said mortgage, the plaintiff loaned to the said John Kalbus \$600, and took a mortgage upon said lots as security for said loan. That said Kalbus failed to repay said loan to her. That he afterwards executed a deed of said lots to Thomas E. Ellison, who conveyed the same by deed to the plaintiff. That no judgment was at any time rendered against the said Edward White in any case to which the said plaintiff was a party for any debt or default of the said John Kalbus, and that if the said Edward White ever paid anything for said Kalbus, as his surety on said bond, such payment was a voluntary one; and that the said Edward White is estopped from setting up any claim under the said mortgage. A reply in denial of this answer was filed by Edward White.

The controversy is upon the issues formed by the cross-complaint of Edward White, the second paragraph of the answer of the appellant thereto, and the reply. The proof showed that on March 20, 1893, John Kalbus was appointed by the Allen circuit court the guardian of Charles Kalbus, a person of unsound mind, and that he gave bond with August F. Schuch and others as his sureties. On September 17, 1894, he filed an additional bond in a penalty of \$700, with sureties whose names do not appear. On September 20, 1895, he filed a further bond in the sum of \$700, with James B. White and Edward White as sureties. On the — day of — he gave an additional bond in the sum of \$1,500, with the Fidelity, Surety & Casualty Company of Baltimore, Md., as surety. It was also proved that Kalbus continued to act as such guardian until March 9, 1896, when he resigned his trust. While acting as such guardian, he filed in said court three reports dated, respectively, September 20, 1894, October 24, 1895, and January 20, 1896, the last report being approved February 28, 1896. September 16, 1896, on petition of George Decker, who had been appointed guardian of the person and estate of the said Charles Kalbus, the order approving the last report of the former guardian, John Kalbus, was set aside, and, upon exceptions filed by said Decker to said report, the court found that there was due from said Kalbus, on ac-

count of the estate of his former ward, \$506.20, with costs, which sum said Kalbus was ordered to pay within 30 days. The court thereupon made the following order and entry of September 16, 1896: "In re Guardianship of Charles Kalbus. Comes now the Fidelity, Surety and Casualty Company of Maryland, John W. White, administrator of James B. White, deceased, and Edward White, August F. Schuch, and Alfred Daugherty, and pay into court the sum of \$506.20, and the further sum of \$47.65 on costs herein, being payment in full of all liability as sureties on the bond of said guardian, and ask the court to be discharged from further liability herein. It is therefore ordered by the court that said sureties be, and they are hereby, discharged from all further liability herein. And it is ordered by the court that the clerk of this court pay to said Charles Kalbus or his attorney the sum of \$518.71, and, upon taking his receipt therefor, be discharged from any further liability on account of the same." The sureties on the several bonds of John Kalbus, by an arrangement among themselves, paid into court the said sum of \$506.20, and the costs, taxed at \$47.65, in the following proportions: The Fidelity, Surety & Casualty Company, \$192.75 on the principal sum, and \$17.78 on the costs; Edward White, \$243.80 on principal, and \$22.50 on costs; August F. Schuch, \$69.65 on principal, and \$6.47 on costs. September 17, 1894, John Kalbus was the owner of lots 4 and 5 in Archer's Addition to the city of Ft. Wayne, Allen county, Ind., and on that day he executed to James B. White and Edward White a mortgage on said lots to secure them against loss and expense, including attorney's fees, and to save them harmless on the bond given to the state by Kalbus, as guardian of Charles Kalbus, to the extent of \$1,000, which amount the said Kalbus expressly agreed to pay, without relief from valuation or appraisal laws. The mortgage was duly recorded in the proper office within the time required by law. On the margin of the record of the said mortgage, the following entry appeared: "We severally acknowledge full payment and satisfaction of the annexed mortgage, this 29th day of February, 1896. James B. White. Attest: George W. Fickler, Recorder of Allen County." September 19, 1896, John Kalbus mortgaged the said lots numbered 4 and 5 in Archer's Addition, etc., to Mrs. Howe, the appellant herein, to secure the payment of a loan of \$600, evidenced by a note payable three years thereafter, with interest, and exchange on New York. This mortgage was duly recorded. September 19, 1896, John Kalbus conveyed these lots by quitclaim deed to Thomas E. Ellison, in consideration of \$1, and an agreement on the part of Ellison to save Kalbus harmless from the mortgage to Mrs. Howe. March 23, 1899, Ellison and wife, by quitclaim deed, conveyed the said lots to Frances M. Howe.

the appellant, for \$1, and Mrs. Howe thereupon canceled the mortgage executed to her by Kalbus.

It was not necessary that a judgment should be rendered against the appellee Edward White before payment by him of the amount for which he was liable on the bond of Kalbus. As soon as such liability was found to exist, if Kalbus, the principal in the bond, failed to pay it, his sureties on that bond, or any of them, had the right to pay the amount due, and to sue their principal, or to seek contribution from their co-sureties. But the proof shows that Kalbus gave at least three different bonds as guardian—one, at the time of his appointment, for \$1,200, on which August F. Schuch and Alfred Daugherty were sureties; one for \$700, September 17, 1894, on which James B. White and Edward White were sureties; and one February 27, 1896, for \$1,500, on which the Fidelity, Surety & Casualty Company was surety. The sureties on these several bonds were not liable for defalcations of the guardian occurring before the execution of the bonds signed by them respectively. *Parker v. Medsker*, 80 Ind. 155; *Moody v. State*, 84 Ind. 433. There might be a separate liability upon each bond, or the sureties on one bond only might be liable for the failure of the guardian to faithfully perform the duties of his trust. *Lowry v. State ex rel.*, 64 Ind. 421; *State ex rel. v. Sanders*, 62 Ind. 562; *Parker v. Medsker*, 80 Ind. 155; *Moody v. State*, 84 Ind. 433; *Williams v. State ex rel.*, 89 Ind. 570.

Whether Edward White was legally liable upon the bond executed by him as surety for any sum, and, if so, to what amount, depended upon the character of the breach charged, and the date when it occurred. Whenever the amount of that liability was ascertained, whether by a finding and judgment of a court or by an investigation of the accounts of the guardian, the surety had the right to pay the amount due, and to look to his principal in the bond, and any securities given by him, for repayment. But, in the absence of a judgment against him, he could recover against his principal in the bond only such sum as he should prove that he was liable to pay and that he had actually paid. If more than one bond was executed by the guardian, the sureties on each could pay and discharge the amount of the liability on the several bonds executed by them. But they could not arbitrarily apportion the amounts to be paid among themselves, without regard to the actual liability of their principal upon each separate bond. The amounts paid by the several sureties on the bonds executed by Kalbus may have been correctly apportioned, but there was no proof of that fact. The order of the court did not attempt to ascertain the extent of the liability of either principal or sureties upon the several bonds, but only the gross or total liability upon all the bonds. The appellee could

recover upon his mortgage only such sum as he was legally liable for, and actually paid upon the particular bond executed by him. What that amount was is not shown by the proof in the case. If he was liable for some amount on the bond executed by him and James B. White, the sum of such liability may be proved, and, if paid by the appellee Edward White, he can recover it in his action to foreclose his mortgage. The amount of that liability, however, must be established by other evidence than the order of the court declaring the total liability of Kalbus on all the bonds executed by him.

The release of the mortgage by James B. White, one of the mortgagees, did not affect the rights of Edward White under that instrument. Neither did the supposed settlement and discharge of Kalbus, as guardian, create an estoppel against Edward White to enforce his claim under his mortgage, if in fact he became liable as surety for some amount, and actually paid it.

The evidence in regard to the payment of the \$243.80 and costs by Edward White was singularly indefinite, but seemed to indicate that the amount paid was advanced for him by the administrator of his father's estate, and was charged against him as one of the heirs, in the account of the administrator. Giving this evidence the most favorable construction, and treating it as establishing the fact that Edward White paid \$243.80 on account of the total liability of John Kalbus as guardian, and \$22.50 as costs, the proof is not sufficient to sustain the finding in favor of the appellee Edward White, for the reason that there was no evidence that any part of this total liability of Kalbus was upon the bond signed by White as surety, or that the amount paid by White was the amount, or any part of the amount, for which he was liable as surety on that bond.

The motion for a new trial should have been sustained. Judgment reversed, with instructions to sustain the motion for a new trial, and for further proceedings in conformity to this opinion.

(32 Ind. App. 340)

LUSCH v. POOL et al.

(Appellate Court of Indiana, Division No. 1.
Jan. 28, 1904.)

APPEAL—ASSIGNMENTS OF ERROR—RECORD ON APPEAL.

1. Where a motion for a new trial on the ground that the verdict is contrary to law and the evidence is overruled, and the evidence is not in the record on appeal, no question is presented as to such ruling.

2. Where no motion was made for judgment on the answers of the jury to interrogatories, no question is presented on appeal by an assignment of error that, under the findings of fact by the jury, the appellant was entitled to judgment.

Appeal from Circuit Court, Huntington County; W. J. Vesey, Judge.

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1287.

Action by Mary A. Lusch against James Pool and others. Judgment for defendants, and plaintiff appeals. Affirmed.

B. M. Cobb, for appellant. J. E. K. France and J. Fred France, for appellees.

ROBINSON, J. Appellant sued to recover the difference between what she received for an interest in land and its actual value; claiming in her complaint that by misrepresentations and false and fraudulent statements made to her by the purchaser, Pool, and another, she was induced to deed the property for an inadequate consideration, and for a consideration unknown to her. Appellees had judgment.

Appellant's motion for a new trial on the ground that the verdict is contrary to law and the evidence, and that certain answers of the jury to interrogatories were contrary to the evidence, was overruled. As no attempt has been made to bring the evidence into the record, no question is presented upon the overruling of the motion for a new trial.

The second error assigned, that, "under the findings of fact by the jury, the appellant was entitled to judgment for a large sum, to wit, five hundred dollars," presents no question for review. No motion was made for judgment on the answers to the interrogatories notwithstanding the general verdict. Had such a motion been made, it must necessarily have been overruled, as the answers are not only not in irreconcilable conflict with the general verdict, but they tend to support the verdict.

Judgment affirmed.

(32 Ind. App. 362)

SMITH v. SUTTON et al.

(Appellate Court of Indiana, Division No. 1. Jan. 20, 1904.)

APPEAL—TRANSCRIPT—RULE REQUIRING INDEX—DISMISSAL.

1. On appellant's failure to comply with Appellate Court Rule No. 3, requiring the transcript to be paged, and an index prepared, the appeal will be dismissed.

Appeal from Circuit Court, Randolph County; A. O. Marsh, Judge.

Action between Lewis K. Smith and Ruth W. Sutton and others. From the judgment said Smith appeals. Appeal dismissed.

Theodore Shockney, for appellant. Engle, Caldwell & Parry, for appellees.

BLACK, J. Rule 3 of this court, in force since November 26, 1900, requires, amongst other things, that the appellant shall cause the transcript of the record on appeal to be paged at the bottom, and that the appellant shall prepare an index referring to the initial page of the direct, cross and re-examination of each witness, and of each pleading, exhibit, and other paper in the record, such index to form the first page of the transcript. The transcript in this cause, with the

appellant's assignment of errors, was filed in this court November 26, 1902. The appeal having been dismissed because of the failure to file his brief within the time limited, as provided in rule 21 of this court, it was reinstated on the appellant's application. In the appellees' brief, filed April 30, 1903, attention was called to the failure of the appellant to comply with the above-mentioned requirements of rule 3. The appellant has not sought or attempted to remedy these faults, or either of them, in the preparation of the transcript. The rule prescribes requirements with the force of law, and we are not at liberty to ignore it, or to treat its violation as a matter of no importance. *State ex rel., etc., v. Lankford*, 158 Ind. 34, 62 N. E. 624; *Dixon v. Poe*, 158 Ind. 54, 62 N. E. 628.

Appeal dismissed.

(32 Ind. App. 265)

GODFREY et al. v. WHITE et al.*

(Appellate Court of Indiana, Division No. 1. Jan. 26, 1904.)

JUDGMENT—COLLATERAL ATTACK—JURISDICTION—DESCRIPTION IN MORTGAGE.

1. The record of a domestic court of general jurisdiction being silent as to whether it had jurisdiction of defendants in an action in which judgment was rendered against them, such judgment may not be attacked, on the ground of want of such jurisdiction, in an action to revive it.

2. Jurisdiction over defendants in an action in which judgment was rendered against them is shown by the agreement of the parties in the record of the action for stay of execution.

3. The description of the land in a mortgage and the decree of foreclosure is sufficient, where the sheriff can readily ascertain the land ordered to be sold by him, and the surveyor can easily locate it.

Appeal from Circuit Court, Allen County; W. J. Vesey, Judge.

Action by John W. White, administrator, against George Godfrey and others. From a judgment for plaintiff and one defendant, the other defendants appeal. Affirmed.

C. A. Hays and Robert Lowry, for appellants. Walpole G. Colerick, Kenneth C. Larwill, and Guy Colerick, for appellee White. W. H. Shambaugh, for appellee Alden.

HENLEY, C. J. This was an action originally commenced by James B. White to revive a judgment entered in his favor in the Allen circuit court on October 25, 1876. The judgment was on four notes executed to him by James R. Godfrey and Archange Godfrey, and for the foreclosure of four mortgages given to the said White by James R. Godfrey and Archange Godfrey, his wife, on real estate owned by the wife, which mortgages were given to secure the payment of the above mentioned notes. The mortgagors above named were the sole defendants in the action which resulted in the judgment and decree of foreclosure. This judgment remained dormant, without any effort being made to collect it by execution or order of

* 1. See Judgment, vol. 20, Cent. Dig. § 331.

*Rehearing denied.

sale, until January 8, 1890, when this action was commenced to revive it. Prior to the last-mentioned day, Archange Godfrey died, and her heirs were made defendants to the action to revive, as were also all other persons who held liens on the real estate affected by the decree of foreclosure. After the action to revive was commenced, the original plaintiff, James B. White, died, and John W. White, the administrator of his estate, was substituted as plaintiff. James R. Godfrey, one of the defendants, also died, and the administrator of said Godfrey's estate and his heirs at law were substituted in his place as defendants in the action. It is shown by the complaint that James B. White on February 8, 1882, sold and assigned twelve-fifteenths of the judgment rendered in his favor to twelve different persons, who were grandchildren of James R. and Archange Godfrey, assigning and transferring to each one fifteenth part of the judgment, and that afterward eight of such purchasers sold and assigned their interests in the judgment to one Carrie S. Alden, and four of them, through their guardians, and acting under the order of the Allen circuit court, sold and assigned their interests in the judgment to James B. White; thereby vesting in White the ownership of seven-fifteenths of the judgment, being the three-fifteenths which he had not sold, and the four-fifteenths which he had purchased. The appellants answered the complaint in three paragraphs. The first paragraph of answer was a general denial. The second alleged, in substance, that Archange Godfrey, deceased, who was the owner of the real estate described in the mortgages, executed them as security for her husband, James B. Godfrey, and that she was not served with summons in the original action, and had not appeared thereto, and that the decree of foreclosure against her was void. The third paragraph alleged, in addition to the averments contained in the second paragraph, that the said Archange Godfrey was an Indian; that she derived her title to the real estate so mortgaged by descent from one John B. Richardville, to whom the same had been granted by the United States under a treaty with the Miami Tribe of Indians, of which tribe he was a member, and that the mortgages had been executed by her and her husband without the consent of the President of the United States, and that the execution of the same had never been approved by the President; and that the decree of foreclosure had been rendered without the court having jurisdiction of her person, by reason of her not having been served with process therein, and not having appeared to the action. A reply of general denial was filed by the appellants. A cross-complaint was filed by Carrie S. Alden, in which the same averments were made, as constituting a ground for revival of the judgment, as were stated by the appellee White in his complaint. The

answers filed by appellants to the cross-complaint of Carrie S. Alden were, with the exception of the fourth, the same as were filed to the complaint of the appellee White. The fourth paragraph of answer to appellee Alden's cross-complaint averred that the assignment of the interests set up in the cross-complaint were procured to be made to her by Samuel R. Alden, her husband, and that he paid the only consideration that was ever paid the assignors, or either of them therefor, by rendering services as their attorney in transactions between them and said Archange Godfrey in her lifetime, and the further payment by said Alden to each of them of the amount of \$50; that said payments were made while the said Samuel R. Alden was acting as their attorney, and that he took said assignments in the name of Carrie S. Alden without her having paid anything therefor, and that the value of each of the interests so assigned was greatly in excess of the amount of the consideration so paid, and the value of the services so rendered; and that each of said interests were worth \$800 in excess of the entire consideration received. There was a reply in general denial to each of the affirmative paragraphs of answer to the cross-complaint. The trial was by the court, and resulted in a finding and judgment for the appellee White and for the cross-complainant, Carrie S. Alden, that they were entitled to a revival of the judgment, and an order of sale for the enforcement of the decree of foreclosure, and that execution issue thereon for the amount of the former judgment and decree, with interest from its rendition; and it was ordered that a copy of the original decree and of the decree thus rendered be issued by the clerk, and that the lands described in said decree, containing 320 acres, or so much thereof as might be necessary, be sold, without relief from valuation and appraisal laws, and the proceeds applied in the payment of the costs of the former suit and of this suit, and of the amount of the judgment and decree so ordered to be revived, together with interest thereon from the 25th day of October, 1876.

The principal question to be determined in this appeal is whether or not the trial court had jurisdiction of the defendants in the suit wherein the original judgment was rendered. It is not, of course, denied but that the court had jurisdiction of the subject-matter of the action; but the claim of counsel for appellants is that the judgment was rendered without the court having jurisdiction of the defendants, because it is asserted that the record does not show that any summons was ever issued in the action wherein the judgment was rendered, and served on the judgment defendants, or that they appeared to the action in person or by attorney; and it is contended that for this reason the judgment is void. We think the position taken by counsel for appellants can-

not be maintained, and that the judgment upon such a state of facts as is presented by the answers is, at most, voidable. It is not claimed that the record of the judgment discloses that the court rendering it did not have jurisdiction over the judgment defendants, but, at most, that the record on the subject of jurisdiction, or the acts necessary to confer jurisdiction, was silent. This being true, the firmly established rule must prevail, that, where the record of a domestic court of general jurisdiction is silent, jurisdiction is presumed, and that, where a court of general jurisdiction is cognizant of the matter in controversy and of the parties, its decree is binding upon all other courts until it is reversed or set aside by a proper proceeding, and that it cannot be attacked collaterally, and that it is conclusive as to all matters therein embraced. *Bateman v. Miller*, 118 Ind. 345, 21 N. E. 292; *Anderson v. Wilson*, 100 Ind. 402; *Dwiggins v. Cook*, 71 Ind. 579; *McCormick v. Webster*, 89 Ind. 105; *Slms v. Gay*, 109 Ind. 501, 9 N. E. 120. In *Castetter, Adm'r, v. State, ex rel. Bradburn*, 112 Ind. 445, 14 N. E. 388, the court said: " * * * Since it appears that judgment was rendered by a court of competent and general jurisdiction, we must presume, in favor of the regularity of its proceedings, that the court had, by notice duly served, or by an appearance in court, acquired jurisdiction over the person of the relatrix. This is according to the rule that where a proceeding in a court of general or supreme jurisdiction is of such a character that upon final action the court should, from the nature of the case, ascertain whether it is such in fact that it has jurisdiction to act as it is invoked to do, and it does so act, its judgment cannot be collaterally questioned, unless it affirmatively appears that the subject-matter was without its jurisdiction, or that it did not have jurisdiction over the persons affected by the judgment." In *First National Bank of Indianapolis v. Hanna, Adm'r*, 12 Ind. App. 240, 39 N. E. 1054, it is held that the presumption is that a court of general jurisdiction had jurisdiction of a person who seeks to set aside its decree, whether such decree contained a recital of jurisdictional facts or not; the court saying: "The court will be presumed to have done its duty, and this includes the presumption that all parties affected by the judgment and decree were properly before it, and were duly served with process." In the early case of *Horne et al. v. Doe*, 1 Ind. 130, 48 Am. Dec. 355, the court said "that, where the record discloses nothing upon the point, jurisdiction of the person and of the subject-matter will—the contrary not being proven—be presumed in cases of domestic judgment of courts of general jurisdiction, where they come collaterally in question." In the case of *Crane et al. v. Kimmer et al.*, 77 Ind. 215, the court said: "In the case of *Cole v. Allen*, supra [51 Ind. 122], the record did not show that any process had

been served, and there was no process appearing in the record, for which error the cause was reversed. The court held in this case and others that, when the judgment is by default, the record must contain the process, with the return of the sheriff of service indorsed thereon, to show that the court had jurisdiction of the defendants, or upon appeal the judgment will be reversed." Citing cases. This is where the judgment is brought in review by appeal, but where the judgment is collaterally attacked a different rule obtains. In that case, if the record states that process has been duly served, that is sufficient, or, if the record says nothing about process, the circuit court being the court of general jurisdiction, it will be presumed that process has been duly served, and that the court had properly acquired jurisdiction over the persons of the defendants." In the case of *Comparet et al. v. Hanna et al.*, 34 Ind. 74, which was an action to revive a judgment by writ of *scire facias*, where it affirmatively appeared upon the face of the record of the judgment sought to be revived that the court rendering the judgment had not acquired jurisdiction of the judgment defendants in any way—the court holding, in effect, that such a proceeding would be void as against the judgment defendants upon a proper plea by them—the court said: "When, however, the judgment or proceedings of a court of general jurisdiction come collaterally in question, and the record discloses nothing upon the point, jurisdiction of the person, the contrary not being shown, will be presumed." In *Harman v. Moore*, 112 Ind. 221, 18 N. E. 718, the court said: "Where the record of a court of general jurisdiction, either affirmatively, or by the presumptions which attach to it, shows that the judgment has been rendered against a party over whom the court had acquired jurisdiction, any attack, the sole purpose of which is to have the judgment declared void by showing facts and circumstances dehors the record, is a collateral attack. It has often been decided that such an attack cannot be successfully made by the party to the judgment."

Under the settled rule of law, as applied to the facts shown by the record in the case at bar, the presumption must be indulged that the court had jurisdiction of the judgment defendants, and that the judgment so rendered cannot be attacked in the manner here attempted by a party to the record. The answers in this case, which seek to set up as a defense to the action that the court had not jurisdiction to render the judgment, were held sufficient by the trial court, and this action of the trial court is not questioned upon appeal. Whether or not the answers stated a defense, they at least formed an issue which was tried, and upon which appellee introduced evidence. The evidence so introduced, we think, conclusively proves that the judgment defendants were in court, personally and by attorney. It was also shown—and

the same appears as a part of the record in this case—that a certain agreement was entered into by the plaintiff and defendants in the action which resulted in the judgment here sought to be revived, by which agreement, in consideration of certain things to be done by the judgment defendants, the plaintiff agreed to suspend for a certain length of time the issuing of execution and order of sale on such judgment; and this agreement between the parties to the action was made in open court by the parties thereto, and spread upon the order book of said court, and made a part of the decree. In the case of *Brake v. Stewart*, 88 Ind. 422—it being a case where the defendant was not served with summons, and did not personally appear—the Supreme Court said: "But in the present case the complaint shows that the court had jurisdiction of the subject-matter of the foreclosure suit, and the record shows that the judgment was in accordance with the relief demanded; and the record contains, also, the following statement at the end of the judgment: 'And it is agreed by the parties that execution shall not issue herein for six months, unless ordered by said Elisha Stewart.' It appears by this statement that the parties were in court, recognizing the validity of the judgment, by making an agreement for a stay of execution. This sufficiently shows jurisdiction of the court over the persons of the defendants. It shows that they were present in court at the rendition of the judgment, and agreeing to its terms with the proviso for a stay of execution."

Neither the power nor authority of D. H. Colerick as the attorney for Archange Godfrey was questioned, and his appearance for her was *prima facie* evidence of his authority to so appear. *Castle v. Bell*, 145 Ind. 11, 44 N. E. 2. We must conclude that the record of the judgment shows upon its face that the court had jurisdiction of the defendant Archange Godfrey; and, in addition to this, the evidence introduced by appellee was sufficient upon which the court could have found that the said Archange had been personally served with the summons to appear to the action.

It is also contended by counsel for appellants that the description of the real estate in the mortgage and decree is so defective as to render the judgment of no effect. The description of the real estate is clearly sufficient. The sheriff of the county could readily ascertain the parcel of real estate ordered to be sold by him, and the surveyor could easily locate it. This being true, the description was sufficient, under the decisions of our courts. *Collins v. Dresslar*, 133 Ind. 292, 32 N. E. 883, and cases cited; *Edens v. Miller*, 147 Ind. 211, 46 N. E. 526; *Stevens v. Flannagan*, 131 Ind. 126, 30 N. E. 898.

We have carefully examined all the questions raised by counsel for appellants presented by the record in this case, and find no reversible error. Judgment affirmed.

(32 Ind. App. 287)

INDIANA & OHIO LIVE STOCK INS. CO. v. BENDER et al.

(Appellate Court of Indiana, Division No. 2.
Jan. 26, 1904.)

SURETIES—DISCHARGE—FAILURE TO DISCLOSE EMBEZZLEMENT OF AGENT—WAIVER OF PERFORMANCE.

1. One who, as agent of an insurance company, had been guilty of embezzlement, was appointed agent of a new company formed with the same stockholders and officers, and it took a bond for faithful performance of his contract of employment, without giving the sureties notice of his embezzlement, of which it had knowledge. *Held* that the sureties were not bound.

2. Sureties on the bond of an agent for faithful performance of his contract, which provides that collections made by him shall be turned over to the employer at the end of each month, are discharged, if not having enforced this, though knowing its funds were being misappropriated by him.

Appeal from Superior Court, Marion County; John L. McMaster, Judge.

Action by the Indiana & Ohio Live Stock Insurance Company against Conrad Bender and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Baker & Daniels and F. P. Mount, for appellant. Daniel Wait Howe, for appellees.

ROBY, J. Action by appellant on bond, judgment for appellees. The first five assignments of error are based upon the action of the trial court in overruling demurrers to separate paragraphs of appellees' answer. A special finding of facts was made, and conclusions of law stated thereon, to each of which conclusions appellant duly excepted. The questions arising upon demurrer to the answers, so far as they are relevant to the facts, are presented by the assignment of error based upon the conclusions of law, and it is therefore unnecessary to consider them as made upon the pleadings. *Woodward v. Mitchell*, 140 Ind. 406-407, 39 N. E. 437; *Forgy v. Harvey*, 151 Ind. 507, 51 N. E. 1086; *Smith v. Mfg. Co.*, 148 Ind. 333, 46 N. E. 1000.

The facts as exhibited by the findings are: The Indiana Live Stock Investment Company was organized in 1888 under the law of the state, for the purpose of insuring live stock. In 1890 Solomon Leapold was appointed a local agent for Marion county, with authority to take and forward applications for insurance to the company, which, if it approved the risks, issued and mailed policies to him for delivery, he collecting premiums thereon, and accounting therefor to the company; receiving for his services 27½ per cent. of such premiums. The amount of premium was charged to him on the company's books when the policy was forwarded, and he was credited with the commission thereon. Further credits on the general account so kept were made when he paid money or returned policies for cancellation. 'On the 1st of each

¶ 1. See *Principal and Surety*, vol. 46, Cent. Dig. § 57.

month a statement was sent to him, showing all charges and credits with the balance due. On March 10, 1893, the appellant company was incorporated, beginning business May 1st. Its stockholders were identical with the stockholders of the stock investment company above referred to, both as to persons and amounts. It had the same officers and employes. Its office was at the same place, and its business was the insurance of live stock; its purpose being to cover the same field. For convenience the prior corporation is referred to as the "Old Company." The old company ceased writing policies the last day of April of said year, but continued its organization for the purpose of paying losses and winding up its business. The appellant did not succeed to its assets, nor assume its liabilities, but its stockholders withdrew a portion of its assets as dividends, and applied the same to the payment of stock in the appellant company. The main purpose of the change being to take advantage of legislation relative to such business. On May 1, 1893, said Leapold was appointed agent for appellant, with the same powers and duties as under the old company. He was not under bond to the old company, but appellant required from him a bond with sureties conditioned for the faithful performance of his agreements and engagements "in the foregoing agreement." The bond in suit was attached to an agency contract between appellant and Leapold, hereafter referred to. E. M. Brewer was adjuster of both companies, his duties being to adjust losses, supervise agents, and see that they faithfully accounted. The bond sued upon was prepared by Brewer, and handed to Leapold, who said he would have it signed by sureties who were financially good, but did not inform Brewer who any of the persons he expected to get as sureties were. The instrument was made by filling blanks in a printed form. It was filled up and handed to Leapold at Indianapolis, and two days later received by Brewer at the same city, it then bearing the names of appellees. Brewer examined the tax duplicate as to the financial standing of the sureties, satisfied himself that it was sufficient, and deposited the instrument in the defendant's home office at Crawfordsville, it accepting the bond, all within three or four days after May 1, 1893. Neither appellant nor any of its officers had any acquaintance with any of appellees until some time after the bond was taken, but knew that all of them resided at Indianapolis. No communication was had with any of appellees on May 1st, or for many months thereafter, nor did such officers see any of appellees during such period. No one acting for the company knew who the sureties were to be until Leapold delivered the bond; and appellant did not directly or indirectly request any of them to sign it, but it was signed by them at Leapold's request in appellant's absence. The only direction given by Brewer was to get the names of

persons who were good financially. Leapold entered upon the employment of appellant under the terms of the contract contained in the said instrument on May 1, 1893, and continued therein until he was discharged August 6, 1894. The appellees, in signing said bond, relied upon the terms of the agency contract included therein. When Leapold was appointed agent for appellant he was indebted to the old company, on account of his agency for it, in the sum of \$4,919.53, as appellant and its officers knew. During April, 1893, he paid nothing to appellant, although the net premiums with which he was chargeable amounted to \$943.16 upon 126 policies forwarded to him upon applications received from him. Neither Leapold nor appellant, its officers or agents, gave appellees notice of his indebtedness to the old company, and they had no notice thereof until after Leapold's death, and no inquiry was made by them relative thereto. During the six months following May 1, 1893, appellant delivered 500 policies to Leapold, charging therefor upon its books and in its monthly statements to him \$5,661.94. The gross premiums thereon deducted on account of commission and other credits left \$3,694.71 still due. The only cash paid by him during such period was \$85, paid in August. During the same period he remitted to Henry Naylor, who was bookkeeper for both corporations, \$1,040 in cash, directing that the sum be applied on his indebtedness to the old company, and it was so applied. Naylor did not know from what source such money was secured. Leapold had no other income during the period than that derived from his agency for appellant, and the court infers that the amount so paid was received by him on business done for appellant. On February 1, 1894, Leapold's balance to the old company was \$3,500, for which he then executed his note, with indorsers other than appellees. Such note is unpaid, and probably worthless. The failure of Leapold to pay on account to appellant began May 1, 1893, and continued until August 1894. Appellant's system of bookkeeping exhibited the names of policy holders, the serial number of policies, and the amount of premiums. In sending money Leapold did not designate what particular premium it represented, except when sent in connection with a canceled policy. At the close of each month it rendered him a detailed statement of his account, showing the balance due and all items and details thereof. The gross premiums on policies written by him averaged \$10.87 on each policy, and the net premiums averaged \$7.88.

During the six months following May 1, 1893, appellant's adjuster had frequent interviews with Leapold, urging him to pay the balance due. In some of the first interviews Leapold claimed that many of the policies sent to him had not been delivered, and that he had failed to make collections. November 1, 1893, the adjuster became more

pressing, and insisted that undelivered policies be sent in and credited. Many of the persons insured were known by the appellant to be solvent business men. It made no inquiry of any of them as to the payment of premiums to Leopold, nor was any demand made upon him to exhibit undelivered policies. When Leopold executed the \$3,500 note he admitted that he had converted said amount. Afterward the adjuster heard of his squandering money collected in drinking, and probably in gambling, and reported such information to appellant. Afterward, and before August 6, 1894, the adjuster several times threatened Leopold that, unless the indebtedness was reduced, he would inform the sureties of it. Leopold begged him not to do so, and stated that if he did he would kill himself. These facts were reported to appellant, and pursuant to the request of Leopold, and his promise to pay off the indebtedness as rapidly as he could, neither appellant nor its adjuster communicated the fact of such indebtedness to appellees. On August 6, 1894, Leopold admitted the conversion of the amount charged against him, and was discharged, being at once re-employed, jointly with his son, who was to handle the money. On November 22d appellee Kahn was notified by appellant of the amount of said indebtedness. Prior thereto he had no notice thereof, nor was any notice given to the other appellees, nor did they have any knowledge of the indebtedness, nor that Leopold had been discharged at any time after the execution of the bond, until after Leopold's death, which occurred January 20, 1895. No monthly settlement was had by appellant with Leopold, as provided by the contract. Just prior to his discharge appellee Kahn asked to be released from further liability, and thereupon appellant demanded an accounting from Leopold, who paid \$250, and admitted that the rest of the money had been used for his own purposes. Appellees made no inquiry at the time relative to the state of his accounts. Appellant knew nothing about the financial standing of Leopold prior to May 1, 1893, and relied upon the bond in suit. He was insolvent at all times, and left no estate. He had no source of revenue except the insurance business during the entire time referred to herein. The monthly statements rendered after May 1, 1893, did not include the old account or balance. Payment of the amount due from Leopold was demanded from appellees prior to the institution of this action. Such sum is due and unpaid. The appellant knew Leopold was a defaulter to the old company when the bond in suit was executed. It also knew that he was a defaulter to it on July 1, 1893. His indebtedness on that day amounted to \$1,830.85. Appellant did not discharge him, nor notify the sureties of his default, "and the court finds that such failure * * * was an act of bad faith on the part of plaintiff toward said defendants,

and was a fraud on their rights as sureties."

The agency contract and the bond in suit must be considered and construed together. *Williams v. Markland*, 15 Ind. App. 669-671, 44 N. E. 562; *Jenkins v. Phillips*, 18 Ind. App. 582, 48 N. E. 651. The terms of the bond with Leopold and appellees were as follows: "In consideration of the foregoing appointment of Leopold as agent, * * * and of the compensation to be paid said agent under the foregoing agreement, we undertake and agree to and with said company that said Leopold will faithfully and fully perform all engagements and agreements in the foregoing agreement, * * * and hereby bind ourselves jointly and severally with said agent for the full performance of all said agreements." This contract was one of suretyship, and not of guaranty. *Lumber Co. v. Rice*, 23 Ind. App. 586, 55 N. E. 808; *Wheeler v. Rohrer*, 21 Ind. App. 477, 52 N. E. 780; *Durand v. Rockwell*, 23 Ind. App. 13, 54 N. E. 771. The facts found show that the agent, at the time of the execution of the bond in suit, was guilty of embezzlement as defined by statute. Section 2022, Burns' Rev. St. 1901. The intent necessary thereto is inferable from the failure to pay to them at any time either the funds of the old company or appellant's funds, such failure being considered in connection with the circumstances shown and statements made by the agent relative thereto. His conduct as agent for the old company cannot, in view of the peculiar facts of this case, be disassociated from appellant. The effect of the defalcation was not different than it would be had there been no change in the corporate name or organization. Where an employé has been guilty of criminal conduct or conduct implying moral turpitude in the employment on account of which a bond for his faithful discharge of duty is about to be taken, the employer and obligee having knowledge thereof, his duty, as stated by the Court of Appeals of New Jersey, is "to disclose the past malpractices of such employé in the course of the business to which the guaranty relates; and, if such duty is not performed, the instrument so taken is ipso facto invalid. The continuance of an agent in an employment is an act so expressive of trust and confidence that it is tantamount to an express declaration to that effect; and hence it must, under usual circumstances, have all the effect of a meditated fraud, if the person so retaining the agent can be permitted to disown the implications inevitably arising from his own conduct." *Sooy v. State*, 39 N. J. Law, 135-147. "The bad faith in withholding from the guarantor such information, so material to the risk assumed, is manifested not only by the fact that the dishonest character of the agent was peculiarly within the knowledge of the principal; but the holding of him out as a person entitled to confidence by continuing him in the service was equivalent to a declaration that the principal had no knowl-

edge of the dishonesty of the agent." *Dinsmore v. Tidball*, 34 Ohio St. 411-418. The doctrine stated is supported by the following, among many cases that could be cited, the facts involved being in line with those in the case at bar and the reasoning therein contained cogent. *Franklin Bank v. Cooper*, 36 Me. 179-196; *Ins. Co. v. Chase*, 72 Vt. 179, 47 Atl. 825; *Graves v. Bank*, 73 Ky. 35, 19 Am. Rep. 50; *Smith v. Josselyn*, 40 Ohio St. 409; *Ins. Co. v. Salmon* (Sup.) 36 N. Y. Supp. 830; *Wilson v. Town of Monticello*, 85 Ind. 10-17. The preparation of an agency contract and bond and its delivery for the purpose of enabling the agent to procure suretyship of such persons as he might be able to induce to take the risk, were acts affirmative in nature, and were calculated to obscure the facts and mislead the sureties, whoever they might be. Appellant's insistence that it did not know who was to sign the bond, and had no opportunity to communicate its special information to them, cannot be regarded. It is neither necessary nor competent, in view of the findings, to consider the duty of the employer, where the facts, known to him, and reflecting upon the integrity of his employé, fall short of establishing criminality.

A further proposition pertinent to the facts has been stated by the Supreme Court as follows: "That the retention in service of one whose conduct and fidelity are guaranteed by another, after knowledge by the employer of his dishonesty, or defalcation, or other misconduct, which renders him unfit for the place, without disclosing the fact to the guarantor, is such a fraud upon the latter as will discharge him from all subsequent liability, is well settled." *La Rose v. Bank*, 102 Ind. 332-343, 1 N. E. 805. In the language of Bleckley, J., of the Supreme Court of Georgia: "When a thief is detected, confidence ought to be withdrawn, at least until those who are likely to be injured by his larcenies have been warned. To persist in supplying him with money after he has made up his mind to steal, and you know it, is contrary to sound morality, unless you mean to bear the loss yourself." *Railroad v. Gow*, 59 Ga. 685-694, 27 Am. Rep. 403. The following cases sustain the proposition stated in *La Rose v. Bank*, supra: *Insurance Co. v. Maria J. Callahan*, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475; *Insurance Co. v. Surety Co.*, 93 Cal. 13, 28 Pac. 842; *Insurance Co. v. Watson*, 76 Minn. 387-390, 79 N. W. 601, 77 Am. St. Rep. 657; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599. The liability of a surety is, as has often been decided, strictly limited to the terms of the contract executed by him. He has the right to stand upon the precise terms of the contract, and if a variation is made without his consent it is fatal, although he sustains no injury thereby. *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232. Where

the contract is for the payment of money at a stated and definite time, mere forbearance to sue when the debt becomes due does not release the surety. *Kirby v. Studebaker*, 15 Ind. 45; *Barnes v. Mowry*, 129 Ind. 569, 28 N. E. 535, and cases cited; *McKecknie v. Ward*, 58 N. Y. 541, 17 Am. Rep. 281. The agency contract for the performance of which appellees became sureties in the case was a continuing one. *Jenkins v. Phillips*, 18 Ind. App. 562, 48 N. E. 651; *McKecknie v. Ward*, supra. According to its terms, "all collections made on any account, or money received from any source, for said company by said agent during any month shall be by him promptly paid over to said company at the end thereof, and all moneys so collected for said company shall be held by said Leopold, and be and remain the money of said company, and shall be held by said Leopold in a fiduciary capacity only." The findings show an utter disregard of this part of the contract persisted in month after month by appellant, when it knew that its funds were being misappropriated by the agent. The waiver of such payments has been held to be a departure from the contract to secure the performance of which bond was given, and therefore to discharge the sureties on such bond from liability. *Fidelity, etc., v. Dewey* (Minn.) 86 N. W. 423, 54 L. R. A. 945; *Burley v. Hitt*, 54 Mo. App. 272; *Rapp v. Ina Co.*, 118 Ill. 390, 55 Am. Rep. 427; *Morrison v. Arona*, 65 Minn. 321, 68 N. W. 33; *Board v. Branham* (C. C.) 57 Fed. 179; *Bragg v. Shain*, 49 Cal. 131.

Each of the three propositions stated are applicable to the facts found, and, taken collectively, it seems to be reasonably apparent that appellant ought not at this time to require appellees to make good the loss, and that the conclusions stated by the trial court were not incorrect.

It is argued in support of the assignment of error based upon the action of the court in overruling the motion for a new trial that there was no evidence to support the finding that appellant had knowledge of the various delinquencies of the agent. Such findings are based upon inferences drawn by the court from facts proven, and it cannot be said that they were not fair inferences.

Judgment affirmed.

(33 Ind. App. 174)

MEROM GRAVEL CO. v. PEARSON et al.¹

(Appellate Court of Indiana, Division No. 2
Jan. 28, 1904.)

HIGHWAYS — ESTABLISHMENT — OBJECTIONS — ISSUES — SUBMISSION — DESCRIPTION — BURDEN OF PROOF — APPEAL — PRESUMPTIONS.

1. Where, in proceedings for the establishment of a highway, objector moved to strike the finding and report of viewers that the proposed highway would be of public utility, etc., and from an order establishing the highway objector appealed, and in the circuit court renewed its motion to strike out the report, which

¹Affirmed and mandate modified on rehearing, 71 N. E. 54.

motion was again overruled, whereupon it filed an answer, which denied only the public utility of the proposed highway, the refusal of the court to submit any other question than that of public utility was proper.

2. A report of viewers in highway opening proceedings, reciting that the highway was to be 30 feet in width, and was to commence at a place where a public highway intersects the section line on the west side of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 21, township 7 N., range 10 W., running thence south to the southwest corner of said section 21, joining to the public highway on the west side of section line of section 28, township and range aforesaid, was not defective for insufficiency of description.

3. Where objectors in highway opening proceedings claimed that the description in the viewers' report was written after the report had been filed, and without the viewers' knowledge, and that the report was insufficient for want of a description, the burden was on the objectors to prove such fact in the commissioners' court.

4. Though a verified motion was filed in the circuit court to strike out the report of highway viewers for want of a sufficient description of the highway, and alleged that the description in the report was written after the report was filed, without the viewers' consent, an order overruling such motion would be presumed correct on appeal in the absence of a bill of exceptions showing what evidence was introduced in support of the motion.

Appeal from Circuit Court, Sullivan County; Wm. R. Nesbit, Special Judge.

Proceedings by James J. Pearson and others for the establishment of a highway in which the Merom Gravel Company filed objections. From a judgment in favor of petitioners, objector appeals. Affirmed.

Wm. T. Douthitt and John T. & Will H. Hays, for appellant. C. D. Hunt, for appellees.

ROBY, J. Appellees petitioned the board of commissioners of Sullivan county, at their May term, 1901, for the establishment of a highway in said county. Viewers were appointed, and at the June term reported in favor thereof. Appellant thereupon objected to the report for these reasons: First, that it "does not show that said viewers proceeded to lay out and mark said highway upon any ground anywhere"; second, that when said report was filed it "contained no description whatever, but the said report has been changed by some one in the absence of said viewers so as to include a description which was not placed there by said viewers, or with their knowledge or consent"; third, that "said proposed highway has not been laid out or marked upon the best ground or upon any ground." This objection was overruled. Appellant thereupon filed a remonstrance asking that other viewers be appointed, but stating no grounds of remonstrance. Reviewers were appointed as asked, and ordered to report upon the question of public utility. Such report was made, finding that the proposed highway would be of public utility. From an order establishing it, appellant appealed, and in the circuit court renewed its motion to

strike out the report, which motion was again overruled. It then filed an answer denying the public utility of the proposed highway. The issue was submitted to a jury. Verdict for appellees. Motions for a venire de novo and for a new trial were overruled. Judgment on verdict.

The court refused to submit to the jury the question as to whether the highway was laid out, marked, or located by the original viewers, submitting to it the single question of public utility. In the case of *Trittip v. Beaver*, 155 Ind. 652, 58 N. E. 1034, the practice upon appeal from the commissioners' to the circuit court was reviewed, and a clear and definite statement of the practice made. The case was one for the establishment of a drain, but its reason makes it equally authoritative in the pending proceeding. The petition, the report of the viewers and reviewers, are considered as the plaintiff's complaint; the remonstrance as the defendant's answer; and such facts as are not controverted by the remonstrance stand admitted. The issue made by this remonstrance went only to public utility, and the court did not err in restricting the trial to such issue.

The third assignment of error is to the effect that the court erred in overruling said motion to strike out said report. Treating this report as a part of the complaint, the correctness of the ruling made is presented. The report is in part as follows: "We met as directed in the order hereunto attached and made a part hereof, and, after being duly qualified as appears therein, proceeded to view such proposed highway in the manner as by the law prescribed, which by routes and bounds, course and distance, is as follows, to wit: The said proposed highway to be thirty (30) feet in width, and commences at the place where a public highway intersects the section line on the west side of the northwest quarter of the southwest quarter of section twenty-one (21), township seven (7) north, range ten (10) west, running thence south to the southwest corner of said section twenty-one (21), joining to the public highway on the west side of section line of section twenty-eight (28), township and range aforesaid." The description of the highway therein contained is sufficient. *Campbell v. Fogg*, 182 Ind. 1, 81 N. E. 454; *Mossman v. Forrest*, 27 Ind. 233.

As to the further ground that such description was written in the report after it had been filed, and without the knowledge or consent of the viewers, it need only be said that the fact involved was primarily for the board and for the court. Appellant did not, so far as appears, offer any proof by affidavit or otherwise in the commissioners' court as to the truth of the statement, which devolved upon him to prove. *Blemel v. Shattuck*, 123 Ind. 498, 33 N. E. 277; *Denton v. Thompson*, 136 Ind. 446, 35 N. E. 264. Its motion filed in the circuit was verified, but,

in the absence of any bill of exceptions showing what evidence was presented, the presumption must be in favor of the correctness of the ruling.

Judgment affirmed.

(32 Ind. App. 281)

WATSON v. ADAMS.

(Appellate Court of Indiana, Division No. 2.
Jan. 28, 1904.)

CUTTING TIMBER—PAROL LICENSE—CONSIDERATION—PERFORMANCE—REVOCATION—TIME—FORFEITURE—PLEADING—AMENDMENT.

1. A parol license to cut timber on the lands of another which had been acted on, and granted on a consideration which has been performed by the licensee, could not be revoked for the latter's failure to remove the timber within the time limited, where there was no provision in the contract forfeiting the timber on the expiration of the time, and the landowner did not notify the licensee, prior to the expiration thereof, that time was of the essence of the contract.

2. In a suit to restrain the cutting of timber on plaintiff's land, defendant could not prove a license in justification under a general denial.

3. Where, in a suit to restrain defendant from cutting timber on plaintiff's land, plaintiff testified to the granting of a parol license to defendant, under which the latter was entitled to remove the timber notwithstanding the fact that the time fixed therefor had expired, defendant was entitled, before the examination of the witnesses was concluded, to amend his answer, consisting of a general denial, by setting up the license and claiming the right to remove the timber thereunder.

Appeal from Circuit Court, Clark County; James K. Marsh, Judge.

Suit by Samuel F. Adams against David Watson. From a decree in favor of plaintiff, defendant appeals. Reversed.

George H. Voigt and John W. Baldwin, for appellant. E. C. Hughes and M. Z. Stannard, for appellee.

COMSTOCK, J. Samuel F. Adams, the appellee, sought to enjoin David Watson, the appellant, from cutting growing timber on the lands of appellee. Upon the filing of appellee's complaint, a temporary restraining order was issued. The complaint alleges that appellee is the owner of a tract of land containing 75 acres, and that appellant wrongfully, and without license or consent of appellee, entered upon the land and was cutting and removing growing timber, which would permanently injure the real estate, and for which appellee could not be compensated in damages. The complaint asks for a temporary restraining order and a perpetual injunction upon a final hearing. Issue was joined upon the general denial. The court found for the appellee, and entered an order and judgment perpetually enjoining appellant from cutting and removing the timber.

Appellant assigns errors of the court: (1) In overruling the demurrer to the complaint. (2) In refusing appellant leave to file a second

paragraph of answer. (3) In overruling appellant's motion for a new trial.

The motion for a new trial assigns the following grounds: (1) The decision of the court is not sustained by sufficient evidence. (2) The decision of the court is contrary to law. (3) The court erred in refusing appellant leave to file a second paragraph of answer. (4) Irregularity in the proceedings in this: that appellee's attorneys, in violation of the order of court, failed to give appellant's attorneys a copy of their brief.

The following is substantially a statement of the facts: In December, 1898, at the time the contract was made, the appellee, Adams, was the owner of the tract of real estate described in the complaint. On this tract of land there was about 12 acres of rough timber. In December, 1898, Adams, desiring to clear out the land, orally agreed to sell said timber to the appellant, Watson, for the sum of \$50. Watson was to have all the timber, except such of the tops of the trees as Adams might desire for wood. And it was agreed that Watson was to cut and remove the timber within one year from the date of the contract, which, as stated, was December, 1898. The contract was in parol. Concurrent with the transaction for the sale of the timber, Watson made a contract with Adams to furnish the latter with lumber to build a barn, at the agreed price of \$8.50 per thousand feet, and Adams agreed to accept the equivalent of the \$50 for the timber in lumber at the price stated. The lumber was furnished, over two-thirds of which Watson obtained from the 12-acre tract, and settlement made. In settlement for the lumber the \$50 was taken in consideration, and Adams gave Watson two mules and paid him \$80 in cash. This closed the transaction, except that Watson had until the end of the contract year to remove the remnant, which was less than one-third of the growing timber on the \$50 tract. The time limit on the contract for the sale of the trees expired in December, 1899. In June, 1900, Watson entered upon appellee's premises, and began to cut and remove a part of said remnant of timber. Appellee then forbade his cutting and removing said timber and entering said premises. On the 27th day of August, 1900, the appellant again entered and began to cut the timber, and this action was brought to enjoin him.

That a contract for the sale of growing timber is a contract for the sale of an interest in land, and must be in writing in order to bind either party; that standing trees may be the subject of a sale so as to give the purchaser a license to go upon the land to cut and remove them—are propositions not controverted in the appeal. It is claimed, however, by appellee that such license is revocable at the pleasure of the vendor at any time before it is acted upon by the vendee, citing *Hostetter v. Auman*, 119 Ind. 7, 20 N. E. 506; *Owens v. Lewis*, 46 Ind. 488-519, 15 Am. Rep. 295; *Terrell v. Frazier*, 75

Ind. 475; *Cool v. Peters Box Co.*, 87 Ind. 531; *Spacy v. Evans*, 152 Ind. 481, 432, 52 N. E. 605; *Hodgkins v. Farrington (Mass.)* 22 N. E. 73, 5 L. R. A. 209-212, 15 Am. St. Rep. 168; *Pifer v. Brown (W. Va.)* 27 S. E. 399, 49 L. R. A. 497, 500, 503, 526; *Bruley v. Garvin (Wis.)* 81 N. W. 1038, 48 L. R. A. 839, 840; 18 A. & E. of Law, pp. 1140-1142. The cases cited do not hold that the license may be revoked when it has been acted upon and the consideration for which has been performed, nor whether part performance of the contract takes the sale of the timber out of the operation of the statute of frauds. The following cases hold that a parol license to cut timber upon the lands of another which has been acted upon and which is granted upon a consideration that has been performed cannot be revoked. *Miller v. State*, 39 Ind. 267; *Messick v. Midland, etc., Co.*, 128 Ind. 81, 27 N. E. 419; *Buchanan v. Logansport, etc., Co.*, 71 Ind. 285; *Lane v. Miller*, 27 Ind. 534; *Saucer v. Keller*, 129 Ind. 475, 28 N. E. 1117; *Buck v. Foster*, 147 Ind. 530, 46 N. E. 920, 62 Am. St. Rep. 427.

Appellee contends that under the contract there was a time limit given for the removal of the trees, and after its expiration appellant had no right to enter upon his land. Upon the question of the right of the vendee to cut timber after the expiration of the limit where the contract does not provide for a forfeiture, the decisions of the courts of other states are not in harmony. The following hold that the right ceases with the expiration of the time limit: *Pease v. Gibson*, 6 Me. 84; *Howard v. Lincoln*, 13 Me. 123; *Saltonstall v. Little*, 90 Pa. 422, 35 Am. Rep. 683; *Utey v. Wilcox Lumber Co.*, 59 Mich. 263, 26 N. W. 488; *Gamble v. Gates*, 92 Mich. 510, 52 N. W. 941; *Macomber v. Detroit & Co. (Mich.)* 66 N. W. 376, 32 L. R. A. 102, 62 Am. St. Rep. 713. In *Irons v. Webb*, 32 Am. Rep. 193, it was held the other way. In *Jones v. Robbins*, 29 Me. 351, 1 Am. Rep. 593, in a bond to convey land upon the payment of a note, time was held not to be of the essence of the contract, unless the parties have expressly agreed that it shall be so regarded. In *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 821, a case in which, in a contract of sale, the purchaser of timber was given four years within which to remove the same, it is expressly held that the purchaser did not forfeit his right to remove the timber after the four years, in the absence of a forfeiture clause. In the course of the opinion the court say, at page 87, 150 Ind., and page 822, 49 N. E.: "If, by delay in taking the timber after the period named, damage should occur to the owner of the land, it could not be questioned that such damage could be recovered. But it would be manifestly unjust that mere delay should forfeit both the appellant's money and his timber, and that the appellee should become the owner of the timber upon the strength of an implied forfeiture."

There is a conflict in the evidence as to whether there was or was not a time limit to the contract. The trial court passed upon that conflict. But whether there was or was not such limit, in the absence of a forfeiture clause such limit would not conclude appellant's right. Did the expiration of the time work a forfeiture? There was no provision in the contract forfeiting the timber upon the expiration of the time given for its removal, and we think the question should therefore be answered in the negative. Appellant cites from 2 *Beach on Modern Law of Contracts*, p. 573, as follows: "The parties to a contract may by its terms make the time of performance essentially important, and its observance in that respect requisite to relief, and, when that is not so, either of the parties to the contract may, by a reasonable notice to the other party for that purpose, render the time of performance as of the essence of the contract, and avail himself of forfeiture on default." It appears in the case at bar that appellee did not, before the expiration of the time, notify appellant that time was of the essence of the contract. Appellee testified that in the month of December, 1898, he entered into a parol contract with appellant by which he sold and bartered to him the timber mentioned in the complaint, and that he gave appellant license to cut and remove the same. He further testified that appellant had fully performed his part of the contract, which consisted in cutting a barn pattern for appellee, a part of which was cut from his land, that he permitted appellant to go upon his land and cut the timber for the barn pattern and received it, and that he made the cash payment required by the contract, and delivered to appellant the span of mules in part payment for the barn pattern. During the further progress of the examination of the witnesses, appellant tendered to the court and asked leave to file a second paragraph of answer setting forth the facts to which appellee had testified in his own behalf, as showing that appellee had given him license to cut and remove the timber. The court refused to permit appellant to file the pleading offered. To this ruling exception was taken by special bill of exceptions. The proposition that a license cannot be given in evidence under the general denial is so firmly settled as to need no citation of authority to sustain it. *Boltz v. Smith*, 3 Ind. App. 43, 29 N. E. 155; *Chase v. Long*, 44 Ind. 427; *Snowden v. Willas*, 19 Ind. 10, 81 Am. Dec. 370. In the case at bar evidence of the transaction and the license had been introduced by both parties to the action, without objection. As held in numerous cases, the filing of additional pleadings is largely within the discretion of the trial court. But when the justice of the case clearly requires that leave should be granted, it is error to refuse. *Railroad v. Jones*, 103 Ind. 386, 6 N. E. 8; *Fargo & Co. v. Cutshaw*, 12 Ind. App. 392, 39 N.

E. 532. The additional paragraph of answer could not have prejudiced the rights of appellee. But if it had been to the disadvantage of appellee, the court would doubtless, upon proper application, have set aside the submission, and continued the cause at appellant's costs. As said in *Chicago, etc., R. R. Co. v. Jones*, supra, "In a matter involving so much of what is usually regarded as the exercise of a merely discretionary power, we come to a conclusion different from that reached by the circuit court, with much hesitation and reluctance"; but we hold that appellant ought to have been allowed to file the additional paragraph of answer. The appellant should not, under the facts disclosed, be denied the right to remove the remaining portion of the timber, unless it is made clearly to appear that he has forfeited that right.

Judgment reversed, with instructions to permit appellant to file additional paragraph of answer, and other proceedings not inconsistent with this opinion.

(33 Ind. App. 112)

WEIL et al. v. STONE et al.*

(Appellate Court of Indiana, Division No. 1.
Jan. 29, 1904.)

SALES—SEVERABLE CONTRACT—BREACH—RESCISSI—DAMAGES—MARKET VALUE—EVIDENCE—NEW TRIAL—JURY—VERDICT—IMPEACHMENT.

1. Where a contract for the sale of skins set out several distinct items to be delivered, and the price of each to be paid, the contract was severable, so as to entitle the buyer to rescind the contract for fraud as to part of the items and recover the price paid therefor.

2. Where a contract for the sale of skins fixed the prices f. o. b. Ft. Wayne, Ind., to be paid 90 per cent. by draft and the balance on receipt of stock, subject to buyer's inspection, and count, though the title to the property passed to the buyer on shipment from Ft. Wayne, it was subject to his right to reject the goods for noncompliance with the contract on examination and delivery in Boston.

3. In an action to recover money paid on rescission of a sale for fraud, evidence as to the market value of the goods at the time and place of delivery was immaterial.

4. Affidavits of jurors that members of the panel made comments on the fact that defendants were Jews, and unworthy of belief, and that one of defendants' witnesses had attempted to defraud an insurance company by burning his own property, were inadmissible to impeach their verdict in favor of plaintiff.

Appeal from Circuit Court, Allen County; C. W. Watkins, Special Judge.

Action by Albert H. Stone and another against Isaac Weil and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Barrett & Morris and Elliott, Elliott & Litleton, for appellants. T. E. Ellison, for appellees.

HENLEY, C. J. Appellees in this case recovered a judgment against appellants grow-

ing out of the alleged violation of a certain written contract. The material averments of the second paragraph of the complaint upon which the cause was tried, are that appellees are partners, doing business in the cities of Boston and New York, and engaged in buying and selling different kinds of skins, and that appellants are likewise engaged in the same business in the city of Ft. Wayne; that in the month of March, 1898, appellees were informed by appellants that they had an extra fine lot of sheepskins which they desired to sell, and pursuant to such notice one of appellees called on appellants at their place of business in Ft. Wayne, and appellees' representative went with appellants to where the sheepskins were stored, and found such skins done up in large packages of a dozen or more, containing about 700 dozen, all different grades and quality; that appellants exhibited samples of the various skins to appellees' agent, and then and there represented that all the skins proposed to be sold were what are known to the trade as "packer's skins" and "fine packer's skins"; that the term "packer's skins" is used to designate skins removed from animals in large slaughter houses, and are free from defects, and are cleaner and better cured, and can be worked into better leather, than the skins which were known as "country skins." It is further averred that appellees and appellants entered into a contract, a copy of which contract is made a part of the complaint, by which appellants agreed to properly pack and ship the skins to Boston, and stating the price which appellees were to pay for them; that while the negotiations were in progress it was discovered that there were not enough sheep skins to make a car load, and that thereupon appellants represented that they had about 150 dozen "A or No. 1" hogskins, and about the same quantity of "B or No. 2" hogskins, which were in process of tanning, and would soon be ready for delivery; that such hogskins were in large vats, covered with liquor, or piled on the floor undergoing the process of being prepared for the market; that the hogskins were in such condition that appellees could not make an examination of them, and, in order that appellees might know the character of the hogskins, appellants exhibited to them several samples; that the skins so exhibited were large, perfect skins, such as are known to the trade as "A or No. 1 Skins"; that appellants agreed to prepare the hogskins so that they would conform in character to the samples exhibited, and appellees agreed to buy and pay therefor at the rate of \$5.50 per dozen for No. 1 skins and \$3.00 per dozen for No. 2 skins; that appellants accepted said offer, and agreed to grade, pack, and ship the skins to Boston, subject to appellees' inspection and count. It is further averred that under such contract various skins were shipped to appellees at Boston, and that before the same were received and examined appellees hon-

* 1. See *Sales*, vol. 43, Cent. Dig. §§ 171, 172.

*Rehearing denied. Transfer to Supreme Court denied.

ored appellants' draft of \$2,812.44; that a few days after the receipt of the draft, upon examination of the goods shipped, they were found to be defective, and not according to sample, and thereupon appellees offered to return all the property so shipped, but appellants refused to accept or permit the return of the goods. It is further alleged that the shipped skins were so packed that the immediate discovery of the defects was impossible, and that upon investigation afterward it was discovered that appellants had stuffed the interior of the casks in which the skins were shipped with inferior sheepskins, not conforming to the samples shown appellees, nor to the quality designated in the contract; that the money advanced to appellants by the payment of the draft aforesaid was procured by the fraud, deceit, and misconduct of appellants. It is further averred that the hogskins shipped were not sufficiently cured for their proper preservation; that they were not of the quality purchased or designated in the contract; that appellees refused to accept them, and immediately notified appellants of such fact, and demanded the repayment of the money advanced to them upon that account; that the hogskins were at once re-shipped to appellants, and appellants refused to receive them; that the representations made by appellants in regard to the quality of the skins proposed to be shipped were falsely and fraudulently made, and that appellants knew, when such representations were made, that the same were false. It is also shown by the complaint that appellees retained the sheepskins and sold them. The following is a copy of the contract between appellants and appellees, out of which this controversy arose:

"Messrs. Stone, Timlow & Co., New York City—Gentlemen:—We offer you as follows: The quantities are approximate to be more or less, all F. O. B. Ft. Wayne, Ind. 6 to 10 doz. XXXX sheep, at \$5.00 per doz. 25 to 35 doz. XXX sheep at \$4.25 per doz. 25 doz. XX sheep at \$3.50 per doz. 75 to 100 X sheep at \$3.00 per doz. 20 to 30 doz. No. 1 sheep at \$2.75 per doz. 150 to 175 doz. XXX Ribby sheep at \$2.87½ per doz. 15 to 25 doz. XX Ribby sheep at \$1.75 per doz. 6 to 10 doz. XXX Blind Ribby sheep at \$3.00 per doz. 5 to 10 doz. Broken Grain sheep at \$4.00 per doz. 40 to 50 doz. cull sheep at \$1.25 per doz. 10 to 15 XX lambs at \$3.25 per doz. 10 to 20 doz. X lambs at \$2.50 per doz. 50 to 75 doz. No. 1 lambs at \$2.37½ per doz. 30 to 50 doz. No. 2 lambs at \$1.50 per doz. 75 to 100 doz. Ribby lambs at \$1.62½ per doz. 40 to 60 doz. cull lambs at 50c per doz. 125 to 150 doz. A Hog Skins at \$5.50 per doz. 125 to 150 B Hog Skins at \$3.00 per doz. Shipment to be made to Boston, Mass., invoice and B/L to be sent to 4 Warren St., New York City. Terms, draft for 90 per cent., balance to be remitted upon receipt of the stock. Yours truly, The Ft. Wayne Sheepskin & Wool Co. A. Weil, Pres. Ac-

cepted: Stone, Timlow & Co. Per A. H. Stone."

Appellants' demurrer to the complaint was overruled, and the cause put at issue by appellants' general denial to the complaint. There was a trial by jury, and a verdict and judgment in favor of appellees in the sum of \$1,183.55. With the general verdict the jury returned answers to interrogatories. The errors assigned and discussed relate to the action of the trial court in overruling appellants' demurrer to the complaint, in overruling their motion for a new trial, and in overruling their motion for judgment upon the special finding of facts notwithstanding the general verdict.

It is contended by counsel for appellants that this is an action to rescind a contract on the ground of fraud and deceit, and that the contract must be regarded as an entirety, and not severable; and that, the complaint showing, as it does, that a part of the goods purchased under the contract, were retained by appellees and sold, renders the complaint insufficient; and that the complaint is insufficient for the further reason that the contract shows upon its face that the goods were delivered to appellees in Ft. Wayne, and that the inspection and the grading and the examination of the goods sold under the contract must, by the terms of the contract, be made at Ft. Wayne, and not at Boston. It is upon appellants' theory and contention that the complaint is one to rescind and recover back money paid that we will proceed to examine the question of its sufficiency.

If the contract must be regarded as indivisible, appellants' argument and objection to the complaint is well taken; but under the authorities we think the contract is one clearly severable. The contract in this case rests upon a consideration susceptible of distinct apportionment. It consists of several distinct items to be furnished by one party, and the price to be paid by the other party is apportioned to each item. In 2 Parsons, Cont. p. 517, it is said: "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable." In Higham et al. v. Harris et al., 108 Ind. 246, 8 N. E. 255, the court said: "Where, however, a contract is divisible, one part having no necessary relation to the other, each resting upon a consideration peculiar to itself, and independent of the other, the injured party may retain the subject of one part, and, having tendered the consideration or benefit received, may treat another part as rescinded at law; or he may maintain a suit in equity to rescind one part upon equitable terms while adhering to another independent part." Oil Co. v. Brewer, 66 Pa. 351. In Kirkland v. Oates, 25 Ala. 285, the court said: "A sev-

erable contract is one the consideration of which is, by its terms, susceptible of apportionment on either side, so as to correspond to the unascertained consideration on the other side." We think the cases cited state the rule of law correctly as applicable to contracts of the class to which the one in controversy here belongs, and place it squarely within the class of severable contracts.

The complaint, after averring specifically the defects in the hogskins shipped appellees under the contract, and that the quality shipped was inferior to the quality specified, avers, in substance, that the hogskins were not marketable in the condition they were in when so shipped by appellants and received by appellees. This averment, however imperfect it may be, was a sufficient averment that the quality of the goods shipped at the time and place of their shipment was inferior to the quality specified in the contract. If appellants desired a more specific averment upon this subject, their remedy was by motion to make more specific, and not by demurrer. The averment was sufficient, under which evidence might have been admitted to prove the quality of the goods at the place of shipment. We think the complaint states a cause of action upon the theory on which appellants contend it proceeds. The same questions arise upon appellants' motion for judgment on the answers of the jury to the interrogatories as arise upon the complaint, and a further discussion is unnecessary. The evidence shows that the sale of the goods was by sample, and while, under the contract, the title to the property was in appellees in Ft. Wayne, the examination and delivery was to be in Boston, the place to which the goods were to be shipped; and this, we think, clearly appears from the contract itself.

The next question presented by counsel arises upon the action of the trial court in admitting certain evidence in regard to the value of the goods in Boston at the time they were received. Mr. Stone, one of the appellees, was permitted to answer the following question, propounded to him by counsel: "Q. Mr. Stone, you may state what the value per dozen would be or was in Boston at the time those goods were received—the A hogskins of the character and quality that were shown to you by Mr. Weil." Appellants' objection to this question was that the market value of these goods in Boston was entirely immaterial, as the contract provided for their delivery in Ft. Wayne; and that the only evidence admissible to show the value of the goods would be evidence to prove the market value of the goods at the time they were delivered in Ft. Wayne, and that the difference between that value and the contract price would be the measure of damages. This action, regarded as an action to rescind a part of the contract, which is the theory upon which counsel for appellants insists the action proceeds, results in

making evidence of the value of the property returned immaterial. The contract, in so far as it relates to the sale of the hogskins, was rescinded, and the goods returned to the vendors at Ft. Wayne. The contract in that respect having been rescinded, and the goods returned, evidence as to the market value of the goods of the quality specified in the contract, either at Boston or Ft. Wayne, could not affect the result.

Another cause stated in appellants' motion for a new trial brings in question alleged misconduct on the part of the jury. Counsel insist that it was reversible error upon the part of the jurors in listening to comments made by members of the panel to the effect that appellants were Jews, and unworthy of belief, and that one of appellants' witnesses had attempted to defraud an insurance company by burning his own property. The affidavits of three of the jurymen appear in the record in support of this reason. The Supreme Court has in numerous cases held that a juror cannot impeach his own verdict. *Stanley v. Sutherland*, 54 Ind. 339; *Houk v. Allen*, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706; *Barlow v. State*, 2 Blackf. 114. It appears from the whole record that the case was fairly tried and determined.

Judgment affirmed.

MICHIGAN CITY v. PHILLIPS.*

(Appellate Court of Indiana, Division No. 1.
Jan. 27, 1904.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—PEDESTRIANS—INJURIES—NOTICE—DAMAGES—APPEAL—INSTRUCTIONS—RECORD—BILL OF EXCEPTIONS.

1. Instructions given, and ordered made part of the record, without bill of exceptions, cannot be considered, unless signed by the trial judge.

2. The memorandum of exception to an instruction, signed by the trial judge and dated, does not make the instruction to which it relates and is appended a part of the record.

3. Where a bill of exceptions is certified by the clerk to be the original bill of exceptions, containing the evidence and rulings thereon, such bill, if properly in the record, cannot bring up the instructions, or anything more than the evidence and rulings thereon, and any other matters included in such bill are not properly before the court.

4. Where all the instructions are not in the record, the giving or refusal to give requested instructions will not be reviewed on appeal.

5. Where, in an action for injuries on a defective city sidewalk, there was evidence that at the time of the injury the walk was unsafe, and had continued to be so for such a length of time as to become known to travelers over the same, and that, in the exercise of ordinary care, the city could have known its condition, notice to the city of such defects will be presumed.

6. Where, in an action for injuries, the evidence as to whether the cause of plaintiff's permanent disability was the result of her fall on the defective sidewalk in question was conflicting, and there was nothing in the ap-

* 5. See *Municipal Corporations*, vol. 22, Cent. Dig. § 1643.

*Rehearing denied. Appealed to Supreme Court, 71 N. E. 205. Rehearing denied.

peal record to show plaintiff's earning capacity or her expectancy of life, a verdict for \$9,000 could not be set aside as excessive.

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Action by Agnes M. Phillips against Michigan City. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. R. & J. B. Collins and Kane & Kane, for appellant. James F. Gallaher and W. W. Pepple, for appellee.

HENLEY, C. J. Appellee commenced this action against appellant for damages resulting from alleged injuries received by her as a result of falling through a defective sidewalk. Appellee was walking along the east side of Franklin street, in appellant city, on a plank sidewalk, which extended from the property line to the curb line of the street, when a board which constituted a part of the sidewalk broke with her, causing her to fall upon and partially through the sidewalk, from which fall she received the alleged injuries complained of. Her complaint was in two paragraphs, which was answered by a general denial. There was a trial by jury, and verdict and judgment in the sum of \$9,000. With the general verdict, the jury returned answers to certain interrogatories submitted.

The first four specifications of the assignment of error attack the sufficiency of appellee's complaint, and are waived because they are not discussed by counsel in their brief. The fifth specification is that the court erred in overruling appellant's motion for judgment on the answers to interrogatories; and the sixth, that the court erred in overruling the motion for a new trial.

It is not necessary that we make a statement here of the facts found by the jury by way of answers to interrogatories. It is sufficient to say that the facts so found are not in irreconcilable conflict with the general verdict, but seem to fairly support it. The important questions attempted to be presented by counsel for appellant in this appeal arise from the ruling of the trial court on its motion for a new trial. A large number of instructions were given by the court to the jury, which were objected to by appellant, and exception duly reserved. Counsel for appellee contend that the instructions are not properly in the record. Appellant has attempted to bring the instructions to this court by having the same made a part of the record without bill of exceptions. It appears from the record that the instructions given by the court of its own motion, and ordered made part of the record without bill of exceptions, were not signed by the judge. It is essential, both under the statute and the decided cases, that instructions given by the court of its own motion, and ordered made part of the record without bill of exceptions, be signed

by the judge. *City of Indianapolis v. Mitchell*, 27 Ind. App. 589, 61 N. E. 947; *Hall v. State ex rel.*, 23 Ind. App. 521, 55 N. E. 798; *Van Sickle v. Belknap*, 129 Ind. 558, 28 N. E. 805; *McCaffrey v. Bradford Milling Co.*, 24 Ind. App. 283, 58 N. E. 679. It has also been held by the courts of appeal in this state, that the memorandum of exception to an instruction, signed by the judge and dated, does not make the instruction to which it relates and is appended a part of the record. *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888; *Hall v. State ex rel.*, supra; *Supreme Lodge v. Johnson*, 78 Ind. 110.

A further attempt has been made to bring the instructions into the record by embracing them in the bill of exceptions containing the evidence, the original of which bill has been certified up without copying. Where a bill of exceptions is certified by the clerk to be the original bill of exceptions, containing the evidence and rulings thereon, such bill, if properly in the record, cannot bring up more than the evidence and the rulings thereon, and any other matters included in such bill are not properly before the court. *Hamilton v. The Estate of Hamilton*, 26 Ind. App. 114, 59 N. E. 344; *Kern v. Raven-croft*, 26 Ind. App. 413, 58 N. E. 854, 59 N. E. 1068; *Prudential Insurance Co. v. Sullivan*, 27 Ind. App. 30, 59 N. E. 873; *Leach v. Mat-tix*, 149 Ind. 146, 48 N. E. 791.

It thus appears that all of the instructions are not in the record, and, this being true, the giving or refusal to give instructions will not be considered. *City of Indianapolis v. Mitchell*, supra; *Harlan v. Brown*, 4 Ind. App. 319, 30 N. E. 928.

It is also contended by counsel for appellant that the evidence fails to show that the city had notice of the alleged defect in the sidewalk where the injury occurred. It is not necessary that we examine and decide the question as to whether or not notice to the policemen of appellant city would be notice to appellant of the defect in its streets or sidewalks, because it is the law that it is a question of fact for the jury to determine from the evidence whether or not appellant had notice of the defective condition of its sidewalk. And there was evidence that the sidewalk where appellee received her injury was, at the time such injury was received, in an unsafe condition, and that such unsafe condition was of such a character, and had continued for such a length of time, as to become known to travelers over said sidewalk, and had continued for such a length of time that appellant, in the exercise of ordinary care, was duty bound to know of its condition. The evidence presented such a state of facts that the law would impute notice to appellant of the unsafe condition of the sidewalk.

The verdict and judgment in this case were for \$9,000, and it is claimed that such a verdict, under the evidence, is excessive.

The evidence as to the cause of appellee's permanent disability is very conflicting, competent and learned witnesses having testified at the trial that her present condition could not have been the result of the injury received by falling through the sidewalk. Other witnesses, competent and apparently equally well informed, testified that her present condition was the result of such fall. With this state of facts before us, and without our attention being called to her earning capacity or her expectancy of life, we cannot say that the verdict is so grossly excessive as to have been the result of prejudice, partiality, or corruption.

Some complaint is made by appellant of the action of the court in admitting and refusing to admit certain evidence, but in no case was such action of the court harmful to appellant.

The record does not present reversible error. Judgment affirmed.

(33 Ind. App. 387)

COPPES et al. v. UNION NAT. SAVINGS LOAN ASS'N OF INDIANAPOLIS.*

(Appellate Court of Indiana, Division No. 1. Jan. 23, 1904.)

MORTGAGES — FORECLOSURE — CROSS-COMPLAINT—SUFFICIENCY—EXHIBIT — EVIDENCE — CONTENTS OF BOOKS—BUILDING AND LOAN ASSOCIATION.

1. The sufficiency of a cross-complaint which does not state facts sufficient to constitute a cause of action may be questioned for the first time on appeal.

2. In an action against a building and loan association to compel satisfaction of a mortgage, wherein defendant filed a cross-complaint demanding foreclosure of the mortgage for the balance alleged to be due thereon, the stock certificate in the association pledged by the plaintiff to defendant for the loan is not the foundation of defendant's cross-complaint, and hence need not be made an exhibit.

3. The failure to file with the cross-complaint a contract, or copy thereof, which is the foundation of the cause of action, is cured by verdict in favor of the cross-complainant.

4. A written contract between a building and loan association and certain borrowing members cannot be varied by evidence of a statement as to its supposed meaning, made by one of the borrowing members to his associates, though he was also a local agent of the association.

5. Where cross-complainant, a building and loan association, was demanding foreclosure of its mortgage against cross-defendants, the admission of an affidavit of the secretary of cross-complainant to the effect that a paper annexed thereto was a full and true copy of the original record of the account of the cross-defendant, showing all payments made on the stock and on account of the loan, to prove the state of the account between the parties as a basis for the computation to be made by the court in rendering its finding, is error; the books from which the account was copied not being before the court, and cross-defendants not having had opportunity to cross-examine affiant, or to make comparison of the copy with the original entries.

6. Burns' Rev. St. 1901, § 474, providing that sworn copies of the acts and proceedings of corporations shall be received in evidence in all cases where the original would be evidence,

*Rehearing denied. On second appeal (App.) 79 N. denied.

does not authorize the contents of the books of account of a building and loan association to be proved by the affidavit of the secretary, in an action by the association to foreclose a mortgage, for the purpose of showing the state of the members' account.

Appeal from Circuit Court, Elkhart County; Joseph D. Ferrall, Judge.

Action by Samuel D. Coppes and others against the Union National Savings Loan Association of Indianapolis. From a judgment for defendant, plaintiffs appeal. Reversed.

For former opinion, see 67 N. E. 1022.

James S. Dodge and James S. Dodge, Jr., for appellants. McBride & Denny, for appellee.

BLACK, J. The complaint of the appellants contained two paragraphs. In the first they sought to have their mortgage to the appellee on certain real estate declared satisfied, and to have satisfaction entered on the record thereof; it being alleged that they had fully paid and satisfied their promissory note for \$6,000 secured thereby, and that the appellee, having been requested to enter satisfaction, had refused to do so; the note and mortgage having been executed October 29, 1894. In the second paragraph it was sought to recover a penalty for the refusal to enter satisfaction, and to recover attorney's fees, and to obtain an order for the entry of satisfaction. The appellee answered by a denial, and filed a cross-complaint against appellants and others for the recovery of the balance due the appellee, and the foreclosure of the mortgage.

The appellants have assigned as error that the cross-complaint does not state facts sufficient to constitute a cause of action. The sufficiency of a cross-complaint, as well as that of a complaint, may be thus tested for the first time on appeal. *Loeb v. Tinkler*, 124 Ind. 331, 24 N. E. 235; *Elliott, App. Proc.* § 478; *Ewbank's Man.* § 38. The only objection suggested to the cross-complaint is that the certificate of stock in the association pledged by the borrowing members as security for the loan from the association evidenced by the note and mortgage was not set out in the pleading, or exhibited with it. The stock certificate was not the basis, in whole or in part, of the cause of action, being a collateral security for the payment of the loan, and it would not have served any useful purpose to set it out or make it an exhibit. *Indiana, etc., Ass'n v. Plank*, 152 Ind. 197, 52 N. E. 991. Furthermore, the want of a copy even of a written contract on which the action is founded is a defect in the complaint or cross-complaint based thereon, which is cured by the verdict or the finding of the court, the writing being deemed to have been supplied by the evidence; and such defect cannot be reached for the first time by an assignment of error on appeal. *Owen School Township v. Hay*, 107 Ind. 351, 8 N. E. 220; *Cummings v. Girtton*, 19 Ind. App. 533. Rehearing denied 30 N. E. 984. Transfer

248, 49 N. E. 360; *Fidelity Mutual L. Ass'n v. McDaniel*, 25 Ind. App. 608, 57 N. E. 645; *State Building, etc., Ass'n v. Brackin*, 27 Ind. App. 677, 62 N. E. 91.

The court trying the cause found in favor of the appellee in the sum of \$2,651.40, and rendered judgment accordingly, foreclosing the mortgage. A motion of the appellants for a new trial was overruled. The note, by its terms, provided that it should be "payable when the stock we own in said association, on account of which the loan is made, matures, * * * and until said stock does mature we agree to pay the appellee the sum of \$97.40 per month, payable on or before the last Saturday of each and every month, the said sum being interest and dues in accordance with the by-laws of said association." It was shown on the trial that at the date of the execution of the mortgage the appellants paid the appellee the sum of \$135, called "three months' advance dues of forty-five dollars each." It was also shown that the appellants had paid the appellee, before the commencement of this suit, \$75, and all monthly payments of \$97.40 each, on account of the note and mortgage, and had paid all insurance and taxes under the terms of the mortgage and the by-laws, and had paid the appellee all moneys that had been demanded of them by the appellee on or before December 29, 1900, which the appellants were notified by the appellee to pay on or before that date, and that the appellants had paid nothing on account of the loan since that date. The appellants paid the appellee \$60 as membership fee, and received from the appellee \$6,000. The stock certificate was for 60 shares, the "monthly payments" thereby provided for being 75 cents on each share, which the holder agreed to pay each month until the maturity of the stock; it being provided therein that upon performance of its conditions the appellee should pay the holder, his heirs, etc., \$100 for each share, "whenever the amount in the loan fund to the credit of any shares from monthly payments and profits equals one hundred dollars." The appellants made no payments on the loan, except the monthly payment of \$97.40, outside of the membership fee and the three-months dues in advance. In the by-laws it was provided that no member could be entitled to file an application for a loan until he or she had paid, or caused to be paid, three monthly installments. Section 3 of article 18 of the by-laws was as follows: "To ascertain the amount of dues payable by a shareholder when he becomes a borrower, deduct the admission fee and three months' dues paid in advance from the amount borrowed, and divide the result into seventy-five equal monthly payments, with interest at the rate of four per cent. per annum." It was provided in the by-laws that any person might become a member of the association and subscribe for shares by making application subject to the by-laws, and paying a membership fee of \$1 per share.

"Monthly payments, or instalments, are seventy-five cents on each \$100 share." "Members shall be required to pay seventy-five cents per month on each share, and when the amount in the loan fund to the credit of any share (from monthly payments and profits) equals \$100, such shares shall be fully matured, and no more monthly payments shall be required; the member can then withdraw the same and receive \$100 therefor." "When a loan is repaid before maturity, the borrower may continue his stock as an investment or he may withdraw it at his option." "The board of directors, on the first Saturday in January and the first Saturday in July of each year, shall declare such dividends to depositors as may accrue from the earnings of the association. The dividends so declared shall be divided amongst the depositors pro rata in proportion to the amount paid by each member as dues on his stock. The amount of dues at the time the preceding dividends were declared shall be the basis of the calculation. Persons subscribing for stock between the last Saturday in January and the last Saturday in June shall be credited with dividends thereon in the following January, and persons subscribing between the last Saturday in July and the last Saturday in December shall be credited with the dividends in the following July." It was also provided in the by-laws that the receipts of the association should be divided; one part, consisting of one-tenth of one per cent. per month on the par value of each share and the membership and transfer fees, being the expense fund, while all other receipts constituted the loan fund. The appellants became members of the association for the purpose of becoming borrowers, and the stock certificate and the mortgage were parts of one transaction.

The court did not err, we think, in excluding the testimony, offered by the appellants, of one Mellinger, who is one of the appellants, and who at the time of the issuing of the stock and the making of the loan was the local agent of the appellee; the appellants offering to prove by him that he stated to the other appellants that the appellee did not charge any premium upon its loans, or any expense fund, but that their payments were all provided for by section 3 of article 18 of the by-laws. The appellants had not asked the witness a question adapted, by its form, to bring from him such testimony. There was no issue of fraud or mistake, and the written contract could not be varied or contradicted or construed by reference to a statement of its supposed meaning made by one of the borrowing members to his associates in the procurement of the loan, though he was also a local agent of the appellee. It was for the court to construe the contract as a whole; taking into consideration the nature of the transaction, and comparing all the writings executed by the parties, and the by-laws referred to therein. At the time when the stock was taken, and the appel-

lants became members of the association, and the loan was made to them, they paid not merely the membership fees of \$60, but also the sum of \$135, called three months' dues paid in advance; and they also paid the monthly installments of \$97.40 each, which amount they were to continue to pay monthly, and they did so continue to pay monthly until December 29, 1900. These sums were spoken of in the note as being "interest and dues," and were referred to as "monthly instalments." The amount of the monthly installment to be paid by the borrowing member was ascertained in the mode prescribed by section 3 of article 18 of the by-laws, above quoted. The principal matter of dispute relates to the construction and application of this section. We are inclined to agree with the view of this matter which seems to have been taken by the court below. The nature of the transaction, as a loan made by a building and loan association to one of its stockholders, is to be kept in view. The word "premium" is not to be found in any of the writings in the case. The amount of the monthly stock dues of nonborrowing members is plainly shown to be 75 cents per month on each share, amounting for the whole stock to \$45 per month. The interest to be added in estimating the monthly payments of the borrowing member was to be at the rate of 4 per cent. per annum, amounting in this case to \$20 per month. Deducting the sum of these two amounts from \$97.40, the monthly payment of the borrowing member, there remains the sum of \$32.40. This sum was not denominated as "premium," but the aggregate of the three sums was called "interest and dues." The borrowers did not cease to be stockholders. Their shares of stock were pledged as collateral security for the loan, and they continued to be under the obligations of stockholders, as did the investing members, with the additional obligation of borrowing members. They might pay off the loan, and continue to be members of the association, holding their shares as other investing members, entitled to credit from the time of the issuing of stock for their payments of stock dues, and the earnings of their stock from the profits of the association. It was not an improper practical construction to treat the "monthly payments" of the borrowing member as including the regular monthly dues upon the stock and the interest, and also a periodical premium, and to regard the remainder of the monthly payments of the borrower, after deducting the amount of the regular stock dues, as constituting part of the profits of the association, in which view it would not be improper to hold, as did the court below, that the monthly payments, by whatever name designated, were to continue until the maturity of the shares of stock through payment of the regular stock dues of 75 cents per month on each share, and the earnings of the stock from profits of the association

should amount to the par value of the stock at \$100 per share.

On the trial the appellee was permitted, over the objection of the appellants, to introduce in evidence an affidavit of the secretary of the appellee to the effect that a paper annexed thereto was a full and true copy of the original record of the account of the appellants, showing all payments made on the stock and on account of the loan, and all credits of profits and dividends due to the appellants on account thereof, and that the original record of the account had remained unaltered from its date, to the best of the knowledge of the affiant. This account, thus verified by affidavit, was not introduced for the purpose of showing admissions of matters of fact by the appellee favorable to the appellants, but was put in evidence by the appellee, over the objection of the appellants, to prove the state of the account between the parties, as a basis for the computation to be made by the court in rendering its finding. It is true that in many particulars it agreed with the evidence introduced in behalf of the appellants, but it contained other material matter of which there was no other evidence. In addition to the charge of the amount of its loan of \$6,000, it contained also, on the debit side, a charge of a small amount, an abbreviation annexed to which is explained in the briefs as showing the charge to be for an abstract of title. It showed the payment made by the appellants in the amounts shown by other evidence, and it also purported to show how they were subdivided under the heads of "stock," "interest," and (up to June 29, 1895) "expenses." It also purported to show the amounts and dates of dividends credited to the appellants, of which there was no other proof; and it contained an arithmetical computation, ending with an amount purporting to represent the total value of the stock, not otherwise explained in evidence. The books from which the account was copied were not before the court, and there was not, and there had not been, any opportunity for a cross-examination of the affiant, or for a comparison by the appellants of the copy with the original entries in the books of the association. Reference has been made in argument to our statute (section 474, Burns' Rev. St. 1901) providing: "The acts and proceedings of corporations may be proved by a sworn copy of the record of such acts and proceedings. The oath shall state that such transcript is a true and full copy of the original, and that such original has remained unaltered from its date, to the best of deponent's knowledge and belief. Such sworn copies shall be received in evidence in all cases where the original would be evidence." It does not seem to have been intended by the Legislature, by this provision, to provide that the contents of the books of account of a private corporation may be used in evidence in a manner different from that in which the

contents of such books of natural persons may be used. We think the state of the account could not properly be proved as was here permitted. See *Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377; *Fleming v. Yost*, 137 Ind. 95, 36 N. E. 705; *Cleland v. Applegate*, 8 Ind. App. 499, 35 N. E. 1108; *B. W. Jones, Ev. § 582*; note 15 Am. Dec. 191. If the sum of \$135 was accredited to the appellants as three installments of stock dues, and was not treated as premium in advance, going into the profits of the association, no objection on the ground of the charging of double premiums will lie.

Judgment reversed, and cause remanded for a new trial.

(32 Ind. App. 355)

**CHICAGO & BLOOMINGTON STONE CO.
v. NELSON.**

(Appellate Court of Indiana, Division No. 2.
Jan. 29, 1904.)

**MASTER AND SERVANT—INJURIES TO SERV-
ANT—DEATH—ACTIONS—MOTHER—RIGHT TO
SUB—PLEADING—PLEA IN ABATEMENT—AS-
SUMPTION OF RISK.**

1. The right of a mother under Burns' Rev. St. 1901, § 267, to sue for the wrongful death of her minor child, by reason of her husband, the father of the child, having deserted his family, can be put in issue only by answer in bar, and not by plea in abatement.

2. A servant assumes the risk not only of the ordinary dangers of his employment which are known to him, but also such as by the exercise of ordinary care he could have known.

3. Where a complaint in an action for death of plaintiff's minor son while in defendant's employ alleged that defendant changed deceased's employment from water boy to signal boy at a derrick, which was a more dangerous position, and so known to be by defendant, of which fact deceased was ignorant, but did not allege that deceased did not know that the place designated for him to work was dangerous, or that he had no knowledge of the danger that confronted him from the operation of a derrick in moving a stone in the manner in which it was moved, which resulted in injuring deceased, it did not sufficiently negative that deceased assumed the risk of such injury.

Appeal from Circuit Court, Owen County;
M. H. Parks, Judge.

Action by Parlie Nelson against the Chicago & Bloomington Stone Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Duncan & Batman and Willis Hickam, for appellant. Henley & Willson and Seymour Riddle, for appellee.

WILEY, P. J. Action by appellee against appellant for the negligent killing of appellee's minor son. Appellant filed a plea in abatement, which on appellee's motion was stricken out. The plea in abatement, motion to strike out, and the ruling of the court thereon, are brought into the record by the bill of exceptions. Answer in denial, trial by the

jury, verdict and judgment for appellee. With the general verdict the jury returned answers to interrogatories, and appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict was overruled. Appellant also moved for a new trial, and this motion was overruled. A demurrer to the amended complaint was also overruled, and all of these adverse rulings are assigned as errors.

James Nelson, the husband of appellee, was made a party defendant—service upon him by publication—and he was defaulted. The complaint, which is in one paragraph, avers that appellant was engaged in quarrying, mining, and manufacturing and selling stone; that plaintiff was the wife of James Nelson, who had abandoned his family, and for two years had failed to contribute to their support; that on the 25th day of August, 1899, appellee's oldest son, Pleasant, was in the employment of appellant, and had been in such employment prior thereto as water boy (engaged in carrying water for other employes to drink); that on that day he was 14 years of age, and that all of the wages he earned by his employment to appellant were turned over to appellee, to assist in the support of her family, and that her said son was the principal support and the only source of income to her; that, in operating its quarries, appellant had a large amount of machinery, including derricks, steam power, masts, booms, chains, hooks, etc.; that, attached to the mast, near the bottom, was a large and heavy piece of timber, commonly called a "derrick boom," which extends out 30 or 40 feet, and which is so constituted that the end farthest from the mast, by force of steam power, may be raised and lowered, turned to the right or left, at the direction of the manager of the derrick; that on the end farthest from the mast are fastened heavy chains, with hooks, which hooks are commonly called "dogs"; that in all properly constituted derricks said dogs are sharp on the end, and so arranged that, when loaded, the points of the hooks clinch the load thus upon them by the natural weight of the load and arrangement of the hooks; that said derricks, as so arranged, are used for the purpose of moving stone in and about the yards, but in the yards of appellant at said time the power house was so arranged that the employes of the power house were not in view of the employes at the derrick; that at that time and place appellant had a large number of men at work, some of whom were engaged at the power house, and some at the derricks, and that it was necessary, in order that those in the power house should know when to apply power, that an employe should be stationed between the derrick and the power house to give the signal from the derrick yard to the power house for the application of the power, or the withdrawal of the power, at the will of the derrick boss;

¶ 2. See *Master and Servant*, vol. 24, Cent. Dig. §§ 571, 572.

that said signal was always given at the command of, and under the direction of, the derrick boss, who first made a signal to the signal boy, when the latter was to repeat it to the power house; that appellant, being in need of a signal boy, changed the work of appellee's son from water boy to signal boy; that the position of signal boy in a stone quarry is much more dangerous than that of water boy, but that said fact was unknown to appellee's son, and was well known to appellant; that on August 25, 1899, appellee's son was in the line of his duty, and stationed upon one of the signal stations of appellant, and, while so stationed, appellant, through its carelessness and negligence, moved one of the derrick booms of its quarry in such a manner as to set the dogs on and hold of a large, heavy stone in the derrick yards, and, instead of lifting said stone from the ground, in order to move it, as was the proper way of moving stones, carelessly and negligently dragged said stone upon the ground, and, before attempting to drag the same, had negligently and carelessly taken hold of said stone with said dogs; that, in the proper manner of moving stones with said derrick, holes are cut in the opposite sides of the stones, in which to place the points of the dogs; that, in the stone being moved, the holes were improperly and carelessly made, and did not give sufficient hold to the dogs, and that, as appellant proceeded to drag the stone on the ground, it was pulled against another large stone, which made it impossible to be pulled farther by the hold had upon it with the dogs, but that appellant continued, carelessly and negligently, to pull upon the stone until the dogs slipped from their hold, and flew with great force through the air toward the signal station upon which appellee's son was standing, and, without warning, or without giving him an opportunity to change his position, struck him and threw him violently to the ground, upon stones, and so injuring him that he died two hours thereafter; that at appellant's quarries, where said boy was working, there were two large derricks, and that a signal boy was employed for each derrick; that the derrick which killed appellee's son was a different one from the one for which he was acting as signal boy, and one with which he had no connection whatever; that each derrick had a separate crew of men, and a separate manager, known as "derrick boss"; and that said derricks were so located that each was in reach of the other, and they were worked and used upon the same yards.

The first question discussed by counsel arises under the ruling of the court striking out appellant's plea in abatement. In the pleading called a "plea in abatement" it is averred that James Nelson, mentioned in the complaint as appellee's husband, was not, at the time of the commencement of the action, dead or in prison, and that he had not de-

serted his family. It was on this ground alone that it was asked that the action abate until the facts charged should be adjudicated and finally determined. At common law, an action for the death of a minor child did not survive in favor of the parent or parents. It is now only by virtue of the statute that such action can be maintained, and primarily the right to sue is given alone to the father. This right is based upon the fact that the father is entitled to the services and earnings of his minor child. Section 266, Burns' Rev. St. 1901, provides: "When a husband or father has deserted his family or is imprisoned, the wife or mother may prosecute or defend, in his name, any action which he might have prosecuted or defended and shall have the same rights and powers therein as he might have had." Section 267, Burns' Rev. St. 1901, is as follows: "A father (or in case of his death or desertion of his family or imprisonment, the mother) may maintain an action for the injury or death of a child." This statute, upon the condition named, vests in the mother the right to prosecute an action for the injury or death of her minor child. Section 368, Burns' Rev. St. 1901, provides: "Pleadings denying the jurisdiction of the court or in abatement of the action and all dilatory pleas must be supported by affidavit. The character or capacity in which a party sues, or is sued, and the authority by virtue of which he sues shall require no proof on the trial of the cause, unless such character, capacity or authority be denied by a pleading under oath, or by an affidavit filed therewith." Counsel for appellant contend that, under this statute, they cannot test appellee's capacity to sue, except by a plea under oath, and that the issue upon that plea should have been determined. We think counsel are mistaken. It is not a question of capacity, but a question of right conferred by statute upon the wife and mother under the conditions named. Under these statutes, the wife and mother has the same right to prosecute an action of this character as the husband or father, when her right rests upon the fact that the husband and father was either dead or in prison, or had deserted his family. To exercise this right, it is essentially necessary for her to bring herself within one or more of the provisions of the statute, and this she has done by the averments in her complaint. In this case appellee bottomed her right to prosecute this action upon the fact that the husband and father had deserted his family. This was a substantive and issuable fact, and, to maintain her right to sue, she was required to prove it. A plea in abatement is one in which is set up matter tending to defeat or suspend the suit or proceeding in which it is interposed, but which does not debar the plaintiff from recommencing another action at some other time or in some other way. *Encycl. Plead. & Prac.* vol. 1, p. 1. Under this recognized definition of the term "plea in abatement," it is clear that the

pleading so designated by appellant, and stricken out on motion, was not such a plea, but an answer in bar. There was no error in sustaining the motion to strike out.

The next question in the order of discussion is the one which arises upon the action of the court in overruling the demurrer to the complaint. The complaint is a common-law count to recover damages for the alleged negligent killing of appellee's son, and is not drawn upon the provisions of the employers' liability act of 1893. It charges appellant with two acts of negligence, in this: First, that it required appellee's son to cease his duties as water boy, and directed him to perform the duties of signal boy—the latter position being a more dangerous one than the former, and so known to be by appellant, of which fact the deceased was ignorant; second, the manner in which appellant, by its servants, undertook to move a heavy stone, bringing it in contact with another heavy object, and applying sufficient force, through its derrick and ropes, to pull the "dogs" from their hold upon the stone, which caused them to fly against the deceased, by which he was killed. An employé, in a case of this character, assumes all the ordinary dangers and risks incident to the employment, which include obvious dangers and risks of which he has knowledge, or of which, by the exercise of ordinary care, he could have known. These are propositions of law about which there seems to be no controversy. It is necessary, therefore, for the complaint in such case to state facts showing that the injured party did not assume the risk. *American Rolling Mill Co. v. Hullinger* (Ind. Sup.) 67 N. E. p. 986. An employé assumes not only the ordinary dangers of his employment which are known to him, but also such as by the exercise of ordinary diligence would have been known to him. *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 53 N. E. 763; *Linton Coal Co., etc., v. Persons*, 15 Ind. App. 69, 43 N. E. 651. The doctrine of assumption of risk on the part of the employé rests upon his knowledge of the dangers incident to his employment, and this includes the dangers which he might have known by the exercise of ordinary care and diligence. It has many times been ruled that, in the class of cases we are now considering, it is essential, in order to make a good complaint, to aver that the injured party had no knowledge of the danger. *Peerless Stone Co. v. Wray*, 143 Ind. 574, 42 N. E. 927; *Louisville, etc., Ry. Co. v. Sandford, Adm'r*, 117 Ind. 265, 19 N. E. 770; *Big Creek Stone Co. v. Wolf, Adm'r*, 138 Ind. 496, 38 N. E. 52; *Louisville, etc., Ry. Co. v. Corps*, 124 Ind. 427, 24 N. E. 1046, 8 L. R. A. 636; *Brazil, etc., Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Wabash, etc., Ry. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; *New Ky. Coal Co. v. Albani*, 12 Ind. App. 497, 40 N. E. 702; *Cleveland, etc., Ry. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174; *Lake Store, etc., Ry. Co. v. Kurtz*,

10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303. In *New Ky. Coal Co. v. Albani*, supra, this court said: "The servant's knowledge or want of knowledge must be specially alleged, because upon this it depends whether or not he is to be held to have assumed the risk; * * * assumption of the risk and contributory negligence being separate and independent factors." As far as the complaint goes in this case is to the extent of averring that the place to which appellee's son was sent to work was more dangerous and hazardous than the position he had formerly occupied, and that he was ignorant of the increased danger. There is no averment in the complaint to the effect that he did not know the place was dangerous. The complaint in no place negatives his knowledge of the danger. The averment that the position of signal boy was more dangerous than that of water boy, and that the deceased was ignorant thereof, falls short of an allegation that he had no knowledge of the danger. Neither is there any allegation that he had no knowledge of the danger that confronted him from the operation of the derrick in moving the stone in the manner described by the complaint. Under the uniform rule in this state, as indicated by the authorities cited, we are constrained to hold the complaint bad for its failure to aver that the deceased had no knowledge of the danger which confronted him and caused his death.

The judgment is reversed and the cause remanded, with instructions to the court below to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

(32 Ind. App. 273)

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA v. DINKLE.

(Appellate Court of Indiana, Division No. 1.
Jan. 26, 1904.)

MUTUAL BENEFIT SOCIETY—CONSTITUTION—CONSTRUCTION—DUES—ASSESSMENTS—ARREARAGES—SUSPENSION FROM BENEFITS—FORFEITURE—CORPORATIONS—ACTIONS—PLEADING.

1. Where the dues of a society in the nature of a mutual benefit association were 50 cents each month, and each local union collected an assessment monthly, and the constitution provided that monthly dues should be charged on the books on the 1st of each month, and that the secretary should not receive dues in the interim between meetings, except that after the last meeting in the month he should receive dues up to and including the last day of the month, the monthly dues and assessments were entered and became due on the 1st of the month, but the members had all of that month in which to pay without becoming delinquent.

2. The further provision that when a member owed a sum "equal to three months' dues" he was not in good standing did not mean merely an arrearage of three months' dues of 50 cents per month, but a sum equal to that amount, and, if a member was assessed \$2 in any one month, and did not pay it for three months, he was not in good standing.

3. An organization of carpenters having a number of objects in view, such as "to discourage piece work, encourage the apprentice system," etc., did not issue a policy of insurance, but provided that each member over six months a contributing member and in good standing should be entitled to certain benefits, but that "when a member owes a sum equal to three months' dues he is not in good standing, and is thereby suspended from all benefits in the interim, and will not again be in benefit until three months after all his arrearages are paid in full," but that the delinquent might exercise the privileges of membership meanwhile, and that forfeiture of membership occurred only after six months' delinquency. *Held*, that the exclusion from benefits for three months' arrearages was not a forfeiture, but was within the power of such organization to make regulations, and was not so unreasonable as to be illegal.

4. Where an association sued by name with the words "a corporation" added thereto answered by that name, filed a motion for new trial, and assigned error, it must be considered a corporation, though there is no evidence of incorporation in the record on appeal.

Appeal from Circuit Court, Allen County; Edward O'Rourke, Judge.

Action by Elizabeth Dinkle against the United Brotherhood of Carpenters and Joiners of America. From a judgment for plaintiff, defendant appeals. Reversed.

Ryan & Ryan, for appellant. Olds & Doughman and J. W. Eggeman, for appellee.

ROBINSON, J. Overruling appellant's motion for a new trial, sought on the ground that the court's decision was not sustained by sufficient evidence and was contrary to law, is the error assigned. The agreed facts, as set out in the bill of exceptions, are as follows: Appellee is the widow of John O. Dinkle, who became a member of the appellant organization on June 11, 1900, and continued a member until his death June 29, 1901. Appellant, "the United Brotherhood of Carpenters and Joiners of America, is an organization consisting of local unions in the United States, and that the defendant herein is the supreme authority in said order, and has control of the grand and subordinate unions of the organization." The objects of the organization, as set forth in its constitution, are to discourage piece work, to encourage the apprentice system and a higher standard of skill, to cultivate feelings of friendship among the craft, to assist each member to secure employment, to reduce the hours of daily labor, to secure adequate pay for work, to furnish aid in cases of death or permanent disability, and by legal and proper means to elevate the moral, intellectual, and social condition of the members and to improve the trade. That there has been organized in Ft. Wayne, for two years last past, a subordinate union known as "Ft. Wayne Union, No. 232, United Brotherhood of Carpenters and Joiners of America," which is under the control of appellant. That each subordinate union collects monthly from each of its members in good stand-

ing an assessment or dues, for the use of the appellant. That the decedent, Dinkle, was admitted to membership in the Ft. Wayne Union, No. 232, and by such admission he was and became entitled to all of the privileges and benefits of membership in the general organization of the appellant, as provided for in the by-laws and constitution. That the following sections of appellant's constitution relate to the question of benefits recoverable in case of the death of a member: "Sec. 102. On the death of a member in benefit, his wife or legal heirs, as named in his application, shall be entitled to the member's funeral benefit as prescribed in the constitution." "Sec. 95. The members' funeral benefit shall be \$100 on six months membership, and \$200 on one year's membership." "Sec. 56. Monthly dues shall be charged on the books on the first of each month. A member joining at any other time in the month shall pay in advance a proportionate amount up to the first of the next month." "Sec. 89. When a member owes a sum equal to three months' dues, he is not in good standing, and is thereby suspended from all benefits in the interim, and will not again be in benefit until three months after all his arrearages are paid in full." The monthly dues were 50 cents. That immediately after the death of Dinkle, appellee, who was the beneficiary, furnished appellant with proofs of the death, as required under appellant's laws and constitution. That the following is a statement of assessments and dues made on decedent, the amount paid, and the date of payment, in the order named: May, 1900, 25 cents, April 2, 1900; June, 50 cents, April 2, 1900; July, 50 cents, December 3, 1900; August, 50 cents, January 14, 1901; September, 50 cents, February 11, 1901; October, 50 cents, March 18, 1901; November, 50 cents, March 25, 1901; December, 50 cents, April 1, 1901; January, 1901, 50 cents, April 29, 1901; February, 50 cents, April 29, 1901; March, 50 cents, May 13, 1901; April, \$2, June 24, 1901; May, \$2, June 24, 1901; June, \$2, June 24, 1901; July, 20 cents, June 24, 1901. The court found for appellee and rendered a judgment in her favor for \$200.

Appellant's constitution (section 56) provides that monthly dues shall be charged on the books on the 1st of each month. It also provides (section 57) that the financial secretary shall not receive the dues of members in the interim between meetings, except that after the last meeting in the month he shall receive dues at his house or office up to and including the last day of the month, entering upon the card of membership the exact date of payment. The agreed facts state that the monthly dues were 50 cents, and that each subordinate union collected monthly an assessment or dues. From this it must be held that monthly dues and assessments were placed on the books and became due on the 1st of the month, but that the member had

all of that month in which to make the payment, and would not be delinquent as to the amount payable that month until the 1st of the following month; that is, the decedent was not in arrears for the dues and assessments for April, 1901, until after the expiration of that month—until May 1st following. It certainly could not be said that he was in arrears during the month of April for the April dues and assessments. So that, when section 89 says that when a member owes a sum equal to three months' dues he is not in good standing, it manifestly means that he is not in good standing when he is in arrears for that sum.

The agreed facts show that the decedent owed \$2 for the month of April, 1901, and that this was not paid until June 24th. He was therefore in arrears for this amount from the 1st day of May until it was paid, June 24th. As the dues were 50 cents per month, he was in arrears, within the meaning of section 89, "in a sum equal to three months' dues." The provision is not that if he owes three months' dues he is in arrears, but that if he owes a sum equal to three months' dues. There is no ambiguity in the language thus used, and we must give to the words used their ordinary meaning. By the provisions of the constitution a member is subject to fines and assessments. The agreed facts state that the monthly dues were 50 cents, and that for the month of April decedent was charged by appellant with \$2. The payment of all sums owing by a member for any month is put on the same basis, and a member is delinquent when he is in arrears in a sum equal to three months' dues. On June 24th decedent paid \$2, for which he had been in arrears since May 1st.

The concluding part of section 89 suspends a member from all benefits while in arrears, and provides that he "will not again be in benefit until three months after all his arrearages are paid in full." This provision, it is argued by appellee's counsel, is unreasonable and oppressive, and should be disregarded. It is not asked that this language be given a certain construction, but that it be stricken out of the section, and wholly disregarded. Appellee bases her right to the money she sues for upon that provision of appellant's constitution which says that on the "death of a member in benefit" his wife or heirs shall be entitled to the member's funeral benefit, as prescribed in the constitution. It is quite true that forfeitures are not favored in the law, and that continuing an insurance policy in force and accepting payment of premiums with knowledge of facts, which, by the terms of a condition of the contract, make it voidable, is a waiver of the condition. *Sweetser v. Odd Fellows, etc., Ass'n*, 117 Ind. 97, 19 N. E. 722; *Painter v. Industrial Life Ass'n*, 131 Ind. 68, 30 N. E. 876. While the appellant has some of the features of an insurance company, yet it does not issue any policy of insurance, and goes no

further in this particular than to pay sick or disability benefits and funeral benefits. And this feature of the organization is by no means the principal purpose for which it exists. The right to such benefits is not concurrent with the payment of dues or an assessment at the inception of membership. Appellant's constitution (sections 93 and 95) provides that each beneficial member will be entitled to benefits, "provided he is over six months a contributing or financial member in good standing"; and that the member's funeral benefit "shall be \$100 on six months' membership; \$200 on one year's membership." Any promise appellant makes in its organic law to pay its members benefits becomes a contract between appellant and any person becoming and continuing a member, and to the extent that the mutual obligations of appellant and a member constitute a contract the constitution and by-laws of appellant are a part of that contract. The member must know what is required of him when he becomes a member, and so long as he voluntarily continues a member he agrees to comply with such requirements. The organization may have good reasons for imposing fines and penalties upon delinquent members. That is a matter it must determine for itself. It concerns no one outside of the membership, whether the enforcement of a certain rule of the organization will be inexpedient or detrimental to the best interests of the organization. Such fines and penalties, imposed by its constitution, may seem severe; but so long as they are not illegal, nor immoral, nor against public policy, they may be enforced. Within these restrictions the society must determine for itself what rules it thinks will best carry out its purpose.

The enforcement of the rule in question is not a forfeiture of membership. The delinquent member, after arrearages are paid, and during the prescribed period, may exercise the privileges of membership, and share in all its advantages except in the matter of benefits. A delinquency of six months is a forfeiture of membership without a vote of the local union, and such person can be readmitted only as a new member. When decedent paid his arrearages, he must have known that by the terms of his contract he would not be entitled to benefits until the expiration of three months thereafter. Even if it be admitted that the rule is a harsh one, we see no sufficient reason for declaring it unreasonable. And, construing the provisions of the constitution relating to the payment of dues and assessments as it was manifestly intended they should be construed, we do not think it can be said that the rule is oppressive. From the declared purpose of the organization, as above set out, we must conclude that decedent became a member with a number of objects in view aside from the matter of benefits. If he voluntarily subjected him-

self to the provisions of what might seem to be a harsh rule concerning the payment of these benefits, we see no more reason for relieving him from its operation than there would be for relieving him from a hard bargain which had been fairly and voluntarily entered into. No unfair advantage was taken; no fraud was practiced. A contractual relation existed between appellant and decedent, and the provision in question entered into that relation. And, as the provision is neither illegal, nor immoral, nor against public policy, we see no sufficient reason for declaring it inoperative.

Nor do we think it material, in this case, whether appellant is an incorporated or an unincorporated society. Appellant was sued as a corporation, the complaint stating that appellee "complains of the defendant, United Brotherhood of Carpenters and Joiners of America, a corporation." By that name appellant answered the complaint by general denial, filed a motion for a new trial, and has assigned error. There is no evidence in the bill of exceptions that appellant is a corporation, and counsel argue that for the purpose of this case it must be considered an unincorporated society. However, upon the authority of *Adams Express Co. v. Hill*, 43 Ind. 187, it must be held that appellant is a corporation. Appellant does not deny the membership of the decedent, but it is argued that whether appellant is an incorporated or unincorporated society becomes important in determining the reasonableness or unreasonableness of the section of the constitution or by-laws; citing *Kennedy v. Carpenters' Union* (Sup.) 78 N. Y. Supp. 85. But, in so far as the payment of these benefits makes appellant a mutual benefit society, the application for membership, the constitution and by-laws, and the certificate of membership constitute a contract between the member and the society. *Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. E. 571; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 118; *Supreme Lodge v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409. In such a case we see no sufficient reason for saying that an unreasonable provision in the constitution of an incorporated society will not be enforced, while the same provision in an unincorporated society will be enforced. However, as we have concluded that the provision in question is not of such a character that it must be declared a nullity, the above distinction becomes unimportant. As before stated, we are not asked to construe this particular provision, but we are asked to strike the provision from appellant's constitution. It must be conceded that appellant has the right to impose fines and penalties for failure to pay dues and assessments promptly, and that it may expel delinquent members. Membership in appellant carries with it the member's assent to these provisions. Within certain restrictions, before mentioned, appellant must determine for it-

self what rules and regulations will best promote the purposes for which it was organized. It has done so. The provision in question is plain, it needs no construction, and there is nothing in it which authorizes us to say that it is null and void.

Judgment reversed, and a new trial ordered.

COULTER et al. v. BRADLEY.*

(Appellate Court of Indiana, Division No. 1.
Jan. 27, 1904.)

PLEADING AND PRACTICE—COMPLAINT—ANSWER—DEMURRER—ASSIGNMENT OF ERROR—SUFFICIENCY.

1. In an action against executors to enforce payment of a legacy, the omission in the complaint to allege that there was property of testator applicable to the payment of the legacy is cured by a special finding showing that fact.

2. An assignment of error that the court erred in sustaining a demurrer to the answer of defendant does not call in question the sufficiency of the complaint, assailed for the first time on appeal, though an assignment of error that the court below erred in not carrying the demurrer back and sustaining it to the complaint would accomplish that result.

Appeal from Circuit Court, Clinton County; J. F. Neal, Special Judge.

Action by Anna Bradley, special administratrix of Frank Bradley, deceased, against David A. Coulter and others, executors of the will of Hiram H. Bradley, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

H. C. Sheridan, for appellants. W. R. Moore and Elias D. Salsbury, for appellee.

BLACK, J. The appellee, special administratrix of the estate of Frank Bradley, deceased, instituted a proceeding against the appellants, as executors of the last will of Hiram H. Bradley, deceased, seeking an order of the court below, in which the settlement of the estate of the testator was pending, requiring the executors to pay the appellee a legacy bequeathed to her intestate in the fourth item of the will, as follows: "I give and bequeath to my nephew, Frank Bradley, son of my brother John Bradley, the sum of one thousand dollars." There was an answer in four paragraphs—the first, a general denial. The court sustained a demurrer of the appellee to the second and fourth paragraphs, and overruled her demurrer to the third paragraph, to which there was a reply in denial. There was a special finding of the facts, with conclusions of law thereon in favor of the appellee. The appellants have assigned in this court the insufficiency of the petition or complaint, that the court below erred in sustaining the demurrer to the second and fourth paragraphs of answer, and that it erred in its conclusions of law.

Coulter v. Bradley, 30 Ind. App. 421, 66 N. E. 184, was a proceeding against the exec-

*Rehearing granted, 71 N. E. 61. Transferred, 71 N. E. 903.

utors of the will here in question to compel the payment of a general legacy bequeathed by the third item of the will to John Bradley. It appears from the opinion of this court that it was urged against the complaint, under an assignment questioning its sufficiency for the first time on appeal, that it did not allege that there was personal property in the custody or control of the executors from which they could pay the general legacies, and did not contain averments that would warrant the court in charging the executors with the payment of the legacy in the absence of personal estate. The same objection, in substance, is urged in the case at bar against the complaint, and, as we understand the argument of counsel, against the conclusions of law. In the case cited, this court expressed the opinion that the personal estate of the testator is the primary fund for the payment of legacies, unless the will, by its terms, shows a different intention, and, before the real estate can be resorted to for the payment of legacies, it must be shown that the personal estate was insufficient, or had been exhausted by the payment of debts, and, if the testator did not specify out of what fund a legacy shall be paid, the legal presumption is that it was his intention that it should be payable out of the personal estate only, and, if the personal estate be not sufficient, the legacy fails. In that case, as in this, the will was not made part of the complaint. The mere fact that it was not exhibited could not, it was held, aid an attack made for the first time on appeal; but it was said that, if it had been made part of the complaint, it might have overcome the objections raised on appeal to the complaint by showing that it was the intention of the testator to make the legacy a burden upon the real estate, or that the residuary clause carried with it enough property to pay the legacies in case the personality was deficient in this respect. The complaint was held insufficient because of its omission of material averments showing property applicable to the payment of the legacy, and it was said that the finding and judgment would not cure the omission. In that case the finding was general. In the case at bar the complaint is similarly deficient, but there is a special finding. For the sake of brevity, we will set out in substance only those parts of the finding which seem to illustrate the contention of counsel on the question now under discussion: The estate of the testator at the time when the will was probated was all real estate. The value of the estate is \$9,000 in excess of the expenses of administration, and not including the portion taken by the testator's widow. The will was not found for five years and four months after the testator's death, and in the meantime his widow had administered upon his estate, and had been discharged as administratrix thereof. By the provisions of the will the testator's widow was given one-third of all his estate, real and personal; but she

renounced the provisions of the will, and elected to take under the statute, and she had received and had been paid all that was allowed her by law as widow. The will, in the first item, provided for the payment of the testator's debts. In the second item was the provision for the widow, above mentioned. In the third item, John Bradley, the testator's brother, was given \$1,000. The fourth item contained the bequest of \$1,000 to Frank Bradley, the testator's nephew; being the legacy here in question. In the fifth item the testator devised to the city of Frankfort certain real estate for a free public park, upon condition that within three years after his death the city should expend \$2,000 in improving and beautifying the real estate. This real estate was and is of the value of \$500. The city refused to accept the devise. In the sixth item the testator gave and devised the remainder of his estate, real and personal, that should be left after the satisfaction of the bequests made in the second, third, fourth, and fifth items, to the Frankfort Commandery of Knights Templars, in trust for the creation of a fund to be devoted to the assistance of sick, disabled, and indigent sir knights who were or might become members of that commandery, and their widows and orphans. In the seventh item it was provided that, if the city should fail to comply with the condition of the fifth item, its rights should be forfeited, and the executors should sell the land so devised to the city, and should pay the proceeds to the commandery, to become a part of the fund given in trust to it. The foregoing were all the provisions of the will devising and bequeathing the property of the testator. It was found that no personal estate came into the hands of the executors, and they received nothing and paid out nothing as executors. It thus appears from the special finding that there is property, consisting of real estate, of much greater value than the legacies, and that it was the testator's intention that only such portion of this remainder of the estate as should be left after satisfaction of the bequests, including that to the appellee's intestate, should go to the commandery as trustee. The will itself, by its express provisions, will not permit the legacy to fail for lack of personal property out of which to pay it, and the fact that no personal property has come to the possession of the executors cannot avail against the legatee. The property now remaining is real estate. The appellants, assuming that the commandery is the devisee of this real estate, contend that the suit should have been against that organization; but the commandery is by the will given in trust, for the creation of a fund, only the remainder of the estate left after the satisfaction of the legacies. The appellants, as executors of the will, are charged with the duty of administering the estate, and all the legacies should be paid before any specific portion of the estate can be ascertained as

the property rightfully to go to the commandery.

We have thus far proceeded upon the assumption that the material incompleteness of the complaint is cured by the special verdict, which is contrary to the view taken by the appellants. In *Conley v. Grove*, 124 Ind. 208, 24 N. E. 731, a demurrer to the complaint for want of sufficient facts having been overruled, and an exception to the ruling having been properly reserved, this action of the court was assigned as error. The court held the complaint insufficient, but, the case having been tried upon an agreed statement of facts, which supplied the material fact omitted from the complaint, it was said: "While the complaint was bad, yet the case was tried upon it and all the facts agreed upon, and a correct finding and judgment upon the facts as agreed upon. There could be no other finding and judgment except that rendered. No good could be accomplished by reversal of the case, as the same finding and judgment would have to be rendered if the case was reversed and the complaint amended." In *Gilliland v. Jones*, 144 Ind. 662, 43 N. E. 939, 55 Am. St. Rep. 210, the court, on appeal, looked to a special finding, and held, upon a finding of matter of fact therein, that the plaintiff was not injured by error in sustaining a demurrer to one paragraph of his complaint. In *Lake Shore, etc., R. Co. v. Kurtz*, 10 Ind. App. 60, 37 N. E. 303, it was said (page 74, 10 Ind. App., and page 306, 37 N. E.) that, in view of the decisions of the Supreme Court alluded to in the opinion, this court did not feel at liberty to go to the extent of holding that a complaint defective in matter of substance can be cured by a special finding. This was said with reference to the action of the trial court in overruling a demurrer to the complaint. In the same case (page 73, 10 Ind. App., and page 306, 37 N. E.) it was said that when there is a special verdict or finding, or an agreed statement of the facts, in which the fact essential to make the pleading good is expressly found, or when such fact is admitted, or established by the undisputed evidence, no reversal can take place without violating the spirit, if not the letter, of our statutes. "Indeed," it is further said, "we can perceive no substantial reason why the same rule should not apply to matters of substance, as well as to matters of form, when the omitted fact is admitted or agreed upon; and this we understand to be the effect of the authorities. * * * When every fact essential to invoke the law upon the rights of the parties is either found, admitted, or undisputed, an appellate court ought to have the power to determine whether or not substantial justice has been done by the judgment of the lower court, regardless of any ruling or error which does not deprive the adverse party of his substantial rights." In *Cleveland, etc., R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86, the decision related to the action of the trial court in overruling

a demurrer to the complaint, in which there was an omission of an essential fact. It was held that the necessary fact omitted from the complaint could not be supplied by the special verdict. See, also, *Western Assurance Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. 265. So, also, in *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638, it was held that, where a pleading is tested by demurrer, it must stand or fall by its own averments; that it can find neither weakness nor strength from other parts of the record. In *Dill v. Mumford*, 19 Ind. App. 609, 49 N. E. 861, it was held that this court cannot look to the evidence in reviewing the action of the court below in overruling a demurrer to the complaint. In *Cleveland, etc., R. Co. v. The Edward C. Jones Co.*, 20 Ind. App. 87, 50 N. E. 319, the statement that, when a necessary and material averment is wholly omitted from a complaint, such defect cannot be cured by a special finding, was made with reference to the trial court's action in overruling a demurrer to the complaint. In *Rau v. Ball Bros., etc., Co.*, 21 Ind. App. 147, 51 N. E. 945, cited for the appellants, the complaint, it was held, might be regarded as defective, merely, and not insufficient for want of a material averment; and the cause was disposed of upon a consideration of the special verdict, judgment thereon in the appellant's favor being ordered. In *Western Assurance Co. v. Koontz*, 17 Ind. App. 54, 45 N. E. 95, it is said that the correct rule deducible from the decisions is that the verdict and judgment will not cure a defective complaint, when the question is first raised by the assignment of error in this court, if the averment of a substantive fact has by the pleader been entirely omitted therefrom. There was in that case a special verdict, which is not set out, and it does not appear that it did, in truth, supply any fact omitted from the complaint. We are of the opinion that the rule as thus stated is sufficiently supported by authority if confined in its application to a general verdict or finding; but it would seem, upon principle and authority, and a correct view of the liberal provisions of our statutes, that the rule should not be so far extended as to include a case wherein the omitted fact is supplied, as here, by a special finding. The appellants bring to us a record which, with the complaint first attacked by assignment of error, contains also a special finding, which is as much a part of the record as the complaint itself; and the entire record thus shows that the cause was decided upon a consideration of facts, among which was included the fact for the omission of which the complaint is assailed. It cannot be said that the same question is involved that would be presented by an assignment of the overruling of a demurrer to the complaint, whereby the defendant was compelled, against his formal objection, taken in the manner provided by law, to combat against a demand not based on any cause of action. If

the fact necessary to the completeness of the cause of action, omitted from the complaint, be supplied by the court's special finding of the facts, it should be presumed, in favor of the regularity and propriety of the proceedings in the trial court, that the fact so supplied was proved without objection, the contrary not appearing. If it were not so proved, the action of the court in admitting the evidence would properly be assailed by saving an exception to such action, and presenting the matter in a motion for a new trial. If matter which would constitute error does not appear on the face of the record, we must presume that it does not exist. Our statutes provide that no judgment shall be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below (section 670, Burns' Rev. St. 1901), and that the court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and that no judgment can be reversed or affected by reason of such error or defect (section 401, Burns' Rev. St. 1901), and even that no objection, taken by demurrer and overruled, shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined (section 348, Burns' Rev. St. 1901). It cannot be claimed here that the question as to the sufficiency of the complaint on demurrer was raised in the court below, and saved for decision here, by the demurrer to the answer, and the exception to the action of the court in sustaining such demurrer, and the assignment here that the court below erred in sustaining that demurrer. In *Stockwell v. State ex rel.*, etc., 101 Ind. 1, 16, it was held that an assignment on appeal that the trial court erred in sustaining a demurrer to a paragraph of an answer brings in question the sufficiency of such paragraph, and requires an examination thereof, but does not require an examination of the complaint, or call in question its sufficiency, and that, to present such question as to the sufficiency of the complaint, the appellant should assign as error that the court below erred in not carrying the demurrer back and sustaining it to the complaint. See, also, *Hunter v. Fitzmaurice*, 102 Ind. 449, 2 N. E. 127; *Hall v. Brownlee*, 28 Ind. App. 178, 62 N. E. 457. In *Peters v. Banta*, 120 Ind. 416, 425, 22 N. E. 95, it was said that, when the appellants alleged as error that the court below erred in sustaining the demurrer to a specified paragraph of answer, they thereby confined and limited the court on appeal to a consideration of the answer—not as to whether it was sufficient, though bad, for a bad complaint, but whether or not it stated such facts as, in law, constituted a good defense to the action, supposing the complaint to be good—and that the sufficiency of the complaint was not brought in question by such

an assignment of error. See *Baldwin v. Sutton*, 148 Ind. 591, 593, 47 N. E. 629, 1067. These decisions must prevail with us, as against any earlier decisions to the contrary that may be found. The appellants waive their assignment of error in sustaining the demurrer to the second paragraph of answer, for the expressed reason that the same facts were probably admissible under the third paragraph, in which they pleaded former adjudication. The fourth paragraph contained no material averments, except such as could have been as effectually proved under the third paragraph or the first, which was the general denial. There could not be, therefore, any available error in sustaining the demurrer to the fourth paragraph.

Judgment affirmed.

HENLEY, C. J., concurs in the conclusion.

(32 Ind. App. 341)

HILLE v. NEALE, Township Trustee.

(Appellate Court of Indiana, Division No. 2.
Jan. 28, 1904.)

DRAINAGE DITCH—CLEANING AND REPAIRING—ALLOTMENT AND REALLOTMENT—VALIDITY—NOTICE TO LANDOWNERS—ACQUIESCENCE IN VOID ALLOTMENT—EFFECT.

1. In proceedings pursuant to Acts 1889, p. 53, c. 88 (Burns' Rev. St. 1894, §§ 5632-5634; Horner's Rev. St. 1897, § 4284a et seq.), to allot a drainage ditch among landowners for cleaning and repairs, the county surveyor did not attempt to give any notice of the time and place for hearing objections to the allotments, nor provide any such time and place, nor enter of record an order confirming the allotment, as required by sections 3 and 4. *Held*, that the allotment was void and subject to collateral attack.

2. Acts 1897, p. 157, c. 90, after a preamble reciting that whereas county surveyors fail, under Burns' Rev. St. 1894, § 5634, to give "personal notice" of the hearing of objections to allotments for repairing and cleaning drainage ditches, and whereas the Supreme Court have decided that "such personal notice" is necessary, provides for establishing by a "personal notice" allotments as previously determined in counties where surveyors failed to give the required "personal notice." *Held* to apply only where attempt was made to give the required statutory notice, and not to cases where there was no attempt whatever.

3. Voluntary acquiescence by landowners for the time being in invalid requirements as to cleaning and repairing a drainage ditch cannot bind them for the future as to void allotments.

4. Burns' Rev. St. 1894, § 5643 (Horner's Rev. St. 1901, § 4284d), providing for a new allotment of a drainage ditch for cleaning and repairs, has no application where no legal allotment is in existence.

5. An allotment of a drainage ditch for cleaning and repairs had been made by a county surveyor without notice, and was therefore invalid, and in a notice of subsequent proceedings they were called an "allotment," whereas they were recorded as a "realotment," and a landowner attacking the latter proceedings by a subsequent suit objected to such notice, but claimed that the prior allotment was so far regular that it might have been perfected by a subsequent notice under Acts 1897, p. 157, c. 90. *Held*, that it was immaterial whether the notice spoke of an allotment or a realotment, as on his theory of the case he would be bound by a

change in the previous allotment on such a notice, and besides the surveyor could not invalidate his acts by a wrong name.

Appeal from Circuit Court, Vanderburgh County; H. A. Mattison, Judge.

Action by Charles Hille against John A. Neale, trustee of Union township, for relief against an assessment for cleaning and repairing a drain. From a judgment for defendant, plaintiff appeals. Transferred from Supreme Court. Affirmed.

Azro Dyer, for appellant. Richardson & Ortmeier, for appellee.

COMSTOCK, J. This proceeding was an agreed case under section 562, Burns' Rev. St. 1894, which was section 553, Rev. St. 1881. The following is a substantial copy of the agreed statement of facts:

At all the times hereinafter mentioned said Hille and Azro Dyer have been the owners in fee, as tenants in common, of a tract of land in said township, Vanderburgh county, Ind., containing 156 acres; said Hille has been the separate owner in fee of another tract of land in said township containing 216 acres; said Dyer has been the separate owner in fee of another tract of land in said township containing 80 acres; Robert J. Stroud has been the owner of another tract of land in said township containing, altogether, 250 acres; and Helen Stroud, the mother of said Robert J. Stroud, has been the owner of another tract of land in said township containing 94 acres. During the year 1898, Long and Duck Pond ditch was, by proceedings had in the commissioners' court of said county, duly established in said township, and thereafter, and prior to December 1, 1899, said ditch, having a total length of 22,700 feet, was constructed in accordance with the specifications required in said proceedings, and was accepted as complete by proper county officers. No remonstrance was filed in said proceedings, and no reviewers were appointed therein. From January 1, 1898, until the 15th day of November, 1900, Robert J. Stroud was continuously the duly elected, qualified, and acting trustee in and for said township, and from said November 15, 1900, until the present time said Neale has been continuously the duly elected, qualified, and acting trustee in and for said township. From January 1, 1899, until the present time Charles C. Genung has been continuously the duly elected, qualified, and acting county surveyor in and for said county. The land owned by said Hille and Dyer as tenants in common was assessed for the construction of said ditch, but the lands owned by them separately were not assessed for the construction of said ditch, nor mentioned in said ditch proceedings.

On December 23, 1899, said county surveyor, in writing, made and entered in his book kept for that purpose, and marked "Drainage Record No. 1," at page 112 there-

of, the following record, to wit: "Allotments for cleaning out and repairing of the Long and Duck Pond Ditch in Union township, Vanderburgh County, Indiana, under Act approved February 23, 1899, made December 23, 1899, by C. C. Genung, County Surveyor." No notice was given by the surveyor to the landowners and parties of allotment according to which the ditch was cleaned out in the year 1900. During said year no day was fixed for hearing remonstrances or objections on the part of the persons affected thereby, and no order was entered by the surveyor confirming or changing said allotment. Following and under said record entry were recited and described 25 tracts of land in said township, the names of the respective owners thereof, and the part, or length, in feet, of said ditch to be cleaned out and repaired by said landowners, respectively, as follows, to wit: The land owned by said Hille and Dyer as tenants in common was charged with 3,125 feet thereof in length, the land of said Robert J. Stroud was charged with 5,123 feet thereof in length, the land of said Helen Stroud was charged with 400 feet thereof in length, and the residue of said ditch was allotted in sections of different lengths to 22 other parcels of land in said township, held by other persons and corporations. No assessment was made in or by said record against the land owned by Hille individually, nor the land owned individually by said Dyer. Opposite the description of each tract of land mentioned therein said record recites the number of acres in such tracts which are benefited by said ditch.

During the year 1900, and prior to July 30th of that year, said Robert J. Stroud, township trustee, procured from said Genung, county surveyor, a transcript of said surveyor's record of allotments, and before August 1st of that year said trustee fixed a time prior to December 1, 1900, within which each allotment for cleaning out and repairing said ditch should be completed, and duly notified each person, to whose land an allotment had been made, of the time so fixed for the completion thereof, and every person so notified proceeded to perform, and did perform, his allotment within the time fixed in said notice, so that the entire ditch aforesaid was perfectly cleaned out and repaired prior to December 1, 1900, precisely as specified and required by said record of allotments made by the surveyor December 23, 1899.

On the 26th day of March, 1901, said county surveyor made and entered in said Drainage Record No. 1, at page 123 thereof, the following record entry, to wit: "Reallotments for cleaning out and repairing of the Long and Duck Pond Ditch, in Vanderburgh County, Indiana, under act approved February 23, 1899, made March 26th, 1901, by C. C. Genung, County Surveyor." Following and under said record was recited and described 25 tracts of land in said township, the names of the respective owners thereof, and the

length, in feet, of said ditch to be cleaned out and repaired by said landowners, respectively. Neither before the making of said record entry nor at any other time has any petition, signed by any party or parties interested in said ditch, been filed with said county surveyor asking for a new allotment thereof or asking anything whatever. By said new allotment or reallocations, the following tracts of land were charged with cleaning out and repairing said ditch, to wit: The said land owned by Hille and Dyer as tenants in common was charged with 3,000 feet thereof in length. The said land owned by Hille individually was charged with 400 feet thereof in length. The land owned by said Dyer individually was charged with 500 feet thereof in length. The land owned by Robert J. Stroud was charged with 3,840 feet thereof in length, "the said Robert J. Stroud having constructed a closed ditch at his own expense for 1,650 feet in length, which was accepted by the county surveyor, and with which 1,650 feet he had been personally charged." No part of said ditch was allotted to Helen Stroud, but the residue of said ditch was allotted in sections of different lengths to 21 other parcels of land in said township, held by other persons and corporations.

On the 11th day of March, 1901, Charles Hille was given a written notice, of which the following is a copy, to wit: "Notice. Mr. Charles Hille—To Whom It may Concern: You are hereby notified, That I will be at my office on the 26th day of March 1901, at the hour of 10 A. M., and will, then and there, hear all objections that may be made to my allotments for cleaning out annually and keeping in repair the Long and Duck Pond Ditch in Union Township, Vanderburgh county, Indiana, when and where you can appear and be heard, if you see fit. Dated this 11th day of March 1901. C. C. Genung, County Surveyor." At the same time a like notice was given to each person affected by said reallocation, and five public notices to the same effect were posted up in five public places in the township where the lands were situated. On the 26th day of March, 1901, there was no remonstrance or objection to the said reallocation, and 10 days thereafter said county surveyor entered in the Drainage Record of said county an order confirming said reallocation. Said record does not indicate the number of acres in each tract which are benefited by said ditch. Before August 1, 1901, said county surveyor caused to be delivered to said Neale, township trustee, a transcript of said surveyor's record of reallocations, and made and entered March 26, 1901, and said Neale has notified said Hille to clean out and repair 400 feet in length of said ditch, as fixed by said reallocations, but said Hille has failed and refused to clean out and repair said 400 feet of said ditch, except 125 feet thereof, and said Neale is now threatening to cause the same to be cleaned out and repaired, and to certify the

cost thereof to the auditor of said county, to be placed on the tax duplicate of said county, as a lien upon the land of said Hille.

The facts give rise to the following issues between said Hille and Neale, to wit: The said Hille claims that the said allotments made and entered by said county surveyor December 23, 1899, are valid and remain in full force and effect, and that the reallocations made and entered by said surveyor March 26, 1901, are void and of no effect; whereas said Neale claims that the reallocations made and entered by said county surveyor March 26, 1901, are valid and in full force and effect, and that the allotments made and entered by said surveyor December 23, 1899, are void and of no effect.

The agreed case being submitted to the Vanderburgh circuit court, that court, as a conclusion of law from the agreed facts, made a finding in favor of John A. Neale, township trustee, that the surveyor's record of March 26, 1901, recorded in Drainage Record No. 1, page 123, was valid, and that the surveyor's record of December 23, 1899, recorded in Drainage Record No. 1, at page 112, was void, and that said Hille was entitled to no relief under the agreed statement of facts, and judgment was rendered against Hille in accordance with said finding.

The errors relied upon for a reversal of the judgment are as follows: First, the court erred in its conclusions of law upon the agreed facts; second, in finding for the defendant, John A. Neale, trustee; third, in entering judgment in favor of John A. Neale, trustee, and against Charles Hille.

These assignments of error present substantially the same question, for the reason that the court's conclusion of law upon the agreed facts, its finding for Neale, and its entering judgment in his favor, all depend upon two questions—whether the allotment recorded by the surveyor December 23, 1899, was valid or a void record, and whether the allotment of March 26, 1901, was valid or void. Appellant claims that the allotment made December 23, 1899, was regular and valid because it was made and recorded in the Drainage Record at the proper time and in the proper form. This claim is based upon sections 5632-5634, Burns' Rev. St. 1894; section 4234a et seq., Horner's Rev. St. 1897; Acts 1889, p. 53, c. 33. By this statute it was made the duty of the county surveyor to make allotments of shares or portions of the ditches or drains, constructed under and by virtue of any law of this state, to landowners and others designated, to be by them cleaned out annually and kept in repair. By section 8 of said act the surveyor was required to reduce the allotments to writing and to record them in the drainage record, and thereupon to cause to be posted up notices of the place where and the time when he would hear all objections to the allotments, a form of notice being set forth in the statute. Provision was made also in said third section for service of

a copy of said notice, as summons are served, upon each resident owner or occupant of land and others designated. By the fourth section the surveyor was required to be present at the time and place mentioned in the notice, and to hear all objections made to such allotments; and, after hearing all objections offered, he was required to confirm or change the allotments as justice might require, and to enter an order accordingly, such order to be final and conclusive upon all parties interested, unless appealed from in 10 days thereafter.

In *Beatty v. Pruden*, 13 Ind. App. 507, 41 N. E. 961, it was held that it was the intention of the Legislature to provide in said section the service of personal notice by copy upon the resident landowners and others designated; and where the only notice given of the allotment was by the posting up of written notices in the form prescribed by statute, and by serving a copy thereof on the township trustee, a resident landowner, to whose land a portion of the ditch was apportioned, was not bound by the proceedings of the surveyor, which were void because of want of jurisdiction.

In the allotment of said December, 1890, the surveyor did not give nor attempt to give any notice of any kind, nor did he provide a time and place for remonstrances and objections, nor did he enter an order upon the record confirming said allotment. He therefore had no jurisdiction, and the allotment was void and subject to collateral attack. An entry upon the surveyor's record was therefore without jurisdiction and necessarily void.

Appellants argue that the allotment was so far regular that it might be made perfect by subsequent notice to the landowner, where he had no knowledge of the allotment when it was entered, under the act regulating the duties of county surveyors. Acts 1897, p. 157, c. 90. By said act of 1897 (section 5634a et seq., supplemental to Burns' Rev. St. 1894; section 4317 et seq., Horner's Rev. St. 1897) it was provided that in all counties where county surveyors failed to give personal notice to the respective landowners of the allotting of any ditch over which such surveyors had supervision under the statute of 1889, and ditch allotments for cleaning and repairing were by them made, they should give personal notice to the landowners of the land affected by such allotments, the form of notice to be the same as that prescribed in said third section of the act of 1889; and that if the landowner should fail to appear before the surveyor at the time and place prescribed in the notice, and present his objections to his allotment, or if, upon presenting his objections, the surveyor should hold against him and adjudge his allotment to be right and equitable, then the allotment should be finally established as previously determined, and he should be required to perform the work allotted to him, "the same as though personal notice had been given him in the first event,

and as though there was no irregularity therein," subject, however, to his right of appeal. It was provided in section 2 that the act should not be construed to give the surveyor power and authority to reallocate the repairing and cleaning of ditches and making of records as is prescribed in said act referred to in the preceding section, but that he is only to perform such duties as are required of him after the giving of notice as is prescribed in the aforesaid act.

The preamble of the act of 1897 reads: "Whereas, a large number of county surveyors, throughout the state of Indiana, fail, under § 5634 of Burns R. S. 1894, to give personal notice to land owners in their respective counties, where and at what time said surveyors would hear objections that might be made to the ditch allotments for the repairing and cleaning ditches made by him under said law, and, whereas, the Supreme Court of the state of Indiana have decided that such personal notice is necessary in order to bind the landowner to perform the work given to him by said surveyor under said allotment," etc. Said preamble and the text of the act indicate that it applies only where there was an attempt to give the requisite statutory notice, and not where the facts show that no notice of any kind was attempted to be given, as in the case before us.

Appellant points out that immediately after the allotment was so made and recorded, to wit, in the early part of the year 1900, the township trustee procured a transcript of the said allotment, adopted and acted upon the same, and thereupon duly notified the landowners interested in said allotment to clean out and repair said ditch in accordance therewith; that the landowners acquiesced in and adopted said allotment by proceeding to clean out and repair said ditch as required by said allotment, and completed the entire work prior to December 1, 1900; and that by the act of 1897, supra, this notice is made to take the place of the omitted notice, and operates like the nunc pro tunc order of the court. This court has held in the *Board of Commissioners v. Trotter*, 19 Ind. App. 628, 49 N. E. 976, adversely to this claim of the appellants. The voluntary acquiescence for the time being of landowners in invalid requirements cannot bind them for the future as to void allotments.

On March 28, 1901, the county surveyor made and entered in his record what he called "reallocation for cleaning out and repair of the Long and Duck Pond ditch." On March 11, 1901, the plaintiff (appellant) was served with a written notice to appear at the surveyor's office on March 28, 1901, and make any objections he had to the surveyor's allotment. At the same time like notices were given to the other interested landowners, and five notices were posted in public places in the township wherein the lands affected by the ditch are situated. On the 28th day of March, 1901, there was no remonstrance or

objection to the said so-called reallocation, and 10 days thereafter the county surveyor entered in his drainage record an order confirming said so-called reallocation. In making this allotment the surveyor followed the provisions of the statute. Appellants claim that this allotment is void. The first reason given is that no reallocation could be rightfully made until two years after the time the original allotment was made, which was December 23, 1899. Second, the attempted reallocation could not be legally made by the surveyor without a petition signed by one-half of the parties interested in the reallocation, and no such petition was ever filed.

In support of these reasons section 5643, Burns' Rev. St. 1894 (section 42841, Horner's Rev. St. 1901) is cited. Said section provides that if, at any time after two years from the time any allotment of any ditch is made under this act, a petition signed by one-half of the parties interested in said allotment, stating that said allotment is unfair and asking for a new allotment, is filed with the county surveyor, the said county surveyor shall proceed to examine said ditch, and, if he finds the allotment to be unfair or unjust, he shall proceed to reapportion said ditch as though no previous allotment had been made, but if he finds no cause for complaint he shall so report to the county auditor, who shall tax all costs in the proceedings to the persons signing said petition, and said costs shall be collected as other taxes are collected. Section 5633, Burns' Rev. St. 1894, provides that as soon as the ditch is constructed the county surveyor shall make an allotment for the cleaning and repairing of said ditch; but said section contains this proviso: that, where ditches were originally allotted for construction by reviewers appointed by the board of county commissioners, the allotments shall remain the same for repairs under this act, unless the majority of the parties assessed shall petition the surveyor for reapportionment.

This ditch was not allotted for construction by reviewers appointed by the board of county commissioners, and the proviso has no application, and it was the surveyor's duty under section 5633, *supra*, to make the allotment. He attempted to do this on December 23, 1899. This allotment we have held was void. When, in March, 1901, he again attempted to make an allotment, there was no legal allotment in existence, and section 5643, *supra*, that provided that, after two years from the time the allotment is made, such allotment can be changed by the surveyor upon petition signed by one-half of the parties interested in such allotment, has no application. Whether the notice served upon appellee spoke of an allotment or reallocation could make no difference, because, upon appellant's theory that the action of December 23, 1899, came within Acts 1897, p. 137, c. 90, such allotment could be changed, as he knew, upon the final hearing. By naming

the action of December, 1899, "an allotment" the surveyor could not make it valid in the absence of jurisdictional requisite. He could not make invalid the acts of March 26, 1901, by conferring upon it a wrong name. The proceedings of March 26th were called a "reallocation" in the record. In the notice served upon the appellant they were called an "allotment." The name given a particular act does not determine its legal effect. The law determines what the facts stated constitute. When the notice matured March 26, 1901, an "allotment" and a "reallocation" appear on the record of the surveyor. The notice recited that the surveyor called attention to the allotment alone, so that in the condition of the drainage record the appellant contends that the notice only applies to the "reallocation"—citing *Southern, etc., R. Co. v. Block*, 84 Tex. 21, 19 S. W. 300; *Fanning v. Krapf*, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293; *Bertoulin v. Bourgoin*, 19 La. Ann. 360.

In the first of the above cases a citation was issued against the Southern Pacific Railroad Company. The return of the sheriff showed service on the Southern Pacific Company. Plaintiff filed an amendment designating defendant as the Southern Pacific Railroad Company. This amendment was not served, and judgment was rendered against the Southern Pacific Company by default. Held, that the name of the plaintiff in error as defendant was not stated in the citation. The Southern Pacific Railroad Company and the Southern Pacific Company could not be regarded as identical.

In *Bloomfield Ry. Co. v. Burreas*, 82 Ind. 84, the objection to the complaint was that it showed upon its face that the judgment sought to be enforced was not recovered against the appellant. The appellant averred that the judgment was recovered against the appellant, but by the wrong name. It was held that it did not affect its validity. If a party is sued by a wrong name, is served with process, and fails to plead the misnomer in abatement, the judgment will bind him. The two cases are in conflict, and the Indiana case must govern.

In *Fanning v. Krapf*, *supra*, the real name of the defendant was T. Phelia Boyd Hopkins. The service of the notice was by publication and the published notice was addressed to P. B. T. Hopkins. It was held that the transposition of the initials of the Christian name of the defendant made the notice of no effect as to her, and gave the court no jurisdiction to render a decree against her.

In *Morgan et al. v. Woods*, 33 Ind. 23, it is held that the introduction of a wrong initial letter between the Christian name and the surname of plaintiff in the publication of notice of the pendency of a proceeding in attachment does not render the proceeding under such notice void, but simply erroneous, and, until reversed by an appellate court, the

judgments proceeding under it are effective and conclusive between the parties.

In *Bertoulin v. Bourgoin*, supra, after a default had been taken, a definitive judgment was rendered against Mrs. Bertoulin. The citation was addressed, not to the defendant, but to Mrs. Bertoulin. The court held that under the Louisiana Code the citation was defective, and that it should have been addressed in the name of the defendant. It is presumed that the wording of the Code supports the decision, but in the event of conflict, as above stated, the Indiana cases must control.

Recurring to the claim of appellant that as the notice recited that objections would be heard to, not a "reallotment," but the "allotment," and as the allotment of December 23, 1899, was the only one that had been made, and as no new allotment or reallotment could be made before December 23, 1901, therefore the notice could only have referred to the allotment of 1899. We deem it proper to add, to what we have heretofore said, that the appellant and the surveyor are held to know the law; to know that there could be no valid allotment until the surveyor had acquired jurisdiction over him in that behalf, even if, as contended, the action of December 23d came within the provisions of the curative act of 1897, supra. Whether the notice spoke of an allotment or reallotment would make no difference, being such allotment as could be changed by the surveyor on the day set for hearing objections. And the appellant would be bound by such change. Besides, the surveyor had no authority to confer names upon his acts, and cannot affect the result of an act by designating it by a particular name.

Various other points in support of the claims of the respective parties are ably presented in the briefs with which counsel have favored the court, and numerous pertinent cases cited in connection therewith. While we have considered them, we have not deemed it necessary, in the view taken of the issue, to discuss them in this opinion. Judgment affirmed.

(35 Ind. App. 121)

SUPREME LODGE K. H. et al. v. JONES et al.¹

(Appellate Court of Indiana, Division No. 2, Jan. 27, 1904.)

INSURANCE — FRATERNAL BENEFIT ORDER — NONPAYMENT OF ASSESSMENT — ESTOPPEL — EVIDENCE — SUFFICIENCY.

1. Under the laws of a fraternal benefit order, each member was liable to an assessment for death benefits, payable on or before the last day of each month. The laws also provided that a member failing to pay an assessment when due should stand suspended, and not thereafter be entitled to benefits until he had been duly reinstated. A certificate had been in force over 12 years when the insured died, March 10, 1901, though some assessments had been paid from one to three days after they

were due. The assessment for February, 1901, was not paid when due; and a creditor of the insured, who had paid some previous assessments, wrote on March 15, 1901, to the local lodge, asking if insured's dues had been paid. The financial reporter of the lodge wrote the creditor that the dues had not been paid, but that insured could be reinstated, if done by the 31st of March. On March 18th the creditor sent a draft to the proper officer of the lodge for the amount of the February assessment, who received it, and sent a receipt therefor to the creditor. On March 25th the order was notified of insured's death, whereupon the draft received from the creditor was returned to him, with the information that insured was under suspension at the time of his death, and, not having been reinstated prior to his death, was not entitled to benefits. It appeared that the financial reporter of the local lodge of which insured was a member had accepted and remitted past-due assessments made against him. Held, that defendant was not estopped from declaring a forfeiture for nonpayment of the assessment of February, 1901, on the day that it was due.

Appeal from Circuit Court, Knox County; Orlando H. Cobb, Judge.

Action by Joseph F. Jones and others against the Supreme Lodge Knights of Honor and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Frederick H. Bacon, Emison & Moffitt, and Louis B. Ewbank, for appellants. Cullop & Shaw, for appellees.

WILEY, P. J. December 20, 1888, appellant issued to Joseph L. Jones a certificate of membership in appellant company, by which it agreed to pay to his wife, who was named therein as beneficiary, the sum of \$1,000 at his death, etc. He was at that time a member of one of appellant's subordinate lodges at Mt. Carmel, Ill. He held his membership in that lodge until it became defunct, and thereupon his membership was transferred to a subordinate lodge at Vincennes, Ind. Later he moved to Knobel, Ark., where he lived to the time of his death, which occurred March 10, 1901. Upon his death, appellant refused to pay the amount provided for in the certificate, or any amount, to appellees, who are his brothers and sisters, and his only heirs, on the ground that he had forfeited his membership and all benefits by his failure to pay the assessments made against him for the month of February. Thereupon the appellees brought and prosecuted this action to a successful termination in the court below. While the record shows the overruling of a demurrer to each paragraph of the complaint and one paragraph of reply, and such rulings are assigned as errors, they are waived by a failure to discuss them. In oral argument, appellant's counsel stated that they relied solely for a reversal upon overruling the motion for a new trial. While several questions are presented under the motion for a new trial, the single question discussed and relied upon is the sufficiency of the evidence to support the verdict and judgment. If the assured was in good standing at the time of his death, and had not forfeited his rights by the

¹Rehearing denied. Transfer to Supreme Court denied.

nonpayment of the assessment made against him for death benefits for February, 1901, then it is conceded by appellant that the correct conclusion was reached in the trial court. Appellant's position is, however, that he was not in good standing; that he forfeited his rights under the certificate, and hence appellees are not entitled to recover. Upon the pivotal facts, which must control, there is no conflict. It is the province of the court in such case to apply the law. Succinctly stated, the facts of controlling influence are as follows: From the issuance of the certificate sued on, up to and including the last day of January, 1901, the assured, or some one for him, had paid all monthly assessments made against him. By reason of such payments, and also the payment of quarterly dues, etc., he was in good standing in the order up to the last day of February, 1901. Under the laws of the appellant, each member was liable to an assessment each month for death benefits, and such assessments, when so made, and proper notice thereof given, were payable on or before the last day of each month. As no question is made of the sufficiency of the notice, it is unnecessary to consider it further. Section 8 of article 9 of the constitution provides that "a member failing to pay any assessment required by law, shall stand suspended and shall not thereafter be entitled to the benefit of the widow and orphans' benefit fund, until he has been duly reinstated in his subordinate lodge in accordance with the laws of the order." The laws make ample provision for the reinstatement of suspended members, but appellees do not rely upon any rights by reason of the reinstatement of the assured, under whom they claim as heirs, and hence no further reference to the laws in that regard is needed. The wife of the assured, who was named in the certificate as his beneficiary, died before he did. He did not leave any children. After her death he applied to the order to have the certificate changed so as to make one Joseph Sellmeyer his beneficiary. Sellmeyer at that time was his creditor. He was informed that, under the laws of the order, this could not be done, for the reason that Sellmeyer was not related to or dependent upon him. Thereupon the certificate was returned to him. For several months prior to his death, the insured did not pay the monthly assessments against him, but they were paid by his brothers and sisters, and two payments were made by Sellmeyer. The latter lived at Knobel, Ark. Some of these payments were not made on the day they were due, but within one, two, or three days thereafter. The officer of the local lodge whose duty it was to receive and receipt for such assessments received the payments that were made after they were due, entered them upon his books as of the date they were due, and remitted them to the supreme lodge. The assessment due the last day of January, 1901, was paid by Joseph Sellmeyer, and on the

day it was due. A receipt for this payment was given by the proper officer, sent to Sellmeyer, and the latter was fully instructed as to what future assessments would be, and when they should be paid, and, if not so paid, the insured would stand suspended. The assessment made for February, 1901, was not paid when due. March 15, 1901, Sellmeyer wrote a letter to the local lodge, asking if the dues on the certificate of Jones had been paid. The financial reporter of the lodge replied to him that the last assessment had not been paid, but that he could be reinstated, if done by the 31st of March. March 18, 1901, Sellmeyer sent a draft to the proper officer of the Vincennes lodge for the amount of the February assessment, who received the same, and sent a receipt therefor. He did not have the draft cashed, but put it in his safe. He received this draft March 19th or 20th, and on the 21st sent to the address of Jones an application for reinstatement. March 25th a sister of the insured, who lived at Mt. Carmel, called on the financial recorder of the local lodge at Vincennes, and told him that her brother was dead. March 26th the reporter wrote Sellmeyer, stating that he had been informed that Jones was dead, and asked for definite information about it. In response to that letter, Sellmeyer replied by letter saying that Jones died March 10th. March 29, 1901, the financial reporter wrote Sellmeyer as follows: "Herewith enclosed I return you draft No. 3,658 sent me for Mr. Jones' assessment. Mr. Jones was under suspension at the time of his death, and having made no application for reinstatement, and not having been reinstated by his lodge, prior to his death, he is not entitled to benefits." The first intimation that the financial reporter of the lodge had that Jones was dead was on March 25th. As soon as that information was confirmed, the draft sent for the February assessment was returned to the sender.

The decision of the case must depend upon a correct answer to this inquiry: Do the facts constitute a waiver, and estop appellant from declaring a forfeiture? It is urged by counsel for appellee that the acceptance of monthly assessments from the assured, and others, for and on his behalf, after they became due, is sufficient to estop appellant from declaring a forfeiture for nonpayment *ad diem* of the assessment that became due the last day of February, 1901. This position is assumed on the theory that the financial reporter of the local lodge, in the receiving and remitting assessments to the supreme lodge, is the agent of the latter, and hence it is bound by his acts. Notwithstanding the fact that it is declared by the laws of the order that the officer charged with receiving from the members and remitting assessments to the supreme lodge shall be the agent for the local lodge, yet it is firmly settled by the authorities that in that respect he will be regarded as the agent of the grand lodge. *Supreme Tent, etc., v. Volkert*, 25

Ind. App. 627, 57 N. E. 203; Supreme Tribe of Ben Hur v. Hall, 24 Ind. App. 316, 56 N. E. 780; Supreme Court, etc., v. Sullivan, 26 Ind. App. 60, 59 N. E. 37; Modern Woodmen, etc., v. Tevis et al., 117 Fed. 369, 54 C. C. A. 293. In the case now before us, it appears from the evidence that the financial reporter of the local lodge of which the deceased was a member had accepted and remitted past-due assessments made against him. It does not necessarily follow, however, that in so doing he bound appellant by his acts, and estopped it from declaring a forfeiture for subsequent nonpayment within the time prescribed by law. An agent cannot go beyond his authority, and by his unauthorized acts bind his principal. Counsel for appellee cite many authorities to support their contentions. The leading case relied upon is that of Modern Woodmen of America v. Tevis et al., 111 Fed. 113, 49 C. C. A. 256, in which the very question here involved was decided in harmony therewith. Unfortunately for them, however, a rehearing was granted, and in a subsequent opinion the Circuit Court of Appeals, by Mr. Justice Sanborn, in a very able and exhaustive opinion, reached a different conclusion. Modern Woodmen of America v. Tevis et al., 117 Fed. 369, 54 C. C. A. 293. The identical question before us was there decided adversely to the contention of appellees. The Circuit Court of Appeals in that case followed the rule declared in the case of Northern Assurance Co. v. Grand View Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. Prior to the decision last mentioned, there was much conflict in the decisions of federal courts on the question; and, in referring to it, Justice Sanborn, in Modern Woodmen, etc., et al., supra, said: "The question became so important, and the opinions upon it so numerous and divergent, that the Supreme Court removed the case last cited [Northern, etc., Co. v. Grand View Building Ass'n, supra] by writ of certiorari, and, in an elaborate and exhaustive opinion, * * * rendered a decision which was evidently intended to close the discussion in the federal courts, and to finally put this question at rest." The issue of law in that case was whether an insurance company could have been deemed to have waived a condition in a policy of fire insurance, rendering it void in case other insurance had been or should be made upon the property, unless by agreement indorsed thereon or attached thereto, because its agent had notice or knowledge of the existence of other insurance in another company at the time he delivered the policy and received the premium, and the policy itself provided that no officer or agent should have power to waive any provision or condition, except by indorsement on the policy, etc. It was held that such knowledge of the agent was not a waiver on the part of the company, and would not bind it. The facts upon which the case of Modern Woodmen, etc., v. Tevis et al., su-

pra, was decided were these: Appellant issued to one W. H. Tevis a certificate on March 31, 1899, by which it promised to pay to the beneficiaries therein named a designated sum of money upon the death of the insured, according to the terms of the certificate, and in conformity with the laws of the order. The condition of payment was that the insured was in good standing at the time of his death. By the terms of the certificate, and in conformity to the laws of the order, he could only be regarded in good standing by performing all the conditions imposed upon him by the contract of insurance. One of these conditions imposed upon him the obligation of paying all assessments for death benefits on or before the 1st day of each month. Upon failure to so pay, by the express terms of the law, he became suspended ipso facto. While so suspended, he was not a beneficiary member. Provision was made whereby suspended members might be reinstated. It was a custom of long standing for the officer of the subordinate camp to which he belonged, whose duty it was to collect and remit to the head camp such assessments, to receive the same from the members after they became due. In some instances 20 days elapsed before such payments were made by some of the members. A proper assessment was made against the insured for July, 1899, which was due and payable not later than August 1st. That assessment was not paid when due. He died August 10, 1899; being 10 days after the assessment became due. His assessment that became due June 1, 1899, he paid on June 2d, in accordance with the custom that prevailed. After the death of the insured, but on the day thereof, his brother paid to the proper officer of the local camp all of his arrearages, who, in ignorance of the fact, accepted them, and sent them forward to the head camp, which received them without notice of the fact that they had been paid after they were due, and after his death. After making copious quotations from the opinion in Northern Assurance Company v. Grand View Bldg. Ass'n, supra, Justice Sanborn in the Modern Woodmen Case, supra, says: "It is impossible to read the opinion from which the foregoing quotations have been made without an abiding conviction that it contains an authoritative determination of the question at issue in this case by the highest tribunal of the land. * * * Tested by this decision, the clerk of the local camp to which the member Tevis belonged was the agent of the head camp, or of the Modern Woodmen of America, to collect, receive, and remit the benefit assessments to it. But he was its agent to collect, receive, and remit them at the time and in the manner prescribed for their payment by the by-laws, and at no other times and under no other conditions. Those by-laws provided that delinquent members were ipso facto suspended; that their certificates were void; that they could be re-

instated by the clerk by the receipt of arrearages only when they were in good health, and when they furnished warranties to that effect; that no act or omission of the clerk of the local camp could have the effect of creating any liability of the society, or of waiving any right or immunity belonging to it. These limitations on the power of this agent were known to the insured and the beneficiaries named in this certificate, because they were a part of their contract; and, in view of this decision of the Supreme Court, * * * there is no escape from the conclusion that these limitations were binding upon all the parties to the agreement, and that the acts of the clerk of the local camp in extending the times of payment of the assessments upon its members * * * were unauthorized by the society, and, in the absence of knowledge of and acquiescence in them by some of the chief officers of the head camp, were ineffective to establish any estoppel against the society, or any waiver by it of any provisions of the agreement." *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387, is also in point. The law as declared in these cases is based upon correct principles and is decisive of the controversy here. A contrary rule—the one for which appellees contend—would undermine all fraternal and beneficial societies of this character, and be subversive of their dominant and leading objects and purposes. As suggested in the case from which we last quoted, fraternal insurance is temporary insurance—insurance from the maturity of one assessment to the maturity of another—and stipulations to insure promptitude in the payment of the assessments constitute both the substance and essence of contracts for it. *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789; *McMahon v. Maccabees*, 151 Mo. 522, 52 S. W. 384; *Harvey v. Grand Lodge*, etc., 50 Mo. App. 472; *Carlson v. Supreme Council*, etc., 115 Cal. 466, 47 Pac. 875, 35 L. R. A. 643. In fraternal insurance companies, assessments of the character under consideration are made but for one purpose, and that is to pay death losses of members who have died while in good standing. This is made plain by the constitution and general laws of the appellant, and it is not out of place to remark that the laws of associations of this character are in this particular substantially the same. The assessment and the payment thereof is the only source of the beneficiary fund, and, without the payment of such assessments, there could be no beneficiary fund. This being true, the association and the individual members have reciprocal obligations, the one depending upon the other. These obligations are that, to the end that each may derive the contemplated benefits, they must both comply with the constitution and laws of the order. *Grand Lodge, etc., v. Marshall* (Ind. App.) 68 N. E. 605. Under the laws of the appellant, and

69 N.E.—46

by the terms of the contract of insurance, the insured was not in "good standing" when he died. That condition was not occasioned by any fault of appellant, but was the direct fruit of his own laches. He and his beneficiaries were bound to know his and their rights, for they were fixed by the laws of the association, and such laws were a part of the contract of insurance. Any infraction of those laws was a violation of the contract, and a failure to pay an assessment when due was such infraction, and worked a suspension of the insured. He died before he was reinstated, and while in default.

If it could be said that Sellmeyer was his agent to pay his assessments, such agency was revoked by his death. *Goetz v. Bank*, 31 Ind. App. 67, 67 N. E. 232. Payment by him after death could not vitalize the forfeited contract, or work a reinstatement of the insured. This is emphasized by the facts that, when such payment was received by the financial reporter, he was ignorant of the death, and returned the payment upon learning thereof.

These considerations lead to the conclusion that the evidence is not sufficient to support the verdict and judgment. Judgment reversed for further proceedings consistent with this opinion.

(177 N. Y. 400)

STRONG et al. v. WESTERN GAS & FUEL CO. et al.

(Court of Appeals of New York. Feb. 18. 1904.)

APPEAL—INTERLOCUTORY ORDER—WITNESS—REFUSAL TO TESTIFY—CONTEMPT.

1. An order directing a witness to answer certain specified questions to be used as evidence in another state is interlocutory, and an appeal therefrom will be dismissed.

2. Proceedings under Code Civ. Proc. § 915, to punish a witness for contempt in failing to give testimony for use in an action in another state constitutes a special proceeding from which an appeal will lie.

Appeal from Supreme Court, Appellate Division, First Department.

Application of William E. Strong and others to compel Frank E. Randall to answer certain questions. From an order of the Appellate Division reversing an order denying such motion the Western Gas & Fuel Company and Randall appeal. Dismissed.

Frank E. Blackwell, for the motion. Willard Parker Butler, Sanford Robinson, and Julius F. Workum, opposed.

PER CURIAM. While we are of opinion that proceedings taken under section 915 of the Code of Civil Procedure to punish a witness for contempt in failing to give testimony for use in actions or suits in other states constitute a special proceeding within the definition of the Code, we are also of

¶ 2. See Appeal and Error, vol. 2, Cent. Dig. § 536; Contempt, vol. 10, Cent. Dig. §§ 223, 224, 225.

opinion that the order from which the present appeal is taken, which merely directs the witness to answer specified questions, is interlocutory in its character. The final order in the proceeding will be that which either punishes or refuses to punish the witness for contempt should he persist in his refusal to testify, and it is such an order only that is appealable to this court, as a matter of right.

The appeal should be dismissed, with costs, and ten dollars costs of motion.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, VANN, and CULLEN, JJ., concur.

Appeal dismissed.

(177 N. Y. 317)

SARGENT v. BOARD OF EDUCATION OF CITY OF ROCHESTER et al.

(Court of Appeals of New York. Jan. 29, 1904.)

SCHOOLS—ORPHAN ASYLUMS—PUBLIC SUPPORT—SECTARIAN CONTROL—CONSTITUTIONAL LAW.

1. St. Mary's Boys' Orphan Asylum of the city of Rochester, incorporated under Laws 1848, p. 447, c. 819, is an orphan asylum within the meaning of Const. art. 8, § 14, allowing the payment of public moneys for the education of inmates of such asylum, and is not a school or an institution of learning within Const. art. 9, § 4, prohibiting the payment of public moneys to such institutions.

2. Under Consolidated School Law, Laws 1894, p. 1288, c. 556, tit. 15, art. 12, § 32, providing for the organization of industrial schools, Indian schools, and orphan schools, and under the charter of the city of Rochester, authorizing the board of education to establish such schools as they may think requisite, and contract with and employ teachers in such schools, the board of education is authorized to employ teachers for the secular education of the inmates of orphan asylums.

3. Under Consolidated School Law, Laws 1894, p. 1288, c. 556, tit. 15, art. 12, § 32, authorizing and requiring boards of education to employ teachers for secular education of inmates of orphan asylums, the fact that such an asylum is controlled by a religious organization, and that the teachers employed, who were licensed to teach by the public authorities, were members of a sisterhood connected with such denomination, is immaterial.

4. The charter of the city of Rochester, giving the board of education the power, and making it a duty, to organize in the city the necessary schools, and Consolidated School Law, Laws 1894, p. 1288, c. 556, tit. 15, art. 12, providing for the organization of special schools, are not in violation of the Constitution as an arbitrary mandate of the Legislature, but the statutes when read together are the depository of large discretionary powers conferring authority on the board of education to raise and expend money in the secular education of orphans in orphan asylums.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by James Sargent against the board of education of the city of Rochester and others. From a judgment of the Appellate

Division (79 N. Y. Supp. 127) affirming a judgment for defendants, plaintiff appeals. Affirmed.

David N. Salisbury, for appellant. William A. Sutherland, for respondents Board of Education of the City of Rochester et al. James M. E. O'Grady, for respondents St. Mary's Boys' Orphan Asylum et al.

O'BRIEN, J. This is a taxpayer's action to restrain the payment of certain public moneys raised for the purposes of education, but which, it is claimed, cannot be properly devoted to the specific purpose for which the funds were raised. In other words, it is alleged that the public officers who have been made defendants in the action are about to deal with this fund in violation of law, and an injunction is demanded to restrain waste and misapplication of the money. The board of education of the city of Rochester was made a defendant, and so were the financial officers of the city, who are required by law to audit and pay claims upon the treasury certified by the board of education. St. Mary's Asylum for Orphan Boys, and four sisters who are employed therein by the board of education to teach the inmates, were also made defendants. The only relief demanded is that the board of education be enjoined from auditing or paying the salaries of these four sisters employed by them to teach the inmates of the asylum. The board of education and the orphan asylum are both corporations duly organized under the laws of this state. The purpose for which the asylum was incorporated is declared to be the "maintenance and tuition of orphan children of the male sex, and in particular of male orphan children of soldiers who have lost their lives in the service of the United States." It appears and is found that this corporation is controlled by persons who are members of the Roman Catholic Church, and by persons who are officers of such church and have such control by reason of being members and officers of the same. The courts below, after a trial and hearing, upon appeal dismissed the complaint, and the only question involved in the controversy is whether the board of education had the legal right to employ and pay the sisters of charity who gave the secular instruction to the inmates of the asylum.

It is found that for many years past the city, through the board of education, has contributed money to the asylum for the purpose of the secular education of the orphans under its charge; that the institution gave secular education the same as that furnished the children of like age in the public schools, and the same system of grades, the same course of studies, the same text-books, examinations, and hours of study were followed therein and made use of in the teaching of the inmates; that no denominational tenet or doctrine is taught or religious instruction

imparted in the asylum during the hours of school prescribed by the rules and regulations of the board of education, but religious instruction is given in the evening at 7 o'clock. The four teachers whose salaries it is sought to cut off by the action have been employed by the board by being appointed and paid as such teachers, one for 13 years, one 11 years, one 8 years, and one 8 years; that all of these teachers are educated and experienced teachers, and were so employed at the date of the passage of the act of 1898, known as the "Dow Law" (chapter 660, p. 1511, Laws 1898); that the asylum is subject to visitation by the State Board of Charities, and that the inmates are received and retained pursuant to the rules established by the said board; that the salaries of these four teachers have been and are paid out of the funds raised by direct taxation upon the property assessed in the city, and have not been and are not paid out of the common school fund of the state; that the asylum maintains no institution of learning or school within the meaning of the state Constitution, but it has maintained an orphan asylum within the meaning of section 14 of article 8 thereof; that the sums paid to these four teachers monthly during the 10 school months of each year amount in the aggregate to \$190 per month, and these amounts were paid to each personally by check to the order of each respectively for services rendered as a teacher in furnishing secular education to the inmates of the asylum; that the asylum, as such, furnishes, in addition to secular education, board, clothing, correction, and moral training to its orphan inmates, and has as inmates children who, by reason of age, receive no secular education whatever; that the common council of the city, in the annual tax levy for the year 1901, raised by general taxation the sum of \$610,850 for the use of the board of education, to be expended by said board for the secular education of the school children of the city and the inmates of the various orphan asylums of the city, including the inmates of the asylum in question, of which amount \$323,850 was appropriated for the salaries of teachers, which is the amount certified by the board as necessary for such salaries, and in computing such amount the salaries for the four defendant teachers were included; that the common council in the year 1901 appropriated and raised by tax, for furnishing secular education, a sum equal to \$25 per capita upon a total of 24,434 pupils, based upon the total number of persons receiving secular education in the schools and asylums of the city during that year, and that the inmates of the asylum in question were included in the number upon which the per capita tax was raised. The affirmation of the judgment by the court below was unanimous, and the only question is whether, upon these undisputed facts, the payment by the board of the salaries, as teachers, of

these four sisters of charity, was in any sense illegal.

It is strenuously urged by the learned counsel for the plaintiff that such payment is in violation of the provisions of the Constitution of this state, and unauthorized by law. Of course, if this proposition can be maintained, the plaintiff ought to have succeeded in the action. The basis for this contention is section 4 of article 9 of the Constitution, which reads as follows: "Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught." It will be observed that the orphan asylum in question is neither a school nor institution of learning, and hence it would seem to be plain that the prohibition contained in the section has no application. But there is another section of the Constitution which must be read with the one just quoted, and that is section 14 of article 8, which reads as follows: "Nothing in this Constitution contained shall prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town or village from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by counties, cities, towns and villages to charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the Legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the State Board of Charities." In this case the money was raised for the secular education of the inmates of the orphan asylum, and we are told in the plainest terms that nothing contained in the Constitution shall be construed to prevent such action. In so far as the claim is made as to the action of the board of education in disbursing money for the secular education of the inmates of the asylum, including the payment of teachers therein, obviously the contention has no foundation whatever.

By chapter 261, p. 500, of the Laws of 1850, it was provided that the several incorporated orphan asylums in the state, other than those in the city of New York, should participate in the distribution of the school moneys in the same manner and to the same extent, in proportion to the number of children educated therein, as the common schools

in their respective cities or districts. Since the enactment of that statute it seems that the city authorities have uniformly raised money for the purpose specified therein without objection from any source. Indeed, it was held by the Supreme Court that these asylums could compel the board of education to disburse the money for the purposes specified in the statute. *St. Patrick's Orphan Asylum v. Board of Education*, 34 How. Prac. 227. The statutory and common law existing in this state prior to the adoption of the present Constitution has been preserved intact, except so far as it is in conflict with the fundamental law; and it has been held by this court, since the adoption of the present Constitution, that the system of statutory law for the maintenance of charities administered by private corporations did not fall when the Constitution went into effect. *People ex rel. Inebriates' Home v. Comptroller*, 152 N. Y. 399, 46 N. E. 852. Of course, this proposition applies with full force to statutes for the expenditure of money raised by taxation to impart secular education to the inmates of orphan asylums.

But it is earnestly contended in behalf of the plaintiff that there was no statutory authority for the board of education to employ and pay the four teachers in question. It is undisputed that the common council of the city had the power to raise money by taxation at the rate of not to exceed \$25 per capita for the education of all children in the city of school age, including those that are detained in the orphan asylums. It is undisputed that it had power to raise all moneys for the payment of teachers that was certified to be necessary by the board of education, and the board certified to the common council the number of children of school age, including those in the asylums, and the amount of money necessary to pay teachers, including the four teachers in question, and the common council did raise the money and paid it over to the board of education. Now, what was the board of education to do with this money? Obviously, it was its duty to apply it to the purpose for which it was raised, and it was raised in part for the secular education of inmates of orphan asylums and the payment of teachers therein. It had no power or right to divert the money to other purposes or to refuse to expend it. The board had certified to the common council that the money was necessary for the purpose specified, and, since the city authorities did actually raise the money and put it under the control of the board of education, these facts alone would seem to constitute sufficient authority to the board to do all that the plaintiff complained of. But we are not left to rest the case upon any implied authority, clear and satisfactory as that would seem to be. There was express statutory authority given to the board to employ these four teachers, and to take such other means as were necessary to impart

secular education to the inmates of this orphan asylum. By the charter of the city (Laws 1880, p. 54, c. 14, § 131) the board of education is given the power, and it is made its duty, "to establish and organize in the several wards of the said city such and so many schools (including the common schools now existing therein) as they shall deem requisite and expedient, and to alter and discontinue the same; to contract with, license and employ all teachers in said schools, and at their pleasure remove them." It will be seen that this language does not limit the power of the board to the maintenance of what are called the "common schools." They were to be included in the scheme of education, but the board was authorized to establish and organize as many schools within the city as they should deem requisite and expedient, and to alter and discontinue the same. This was a large discretionary power, and doubtless conferred sufficient authority upon the board to extend the benefits of education to the inmates of the asylum. It is quite too narrow a construction to say that their power was limited entirely to what are known as the "common schools." But by chapter 660, p. 1512, of the Laws of 1898, § 127, the powers of the board were very much enlarged. It was authorized by that statute "to establish kindergartens, common schools, one or more high schools, manual training schools or classes, evening classes or schools for special studies, training schools or classes for teachers, and truant schools, and shall have power to discontinue or consolidate schools." It is quite clear from the language of this later statute that the Legislature intended to confer upon the board very large powers and great discretion with reference to the organization and maintenance of schools, and clearly the power thus conferred was not limited to what are commonly known as the common schools. By the Consolidated School Law, Laws 1894, p. 1288, c. 556, tit. 15, art. 12, § 32, provision is made for the organization and maintenance of a great variety of special schools, such as industrial training schools, schools for music, for colored children, for Indian schools, and for orphan schools. With respect to the latter class of schools the statute (title 15, art. 12, § 32) reads as follows: "The schools of the several incorporated orphan asylum societies in this state, other than those in the city of New York, shall participate in the distribution of the school moneys, in the same manner and to the same extent, in proportion to the number of children educated therein, as the common schools in their respective cities or districts. The schools of said societies shall be subject to the rules and regulations of the common schools in such cities or districts, but shall remain under the immediate management and direction of the said societies as heretofore." In view of these clear statutory provisions, it is quite plain that the

board of education not only had ample power to do everything that is complained of in this case, but the employment of these teachers for the education of the inmates of asylums was imposed upon the board as a duty.

But it is contended in behalf of the plaintiff that public moneys ought not to have been used for the education of children in an orphan asylum maintained by any church or religious organization. The plaintiff is evidently willing that the children should be educated, but in some other place than the asylum. It is said that children ought to be removed from the influence of religious teaching in the asylum, and especially the influence of female teachers who belong to some religious order and wear the garb of that order. It is quite clear, I think, that such objections do not rest upon any reasonable foundation. In the first place, it is perfectly obvious that these children could not receive instruction in any other place. They were under the exclusive control of the managers of the asylum. They were in a certain sense deprived of their liberty. Some of them may have been sent to the asylum after conviction for crime, and in such cases they may, when of a certain age, be committed to such an institution by magistrates, courts, and judges. *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 997. The children that were placed in the asylum otherwise, that is, by parents and guardians, were under the same discipline and control, and it is plain that they could not be discharged from such control or the discipline of the institution. In some sense it would be about the same as discharging boys from the county jail in order to permit them to attend the common schools. Of course, such an idea is entirely inadmissible, but it is plain that the statute last above quoted contemplated that the teaching of these orphan boys should be in the asylum where they were detained. The language is that the asylum "shall participate in the distribution of the school moneys in the same manner and to the same extent in proportion to the number of children educated therein as the common schools in their respective cities or districts." The statute clearly recognizes the fact that the instruction was to be had or given "therein," that is, in the asylum where the boys were detained. When we look into the debates on this subject in the constitutional convention when the provisions of the Constitution already quoted were the subject of debate, it is clearly apparent that the members of that body understood that instruction in the case of orphan children detained in an asylum was neither practicable nor possible elsewhere than in the institution itself. The four teachers in question were licensed by the public authorities to teach. To license them as qualified teachers and employ them and receive the benefit of their services, and then refuse to pay them upon the objection

of some taxpayer, would be a species of injustice unworthy of a great state.

The objection is made that the several statutes referred to, and under which the moneys were raised and paid over to the board of education for the purpose of defraying the expense of secular education in orphan asylums, are mandatory, and thus in violation of the Constitution. When the statutes are all read together it will be seen that they are not an arbitrary mandate of the Legislature, but the depository of large discretionary powers, and, even if they were, the only consequence would be that they could be disregarded by the local authorities. The statutes are good as an authority, even though they would be held to be void as a command. They are certainly broad and comprehensive enough to confer authority upon the city government and the board of education to raise and expend the money for the purposes indicated, and to do all the things of which the plaintiff complains in this case. There was no error in the disposition of the case below, and therefore the judgment must be affirmed, with costs.

PARKER, O. J., and GRAY, BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur.

Judgment affirmed.

(177 N. Y. 305)

MORRISON v. SMITH et al.

(Court of Appeals of New York. Feb. 9, 1904.)

LIBEL—QUESTION FOR JURY.

1. Where an article is libelous per se, the case should be submitted to the jury, though plaintiff has by innuendo put a meaning on the alleged libelous publication which is not supported by its language or by proof.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Lillian Coleman Morrison against Ormond G. Smith and others. From a judgment of the Appellate Division (82 N. Y. Supp. 166) affirming a judgment for defendants on dismissal of the complaint, plaintiff appeals. Reversed.

Israel A. Washburne, for appellant. Joseph Fettretch, Theodore H. Silkman, and Daniel E. Seybel, for respondents.

GRAY, J. In this action, which is for libel, the complaint alleges that in the defendants' magazine was printed the following advertisement: "Illustrated new book. Up-to-date. The experience of a giddy typewriter girl in New York. Typewritten. GOOD is no name for it. Sent in plain wrappers, postpaid, on receipt of 25c. in silver or stamps. Dell Book Co., 119 Flournoy St., Chicago." It was then alleged that "accompanying these words and completing the

¶ 1. See *Libel and Slander*, vol. 22, Cent. Dig. § 208.

advertisement was the picture of a young and comely woman, and this picture was a likeness of the plaintiff," and that "the meaning of this advertisement was that the plaintiff had been the subject of an unchaste and indecent experience." At the trial the plaintiff proved that she was a married woman, and an actress, acting under her maiden name; that the portrait accompanying the advertisement was one of herself; and that she never had been a typewriter. But upon this proof a motion to dismiss the complaint was granted upon the ground that the words could not be given the construction placed upon them by the plaintiff. The Appellate Division affirmed the judgment of dismissal; the prevailing opinion in that court holding, in substance, that, while inclined to view the advertisement and portrait as libelous per se, or at least as presenting a question for the jury in that respect, the court was to determine only whether the plaintiff was right in the construction set out in her complaint. It was held that she had tendered an issue as to whether the words used were "susceptible per se of the interpretation that they charge her with unchastity," and that she had failed "to sustain the burden thus placed upon her."

The question is a clean-cut one which we must determine, and it is whether, because the plaintiff has, by innuendo, put a meaning upon the language, she is bound by it, and, however libelous the language standing alone, she must fail in her action if that meaning is not supported by the language or by proof. I am not inclined to concur in so restricted a view of the plaintiff's position, and I am not aware of any decision of this court compelling it. It appears to have support in some decisions of the Appellate Division, and hence the question is made serious, if we shall determine it the other way. But I think, if we regard some general rules, which are now established in this class of cases, and if we follow that instinct of justice to which common sense impels our judgment, that we will find neither rule, nor principle, opposing a contrary view to that adopted by the majority of the learned justices of the Appellate Division. At common law that which implied reproach, scandal, or ridicule to any person, and reflected disgracefully upon his character, whether written or spoken, was a libel, and was actionable without proof of special damage. The language used is to be understood by judge and jury in the same manner as others understand it, and words are to be taken in that sense which would be naturally conveyed to persons of ordinary understanding. The principle upon which the rule of legal liability for damages rests is that no man possesses the right to lessen the comforts or the enjoyment of another, and that when he does so deliberately, wantonly, and maliciously it is *prima facie* evidence of malice, and he is bound to make compensation for the mischief occasioned.

Therefore if by word or writing bad actions or vicious principles are imputed to a man, and his respectability is diminished, his comfort and his enjoyment are lessened by the attendant disgrace, contempt, or ridicule, and damage will be presumed. See Folcard's Law of Slander and Libel (5th Ed.) 165, 172, 177; Odgers' Libel and Slander (3d Ed.) pp. 7, 18, 336; Root v. King, 7 Cow. 633; Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105; Morey v. Morning Journal Association, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621, 20 Am. St. Rep. 730. If the language is unambiguous, whether it is actionable becomes a question of law; but, if ambiguous, and capable of an innocent as well as of a disgraceful meaning, the question becomes one for the jury to settle. When the defamatory meaning is not apparent, innuendo is necessary. If the words are incapable of the meaning ascribed to them by the innuendo, and are *prima facie* not actionable, the complaint should be dismissed. If they are capable of such a meaning, however improbable it may appear, the jury should say whether they may be so understood. Odgers' Libel and Slander, 107; Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105. It is said, however, that, the purpose of an innuendo in a pleading being to show the true meaning of published words, every other meaning is to be rejected, and that, however libelous the words standing alone, still no cause of action is stated if the meaning assigned is not supported. Brown v. Tribune Association, 74 App. Div. 359, 77 N. Y. Supp. 461; Morse v. Press Pub. Co., 49 App. Div. 375, 63 N. Y. Supp. 423. But what good reason is to be adduced for this rule? Is it that the defendant will be prejudiced if he is called upon to defend against the ordinary meaning of the language, when the meaning assigned by innuendo fails? I think the answer made to this in the dissenting opinion below is a good one. It is there said that, with the innuendo eliminated by the rulings of the court or the finding of the jury, the defendant is in no worse position than if the innuendo was not in the complaint, and the plaintiff should be permitted to recover for a libel clearly appearing on the face of the article, for which no innuendo was necessary; citing Odgers' Libel and Slander (3d Ed.) p. 107, and cases in note.

Now, what idea is this advertisement calculated to convey to the ordinary reader when it describes an illustrated book as containing "the experience of a giddy typewriter girl," that it is "typewritten," that "good is no name for it," and bears upon it a portrait of the plaintiff? The plaintiff read it as imputing to her an experience of "an unchaste and indecent" nature, and so alleged in her pleading. I agree with the trial judge and with the majority of the Appellate Division that the words do not impute unchastity to the plaintiff, and are not susceptible of her interpretation. But, granting that,

what, in reason, should preclude her from having the case submitted to the jury for an award of damages for the really libelous character of the advertisement? It is such, as all do and must concede, for it exposed the plaintiff to contempt and to ridicule, if it did not imply disgraceful conduct. None of her friends and acquaintances could fail to understand that in the plaintiff's life there had been passages of such a nature that only a woman of unbalanced character and of foolish recklessness could have experienced, which made interesting reading, and which the advertiser could not print, but was publishing in typewritten form. This was an outrage upon the reputation of a respectable woman, because it was a statement which she had shown to be false as to her. The use of her portrait was wanton, and obviously inspired by the notion that it would attract purchasers of the mysterious publication. There is no hardship in compelling the defendants to defend against the plain charge that the advertisement is libelous per se. If no innuendo was necessary to be averred in the complaint in order to state a cause of action, then her averment of a libelous meaning by innuendo was surplusage, and the defendants were bound to defend the action, not merely upon the ground that their advertisement was not susceptible of the interpretation put upon it by the plaintiff, but upon the general ground, if they could, that it was not a false, and therefore a libelous, imputation upon her character and reputation as a member of society. This could not be an embarrassment to a defense upon the trial, for the proofs must relate to the occupation and past behavior of the plaintiff as the subject of their publication. If the plaintiff was not, in fact, intended as the subject of publication, then the conduct of the defendants was wholly unjustifiable, and the jury should be allowed to award such damages as, in their judgment, the case warranted.

I advise the reversal of the judgment, and that a new trial should be ordered, with costs to abide the event.

PARKER, C. J., and BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

Judgment reversed, etc.

(177 N. Y. 396)

In re MOLINEUX.

(Court of Appeals of New York. Feb. 16, 1904.)

PUBLIC RECORDS—PHOTOGRAPHS OF CONVICTS—SURRENDER.

1. A person confined in state's prison under a sentence of death is a convict within Laws 1889, p. 511, c. 382, § 40, authorizing the Superintendent of State Prisons to make regulations for record of photographs and other means of identifying each convict, and is a person re-

ceived under sentence within Code Cr. Proc. §§ 491, 507, 508, relating to the same subject, and is a criminal while the sentence remains in force; and, where his photograph has been taken and measurements made and recorded in the manner provided by the statute, they constitute public records, and, though he may be acquitted on a subsequent trial, he is not entitled to mandamus to compel the Superintendent of State Prisons to deliver such records to him.

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the application of Roland B. Molineux for writ of mandamus to Cornelius V. Collins, Superintendent of State Prisons. From an order of the Appellate Division (84 N. Y. Supp. 1136) affirming an order of the Special Term denying a peremptory writ of mandamus to compel defendant to deliver certain photographs and measurements in his custody to petitioner, petitioner appeals. Affirmed.

Robert G. Scherer and J. Murray Downs, for appellant. John Cunneen, Atty. Gen. (Sanford T. Church, on the brief), for respondent.

VANN, J. On the 16th of February, 1900, the appellant, Roland B. Molineux, was adjudged guilty of murder in the first degree, and sentence of death was pronounced against him. A warrant was at once issued to the warden of the state prison at Sing Sing commanding him to keep the said Molineux in solitary confinement until the time appointed for his execution, and to then put him to death in the manner provided by law. Before that time arrived enforcement of the sentence was stayed by the service of a notice of appeal to this court, which afterward reversed the judgment of conviction and ordered a new trial. The second trial resulted in an acquittal. During his imprisonment at Sing Sing a photograph was taken of Molineux, and he was measured according to the Bertillon system under the direction of the warden, who forwarded the negative, photograph, and measurements to the Superintendent of State Prisons at Albany, in whose office they have ever since remained as part of a collection which embraces similar data relating to criminals who have been lawfully convicted under the laws of the state. Upon an affidavit setting forth these facts, and alleging that said Molineux was unlawfully convicted, that the photograph was taken and measurements made against his wishes and without his consent, and that he is thus held out as a lawfully convicted criminal, a motion was made at Special Term for a peremptory writ of mandamus commanding the Superintendent of State Prisons "to remove the plates, photographs, and measurements . . . from the records of his office and deliver the same to the said Roland B. Molineux." The motion was denied, and upon appeal to the Appellate Division the order was unanimously affirmed "as a matter

of law, and not in the exercise of discretion." By an appeal to this court from the order of the Appellate Division, the question of power to issue the writ is now before us for decision.

The Code of Criminal Procedure provides that when a death warrant is delivered to the agent and warden of a state prison he is required to keep the defendant named therein "in solitary confinement at the said state prison" until the infliction of the punishment of death upon him, or he is lawfully discharged. Section 491. By the prison law the Superintendent of State Prisons is authorized to "make rules and regulations for a record of photographs and other means of identifying each convict received into said prisons." Laws 1889, p. 511, c. 382, § 40. By an act passed in 1896, "to facilitate the identification of criminals," the Superintendent of State Prisons is required to "cause the prisoners in the state prisons therein confined at the time this act takes effect, and all prisoners thereafter received under sentence, to be measured and described in accordance with the system commonly known as the Bertillon system for the identification of criminals." He is also required to "prescribe rules and regulations for keeping accurate records of such measurements at such prisons and in duplicate at his office in Albany and for classifying and indexing the same." Laws 1896, p. 401, c. 440, § 1. The appellant claims that neither of the acts authorizing these methods of identification applied to him, because he was not a "convict" within the meaning of the earlier, nor a prisoner "received under sentence" within the meaning of the later. The Criminal Code, however, expressly refers to a prisoner confined in state prison under sentence of death as a "convict," and requires the warden to keep him "in solitary confinement at said state prison" during the definite period which must elapse before execution, and, in case an appeal is taken, during the indefinite period which may elapse until it is decided. Code Cr. Proc. §§ 491, 507, 508. The object of the Legislature, as expressed in the title of the act of 1896, was "to facilitate the identification of criminals," so as to aid in retaking a prisoner after an escape. A prisoner under sentence of death is a criminal in the eye of the law so long as the sentence remains in force, because he has been adjudged guilty of a crime. As he may escape, the same as a convict whose only sentence is to imprisonment, he comes within the spirit of the law. He also comes within the letter, because he is "received under sentence," and "solitary confinement at said state prison" is a part of the sentence imposed by command of the statute. The Legislature did not intend that those imprisoned for the most serious crime known to the law, even for safe-keeping and during a short period, should be exempt from the general rule designed to facilitate the recapture of escaped

prisoners. The measurements and record, therefore, were made by authority of law, and became the property of the state, which paid "the necessary expenses incurred" for the purpose. Laws 1896, p. 402, c. 440, § 2. They were public records, and were beyond the control of the Superintendent of Prisons, except for preservation and use. He had no power to destroy them, or give them away, or surrender them, even to one who, although under judgment of death when they were made, was finally adjudged not guilty. The custodian of a public record cannot deface it or give it up without authority from the same source which required it to be made. The statute directed the Superintendent to make the record, and when he made it the state made it, and it has not authorized him to destroy it under any circumstances, not even to relieve a citizen from an unjust reflection upon his character. It would be usurpation of power for him to surrender the record, or for the court to direct him to do so. If the position of the defendant is sound, where is the destruction of public records to end? What may become of the indictment, the minutes of the clerk recording the verdict of guilty, and the judgment of conviction? May the death warrant be withdrawn from the custody of the warden, although it is the only authority he had for the imprisonment of Molineux while he was awaiting execution? Even the courts, which have control of their own records, do not direct one made through error to be physically destroyed, although they vacate it and direct that it shall be held for naught. Our order of reversal and the judgment acquitting the defendant are public records, open to the inspection of all, which neutralize every legal presumption against him arising from the judgment of conviction.

While the courts can command the Superintendent of Prisons to do his duty, it is not his duty to give up a record made under the authority of a statute, and, until the Legislature makes it his duty to surrender the record in question, it should remain in his custody, because the state put it there, and has not authorized its removal. An innocent man accused of crime is sometimes compelled to make sacrifice and undergo suffering for the benefit of society. Like payment of taxes and service upon juries, it is part of the price paid for the privilege of living in a country governed by law. One, for the good of all, may be required to submit to imprisonment, incur expense, and endure mental distress, because the state cannot exist without the preservation of order, and order cannot be preserved without the punishment of the guilty, which necessarily involves, sometimes, the trial of the innocent. There is no relief for this apparent injustice except through the Legislature, and to that body alone the appellant should look for relief from the annoyance of which he now complains.

The order appealed from should be affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, and CULLEN, JJ., concur.

Order affirmed.

(177 N. Y. 379)

SMITH v. LEHIGH VALLEY R. CO.

(Court of Appeals of New York. Feb. 16, 1904.)

WITNESS—IMPEACHMENT—DEATH OF WIFE—DAMAGES—EVIDENCE.

1. In an action to recover for the death of plaintiff's wife, killed at a railroad crossing, the evidence was conflicting as to whether signals were given as the train approached the crossing. Defendant read so much of the testimony of a witness at a former trial as was to the effect that the whistle was blown and the bell rung. Plaintiff from the same testimony read to the effect that the bell was ringing at points several miles distant from the crossing. *Held*, that the effect was the same as if the evidence was brought out on cross-examination of defendant's witness by plaintiff, and it was error to permit plaintiff to contradict it by proof that the bell was not ringing at those points.

2. In an action by a husband to recover pecuniary injuries resulting from the death of his wife, such injuries, under Code Civ. Proc. § 1904, are to be compensated for on the basis of the monetary value of the services of the deceased to her husband and children, and the introduction in evidence of the photograph of a handsome woman could not be expected to accomplish any other result than to introduce the personal element for the consideration of the jury and awaken their sympathies, and is error. Cullen, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Porter D. Smith, administrator of Amy A. Smith, against the Lehigh Valley Railroad Company, to recover damages for the death of plaintiff's intestate. From a judgment of the Appellate Division (83 N. Y. Supp. 1117) modifying and affirming a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

John McCormick Mitchell and Martin Carey, for appellant. Thomas Raines and Charles F. Miller, for respondent.

PARKER, C. J. We are agreed that the trial court was right in determining that the questions (1) of defendant's negligence, and (2) of freedom from contributory negligence on the part of plaintiff's intestate, were for the jury. But we are divided in our view as to how we should answer the question, was it error to permit plaintiff to prove, on cross-examination of defendant's witness, that the bell on the engine was ringing, prior to the accident, at points several miles distant from the crossing where the accident occurred, and then permit him to prove, in rebuttal of that which he had so drawn out, that the bell was not ringing at those points? If this question be answered in the affirmative,

the judgment must be reversed, for the evidence received could not but have had very considerable weight with the jury. Indeed, it is not impossible but it may have had controlling weight with the jurors' minds in passing upon the question whether defendant was guilty of negligence by failing to give notice, by the ringing of the bell or otherwise, of the very rapid approach of this train.

On the morning of February 25, 1900, and but shortly after midnight, plaintiff's intestate, while being taken across defendant's tracks, 229 feet east of the Farmington Station, with her husband as driver, was struck and killed by one of defendant's engines drawing a train at a very high rate of speed. Upon the trial plaintiff called four witnesses, who testified that, although close enough to have heard the bell had it been rung, they did not hear it, while defendant produced 13 witnesses, who testified that they heard the whistle and bell as the train approached and passed the place of the accident. A number of the 13 witnesses were passengers on the train, and others were not in defendant's employ. It is true that witnesses are to be weighed and not counted, and so we cannot say—having nothing but the record before us—but that a jury would have been justified in accepting the testimony of plaintiff's 4 witnesses who did not hear rather than that of defendant's 13 witnesses who did hear. We cannot know, however, how the verdict may have been affected by the testimony of the six witnesses called by plaintiff in rebuttal to show that the bell did not ring at a point some miles distant from the place of the accident, when the engineer's testimony, elicited by plaintiff, compelled the inference that it was ringing at that point. The testimony of the engineer, on his cross-examination by plaintiff, to the effect that the bell was automatic, and was started at Rochester Junction, and not turned off until after the accident, necessarily gave the evidence afterward put in by plaintiff on rebuttal strong probative force with the jury. It is not unlikely that the jury, in weighing the testimony as to the ringing of the bell at the crossing, placed the testimony of the six witnesses in rebuttal alongside of that of the four witnesses who swore that the bell was not ringing at the crossing. If defendant upon this trial had called the engineer to testify that the bell was automatic, and was started at Rochester Junction, and continued to ring until after the accident, plaintiff would have had the right, undoubtedly, of contradicting this testimony by calling witnesses to testify that at an intermediate point the bell was not in fact ringing. But defendant did nothing of the kind. So the question is presented whether plaintiff could make defendant's witness his witness in certain respects, and then call witnesses to contradict him.

It is true that the evidence was not brought out by plaintiff on oral cross-examination of

defendant's witness, but we are agreed that the situation is the same, and that this question is to be treated precisely as if it was so brought out. The engineer was not in fact on the witness stand. There had been a previous trial, and by agreement counsel read such portions of the testimony given on the previous trial as he desired to offer on this one. On such prior trial defendant had elicited from the engineer the statement that he had set the automatic bell ringing at Rochester Junction, and that it continued ringing until the accident. This enabled plaintiff to produce several witnesses who testified that at certain points between Rochester Junction and the place of the accident the bell did not ring. On this trial defendant deemed it wise not to give plaintiff an opportunity to introduce that evidence. Plaintiff tendered the issue that the whistle was not blown nor the bell rung as the train approached the crossing, and called, as we have said, four witnesses to testify to that effect. Defendant attempted to meet just that issue, and the 13 witnesses called by it testified that the bell was rung. Defendant's counsel read so much of the engineer's testimony as was to the effect that the whistle was blown and the bell rung as the train approached the crossing and passed. Whether the bell was rung at Rochester Junction and intermediate points was not relevant to the issue. The question was whether defendant had given notice of the approach of the train at this crossing, not whether it had been given at some other crossing. Plaintiff's evidence offered to make out his case was properly and necessarily confined to that issue. Defendant had the right to confine its evidence to that issue, and did. Perhaps its purpose was to avoid falling into a trap of which it had fair warning, but its motive was of no consequence to the trial court, whose duty it was to preserve its rights. It was defendant's right to refuse to examine its witness upon a collateral issue, or to permit plaintiff to draw out such testimony except under the well-understood penalty in such cases, namely, that of treating the witness as the witness of the party examining as to new matter. Defendant apprised plaintiff of its position by objecting to the reading of such testimony. And when, in rebuttal, plaintiff called his six witnesses to testify that the bell was not ringing as the train passed them, defendant objected to that testimony contradicting a statement of defendant's engineer upon an irrelevant issue—a statement elicited by plaintiff to make available the testimony of the six witnesses gathered from a distant point. The testimony was not relevant to the issue, because there was no foundation for it save in the implication from the testimony of the engineer, whom plaintiff sought to impeach by the rebuttal evidence. Certainly plaintiff could not swear six witnesses to prove that the testimony of

the engineer was either false or incredible, and at the same time justify the evidence as relevant upon the ground of the absolute verity of the inference from the engineer's testimony, namely, that no change was made in the operation of the bell between Rochester Junction and the place of the accident. This was error for which the judgment should be reversed.

We are also of the opinion that the court erred in admitting in evidence the photograph of deceased. The action was to recover for pecuniary injuries resulting from decedent's death. Code Civ. Proc. § 1904. Such injuries are to be compensated for on the basis of the monetary value of the services of deceased to her husband and children. Into such a case the personal element does not enter, for the law does not compensate for grief or sorrow, but only for the actual pecuniary loss. The introduction in evidence of the photograph of a handsome woman could not be expected to accomplish any other result than to introduce the personal element for the consideration of the jury. Certainly the language employed in *Lipp v. Otis Brothers & Co.*, 161 N. Y. 559, 564, 56 N. E. 79, would seem to be applicable to the introduction of this photograph: "Clearly, the testimony we have been considering could not render any service in the case other than to awaken the sympathies and thus influence the judgment of the jurors in the direction of a greater award, nor is it reasonable to assume that any other result was expected from it." In that case this court reversed a judgment obtained by a father, as sole next of kin, for pecuniary injuries resulting from his son's death. No one except the father was entitled to recover, and yet plaintiff was permitted to question a brother of deceased as to brothers, sisters, nephews, and nieces of deceased, and their necessities—testimony which pointed out opportunities plaintiff would have for making charitable use of any moneys left after satisfying his own necessities. The reason for the decision in that case calls for a decision in this, that evidence of such a character should not be received in cases where the personal element is not permitted by the statute to enter, as in this case.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, J. (dissenting). I dissent from the decision about to be made, on the ground that the evidence for the admission of which the judgment is sought to be reversed was relevant and competent, and therefore admissible. One of the principal questions in issue was whether the bell on the locomotive which struck the plaintiff's intestate was, at the approach to the crossing, ringing or not. Produced as a witness for the defendant, the engineer, on his direct examination, testified that the bell was ringing at the time.

On cross-examination he stated that the bell was an automatic bell; that he started it ringing immediately after leaving Rochester Junction (some distance from the scene of the accident), and that he did not do anything with it till after the accident. He gave this further testimony: "That is my practice, and that is my recollection of it. There was no reason that night why I should have thought about the bell ringing any more than any other night before the accident happened. I am prepared to testify that for the year preceding that, as long as I had that run, that on every night, excepting stops at the Rochester Junction and other places from Buffalo to Sayre, my bell was ringing automatically from Buffalo to Sayre whenever I had that engine; I had that engine most always." The fair inference from this testimony, or at least an inference which the jury might have drawn, was that the witness' statement that the bell was ringing was wholly based on his knowledge of or belief in the fact that the bell was an automatic bell, that he had set it ringing at Rochester Junction, and had not touched it till after the accident. The facts thus elicited were not at all collateral. They were vital to the issue of whether the bell was ringing or not at the time of the accident. This was not an inquiry into new matters, but into his knowledge of the fact to which he had testified, and its effect was, or at least the jury might have so found, to limit his testimony, which on its face was an assertion of a fact of which he was conscious through his senses, to merely his inference or conclusion from other facts which he knew, to wit, starting the bell ringing at Rochester Junction, and that it was not subsequently changed. The plaintiff necessarily had the right to contradict the modified statement made by the witness as fully as he had to contradict the broad statement made by the witness in the first instance, and the fact that he compelled the witness on cross-examination to modify his statement in no degree impaired the right to contradict it. Therefore testimony which proved that the bell was not ringing at a place beyond that at which the witness testified he set it ringing seems to me clearly contradictory of the witness' testimony that the bell was ringing at the time of the accident. I think the case falls exactly within the principle of *Pontius v. People*, 82 N. Y. 339. In that case the defendant was indicted for assault with intent to kill. To show motive, the people proved that the defendant had in his possession a number of promissory notes of the person assaulted, which it was claimed were forgeries. The defendant testified that the notes were genuine, and that he had lent the maker or indorser the moneys represented by the notes. It was held competent for the people to interrogate him as to his means and the source from which he obtained the moneys, and then to contradict by other witnesses

his statements as to those matters. Judge Danforth there said: "It was relevant to inquire upon cross-examination as to this money, where it was procured by him, at what place kept, from whence taken to make the loan; and it was also relevant and pertinent to give in evidence any fact which would tend to show the improbability of his narrative." An examination of the record on appeal will show that the evidence here referred to was the testimony of witnesses other than the defendant, given to contradict his statement on cross-examination. It is idle to argue that the appellant's counsel sought to limit the inquiry to the operation of the bell at the exact place of the accident, when he put on the stand a witness whose cross-examination he knew, from the previous trial, would reveal the fact that the witness was testifying to a conclusion from facts and circumstances prior to the accident.

I can see no purpose for which the photograph of the deceased was competent evidence. There was no dispute as to her age, her health, or physical condition. But it seems to me the error is of too little moment to justify a reversal of the judgment. Almost every day of the term we affirm judgments which present far more serious error.

The judgment should be affirmed, with costs.

GRAY, BARTLETT, and HAIGHT, JJ. (VANN, J., on last ground of opinion only), concur with PARKER, C. J. CULLEN, J., reads dissenting opinion. WERNER, J., not voting.

Judgment reversed, etc.

(177 N. Y. 401)

HOLLY v. GIBBONS et al.

(Court of Appeals of New York. Feb. 16, 1904.)

APPEAL—JUDGMENT—REVERSAL—RESTITUTION OF PROPERTY.

1. Where a judgment in a creditor's action to compel an executor to sell real estate for the payment of debts under a power of sale is reversed, it entitles defendant, under Code Civ. Proc. § 1323, to a restitution of the property, and the fact that the judgment orders a new trial does not affect such right, together with the right to an accounting as to mesne profits.

Motion to amend remittitur. Granted.

For former opinion, see 68 N. E. 889.

PER CURIAM. Motion to amend remittitur by inserting a provision for restitution. The effect of our reversal of the judgment of the Supreme Court, under which the "Jay Gibbons" and the "Huyck" farms were sold to the original plaintiff in this action, who was the present plaintiff's testator, was to entitle the appellant to a restitution of the property lost by the erroneous judgment, and which the respondent still possesses. Code

Civ. Proc. § 1323. The property was not sold to a purchaser in good faith, and therefore the respondent is in a position to respond to our order.

That a new trial has been ordered does not affect the right to a restoration of the property. *Murray v. Berdell*, 98 N. Y. 480. A reconveyance is not necessary. It only requires that the respondent shall be directed to restore to the appellant executor the property, in order that if, upon a new trial, the plaintiff in the action recover a judgment directing a sale of the property under the power of sale in the will of the defendant's testator, he may execute it conformably to law. Such restoration should be accompanied by an accounting with respect to the rents and profits, after proper deductions for taxes and ordinary repairs. *Murray v. Berdell*, supra; *Wallace v. Berdell*, 101 N. Y. 13, 3 N. E. 769.

The motion is granted, and the remittitur will be amended, so as to recite this motion, and to contain a direction that Edward Gibbons, as executor, etc., of Ransom H. Gibbons, deceased, be restored to the possession of the real estate sold under the judgment of the Supreme Court in this action and conveyed to the plaintiff's testator; that the means profits of the said real estate be ascertained, and paid by the plaintiff herein to the said Gibbons, as executor, subject to his liability to account therefor; and that it be remitted to the Supreme Court to make such orders and to issue such process or mandates as may be necessary and appropriate to effect the restitution hereby ordered. Ten dollars costs of the motion are awarded to the defendant Gibbons, as executor.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

Motion granted.

(177 N. Y. 387)

In re BAREFIELD.

In re ROSELL et al.

(Court of Appeals of New York. Feb. 16, 1904.)

APPEAL—ADMINISTRATOR—ACCOUNTING—
REFEREE'S REPORT—PRESUMPTIONS
—TRUST—GIFT—EVIDENCE.

1. Where a referee is appointed under Code Civ. Proc. § 2546, to examine the accounts of an administratrix, his report is not final, and the decree of the surrogate should be founded on the law applied to the evidence before the referee, and he may confirm, modify, or reject such report, and his adjudication thereon is the only decree from which an appeal can be taken.

2. On reversal of the surrogate's decree by the Appellate Division, where the order does not show that it is on a question of fact, it will be presumed to be on a question of law, and that the decree was justified by the evidence.

3. A daughter deposited certain moneys in a savings bank in her name, as trustee for her mother, while the latter was living. The uncontradicted evidence showed that the moneys

deposited were those of the daughter; that she opened the accounts personally, and took the bankbooks. Held to justify a conclusion that in making the deposit the daughter had no intent to give the money to her mother, in view of evidence of repeated declarations by the mother that she had no property.

4. Where a mother who had deposited money in a savings bank in her own name delivered the bankbook to the daughter, with a written order directing the bank to pay the amount of the deposit to the daughter, and the daughter had exclusive possession of the book for 14 years, it supported a finding of title in the daughter to the book and account by gift.

5. Where there is a finding that a joint account of the mother and daughter in a savings bank belongs to the daughter individually, and the Appellate Division reversed the judgment on the law, the Court of Appeals can inquire whether there is evidence to support the finding; and where the record shows testimony by the daughter that the book was hers, that the money was deposited by her, and belonged to her, the court was authorized to find that it was the property of the daughter.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the accounting of Rebecca A. R. Barefield, administratrix of Mary E. Rosell. From an order of the Appellate Division (81 N. Y. Supp. 843) reversing a decree settling the accounts of the administratrix on the appeal of David H. Rosell and others, administratrix appeals. Reversed.

Benjamin F. Tracy and F. W. Catlin, for appellant. Richard T. Greene, for respondent.

PARKER, C. J. The matter of the judicial settlement of the account of Rebecca A. R. Barefield, as administratrix of the estate of Mary E. Rosell, deceased, coming on before the surrogate of Kings county, he appointed a referee, under section 2546 of the Code of Civil Procedure, to examine the account, and to hear and determine the questions arising upon its settlement. The referee's report comprises the evidence taken; certain formal findings of fact, as to which there was no dispute; an enumeration and description of five bank accounts, and the dates at which they were closed by the administratrix; and his conclusions of law, which are practically a restatement of the facts about these bank accounts in the form of schedules, as a result of which he charges the accounting administratrix with the amount of the bank accounts. On the motion to confirm the referee's report, the surrogate came to an entirely different conclusion as a result of his examination of the testimony. In his opinion he discusses fully the law and the facts, disclosing the reasons that led him to the conclusion, from the undisputed facts, that the amount of the bank accounts belonged to Mrs. Barefield individually, both before and after deposit. The decree does not contain specific findings of fact, but states the conclusions to which he had arrived.

While some doubt has been expressed as

¶ 4. See Gifts, vol. 24, Cent. Dig. § 55.

to the effect of the report of a referee appointed in pursuance of section 2546, it is now settled that the report is subject to confirmation, modification, or rejection by the surrogate. Indeed, we held in *Matter of Clark*, 168 N. Y. 427, 61 N. E. 769, that notwithstanding the last clause—which provides that the report shall be deemed confirmed unless acted upon by the surrogate within 90 days after it has been submitted to him—the report is not self-executing, and the surrogate has the right, and it is his duty, to act upon it after the expiration of such period, if he has not done so before. The court says in that case (168 N. Y. 427, 433, 61 N. E. 769, 771): "We think the section was not intended to deprive the parties of their right to the judicial action of the surrogate, but that its obvious purpose was to expedite decisions in this class of referred cases, and to provide a means by which any interested party could enforce promptness of action." The referee's report, therefore, is not final. His conclusions must be deemed to be reported to the surrogate in aid of his decision and decree, which should be founded upon the law as applied to the evidence taken before the referee. The decree is the first binding adjudication, and from it only can an appeal be taken. This decree was reversed by the Appellate Division by an order which does not disclose that the reversal is upon a question of fact, and in such case it must be presumed that it is upon the law. *Matter of Keefe*, 164 N. Y. 352, 58 N. E. 117.

We are thus brought to the question whether the decree has such support in the undisputed facts as entitles it to stand. For where the decision of the trial court does not separately state the facts found, and the order of the Appellate Division does not state that the reversal is upon a question of fact, it must be presumed that all the facts warranted by the evidence and necessary to support the judgment are found by the trial court. *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 54 N. E. 689; *Gannon v. McGuire*, 160 N. Y. 476, 55 N. E. 7, 73 Am. St. Rep. 694.

We shall first take up the three deposits—in the Seaman's Bank, the Greenwich Savings Bank, and the Bowery Savings Bank—in the name of "Rebecca A. R. Barefield in trust for Mary E. Rosell." It is not necessary to determine whether the evidence furnished by such bankbooks, standing alone, creates a valid and irrevocable trust, for that is not this case. The uncontradicted evidence is that the moneys deposited were Mrs. Barefield's; that she opened the accounts personally, took the bankbooks, and retained them until after the death of Mrs. Rosell. And Mrs. Barefield, in her testimony in various places, distinctly claims such accounts as her own. She testifies: "The account was mine. * * * Absolutely my own account. * * * They were my private affairs." The record con-

tains no suggestion of any change in the accounts nor in her intention. The surrogate was justified, therefore, in reaching the conclusion, to which he gave expression in his opinion, that it was "the positive testimony * * * that there was no intention to give this money to the beneficiary." A further circumstance bearing upon the question of whether she intended to create a trust is to be found in the testimony of Mrs. Rosell's physician, who says: "I had repeated conversations with her about her property. She was very sick with pneumonia. I told her if she had any business to transact she had better transact it now. She told me she had no business; that she had attended to all such affairs. She said, 'I have given all to my only child, my daughter. I have no will to make. I have nothing to will.'" She was then living with her daughter, and had been for many years. Her repeated declarations that she had given everything to her daughter, which her daughter well knew, present a still further circumstance in support of the daughter's claim that she had no intention of creating a trust, for why should she create a trust for her mother, when she knew that all that her mother had was given to her? This testimony, with the facts before alluded to, furnishes sufficient support for the finding the surrogate must be presumed to have made—in view of the character of the decree—that Mrs. Barefield had no intention of creating a trust for her mother, and brings this case clearly within *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641, referred to in the surrogate's opinion. In that case a depositor opened an account in a savings bank in his own name. Afterward he changed it to his own name in trust for his brother. The brother died. Three days later the depositor changed the account back to his own name. He at all times held the bankbooks, the brother was not informed of the account, and the depositor denied the trust, claiming never to have intended to part with the money, although giving no reason for opening the account in trust. This court holds that the transaction did not create a trust, and that decision justifies the surrogate in holding that, in the light of the facts here, no trust was created.

The Appellate Division also reverses that portion of the decree which adjudges that the account in the Bank for Savings in the name of Mary E. Rosell belongs to Mrs. Barefield. In adjudging that the administratrix shall not account therefor, the surrogate necessarily finds that it did not belong to Mrs. Rosell at her death, and an examination of the record satisfies us that there is evidence to support that implied finding. Mrs. Barefield testifies that the bankbook came into her possession in 1884, together with the following order on the bank: "Please pay to my daughter the amount and interest due me on

book No. 476,029. *Mary E. Rosell.* Thereafter the book and order continued in her physical possession. Edward Barefield testifies that he saw this book and order in Mrs. Rosell's lifetime, and she informed him that the money was Mrs. Barefield's, adding, "I have given it to her, and I have given the bankbook to her." This is corroborated by Mrs. Rosell's physician, to whom she declared just before her death that she had given everything to her daughter. To the same general effect is the testimony of Mrs. Jeffrey. Here, then, is evidence of a delivery of the book to the daughter, with written authority for her to withdraw the account and interest, together with evidence of exclusive possession on her part of book and order for 14 years. This evidence is uncontradicted, and is certainly sufficient to support a finding by the surrogate that Mrs. Barefield obtained title to the book and account, by gift.

The remaining item in dispute is the joint account of Mrs. Rosell and Mrs. Barefield in the Kings County Savings Institution, which the surrogate also holds belongs to Mrs. Barefield individually. As to that item, counsel for respondent correctly says that the question is purely one of fact, but incorrectly—for reasons already pointed out—asserts that the Appellate Division decided adversely to the surrogate as to the facts. The form of the order shows that the Appellate Division reversed upon the law, and hence we have only to inquire whether there is evidence in the record which supports the finding, necessarily implied in the surrogate's decision, that the book and account belong to Mrs. Barefield. She testifies that the book was hers, that she personally deposited the money, and that it was her money. If the surrogate, as he had the right to, believed this testimony, he was authorized in decreeing that the money belonged to her, and that the estate had no interest in it. *Mulcahey v. Emigrant Ind. Savings Bank*, 89 N. Y. 435.

The order should be reversed, and the decree of the surrogate affirmed, with costs to both parties payable out of the estate.

BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Order reversed, etc.

(177 N. Y. 371)

DRESSER v. TRAVIS et al.

In re KOSS.

(Court of Appeals of New York. Feb. 9, 1904.)

PARTITION—NECESSARY PARTIES—SALE—MARKETABLE TITLE.

1. Testator directed the rents and profits of certain real estate, which he placed in trust, to be paid to his daughter, during life, the body of the estate to go at her death "to her children then living, and to her child or children who

may then be deceased, per stirpes." Held ineffectual as a devise to any one except her living children, so that a granddaughter would have no interest in the property except as derived from her father, so that she was not a necessary party to an action for partition in which he was made defendant.

2. Where testatrix gave certain property in trust, and the trust was determined invalid, and the property was adjudged to have descended to a certain woman living at the time of the commencement of partition proceedings, neither her son nor his daughter who took under the trust had any interest therein, so that a failure to make the granddaughter a party defendant to the partition suit did not render the title unmarketable.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Catharine M. Dresser against Martin V. B. Travis and others. Application of Charles G. Koss to be relieved of his purchase of certain premises. From an order of the Appellate Division (84 N. Y. Supp. 1124) affirming an order of the Special Term denying the motion, petitioner appeals. Affirmed.

Thomas O. Ennever, for appellant. Wilson M. Powell, for respondents.

WERNER, J. The appellant, Koss, became the purchaser of certain lands at a partition sale in the above-entitled action. After he had paid the purchase money and received his deed, he tendered a return of the deed to the referee, and demanded back his purchase money, on the ground that the title was defective and unmarketable. Upon the referee's refusal to comply with the appellant's demand, the latter applied to the Supreme Court at Special Term to be relieved of his purchase and his motion was denied. Upon appeal to the Appellate Division, the order of the Special Term was unanimously affirmed.

The question whether the appellant obtained a good and marketable title depends upon the construction of two paragraphs of the will of one John O. Hart, deceased, of whose estate the lands mentioned formed a part. By this will the testator divided his numerous pieces of real estate into four parcels called the "trust estate," which he devised to his executors upon various trusts, one of which was "to collect the rents, issues and profits of said trust estate and out of the first proceeds thereof to pay off, cancel and discharge the mortgage now a lien upon said parcel number one and such other liens, incumbrances and indebtedness as to which the whole trust estate at the time of my decease may be subject to and charged with." The testator left him surviving four daughters, and the other provisions of the trust were to pay to them respectively, during their lives, the rents of the separate parcels, with remainder in fee to their respective children.

Upon the trial the plaintiff, who sought

¶ 1. See *Partition*, vol. 23, Cent. Dig. § 122.

partition, contended that the testamentary direction to accumulate the rents of all the parcels, for the purpose of paying off the mortgage for \$22,000 upon parcel No. 1 was void, on the ground that it contravened the statute against the accumulation of income for the benefit of persons not minors, and that the trust was further void because it was to endure for a period measured by years instead of lives. The surviving trustee under the will asserted the validity of the trust, and also claimed that, if the direction to accumulate rents should be held to be invalid, it could be cut out of the will without material effect upon the general testamentary scheme thereof. The issue thus tendered was decided in favor of the plaintiff, the trial court holding that the trust was invalid on both grounds, and that the estate descended to the testator's heirs at law. Thereupon judgment was entered directing a sale of the real estate. It was sold in separate parcels to six different purchasers, four of whom have taken title without objection, while the plaintiff and one Coogan seek to be relieved from their purchases. No appeal has been taken from the judgment of the trial court, and the time to do so has expired. It is therefore the law of this case that the trust referred to is invalid, and that all of the testator's real estate descended to his four daughters, all of whom are living.

Appellant's specific objection to the title is that one Marion Travis, who may have some interest in the testator's estate, was not made a party to the action, and is therefore not bound by the judgment. This Marion Travis is the infant daughter of John O. Travis, who is the son of Mary E. Travis, who is one of the four daughters of the testator. Mary E. Travis, as we have seen, being one of the four daughters and heirs at law of the testator, took an absolute title by descent, so that neither her son, John O. Travis, nor his daughter, Marion Travis, had any interest in the estate, and hence it was not necessary to make the latter a party to the action, and the failure to do so does not affect the appellant's title one way or the other.

Should we assume, however, that the trust was valid, no different result can be reached. As we read the will, Marion Travis is in no event entitled to anything under it. By the second paragraph of the will the residue of the rents, issues, and profits realized from parcel No. 1 of the trust estate is directed to be paid to the testator's daughter Mary E. Travis during her life. The third paragraph of the will directs that: "Upon the death of my said daughter, Mary E. Travis, wife of Martin V. B. Travis, I give, bequeath and devise unto the children of my said daughter Mary E., then living, and to the child or children of said daughter Mary E. who may be then deceased, per stirpes and not per capita, the said parcel number one (No. 1) of said trust estate, to have and to hold the

same to them and to their heirs forever." John O. Travis, the only son of Mary E. Travis, and the father of Marion Travis, is alive. He is a party to the action, and is, of course, bound by the judgment. It is evident, therefore, that if Marion Travis has no interest in the estate except such as she may get through her father, she is as much bound by the judgment as she could possibly be if she had been made a party to the action. Upon a critical examination of paragraph 3 of the will, we find that there is no contingency under which Marion Travis could, in her own right, take any interest in the testator's estate, without a radical reformation of that paragraph, involving the excision of some of its parts, and the reading into it of extraneous language to effectuate that purpose. The substance of the third paragraph is that, upon the death of Mary E. Travis, the lands in parcel No. 1 shall go to her children then living, and to her child or children then deceased, per stirpes and not per capita. This language, literally accepted, is obviously meaningless, and not what the testator intended to say. If there is any way in which children living and children dead can share in an estate per stirpes, it still remains to be pointed out. If we could amend the paragraph by inserting the words "of any deceased child" after the words "child or children," it would then provide for a division per stirpes between the children of Mary E. then living and the child or children "of any deceased child" of Mary E. But this would have to be followed by the excision of the words "who may be then deceased," because with these words left in the paragraph it would provide for a division per stirpes between the children of Mary E. then living and the child or children of any deceased child of Mary E. who may be then deceased, and thus the whole would again be quite as senseless as it is now. This simple illustration will suffice to show that the paragraph as it stands is ineffectual as a devise to any one, except, possibly, the living children of Mary E. Travis; and it is equally clear that it cannot be amended so as to effectuate the testator's probable intent without transcending the limits of judicial power. *Brown v. Quintard*, 177 N. Y. 84, 89 N. E. 225. It follows that under no possible construction of the will could Marion Travis have any interest in the estate of which the premises purchased by the appellant, Koss, formed a part.

The appellant's objection to the title, on the ground that Marion Travis was not made a party to the action, was therefore not well taken, and the order of the Appellate Division must be affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, and CULLEN, JJ., concur.

Order affirmed.

(177 N. Y. 376)

DRESSER v. TRAVIS et al.

In re COOGAN.

(Court of Appeals of New York. Feb. 9, 1904.)

PARTITION SALE—CLOUD ON TITLE.

1. Where, in partition of premises leased before the commencement of the action for three years, the lessee is made a party and fails to appear and answer, and the final judgment decrees that every person deriving title to the property after filing of a notice of the pendency of the action shall be forever barred, the lease is not such a cloud on the title as to render it unmarketable.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Catharine M. Dresser against Martin V. B. Travis and others. Application of James J. Coogan to be relieved from his purchase of certain premises. From an order of the Appellate Division (84 N. Y. Supp. 1124) affirming an order denying the application, petitioner appeals. Affirmed.

Henry B. Anderson and Chandler P. Anderson, for appellant. Wilson M. Powell, for respondents.

WERNER, J. The appellant, Coogan, seeks to be relieved from his purchase of certain premises at the partition sale in the above-entitled action. His application is based upon various grounds, some of which have been discussed and disposed of in our opinion upon the appeal of another purchaser named Koss. *Dresser v. Travis* (Application of Koss) 177 N. Y. 371, 69 N. E. 734. We have here, however, one question that was not presented in the Koss appeal, and that is whether a lease in existence at the time of the commencement of the action, and purporting to run until October 1, 1904, upon a portion of the premises purchased by the appellant, Coogan, under terms of sale reciting that "the premises will be sold subject to leases to expire May 1st, 1903," is such a cloud upon the purchaser's title as to render it doubtful and unmarketable.

At the threshold of our investigation of this question we are reminded that the unanimous affirmance by the Appellate Division of the order denying Coogan's application to be relieved from his purchase compels us to assume that all the facts necessary to support the order were established in the court of original jurisdiction. This limitation has an important bearing on this appeal, because it precludes us from considering certain matters of fact referred to and relied upon by the appellant. The facts which we must assume to have been established at Special Term are as follows: At the time of the commencement of the above-entitled action, one John V. Higgins was in possession of a portion of the premises purchased by Coogan, under a lease from M. V. B. Travis, as trustee, running until October 1, 1904. This action for partition was commenced October 29, 1901. A notice of the pendency thereof was then duly filed, re-

corded, and indexed. Higgins, the lessee, was made a party, and failed to appear or answer. He assigned his lease to J. Palm & Co., the present occupants, on March 17, 1902, and the assignment was not recorded until January 21, 1903, or 19 days after the entry of the interlocutory judgment herein. It is true that the interlocutory judgment, the terms of sale, and the referee's deed tendered to the appellant all show that the sale was made subject to leases expiring May 1, 1903, but that of itself proves nothing so far as the lease to Higgins is concerned, for that runs to October 1, 1904. In this connection it will be observed that the interlocutory judgment contains no provisions relating to leases, except that the eighth parcel shall be sold subject to the lease thereon, and the remainder of the premises (including those purchased by Coogan) shall be sold subject to the lettings to expire May 1, 1903. The final judgment is silent as to all the leases, but decrees "that each of the parties to this action, and each and every person deriving title to said premises from, through, or under a party after the filing of the notice of pendency of this action, be forever barred of and from any and all right, title, and interest in and to the premises sold as aforesaid." Upon these facts it cannot be doubted that Higgins, the original lessee, and J. Palm & Co., his assignees, are bound by the judgment herein. The appellant, Coogan, therefore, took a title under which he could have invoked the mandate of the final judgment in partition to secure immediate possession of the premises purchased by him, and his objections to the title must be overruled.

The order of the Appellate Division should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, and CULLEN, JJ., concur.

Order affirmed.

(177 N. Y. 402)

HENDRICKS v. HENDRICKS et al.

(Court of Appeals of New York. Feb. 16, 1904.)

WILLS—CONSTRUCTION—RIGHTS OF DEVISEES.

1. A will provided that on the death of R., and until the decease of testator's wife, the trustee should pay to his three sons two-eighths of the income of the trust estate, and on the death of the wife should pay the principal of the then remaining five-eighths of the trust estate to such sons, share and share alike, and that on the death of either of the sons, before the death of the mother, leaving lawful issue, such issue should take by representation the share of the parent, and on default of issue the portion of the trust property bequeathed to the son so dying without issue should be paid to the surviving sons. *Held*, that the issue of a son dying before his mother occupies the position his father would have occupied as to the income and principal of the share of a son dying before his mother and leaving no issue.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Henry H. Hendricks, executor and trustee of Joshua Hendricks and Edgar Hendricks, against Henry S. Hendricks and others. From a judgment of the Appellate Division (79 N. Y. Supp. 516) affirming a judgment of the Special Term, Henry S. Hendricks appeals. Reversed.

The material portions of the will are subdivisions fourth and fifth, reading as follows:

"Fourth. All the rest, residue and remainder of my estate, both real and personal, of every nature and description of which I may die seized, possessed or entitled to, I order and direct my executors to sell and convert into cash, at such time or times and upon such terms as they may think best for the interest of my estate, and I give and bequeath the same to my executors hereinafter named, to have and to hold the same in trust, to invest and keep the same invested in such securities as they may deem safe, and to receive the interest and income thereof, and pay over the same as follows:

"I. To pay to my wife, Emma B. Hendricks, five-eighths of the income of my estate, until the decease of her mother, Mrs. Rachael Brandon, when my said executors shall thereafter pay to my said wife during her life, the income of three-eighths of my said trust estate.

"II. To pay equally to my three sons, Edgar B. Hendricks, Henry H. Hendricks and Clifford B. Hendricks, three-eighths of the income of my trust estate, during the lifetime of said Rachael Brandon, and upon her decease to pay three-eighths of the principal of said trust estate to my said three sons, share and share alike.

"Should said Rachael Brandon survive my wife, then upon the decease of my wife, to pay the principal of three-eighths of said trust estate equally to my said three sons.

"III. From and after the decease of said Rachael Brandon and until the decease of my said wife, to pay to my said three sons two-eighths of the income of said trust estate; and upon the decease of my said wife to pay the principal of the then remaining five-eighths of my said trust estate to my said three sons, share and share alike.

"Fifth. In case of the decease of either of my said three sons before the decease of their mother, leaving lawful issue, the issue of such deceased son shall take by representation the share the parent would be entitled to if then living, and in case of default of such issue, then my said executors shall pay over to my surviving sons equally the portion of said trust property herein bequeathed to the son so dying without issue."

Charles E. Hughes and Grosvenor Nicholas, for appellant. Samuel Riker, Jr., for respondent.

BARTLETT, J. (after stating the facts). The testator, Joshua Hendricks, left him surviving his widow, Emma, and three sons, Edgar, Clifford, and Henry H. The testator died in 1893; the son Edgar died in 1894, leaving the defendant and appellant, Henry S. Hendricks, his only child; the son Clifford departed this life in 1901 without issue. The widow, Emma B. Hendricks, and the son Henry H. Hendricks still survive. The mother of Emma B. Hendricks, Rachael Brandon, referred to in subdivision "Fourth" of the will, predeceased the testator, thereby requiring the payment to the sons of three-eighths of the principal of the trust estate at testator's death, share and share alike.

This appeal involves the question as to the disposition to be made of the principal and income of the share of the residuary estate bequeathed to the son Clifford, who died leaving no issue. The plaintiff, as the only surviving son of the testator, contends that, after the death of his brother Clifford childless, he became entitled to the income of Clifford's share during the life of his mother, and at her death to the principal thereof. The defendant and appellant, Henry S. Hendricks, the grandson of the testator, and sole surviving child of testator's son Edgar, insists that he and his uncle, the plaintiff, should receive equally the income of Clifford's share during the life of the widow, and at her death the principal thereof must be divided between them in like manner. The Special Term adopted the theory of the plaintiff, and the Appellate Division affirmed the judgment, with a divided court.

The question presented must be answered by construing subdivision "Fourth" of the will, paragraph 3, and subdivision "Fifth," reading as follows:

"Fourth. * * *

"III. From and after the decease of said Rachael Brandon and until the decease of my said wife, to pay to my said three sons two-eighths of the income of said trust estate; and upon the decease of my said wife to pay the principal of the then remaining five-eighths of my said trust estate to my said three sons, share and share alike.

"Fifth. In case of the decease of either of my said three sons before the decease of their mother, leaving lawful issue, the issue of such deceased son shall take by representation the share the parent would be entitled to if then living, and in case of default of such issue, then my said executors shall pay over to my surviving sons equally the portion of said trust property herein bequeathed to the son so dying without issue."

We are of opinion that the scheme of the testator and the reading of his will are plain, and that his intention is clearly expressed to place the issue of a son, dying before his mother, in the precise position his father would have occupied as to the income and principal of the share of a son who pre-

deceased his mother leaving no issue. The evident intention of the testator was not to deal with his sons as a class, but to bestow upon the issue of a deceased son all rights of the father. The testator was confronted by three possibilities: A son might die before his mother, childless; a son might predecease his mother leaving issue; all of his sons might survive their mother. In paragraph "Fourth," subdivision "III" of the will, he dealt with the latter possibility, and provided that upon the decease of his wife the principal of the remaining five-eighths of the trust estate should be paid to his three sons, share and share alike. Then contemplating that, which as matter of fact did happen, he provided for it in subdivision "Fifth" of the will, to the effect that in the event either of his three sons died before his mother, leaving issue, the latter "shall take by representation the share the parent would be entitled to if then living." The words "if then living" refer to the time when interest or principal is payable out of the share of a son who had died leaving no issue. Applying this provision to the facts in this case, what is the situation disclosed? Testator's son Edgar died in 1894, leaving his only child, Henry S. Hendricks, the appealing defendant, and in 1901, the son Clifford died, leaving no issue, so at the latter date Henry S. Hendricks, the only grandson, took by representation the share that his father, the testator's son Edgar, would have taken "if then living," which was one-half of the income of Clifford's share during the life of testator's widow, and one-half of the principal of that share at her death. We not only regard this as the proper reading of the will, but as a most natural disposition of testator's estate. The result is that testator makes no distinction between his surviving son Henry H. and his deceased son Edgar, the issue of the latter being permitted to stand in his father's place.

The judgments of the Special Term and Appellate Division should be reversed, with costs to the appealing defendant in all the courts to be paid out of the estate, and judgment entered in his favor according to the views expressed in this opinion.

PARKER, C. J., and GRAY, O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur.

Judgments reversed, etc.

(69 Ohio St. 414)

LAKE SHORE & M. S. RY. CO. v. CITY OF ELYRIA.

(Supreme Court of Ohio. Jan. 19, 1904.)

MANDAMUS BY CITY SOLICITOR—RAILROADS—REMOVAL OF ABUTMENTS—PETITION—AMENDMENT—PARTIES—OVERHEAD CROSSINGS—CONTRACT—AUTHORITY OF COUNCIL—INJUNCTION.

1. In an action brought by the solicitor of a city or village in his own name as such, and so as a taxpayer, but in behalf of the corpora-

tion, to compel by mandatory injunction a railroad company to remove from a public street its abutments placed therein to support an overhead crossing of its railroad, the court, under favor of section 5114, Rev. St., in furtherance of justice and upon proper terms, may amend the petition by striking from the title of the cause the name of the solicitor and taxpayer, and adding in lieu thereof the name of the city or village as plaintiff and the real party in interest, in which name the action may proceed against the defendant; and in like manner, and for like purpose, the court may amend the body of the petition by striking therefrom the name of the solicitor and taxpayer, and other words describing his relation to the cause of action.

2. By appealing from a final decree made on the issues subsequently joined between the parties, the railway company waived its right to complain of such amendments on hearing of the cause on the appeal.

3. Where a railroad company, for the purpose of supporting its overhead crossing of a public city or village street, erects and maintains abutments which occupy a portion of the street, excluding the public therefrom, and claims the right to do so under a contract made with the municipal council, it must appear that the council was authorized by statute in express terms, or by clear implication therefrom, to make such contract, and mere general legislation authorizing a railroad company to occupy a street for the purposes of its road is insufficient for such permanent and exclusive use. *Ravenna v. The Pennsylvania Co.*, 12 N. E. 445, 45 Ohio St. 118, approved and followed.

4. Section 3283, Rev. St., does not authorize a city or village council to agree with a railroad company for the permanent and exclusive occupation of a public street with abutments to support an overhead crossing of the railroad; nor can such occupation be rightly gained by means of appropriation; and, if the company so occupying the street refuses to restore it to its former condition of usefulness to the public, it may be compelled to do so by mandatory injunction, without a right to compensation for the expense of removal.

Davis, J., dissenting in part.
(Syllabus by the Court.)

Error to Circuit Court, Lorain County.

Petition by Frank M. Stevens, city solicitor of the city of Elyria, against the Lake Shore & Michigan Southern Railway Company. Thereafter the city of Elyria was substituted as plaintiff. From a decree of the circuit court modifying a decree of the common pleas, both parties bring error. Affirmed in part and reversed in part.

The action, as originally instituted against the plaintiff in error, was brought in the name of "Frank M. Stevens, as city solicitor, and as a taxpayer on behalf of the city of Elyria," and the petition alleged that "he is a taxpayer, and that he brings this action both as solicitor for said city and as a taxpayer in behalf of said city." The petition, thus styled, complained that the railway company owned, operated, and controlled, for the 15 years last past, a certain railroad extending through the city of Elyria, crossing Huron, West Bridge, and West River streets at their intersection, and that the ground at this intersection, long prior to the organization of the railway company, was established as a county road sixty-six (66) feet in width, which by annexation proceedings

has become a street of the city; and that prior to February 24, 1890, the company had maintained its tracks at this point at grade with the street, leaving the highway unobstructed to its full width; that on or about February 24, 1890, the railway company changed its crossing from a grade to an overhead crossing, and that in so doing it placed high abutments, on which to rest its tracks, within said street on both sides thereof, thereby narrowing the highway 28 feet, wholly depriving the public of the use of that part of the same. A sidewalk 6 feet wide was constructed on one side of the remainder of the street, so that the driveway not occupied by the two abutments and said sidewalk is only 34 feet wide. The petition further charges that the acts complained of makes the street or highway at West River street narrow, dangerous, and grossly inadequate for the use of the public, and render the same dangerous to both life and property, owing to the increase of population of the city and vicinity, and that the public needs the full and unobstructed width of the street. It is alleged that any contract between the authorities of the municipality and railway company by virtue of which said abutments were placed in the street is illegal and in excess of the powers vested in the council of the city, and that it has repudiated and does now repudiate such contract, and any arrangement which may have been formerly made for that purpose; and that the city, before this action was commenced, repeatedly demanded that the railway company remove the abutments from the street, which it has refused to do. The prayer is for a decree declaring void any contract by which the company claims the right to so occupy the street, and for an order that the abutments be removed.

The railway company filed an answer to the petition, and denied that it illegally occupied the street with said abutments, and asserted that its acts with reference thereto were duly authorized. It also denied that the public needs the full width of the street at the point of crossing. After the issue was thus made up, the plaintiff asked and obtained leave to amend the petition, by striking from the name of the plaintiff the words, "Frank M. Stevens, as city solicitor of the city of Elyria, and as a taxpayer on behalf of," leaving the words "The City of Elyria," as the name of the plaintiff. The motion also asked leave to strike from the body of the petition all words showing the relation of the solicitor and taxpayer, as such, to the cause of action, eliminating them in name and averment from the case. The company resisted the motion, but it was allowed, and the company excepted. It also moved to strike the petition from the files because of erasures and interlineations. This motion was overruled, and a bill of exceptions taken.

The petition was rewritten as an amended petition, reforming it as to the title of the

action, and to otherwise conform to the changes permitted by the court. The action proceeded thenceforth in the name of "The City of Elyria" as plaintiff. The defendant answered the petition as reformed, preserving the original title of the case. On motion this answer was stricken from the files for that reason, and the company excepted. Subsequently, the defendant filed an amendment to the former answer under the new title as to the plaintiff, and afterwards filed a second amended answer, wherein it protests that the court had lost jurisdiction over it because of the substitution of the city of Elyria as plaintiff, and that the petition is insufficient to require an answer. It does not deny that the driveway between the abutments is but thirty-four (34) feet in width. The necessity for a greater width is denied, as well as all other allegations as to the present dangerous character of the same.

The answer proceeds to set out that prior to the acts complained of it exercised the rights conferred upon it by section 3277, Rev. St., in order to improve its road from Sandusky to Elyria and beyond, by taking out curves and reducing grades. In order to render the highway across its road at West River street less dangerous and difficult to the public, the company determined to construct an overhead crossing, for which purpose abutments were erected in West River street, at points named in the petition, to support the railroad tracks; and to accomplish this change, and in order to restore the street to its former condition of usefulness, the defendant, in February, 1890, entered into an agreement with the authorities of the city, whereby the manner, terms, and conditions upon which the company might use and occupy the street were agreed upon, and that in pursuance thereof the abutments were placed where they now are. For a second defense, the two-year statute of limitations is pleaded. The allegations of new matter contained in the answer are denied by a reply. On the issues thus framed the cause was tried in the court of common pleas, and the prayer of the petition was granted.

The defendant appealed from the decree to the circuit court, where defendant renewed its motion to strike the amended petition from the files because of the substitution of "The City of Elyria" as plaintiff in the common-pleas court, and because of erasures and interlineations made in the petition by permission of that court. The motion was overruled, and the company excepted.

The cause was heard in the circuit court on the evidence, and on request the court found the facts, part of which are as above stated. The other material facts appear in the opinion. The court also found that the "abutments obstructed the public highway, and wholly excluded the public and the plain-

tiff from the use and enjoyment of the parts of said highway occupied by said abutments, but that public necessities do not require the removal of said east abutment at the present time." The court held, as a matter of law, that the municipal authorities had no power to make the contract for placing the abutments within the street, and that so occupying the street is a public nuisance; and the court ordered that by a day certain, the company remove the west abutment, but declined to make such order as to the east abutment. Both parties prosecute error in this court.

E. G. Johnson, M. R. Dickey, and Geo. O. Greene, for plaintiff in error. F. W. Stevens and W. W. Boynton, for defendant in error.

PRICE, J. (after stating the facts). Preliminary to a consideration of the main controversy, we are requested and strongly urged by counsel for plaintiff in error to pass on a question of practice that arose in both the lower courts. It relates to the change in the title of the cause, which was permitted by the court of common pleas, whereby the words "Frank M. Stevens, as city solicitor of the city of Elyria, and as a taxpayer of," were stricken from the style of the case, leaving the words "The City of Elyria" as the name of the plaintiff in the case. It is claimed that granting such change was in violation of section 4972, Rev. St., providing, " * * * and the title of a cause shall not be changed in any of its stages, except when the defendant prosecutes error." The plaintiff in error objected to the striking out of the above words, and excepted to the overruling of its objection. The same question further appears in a motion to strike off the petition because of such change, on the alleged ground that the court no longer had jurisdiction over the defendant in the case.

It is well to note that there are other sections of the statute which closely bear on this point, which must be looked to for a proper determination of the question made. Section 4993 requires that an action must be prosecuted in the name of the real party in interest, and section 5114 provides most liberally for amendments of pleadings. Under its authority the "court may * * * amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case. * * *" The court is authorized to prescribe the terms on which the amendment may be made. It is quite true that it is not within the right or power of a party to the suit to change the title of a cause of action in any of its stages, except where he is a defendant and prosecutes error. But when the power of the court is invoked under section 5114, we find that a name of a party

may be added or stricken out; and, if that can be done by the court, it may do both in one order, that is, strike out the name of a party and add or substitute the name of another. This case presents a very fair illustration of the proper exercise of such authority. While the suit was instituted with the title of "Frank M. Stevens, as city solicitor of the city of Elyria, and as a taxpayer," it was so instituted on behalf of the city of Elyria as the real party in interest, and an inspection of the original petition shows that the facts alleged are facts in which the city alone is interested, as a trustee of the public. The relief sought is relief in the interest of the city. Stevens, as solicitor and taxpayer, sought no personal relief, and it is doubtful whether, in fact, there has been any material change in the title of the cause of action. The city of Elyria appeared in the title as the real party in interest, and it so appeared in the averments of the petition. The cause of action was not changed, and all its substance remained after the so-called substitution, except the elimination therefrom of such words as the name of the solicitor and taxpayer where they occurred, and averments connecting them with the cause of action. The case was finally tried on the same cause of action, stripped of the unnecessary incumbrance first thrown around it. In such case, we have no doubt, a court may amend the pleading by substituting the name of the real party in interest, and striking out the name of an unnecessary party and one who has no interest in the controversy. The cause of action still remains against the defendant, and the court could not lose jurisdiction over the party in doing what it plainly had authority to do in this case.

There is another and conclusive answer to the claim of plaintiff in error in this court. The defendant, as a matter of course, was required to answer the petition as amended, with an answer bearing the same title. It objected to this, but complied with the order of the court. The issues were made up between the parties under the new title, and under such title the decree of the court was made from which the defendant appealed to the circuit court. The appeal did not reach back to the rulings of the court in reforming the petition, as might be the case on a demurrer filed and ruled on, but the appeal was from the decree made on the issues as joined. If the plaintiff in error had desired to review the questions of change of title and the kindred changes made in the petition, the remedy was error and not appeal. It excepted to the rulings of the court, but abandoned them, at least for the time being, in selecting a remedy by appeal. Therefore, such questions did not pass up with the appeal to the circuit court for its judgment, and are therefore not before us in this proceeding. The same remark may be made to the erasures and interlineations

made in the petition which are complained of. The court permitted them to be made. It seems they were not serious enough to prevent the court and counsel from understanding them, and a fairly good petition has survived and found its way from the lower courts to this court, as appears in the printed record. Thus far, the plaintiff in error has no ground for reversal.

We now reach the more serious and substantial controversy. Both parties to this proceeding are here complaining of the decree of the court, and asking for reversal; one of the command to remove the west abutment, and the other praying for a reversal of that portion of the decree in which the court declined to order the removal of the east abutment. The claims of each party rest upon the same facts, and must be adjudicated under the same rules of law. These respective claims stand or fall as the question may be answered: Had the council of the village of Elyria the power to contract with the railway company for the permanent occupancy of portions of the street with the abutments to support its tracks as an overhead crossing? The circuit court has found that the portion of West River street where these abutments stand once formed a part of an established county road 66 feet in width, and that it was laid out, opened, and used by the public as such; and, further, that long prior to the erection of the abutments and the making of the alleged contract under which the railway company erected them, that portion of the county road was taken into the village of Elyria by proper proceedings of annexation, and thereafter continued to be a street of the same width. The public, therefore, had the right to use the same to its full width free from obstructions, and it was so used until the committing of the acts complained of, in the year 1890.

It is well to know the precise nature of the contract relied upon by the railway company, and also what was done thereunder by the parties. To conform with a general improvement and betterment of its roadbed, and eliminate difficult and dangerous grades and curves on a portion of its line, it seemed to be necessary to raise the grade at West River street and other points, and it was done. But this made the crossing of the street more difficult and dangerous to the traveling public. An overhead crossing was determined upon by the railway company, and it applied to the village authorities for permission to make that kind of crossing, and submitted to them plans and profiles for the purpose, which embraced the placing of the east and west abutments for the support of the track within the street. Action was taken upon these plans by the village council, and a resolution was adopted in February, 1890, of which the following in part is a copy: "Be it resolved by the council of the village of Elyria, Ohio, That the proposed

changes in the grade and construction of the streets of said village, at their intersection with the Lake Shore & Michigan Southern Railway track and the Cleveland, Lorain & Wheeling tracks, shown on the plans and profiles above referred to in the preamble, are approved as proper restorations of said streets to their former usefulness, with the following modifications," etc. One of the modifications made was a change from 13½ feet to 14 feet in the height of the crossing above the street at West River street. This, with other modifications, was accepted by the railway company, and became the contract upon which the plaintiff in error relies. The language of the resolution must not be overlooked, where it is said that the proposed changes in the grade as shown on the plans and profiles, etc., "are approved as proper restorations of said streets to their former usefulness. * * *". The defendant in its amended answer avers: "That in order to properly make such change of location and grade, and to construct such undercrossing, and to put such street in such condition as not to impair its former usefulness, it became and was necessary, in the location of that part of the defendant's railroad, to use and occupy a part of such street, and being the same part now occupied by the abutments of said defendant company," etc. It is alleged that for this purpose the contract above set out was entered into.

From this averment of the answer and the language of the resolution, it is very clear that both parties, the village council and the railway company, acted with some deliberation. The sections of the statute under which the council acted must have been examined and the extent of its powers considered, and the company recognized its obligation to restore the street to its former state of usefulness, and the council, in the resolution adopted, was of the opinion that, if the changes were made as proposed, there would be a restoration of the street to its former condition of usefulness. This was the opinion of that council on the then existing conditions, such as the extent of the population and business of the village and the general public of which it formed a part. But did it become binding for all time, no matter what the increase of population, business, and public travel might be in after years? The answer admits that there has been a growth of the village into a city and a large increase of population in the section of the city where this crossing is situate; and it would seem difficult to maintain the proposition that the opinion of the council in the year 1890 should bind the public perpetually, although the public should need the free and unobstructed street to its full width. When the city annexed the territory which embraced the county road, the title in fee to such part of the county road vested in the city in trust for the public. Such is the title of a village or city to a street, and the stat-

ute commands the council to keep it open, in repair, and free from nuisance. See section 2640, Rev. St.

But the plaintiff in error plants its right to remain in the street upon one or more sections of Revised Statutes, which it is said fully authorized the council to make the contract in question. In its answer it is alleged that its line of road between Sandusky and Elyria was difficult and dangerous on account of grades and curves, and that it became necessary, in order to avoid annoyance to the public, and the difficult and dangerous grades, to raise the grade; that, in exercise of rights conferred upon it by section 3277, Rev. St., it raised its grade at West River street and other points on its line at great expense. This section empowers a railway company to change the location or grade of any portion of its road "for the purpose of avoiding annoyance to public travel, or dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundation, or when the roadbed has been injured or destroyed by the current of any river, watercourse, or other unavoidable cause, * * * but shall not depart from the general route prescribed in the articles of incorporation." This section, just as it says, confers power to cure curves and grades along its line, or obtain more secure and substantial foundations for its roadbed within the general course of the line, but makes no provision for the crossing of a street within a municipal corporation. The next section (3278) provides for appropriation of land needed in order to make the above necessary changes. It is not claimed by counsel for plaintiff in error that the above section enables a municipality to contract with a railroad company for the use of a street, because it plainly relates to a roadbed at other points on its line where no municipal grant is required. On the contrary, it is thought that vital power is conferred on the council by section 3283, Rev. St., and that under its provisions the contract relied on is valid and enforceable. The language of this section is in part: "If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms, and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way, or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals. * * *" It is upon this section the railway company now most confidently relies as the authority for the contract

made with the council. Does it authorize the council to grant to a railway company the exclusive and permanent right to occupy a public street, or part of it, at a crossing or elsewhere? Or does it merely authorize a joint occupancy? We have no doubt that the General Assembly, representing the sovereignty of the state, may empower municipal councils to make the larger grant and confer the exclusive use, but has it done so by the foregoing legislation? We think not. To establish, lay out, and open up a county road or a public street, the statutes have made clear and distinct provisions, and, when the road or street is no longer of public use or utility, provisions equally clear and distinct are made for their vacation, of all which public records are made, and we find nowhere any other method of vacating such public highway or any part of it. By the proper establishment and opening of the street, the village or city becomes vested with the full title thereto, in trust for the public, and it is not within the delegated powers of the municipal council to barter or grant away such title except in the mode provided for the purpose. In the liberality of our laws, and in proper recognition of the necessities and benefits of railroad enterprises, a joint use is permitted, and the railway company, in a manner, and upon such terms and conditions as it and the council may agree, may occupy a road, street, alley, way, etc. But its occupancy must not extinguish the prior title and use, and permanently exclude the public. It cannot destroy the dominant right of the public. To authorize the council, the municipal authorities, to grant more than a joint occupancy, requires clear and express language in the statute to that effect, and which we do not find in the section. The right to "occupy," where there is a prior existing use or easement, does not mean that the first or existing use or easement is ousted and the "occupancy" of the railroad exclusive. This view becomes clear when we examine the clause, which provides that where the council and the company cannot agree upon manner and terms of occupancy it may appropriate so much of the streets, or alley, etc., as "may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals. * * *" If this company and the council had been unable to agree, and the former had resorted to appropriation, what would it have obtained by the proceeding? A title in fee in portions of the street desired, or a perpetual easement therein to the exclusion of the public? Certainly not. It would have obtained a right in common with the public to occupy the street or part of it. The appropriation would have been made "in the manner and upon the same terms as provided" for cases of individuals, which means the method of procedure and terms of compensation. It

does not undertake to measure the title which the company may acquire. To go beyond a joint occupancy or use of the street, the statute must speak in clear and unmistakable language. There can be no authority in such cases by implication, unless it is unmistakable. This court has held the substance of this doctrine on more than one occasion. It will be sufficient to notice but a few of such cases.

In *Railroad Company v. The Commissioners of Greene County*, 31 Ohio St. 338, the following was held as part of the syllabus: "Power given by a charter of a railroad company to construct its road across a public highway upon condition that the same be restored to its former state, 'or in a sufficient manner not to impair its usefulness,' does not authorize the company permanently to appropriate any portion of the public highway by obstructions which may materially interfere with the public travel." In the opinion of the court, on page 347, it is said: "But it was never intended to invest the company, without the burden of compensation, with the right to narrow the width of the highway, or materially to interfere with its facilities for public travel; much less with the right to incumber the same, as was done here, with abutments and embankments which effectually exclude the public from the use and enjoyment of the greater part of it. * * * The fact that the public travel over the road may, for the time being, be limited, does not lessen the duty to restore. Roads and highways are established to subserve the future needs of the public as well as the present." The court further held in that case that the statute of limitations did not run in favor of such encroachments upon the public highway.

In *Railroad Co. v. City of Defiance*, 52 Ohio St. 262, 40 N. E. 89, there is an extended discussion of the question before us. Council for plaintiff in error labors in vain to show the irrelevancy of that case. There the plaintiff in error, in large degree, stood on the provisions of section 3283, as is done here. For the sake of brevity, we omit a quotation of sections 5, 6, and 7 of the syllabus, which are very clearly in point. We note the language of Williams, J., on page 309, 52 Ohio St., page 100, 40 N. E.: "The statute, we think, does not contemplate the destruction of the street, or the cessation of its use by the public, or its withdrawal from the control and supervision of the proper municipal officers; nor is authority found in it for any agreement having such results. On the contrary, the statute recognizes the street so burdened with a railroad as a 'public street,' with all that term imports." That case was taken on error to the Supreme Court of the United States, where the judgment of this court was affirmed. See *Wabash Railroad Co. v. City of Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87. In the course

of the opinion in that case, Justice Brown, speaking of another case, on page 97, 167 U. S., page 751, 17 Sup. Ct., 42 L. Ed. 87, says: "If the court, however, is considered as holding that an agreement or license to construct bridges, which is silent as to time, should be construed as an agreement that they are to remain in perpetuity, we should find ourselves confronted with too many authorities to the contrary to accept it as a sound exposition of the law. Indeed, the general principle that the legislative power of a city may control and improve its streets, and that such power, when duly exercised by ordinances, will override any license previously given by which the control of a certain street has been surrendered to any individual or corporation, is so well established, both by the cases in this court and in the courts of the several states, that a reference to the leading authorities upon the subject is sufficient. Indeed, the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety, and morals of its inhabitants."

In *City of Zanesville v. Fannan*, 53 Ohio St. 605, 42 N. E. 703, 53 Am. St. Rep. 664, our question was indirectly involved, and section 3283, Rev. St., was again considered. On page 614, 53 Ohio St., page 704, 42 N. E., 53 Am. St. Rep. 664, Williams, J., laid down the following as its construction: "Any permanent obstruction or incumbrance in any street of a municipal corporation is made a nuisance by statute (section 6921, Rev. St.), which the municipal authorities are invested with the power and charged with the duty of removing (sections 1690, 1878, 1934, and 2640, Rev. St.). And those powers and duties continue when a railroad company has placed its tracks in a public street, whether they were so placed under permission granted by the municipality, or under an appropriation for that purpose. In neither event are the municipal authorities divested of their powers, nor absolved from the performance of their duties. Nor does section 3283 contemplate that a railroad company, in the use of a street for the purposes of its road, under a right acquired in either of the modes provided, may destroy the same, or create nuisances therein. * * * " The doctrine here quoted is but the consensus of former opinions of this court and of those of other jurisdictions. As illustrative of the law held in the latter, we think it sufficient to refer to the leading case of *Delaware, L. & W. R. R. Co. v. The City of Buffalo*, decided in 1899 by the Court of Appeals in New York, found in 158 N. Y. 266, 53 N. E. 44. That court had the precise question we are deciding. The railroad company constructed its railway across Main street in the city of Buffalo. The structure rested upon abutments and piers, all placed in the street,

which at that point was 90 feet wide. The company was afterwards warned to remove them, but, refusing to do so, claimed legislative and municipal authority for placing the structures in the street. It seems that the laws of New York authorize railroad companies to construct their roads across, along, or upon any street or highway with the assent of the municipal authorities. That is about all that can be claimed for section 3283. In that case the Court of Appeals expressed the following principles in the syllabus: "(2) When a railroad company relies upon a legislative act as a justification for the occupation of a public highway with its piers and abutments, it must show that the statute authorized in express terms, or by clear and unquestionable implication, the doing of the very acts complained of, or that the statute was imperative and could not be executed without causing a nuisance. (3) Mere general legislative authority to a railroad company to cross a city street with the consent of the local authorities gives it no right to occupy a large portion of the street with abutments and piers for the support of its structure, to the great inconvenience and detriment of the public. (4) Municipal authorities, in the exercise of the power to permit railroads to cross streets, are not authorized to surrender to the railroad the exclusive use of a considerable portion of the street for the erection and maintenance of abutments and piers to sustain an elevated structure." All the judges sitting concurred in the decision. On a rehearing granted, the case was again fully heard and considered, as seen on page 478 of same volume of Reports, 158 N. Y., 53 N. E. 533. The former judgment was adhered to by a unanimous court.

Further citation of authorities, we think, is not necessary. Whether section 3283 or section 3284 is depended upon by the railway company in this case, the results are the same. Under neither has there been a restoration to the former condition of usefulness contemplated by law, nor can there be with the abutments which occupy 28 feet of the width of the street. Under neither section has a municipal council the power to permit or grant to a railway company the exclusive and permanent occupation of a public street. To confer such power, the legislation must be express and clear to that effect, as held in *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445.

Looking to the various sections bearing upon the subject of the present litigation—sections 2640, 3283, 3284, and 6921—we must construe them so as to give to each its intended operation. They are equally venerable as a part of our statute law, and we think our views will permit each to be enforced with fairness to all parties concerned—the public, the individual, and the corporations.

As to the plea of the statute of limitations

made in the answer, it is sufficient to say that it is the well-settled law of this state that encroachments upon a public highway never ripen into a title by adverse possession, nor is such title pleaded in this case.

There is one more contention made by plaintiff in the reply brief. It is urged that to compel a removal of these abutments which, with the overhead structure, cost the railway company \$10,000, will take its property without due process of law, and thus violate a constitutional right. The brief says, on page 16: "We insist that we have shown that we have property in the abutments on this street, and that due process of law requires that before they shall be taken from us the city must provide by resolution or ordinance for an improvement of this street, which would require the removal of these abutments, furnish notice of the same, and give us an opportunity to present and maintain our claim for damages; and, as nothing of the kind was done in the case at bar, we maintain that this mandatory injunction takes our property without due process of law. * * *" This position shows much fortitude, and is at least peculiar. It assumes that the grounds where the abutments stand had ceased to be a part of the public street to such an extent that to get rid of them the city must appropriate and pay compensation for their removal. We have seen that the railway company did not and could not lawfully get the right to place the abutments in the street, and that their presence tends to a permanent obstruction of the highway without authority of law. The city is seeking to restore the street to its former condition of usefulness, which the company agreed but failed to do, and it is in no condition to invoke the rule for appropriation cases. It would be strange, indeed, if the railway company has a right to compensation from the city for the removal of a nuisance in the street, which, through wrong or mistake, was erected therein.

The circuit court declined to order the removal of the east abutment, saying, in its finding, that "present necessities of the public do not require it." The city, by cross-petition in error, asks a reversal of that portion of the decree and a judgment in its favor. It is true that the east abutment at its widest part is only about five feet in the street, but we are unable to see a legal distinction between it and the west abutment. The controversy has been serious, and we think the door should be closed, so far as practicable, against further expensive litigation, and settle now all the questions litigated. On the facts and law we feel justified in so doing. We therefore affirm the judgment of the circuit court relating to the west abutment, and reverse it as to the east abutment, and order the removal of both by a day stated in the journal entry.

Judgment affirmed as to the west abutment, and reversed as to the east abutment,

and, as to it, judgment in favor of defendant in error on its cross-petition.

BURKET, C. J., and SPEAR, SHAUCK, and CREW, JJ., concur. DAVIS, J., concurs in first and second sections of the syllabus, and dissents from the third and fourth, and also the judgment.

(69 Ohio St. 452)

RHEINSTROM et al. v. STEINER et al.

(Supreme Court of Ohio. Jan. 19, 1904.)

ERROR TO COMMON PLEAS—SALE—REFUSAL TO ACCEPT—ACTION FOR PRICE—REVERSAL—PRESUMPTIONS—REVIEW—CONTRACTS.

1. Where, in a petition in error to a judgment of the court of common pleas, in an action to recover for goods sold and delivered, the grounds of error, with others separately stated, are that the judgment is against the weight of the evidence and that it is contrary to law, and the circuit court reverses the judgment, reciting as the only ground of error that the "judgment rendered in this action was contrary to law and the evidence on the question of the acceptance and retention of the goods by the defendants below," it will be presumed that the assignment that the judgment is against the weight of the evidence was overruled.

2. Such judgment of reversal may be reviewed by this court.

3. Where a party, under a contract to manufacture and deliver certain specific goods, delivers to the buyer goods of a kind not conforming to the contract, and, upon examining them, and without delay, the buyer informs the seller of that fact, and unequivocally refuses to accept or use the goods, and does not use any of them, it is not incumbent on such buyer to manually return such rejected goods, nor, in words, to offer to return them. It is sufficient to relieve him of liability to pay for them if he in due time gives the seller clearly to understand that he refuses to accept the goods.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Action by Wm. Steiner Sons & Co. against Rheinstrom Bros. Judgment for plaintiffs, on error from the court of common pleas, and defendants bring error. Reversed, and judgment of common pleas for defendants affirmed.

The defendants in error brought action against plaintiffs in error, in the court of a justice of the peace of Hamilton county, to recover \$247.50, the agreed price of certain labels claimed to have been sold and delivered to Abraham and Isaac Rheinstrom at their request. The cause being appealed to the court of common pleas, the defendants in that court answered by general denial. On trial to the court, a jury being waived, the issues were found for the defendants, and judgment in their favor rendered. Steiner & Co. took the case on error to the circuit court, and that court, finding "that there is manifest error upon the face of the record, to the prejudice of the plaintiffs in error, in this case, to wit, said judgment rendered in this action was contrary to law and the evidence on the question of the acceptance

and retention of the goods by the defendants below," proceeded to reverse the judgment of the common pleas, and remanded the cause to that court. The Rheinstroms bring error. Facts necessary to an understanding of the points decided will be found in the opinion.

J. Shroder, for plaintiffs in error. Galvin & Bauer, for defendants in error.

SPEAR, J. 1. The first question is one of practice. Does the entry of the circuit court show that the common pleas was reversed on the weight of the evidence, or was it upon that which, in the last analysis, is a question of law? If upon the former ground, then this court will not review the judgment. A number of grounds of error are set forth in the petition in error to the circuit court—among them, that the "judgment is against the weight of the evidence"; and another, that "the judgment is contrary to law." By section 6709, Rev. St. 1892, it is made the duty of the circuit court to pass upon all the errors assigned in the petition in error, and, where the judgment below is reversed, and the cause remanded for new trial, the mandate shall state the errors found in the record upon which the judgment is founded. Now, as all presumptions are to be indulged in favor of the judgment under review, we assume that the circuit court did its duty in this respect, and that, if it had, on the weight of the evidence, found error, it would have so stated in its mandate. In the absence of such statement, we assume that that claim of error was overruled, and the reversal based wholly on the other proposition, viz., that the judgment is contrary to law, notwithstanding that the entry adds that it is contrary to the evidence on the question of acceptance. In legal effect, it means that, giving proper construction to the evidence on the question of the acceptance and retention of the goods by the defendants below, the rule of law applied to it by the trial court was erroneous. The judgment, therefore, may properly be reviewed by this court, without departing from our rule which forbids the weighing of evidence. *Wetzell v. Richcreek*, 58 Ohio St. 62, 40 N. E. 1004; *Gamble v. Railroad Co.*, 63 Ohio St. 352, 59 N. E. 99.

2. Did the trial court apply the wrong rule of law to the evidence respecting the acceptance and retention of the goods? Without question, the burden was upon the defendants in error to establish acceptance. To determine this with fairness to them, it is proper to recite the evidence adduced by them to support that contention—not that the evidence is to be weighed, but, taken all together, does the evidence tend to show such acceptance, or does it show the contrary?

On the day the goods were received by defendants below, they acknowledged receipt, under date of January 31, 1900, by the following letter, viz.:

¶ 2. See *Sales*, vol. 48, Cent. Dig. §§ 303, 305.

"Dear Sirs: We received to-day the shipment of Jed Clayton labels, but regret to find that the work is not properly carried out. Please return to us the original sketch and we will point out to you in detail the defects. Yours truly, Rheinstrom Bros."

To this the plaintiff below responded under date of February 2, 1900, as follows:

"Gentlemen: We beg to acknowledge receipt of your favor of the 31st ult. in regards to 'Jed Clayton' labels, that same have reached you but that the work is not properly carried out.

"We are again very sorry to hear your complaint, and herein enclose the sketch which was submitted to you, with one of the labels, and no doubt our Mr. Steiner will be in your city by the time these few lines reach you, and you can explain matters to him personally.

"We remain your very truly, Wm. Steiner Sons & Co."

Some time after the above date, Mr. Isadore Steiner, one of the plaintiffs below, called at the office of Rheinstrom Bros.; and his account of the conversation then had is, in substance, that "Mr. Rheinstrom then told me that he received our labels, but will not use them. I asked him why, and he said they were too far away in color from his original label; and, in answer to that, I told him we made them like the sketch which he furnished. He told me something regarding his attorneys telling him that he had a copyright on his label, and that, by changing off to a different color, that his copyright was no good, as anybody could infringe upon his label. I pleaded with him, saying, 'The labels are no earthly good to me.' He said he couldn't help that. 'The best thing you can do is to put them in the fire and burn them up while you wait here.' I said: 'You cannot burn them. They are my property until they are paid for.' Then I tried to get him to accept them. He said he would not accept them labels for any price—not for ten cents a thousand. I put on my hat and coat and walked out." There is no other evidence by plaintiffs below bearing on the question of acceptance than the foregoing, and no evidence at all of use by defendants below of any of the labels. Mr. Abraham Rheinstrom testified, in substance, that the labels were defective in drawing, color, and workmanship. "We could not use them at any price. We never accepted these labels, but wrote immediately rejecting them. [Letter of January 31, 1900, heretofore given.] They replied by letter. [Letter of February 2, 1900, heretofore given.] The labels were put in charge of one of our employes, in the original packages, to be held until called for. We heard nothing more until Mr. Steiner came to our office."

The burden was upon plaintiffs below to prove a compliance with their contract. The effect of the finding and judgment of the common pleas on the issues is that the goods

furnished were not the goods ordered. The finding and judgment in this respect not having been found erroneous by the circuit court, but the judgment in respect thereto having been affirmed, the only ground on which a recovery could have been predicated was that the goods had been accepted by the buyers, and hence they were liable for the price. Here, too, the burden was on the sellers. Their own evidence shows conclusively that the buyers did not accept, unless a failure to manually return the rejected goods is, in law, an acceptance. Is it? From the standpoint of ordinary fairness, how is it? The buyers had ordered labels of a specified kind. The sellers had delivered labels of a different kind, not conforming to the agreement, of which facts the sellers were at once, by letter, fully apprised, to which they responded that, by the time their letter should reach the buyers, one of their firm would call, and matters could be explained. He did call, and was distinctly notified that the labels were wholly useless to the buyers, and as distinctly informed that they were rejected. On what principle of commercial dealing could they ask the buyers to take further trouble in the matter, at the peril of being compelled to pay for a wholly useless article, and one which they had not purchased? We can conceive of no rule of business comity which would justify such a claim. If maintainable at all, it must be by force of some rigid rule of law.

Numerous authorities are cited by counsel for defendants in error which bear on the subject of sales, and afford general rules which should govern the conduct of the buyer where the goods are not satisfactory. Without doubt, the rule is well settled that the buyer's retention of the goods beyond a reasonable time for examination and communication with the seller, standing alone, will be regarded as warranting the conclusion that he has accepted, and thus become liable, especially if the delay has worked prejudice to the seller. But we find no case, either among those cited or elsewhere, analogous to the case at bar on its facts, and none in which the mere failure to make manual return of the goods after a timely and explicit rejection of them, and where it appears that no prejudice to the seller has been caused by the delay, is held to make the buyer liable under the contract. On the contrary, there is abundant authority for the proposition that, unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he informs the seller that he refuses to accept them. Of many, we cite *Benj. on Sales* (Bennett's 7th Ed.) 975. The familiar rule, held in one of the cases relied upon, that there must be an offer to return on the part of one who seeks to rescind a contract, is not applicable to the facts of this case. There was no com-

pleted contract, because there had been no delivery of the goods agreed to be furnished on the part of the sellers, and no acceptance by the buyer of those which had been delivered, and hence there was no contract to be rescinded. That the goods should be as ordered was a condition of the contract, and that condition had not been performed by the seller. And as held by Mr. Justice Woods, in *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 898: "When the subject-matter of a sale is not in existence or not ascertained at the time of the contract, a contract that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation on the vendee under the contract, because the existence of those qualities, being part of the description of the thing sold, becomes essential to the identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."

We fail to find any fast rule of law which would make the defendants below liable simply because they did not manually return the labels. In fact, as shown by uncontradicted testimony, these labels were not used at all by them, but were kept in the original packages, to be held until called for; and this fact was fully made known to Mr. Steiner by the conversation at the time of his call, in connection with previous correspondence. True, it does not appear that it was stated to him in words that the goods were held subject to his order, but any intelligent business man could not fail to draw the conclusion that such was the fact, and his own declarations show that he regarded the labels as still the property of his firm. And such, indeed, was the law of the situation; the rule being that where there is a contract for sale of specific goods, and the seller is bound to do something to put them in a deliverable state, the property does not pass until that is done, and the buyer has notice. *Bonham v. Hamilton*, 66 Ohio St. 82, 63 N. E. 597. No prejudice of any kind resulted to the sellers by the nondelivery, because, as stated by Isadore Steiner, the labels were of no use to them, and we are clear that they have made no case warranting a recovery for the goods. To have shipped the goods to the Steiners, without direct orders to do so, would have made the Rhelnsstrom Bros. liable, in the first instance, for drayage and freight; and this burden the Steiners had no right, either in morals or in law, to place upon them. *Grimoldby v. Wells*, 10 L. R. C. P. 391; *Lucy v. Mouflet*, 5 H. & N. 228; *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728; *Landesman v. Gomersell*, 16 Mo. App. 459.

Another ground urged by counsel for plaintiffs in error as supporting the judgment of the common pleas is that there was a deliv-

ery of a large quantity of labels in excess of the number ordered. The point is somewhat technical, inasmuch as it does not appear that this fact was stated as a ground for rejection; and, as it is unnecessary to a decision, we do not care to consider it.

We are of opinion that the court of common pleas applied the correct rule of law to the evidence on the question of acceptance and retention of the goods, and that the reversal of its judgment by the circuit court was erroneous. Its judgment will therefore be reversed, and that of the common pleas affirmed. Reversed.

BURKET, O. J., and DAVIS, SHAUGK, PRICE, and CREW, JJ., concur.

(208 Ill. 77)

JOYCE v. HARDING et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

APPEAL—MATTERS OUTSIDE OF RECORD—CONSIDERATION OF AFFIDAVITS.

1. The Supreme Court cannot, on an equity appeal, consider affidavits filed in that court, and stating facts which do not appear by the record of the circuit court, for the purpose of determining whether or not some fact exists showing that the circuit court erred.

Error to Circuit Court, Cook County; R. F. Dunne, Judge.

Suit by Walter M. Joyce and another against George F. Harding and others. There was a decree dismissing the bill, and complainant Joyce brings error. Affirmed.

Thomas B. Lantry, for plaintiff in error. Charles B. McCoy and George F. Harding, for defendants in error.

SCOTT, J. This writ of error presents for our review a decree of the circuit court of Cook county entered on March 3, 1900, dismissing a bill in chancery for want of equity and awarding costs against complainants. Several errors are assigned. The only one relied upon is based on the statement that Michael Smith, one of the complainants, died prior to the date of the entry of the decree in the circuit court. This fact does not appear by the record of that court. It is shown by an affidavit filed in this court. Plaintiff in error should have applied to the circuit court for the relief he seeks. *Life Association of America v. Fassett*, 102 Ill. 315; *Claffin v. Dunne*, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263. Attention is called to the fact that these cases cited were both suits at law. The rule in equity must be the same. This is a court of review. We cannot consider affidavits filed in this court for the purpose of determining whether or not some fact exists which will show that the court below erred. The decree of the circuit court will be affirmed.

Decree affirmed.

(208 Ill. 128)

BECKER v. CITY OF CHICAGO.

(Supreme Court of Illinois. Feb. 17, 1904.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—RESOLUTION—RECORD—FAILURE TO INCLUDE ESTIMATES—ORDINANCE—VALIDITY.

1. Where there was a detailed or itemized estimate of a public improvement by the city engineer, which was presented to the board of local improvements at the time the first resolution for the improvement was adopted, failure to include the estimate in the record of such resolution rendered the ordinance based on the resolution void.

Appeal from Cook County Court; O. N. Carter, Judge.

Proceedings for the confirmation of a special assessment by the city of Chicago on the property of F. W. Becker. From a judgment confirming the assessment, Becker appeals. Reversed.

F. W. Becker, for appellant. Robert Redfield (Charles M. Walker, Corp. Counsel, and Edgar Bronson Tolman, of counsel), for appellee.

RICKS, J. The appellant has appealed from a judgment of the county court of Cook county confirming a special assessment levied to defray the cost of constructing a water supply pipe in Coles avenue, between Seventy-Third and Seventy-Fourth streets, in the city of Chicago. By the appeal but two questions are presented: First, was there such a variance between the first resolution of the board of local improvements and the ordinance as should avoid the ordinance? Second, should the South Chicago City Railway Company have been assessed for benefits?

On March 12, 1902, the board of local improvements passed and entered of record a resolution "that a water supply pipe be constructed and laid in Coles avenue from Seventy-Third street to a point two hundred and ten feet northwesterly of the northwesterly line of Seventy-Fourth street, the estimate of the cost of such improvement made by the engineer of said board being \$725, and that Monday, the 24th day of March, 1902, at eleven o'clock a. m., in room 203, City Hall, be fixed for the time and place for the public consideration thereof." A public hearing was had on March 24, 1902, and the board determined to adhere to the previous resolution and proceed with the improvement. On May 12, 1902, the board submitted to the city council its recommendation for the improvement, and a copy of the estimate of the civil engineer for a six-inch supply pipe, and the estimate of the cost as submitted to the city council was: For the pipe and the crosses and tees, \$612; the fire hydrant, \$35; one valve, \$18; one hydrant basin, \$30; and one valve basin, \$30—making the total estimated cost of \$725. Pursuant to the recommendation, an ordinance was passed for the laying of the pipe, placing the hydrant and valve and hydrant basin, and on the 29th of May

the petition was filed in the county court of Cook county for the assessment. The superintendent of special assessments was directed to make, and did make, the assessment, assessing the property of the objector and other property, but not assessing the South Chicago City Railway Company, which had a double-track electric street railway along said street.

It is first contended that the ordinance is void because the resolution of the board of local improvements did not contain any mention of the hydrant and the hydrant and valve basins, and that the record does not show a detailed estimate of the improvement made by the engineer, including these items as of the time of the first resolution. If there was a detailed or itemized estimate of the improvement by the engineer, and presented to the board of local improvements at the time the first resolution was adopted, it was its duty to include the same in its record of such resolution, and failing to do so renders the ordinance based upon the resolution void. Such was the holding of this court in *Bickerdike v. City of Chicago*, 208 Ill. 636, 68 N. E. 161, which has been decided since this appeal was prosecuted.

We deem it unnecessary to note further the contentions of appellant, or to further consider the case.

The judgment of the county court will be reversed, and the cause remanded for such further proceedings as to law and justice may appertain. Reversed and remanded.

(207 Ill. 553)

DEACONESS HOME AND HOSPITAL v. BONTJES.

(Supreme Court of Illinois. Feb. 17, 1904.)

NUISANCES—INJUNCTION—FACT OF NUISANCE—DETERMINATION—DECREE—CONFORMITY TO PRAYER.

1. A decree restraining defendant from carrying on a hospital in the building which it now occupies during the continuance of the relative proximity of complainant's said residence and the building of defendant heretofore used as a hospital, and of the present internal and external construction of defendant's said building, is not inconsistent with the prayer of the bill that defendant be restrained and enjoined from further operating and carrying on said hospital.

2. A hospital conducted on the lot adjoining that on which complainant's residence was constructed in such close proximity that there was a distance of but 30 to 35 feet between the two buildings, and so maintained that the operations being conducted in the hospital, the removal of deceased patients, and practically all the transactions of the hospital were in full view from complainant's windows, and so that the groans and complaints of the sick and dying were constantly heard, and the health of complainant and members of her family was seriously impaired, was a private nuisance.

3. Where the facts establish a nuisance destroying the peace of the neighborhood, and injurious to health, equity will interfere by injunction without awaiting a determination of the question of the existence of the nuisance in an action at law.

¶ 2. See Nuisance, vol. 37, Cent. Dig. § 28.

4. That the trustees of a hospital did not know that it was being conducted in a manner offensive to complainant, who resided next door, and that they would have minimized the evil so far as possible had they known of the condition of affairs, is no answer to a suit for an injunction to restrain the maintenance of the hospital.

Appeal from Appellate Court, Second District.

Bill for injunction by Emelia Bontjes against the Deaconess Home and Hospital. From a judgment of the Appellate Court (for opinion, see 104 Ill. App. 484), affirming a decree for complainant, defendant appeals. Affirmed.

"Mrs. Emelia Bontjes, a widow, bought a half lot, fifty feet wide and three hundred and twenty-three feet deep, upon a bluff in a residence district in the city of Peoria, at a cost of over \$5,000, and in 1894 built thereon a dwelling house, which she has ever since occupied as her home. She also built a barn. She expended about \$13,000 in improvements. Her family consists of herself, her daughter, her daughter's husband, and their little child. When she bought this tract and built her house thereon, the lot next east, one hundred feet wide, had upon it a brick house, designed for and occupied by a private family. Its main rooms and most of its windows faced west. Mrs. Bontjes built her house with the rooms and windows mainly on the east side. Thus the living apartments and most of the windows of the two houses face each other. There is a space of thirty or thirty-five feet between the two houses, two or three feet of which is owned by Mrs. Bontjes and the rest is part of the lot on which the brick house stands. Next to the brick house is a walk by which to pass between the front and rear of those premises, and between that walk and Mrs. Bontjes' lot line is a driveway for teams and carriages, used in connection with the brick house, and the only means of access to the brick house for conveyances. The front of each lot is occupied by a terraced slope to the street, which is nearly one hundred feet below. In October, 1898, a corporation was organized under the laws of this state, named the 'Deaconess Home and Hospital of the Central Illinois Conference,' having its office and principal place of business at Peoria. Its purpose was declared to be 'to establish and maintain a Deaconess home and hospital in co-operation with the Methodist Episcopal Deaconess Society,' and 'to provide for and carry on all the varied religious, educational, humane and philanthropic work which may properly come within the province of such an organization, in accordance with the discipline of the Methodist Episcopal Church of the United States.' In November, 1898, the society purchased the brick residence and the lot on which it stood for \$12,000, and established there a Deaconess home. In the spring of 1900 it made some changes in the interior of the building, and on May 24, 1900, it opened there a hospi-

tal for the care and treatment of the sick and injured, which it has ever since maintained. On November 1, 1900, Mrs. Bontjes filed a bill in the court below to enjoin the Deaconess Home from further carrying on and operating said home and hospital. The facts which she claimed entitled her to that relief are set out at length in the bill. The defendant answered, admitting some allegations and denying others. The cause was referred to a master to take and report proofs, with his conclusions of law and fact. The proofs were taken from January to May, 1901. The master's report was in favor of complainant. Defendant filed objections thereto, which the master overruled. The report was filed in court, and defendant filed exceptions thereto. The court did not act directly upon these exceptions, but entered a decree finding the facts in detail, ending with the conclusion that defendant's hospital is a private nuisance, and ought to be abated; that the equities are with the complainant, and she has no adequate remedy at law. It was decreed that defendant be permanently restrained from carrying on or operating a hospital in the building on defendant's said premises 'during the continuance of the relative proximity of the complainant's said residence and the building of defendant heretofore used on its said lot as a hospital, and of the present internal and external construction of defendant's said building.' This is an appeal by defendant from said decree.

"From the time the hospital was opened till the testimony was closed the hospital had been run at substantially its full capacity. During the first ten months it had one hundred and fifty to one hundred and sixty patients. The barn back of the brick house was made an annex to the hospital to increase its capacity. From complainant's living rooms, up stairs and down, the operations of the hospital were often visible day and night. What was said in the operating room during an operation in summer time, when the windows were necessarily open, was often heard in the bedrooms in complainant's house. The inmates of complainant's house, looking from its rooms, saw patients in the hospital entirely nude and others partially disrobed while surgical and other operations were being performed upon them. They saw surgical instruments, naked human limbs held aloft, and a fountain syringe used upon patients. They saw the bedding changed under patients too ill to be removed from the bed. They heard moans and groans, and patients crying and vomiting. When surgical operations took place at night, they were performed under a bunch of six electric lights, which made complainant's rooms opposite light enough to read by, unless the reflection was excluded by keeping the shades down, which was not practicable in warm weather, when ventilation made it necessary to keep complainant's windows open. Soiled and bloody bandages and other unsightly articles from

the sickroom were deposited in a receptacle in the back yard, and afterwards taken out by a scavenger in such a way as to make the sight offensive. Whenever a patient died or recovered, the mattress, quilts, and sheets and the rubber cloth used on the patient's bed were ventilated in the back yard near complainant's yard, and in full view. As defendant's barn or annex was only fifty feet from the hospital proper, the space for such ventilation was limited. This airing of bedding was of daily occurrence. The odor of iodoform and other drugs from the hospital pervaded complainant's house, passing through the open windows in the summer time and through the cold-air duct in the winter; this effect being afterwards obviated for the winter by taking in the cold air for the furnace from a different side of the house. Ambulances conveying sick patients or persons injured in accidents came in over the driveway at all hours of the day and night, passing close to complainant's living rooms and bedrooms. Physicians were daily driving in over that driveway, hitching their horses there, and frequently driving away late at night or in the early hours of the morning, after attending patients and performing surgical operations. If it was warm weather, complainant's windows were necessarily open, and also the hospital windows, and the sounds connected with the receipt and handling of persons seriously hurt or very ill, both outside and also inside the hospital, would very often be heard in complainant's house. From time to time coffins were brought to the hospital, and afterwards removed with dead bodies in them. This was generally done at night, in which case complainant and her family were usually awakened by the noises and aware of the cause. It has, however, been done several times during the mealtime, and the ambulance would be but a few feet from complainant's dining room. Sometimes the dead patient was not removed in a coffin, but on a litter, the form showing through a cloth laid over the body. Patients who had sufficiently recovered to take exercise were caused to walk back and forth between the houses, attended and supported by a nurse. In such cases sometimes the patient was wrapped in a blanket or the head was bandaged. In very warm weather patients were brought out and placed on the front porch or in the front yard, and placed in easy chairs and hammocks. The nurses fanned the patients, and administered medicines to them, and took their temperature, in the front yard. Women about to be confined, and who had come to the hospital for confinement, sat upon the front porch in hot weather, clad in loose garments. These uses by defendant of its front yard and porch precluded complainant and her family from using her adjoining front yard and porch, and especially were they debarred from entertaining their guests and callers upon her front yard and porch. We

have not stated all the offensive details given in complainant's proof, but only an outline thereof. Defendant's proof did not overcome the case thus made. Two persons who have at different times acted as superintendent of the hospital testified they were unable to see how some of those things could have occurred, and that some others must have arisen from disobedience of rules by attendants, and officers of defendant expressed their desire to do what they reasonably could to avoid giving offense, but no substantial attempt was made to deny the main specific facts detailed in complainant's proof. The events and incidents we have referred to greatly disturbed the comfort and nerves and sleep of the inmates of complainant's home, and she and her family were greatly annoyed and distressed in mind. Complainant was deprived of the ordinary use and enjoyment of her property. In the main these sights and sounds and smells were not abnormal, but were the usual and necessary accompaniments of a busy hospital, conducted with a view to the proper treatment of persons who are in great pain and distress."

The foregoing statement of the facts of this case appears in the opinion of the Appellate Court herein, and such statement has been adopted by us. It further appears that typhoid fever and erysipelas were treated at this hospital, and the medical evidence was to the effect that these diseases were contagious, and might be contracted in the Bontjes residence when the windows of the hospital were open and the wind was blowing from that direction. It further appears that both appellee and her daughter were made sick and nervous by the sights, sounds, odors, and influences to which they were subjected by this institution; that neither was able to regain her health at home, but both were obliged to go elsewhere for several weeks to recover. The Appellate Court affirmed the decree rendered on the circuit, and the case comes to this court by a further appeal.

Sheen & Miller and Winslow Evans, for appellant. James A. Cameron, for appellee.

SCOTT, J. (after stating the facts). The first assignment of error to which our attention is called is that the relief granted does not correspond with the relief prayed in the bill. The prayer is that the defendant be "restrained and enjoined from further operating and carrying on said home and hospital." By the decree it is permanently restrained from carrying on and operating a hospital in the building which it now occupies "during the continuance of the relative proximity of the complainant's said residence and the building of the defendant heretofore used * * * as a hospital, and of the present internal and external construction of the defendant's said building." The relief granted is not as extensive as that prayed, but is not inconsistent therewith, and that

granted is within the prayer of the bill, and the decree is therefore sustained by the bill.

It is then urged that, as the hospital is not a nuisance per se, its operation cannot be enjoined until there has first been a determination by the verdict of a jury in an action at law that it is a nuisance. From the evidence in this case it is clear and certain that the hospital conducted by appellant is a private nuisance. It not only destroys the peace, quiet, and comfort of those living in the residence of appellee, but likewise seriously and injuriously affects their health, and occasions irreparable injury, within the meaning of the law. Under these circumstances equity will interfere by injunction, without waiting for a determination of the question of the existence of the nuisance in an action at law. *Wahle v. Reinbach*, 76 Ill. 322; *Dierks v. Commissioners of Highways*, 142 Ill. 197, 31 N. E. 496. If there is such contrariety of evidence that there remains a substantial doubt whether a nuisance exists, the question should first be determined in a suit at law. *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839. In this case, however, there is no evidence which tends to show that a nuisance does not exist. The most that can be said for the evidence offered by appellant is that it indicates that the wrong is not of so serious a character as complainant charges, and that it may be lessened somewhat by certain precautions which appellant is willing to use hereafter. The proposed measures would not result in an entire removal of the nuisance. It is said that a screen may be erected between the two properties, and that the windows of the hospital may be kept closed and the curtains drawn on the side next the property of appellee. It is manifest that in the summer time the windows must be opened and the curtains drawn aside in both buildings for ventilation, and it is equally apparent that the screen would not prevent the cries of the suffering, the moans of the dying, and other offensive noises being heard in the home of the appellee; nor would such an obstruction entirely prevent the transmission of the smell of iodoform, ether, and other offensive substances; nor would the annoyance resulting from the frequent visits of the hearse and the ambulance to the hospital be materially lessened by the proposed precautions. The work in which appellant is engaged is philanthropy of the highest order, but the law will not permit it to be conducted in such a manner that it becomes an intolerable nuisance to those who are in no wise responsible for its location and operation.

The statement is made that appellee had the power in her own hands, by mere request to those who were operating the hospital, to prevent the injury complained of; and it is insisted that she failed to speak when fairness and good conscience required her to make her objections known to the hospital authorities, and that she is therefore

estopped to now seek the aid of a court of equity. Without stopping to consider at all this proposition of law, it is sufficient to say that the argument is based upon a misapprehension of the evidence. Prior to the establishment of the hospital, appellee objected to its location in the building in question. She made these objections known to persons who were raising money by subscription to set the hospital on its feet, and offered a donation if it was located elsewhere. From the testimony of Mr. Walter Wyatt, secretary of the board of trustees of appellant, it appears that complaint was made to him by Cameron, the attorney for appellee, prior to the beginning of this suit, of the manner in which the institution was conducted. Wyatt, in substance, invited this litigation by stating to the attorney that he saw no way out of the matter except to bring suit. Wyatt, however, reported the complaint to the trustees, who took no action except to direct the superintendent to conduct the hospital in such a manner that there would be no complaint from any one. This direction bore no practical fruit. The trustees testified that they did not know that the hospital was being conducted in a manner so offensive to those in the home of appellee; that, had they known of the condition of affairs, they would have minimized the evil as far as possible. This is no answer to the complaint. They were responsible for the management of the institution, and it was their duty to see that it was conducted in such a manner that the lawful rights of others were not infringed. From the evidence before us, this difficulty seems to come about from the fact that the grounds occupied by appellant are wholly inadequate in extent for the operation of a hospital of the character there conducted.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(207 Ill. 88.)

ILLINOIS CENT. R. CO. v. HATTER.

(Supreme Court of Illinois. Feb. 17, 1904.)

TRESPASS—DECLARATION—FORM OF ACTION—JURISDICTION OF APPEAL—ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY—INSTRUCTIONS—ERROR—TACKLING POSSESSION.

1. Where the declaration follows the common-law pleading as for an action of trespass *quare clausum fregit*, except that instead of averring in so many words that the plaintiff was the owner of the premises it is alleged that she and her grantor have been in adverse possession thereof for more than 20 years, the action is for a trespass *quare clausum fregit*, and not *vi et armis*, though the trespass complained of was an entry on the premises against the protest of the plaintiff during which a fence was removed, a tree cut down, and another fence erected.

2. Where, in an action of trespass *quare clausum fregit*, the defense of *liberum tenementum* is interposed, to which a replication concluding to the country is filed, the question arises as to who is the owner of the freehold on which the trespass is alleged to have been committed, so as to give the supreme and not the appellate court jurisdiction of the appeal.

3. Where the evidence in an action of trespass *quare clausum fregit*, in which the plain-

tiff claimed title by adverse possession, shows nothing more than possession, it is insufficient to sustain a verdict for plaintiff finding that her possession was adverse to defendants, and under a claim of right.

4. In an action of trespass quare clausum fregit, where plaintiff claimed title by adverse possession, and the defendant files a plea of liberum tenementum, which the evidence tended to support, a charge under which the jury were permitted to award damages for the acts of defendant in going on the land in controversy is erroneous, in the absence of proof of 20 years' adverse possession by plaintiff.

5. Where title by adverse possession is claimed to have been secured through plaintiff's possession and that of her two immediate predecessors in title, plaintiff cannot tack her possession to that of her predecessors in title, unless the conveyances to plaintiff and to plaintiff's grantor are by deed, or possession is delivered by each grantor to his grantee.

6. Though actual possession by the grantor's tenant of land conveyed does not deprive the grantor of the power to deliver possession to the grantee, it is a circumstance which may be considered by the jury in determining whether possession was delivered.

Appeal from Circuit Court, Jo Daviess County; R. S. Farrand, Judge.

Action by Ellen V. Hatter against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action of trespass quare clausum fregit, brought by appellee against appellant in the circuit court of Jo Daviess county to the February term, 1902, of that court. The declaration consisted of one count, alleging title by adverse possession to a strip of land adjoining appellant's depot platform in the city of Galena, and charging appellant with tearing down a fence and chopping down a large shade tree on such strip, throwing both on adjoining land of appellee, and erecting on the strip a tight board fence, without permission from appellee. Appellant filed a plea of not guilty and a plea of liberum tenementum. The cause was tried before a jury, and a verdict of \$650 rendered. Appellee remitted \$350 of this amount, and, after overruling motions for a new trial and in arrest of judgment, the court entered judgment for \$300 in favor of appellee. The appeal is directly from that judgment to this court.

Ellen V. Hatter, the appellee, lives in Galena, Illinois, immediately adjoining the Illinois Central Depot. The depot is located on a lot north of the building occupied by Mrs. Hatter. West of this depot and of the property of appellee, and extending the entire distance along the west end of appellee's property, is a platform belonging to the railroad company. Between the property of appellee and the platform, and south of appellee's house, there was, prior to the trespass complained of, a picket fence, which inclosed appellee's property on the west side south of her house. This fence was about 5.2 feet east of the outer edge of the platform at its south end and 5.8 feet at the north end. East of this fence, and within the right of way, was an elm tree, which shaded the

porch of appellee. About December 9, 1901, the servants of appellant, without permission from appellee, and against her protests, removed this fence, cut down the elm tree, and erected a board fence, the south end of which is about 12 feet from the platform and the north end 14 feet, and just within the line of the right of way as conveyed by Mrs. Wight. Appellant, on March 13, 1854, obtained a deed from Lucy N. Wight, conveying to it, with other property, this strip of land, which was part of its right of way, and appellant claims that it was exercising its right in doing the acts complained of. Appellee purchased the property occupied by her from M. L. Johnson in 1896. Johnson had obtained a deed for the same property from Lucy N. Wight in 1894. Both of these latter deeds conveyed only property east of the right of way of the railroad. About 1854 a railing was placed along the east side of the platform by the railroad company, and in 1866 or 1867 the fence on the south side of appellee's property and the fence immediately south of her house were each continued west until they connected with this railing, so that the railing constituted the west inclosure for the property. This railing was removed at some later period—just when does not appear from the record. Some time about the year 1880, and probably previous thereto, Johnson, who was in charge of Mrs. Wight's business, and who was her agent, erected a fence about five feet east from the platform, and almost parallel therewith, as he testified, so that persons on the platform could not sit on the fence and whittle it. He further testified that the improvements and possession of the strip in dispute were continuous for 35 years that he remembered of, and that no other person exercised any ownership over it during that period. Other testimony shows that there was a low place near the platform, partly on this strip, but principally on the adjoining land, and that appellee, Johnson, and Mrs. Wight had caused earth to be hauled and used in filling the low place almost to the fence, which was removed by appellant, and that the agent for the company saw this work being done, and made no objection, and that appellant had used this hole as a dumping place for cinders. It also appeared that appellee had cultivated the tract of land in dispute during the last few years, and had raised vegetables thereon.

W. J. Knight and W. T. Hodson (J. M. Dickinson, of counsel), for appellant. Sheean & Sheean, for appellee.

SCOTT, J. (after stating the facts). It is suggested by appellee that this appeal should have been taken to the Appellate Court, and it is said that the suit is for an injury to the possession; that it is a possessory action, brought for a trespass vi et armis; and it is argued that, having been in possession, the

plaintiff is entitled to recover for the injury to the possession, even though the defendant was the owner of the freehold and entitled to the possession; and appellee asserts that this is an action of trespass *vi et armis*, not of trespass *quare clausum fregit*. The latter is the technical name of that form of trespass *vi et armis* which is brought for violent or forcible injury to real property. 21 Ency. of Pl. & Pr. p. 786. The pleader in this instance seems to have followed the form given by Puterbaugh's Common Law Pleading and Practice at page 577 (3d Ed.), for a declaration in trespass *quare clausum fregit*, except that, instead of averring, in so many words, that the plaintiff is the owner of the premises, it is alleged that she and her grantor have been in the adverse possession thereof for more than 20 years, from which it would appear that the claims of all other persons thereto had been barred. It is evident that the action is for trespass *quare clausum*.

The defendant interposed the general issue and a special plea *liberum tenementum*. To the latter plaintiff filed a replication concluding to the country. This special plea presented a perfect defense to the action, and the appeal was properly taken from the circuit court to this court; one question in the case being, who is the owner of the freehold to which the trespass is alleged to have been committed? *Piper v. Connelly*, 108 Ill. 646. On this phase of the litigation appellee places great reliance on the case of *Illinois & St. Louis Railroad & Coal Co. v. Cobb*, 68 Ill. 53. In that case the only plea was the general issue, and the court there calls attention to the fact that "the defendant did not seek to show any proper title to the premises." On March 13, 1854, Lucy N. Wight, then the owner of lots 2 and 3 in block 5, in the city of Galena, conveyed to appellant a right of way through these lots. This right of way runs in a northerly and southerly direction. The passenger depot of appellant is on the lot next north, and the passenger platform, built some time about 1854, extends south on the east side of the railroad tracks entirely across lots 2 and 3. The east edge of this platform, where it crossed lots 2 and 3, was about 14 feet inside the east line of the right of way. A railing was built by the company along the east edge of this platform from about the middle of lot 2 south to a point near the south line of lot 3, for the apparent purpose of preventing passengers or others upon the platform stepping or falling off the east edge of the platform, there being a descent of about two feet there to the ground. About 1886 Mrs. Wight, being still the owner of that portion of lots 2 and 3 lying east of the right of way, fenced the same. She did not, however, put a fence along the line of the right of way on the east side of the platform, but, instead, joined her fences to the ends of the guard rail above mentioned, thus including in her inclosure the strip 14 feet in width,

and extending from the place where her fence joined the guard rail on the north to the place where her fence joined it on the south. She made no further conveyance affecting her title to lots 2 and 3 until July 13, 1894, when she conveyed her title therein to Madison L. Johnson, her grandson. Prior to this last-mentioned conveyance Johnson had been acting as her agent, and in 1880 he constructed a fence about five feet east of the guard rail, and practically parallel therewith, which left an uninclosed strip of that width between the platform and the new fence, and this fence remained on that line until the time of the occurrences which occasioned this suit. At the time Mrs. Wight's fences were joined to the guard rail there was a hole or depression several feet in depth, beginning about five feet east of the platform, and extending further east. This depression was circular in form, and its extent is uncertain from the evidence; the testimony of one witness fixing its diameter at about 15 feet and that of another at about 40 feet. In any event, its greater extent was east of the right of way. This was so low that it frequently contained stagnant water. The health officers complained about it. Mrs. Wight, through her agent, caused earth to be put in it, and the defendant made it a dumping place for cinders.

Appellee, on the trial, sought to show a title by adverse possession to this strip in herself by tacking the possession of Mrs. Wight, Madison L. Johnson, and herself. We are of the opinion that the testimony fails to show the possession of Mrs. Wight to have been under a claim or color of title. At the time she fenced up to the guard rail she had but recently conveyed the right of way to the company, and it is probable that she joined her fences to the guard rail as a matter of convenience, and because of the inconvenience of fencing through the hole on the line of the right of way. It does not seem that she would at that time set up a claim of ownership to this strip of ground, which she must have known she herself had deeded to the appellant. Her acts, or those of her agents, in causing the depression to be filled, are without significance. The greater amount of the filling was done on her side of the right of way line. The company assisted in the filling by throwing cinders there. The fact that she may have done more than her proportion of this work, if that be the fact, does not warrant the conclusion that she was claiming the strip of land then belonging to the appellant. It does not appear that she had any knowledge of the building of the fence, in 1880, by Madison L. Johnson, at all. He says he built it where he did without regard to where the line was, because the guard rail was constantly being broken down, and he wanted the fence back from the platform, where persons upon the platform would not be apt to destroy it. Except for these acts

of the agents and employes of Mrs. Wight, the record contains no evidence in reference to what she claimed about the ownership of this strip except that of Madison L. Johnson, who, in response to leading interrogatories propounded by counsel for appellee, testified on her behalf as follows: "Q. Did Mrs. Wight claim up to the platform? A. Well, I don't know as she ever got out. Q. Well, you acted for her? A. Yes, I assumed we claimed it; yes, sir." It is apparent that Johnson did not know what his grandmother claimed. His assumption that she claimed title would not constitute a claim of title by her, and the testimony does not show that he was her agent for the purpose of determining whether she owned this strip or for the purpose of making any claim in reference thereto. Johnson's testimony, in connection with the evidence of possession and filling the depression is all the proof in the record from which any argument that Mrs. Wight claimed to own this strip can be deduced. It is not sufficient to sustain a verdict finding that her possession was adverse to appellant and under a claim of right. At most, it shows nothing more than possession. This is not enough. The evidence must go further, and show that the possession was (1) hostile or adverse; (2) actual; (3) visible, notorious, and exclusive; (4) continuous; and (5) under a claim of ownership. *Zirngibl v. Calumet Dock Co.*, 157 Ill. 430, 42 N. E. 481. There is no evidence in this record showing that the possession of Mrs. Wight satisfied the fifth element, and, as 20 years had not elapsed subsequent to the execution of her deed to Johnson, there was no evidence upon which the jury could rightfully find the title to this strip to be in appellee. Consequently there was no evidence upon which to base the fourth and fifth instructions given on the part of appellee, which submitted to the jury the question whether she had title by 20 years' adverse possession to this 14-foot strip.

Under the issues in this case, and in the absence of proof of 20 years' adverse possession, the second instruction given on appellee's part is also erroneous in so far as it permits the jury to award damages for the acts of the defendant in going upon this strip of land and doing the things it did upon that strip.

This record presents no defense whatever to the act of the railroad company in throwing the old fence and the shade tree on the land of Mrs. Hatter lying east of the boundary of the right of way, but there is no method by which this court can separate the damages allowed by the jury for that trespass, if any, from those which they have apparently allowed for a trespass to the 14-foot strip.

As the case must be submitted to another jury, we have examined the instructions refused which were offered by appellant. We think, so far as they stated correct principles

of law, the subject-matter thereof was fully covered by instructions given, except those stating the doctrine of tacking possession. Appellant was entitled to have the jury instructed that, if the 14-foot strip in question was not conveyed by deed to Johnson and by deed from him to Mrs. Hatter, then the possession of Johnson and the possession of Mrs. Wight could not be tacked upon the possession of Mrs. Hatter, unless Mrs. Wight delivered to Johnson and Johnson delivered to Mrs. Hatter the possession of this strip of land; but the instructions which embodied this proposition also submitted to the jury the question whether, at the time of the delivery of the deeds, respectively, the strip was actually in the possession of a tenant of the grantor. We think this misleading. The jury was apt to conclude therefrom that, if the actual possession was in the tenant, there could be no delivery of the possession by the grantor to the grantee. This is not the law. The fact that the actual possession was in the tenant was merely a circumstance to be considered by the jury with the other evidence in determining whether or not the possession was delivered.

Complaint is also made that the court allowed counsel for appellee, in his closing argument, to make prejudicial and improper remarks to the jury. We are disposed to think that some of the language pointed out should not have been used, but, as it will probably not be repeated on another trial, further discussion thereof would be profitless.

For error in giving the second, fourth, and fifth instructions given on the part of the plaintiff below the judgment is reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(207 Ill. 636)

DICK v. ZIMMERMAN.

(Supreme Court of Illinois. Feb. 17, 1904.)

ACCOUNT STATED—WITNESSES—CROSS-EXAMINATION—HARMLESS ERROR—EVIDENCE—LETTERS—COPIES—APPEAL.

1. In an action on account stated, plaintiff having testified to interviews resulting, as he claimed, in an agreement as to the amount due, and to having written certain letters to defendant, it was proper to confine cross-examination to the same matters, and not allow questions as to the correctness of certain items.

2. The remark by the court that "there is nothing to cross-examine him about except these interviews and letters" was not prejudicial to defendant, in view of subsequent permission to him to offer evidence showing the condition of the accounts of the parties, on his theory of the case.

3. Where the receipt of a letter written by plaintiff to defendant was acknowledged by a letter written by defendant, a copy of plaintiff's letter was properly admitted in evidence.

4. Evidence that a letter written by plaintiff to defendant was properly addressed and mailed by plaintiff raised a presumption that it was received by defendant, and justified admitting a copy in evidence.

5. In an action on account, any error in admitting in evidence a copy of a letter written by plaintiff to defendant, containing expressions of regret that defendant had not remitted the amount alleged to be due, was harmless, where copies of two other letters, properly admitted, contained the same statement.

6. Where, in an action on account, defendant failed to save an exception to the court's action in admitting in evidence plaintiff's declaration with the statement of account and affidavit of merits thereto, he could not avail himself of the error.

7. Where there was evidence that the amount recovered by plaintiff was due from defendant, the affirmance of the judgment by the Appellate Court precludes the Supreme Court from considering the objection that the verdict was contrary to the weight of the evidence.

Appeal from Appellate Court, First District.

Action by John Zimmerman against Herman E. Dick. From a judgment of the Appellate Court (105 Ill. App. 615) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This was a suit in assumpsit in the circuit court of Cook county by appellee against appellant, which resulted in a verdict of \$1,420 for appellee, and judgment thereon for that amount. The judgment has been affirmed by the Appellate Court for the First District, and the case is now brought to this court by appeal.

The declaration consisted of the common counts, and attached thereto was a copy of the account sued on and an affidavit of the amount due. Appellant pleaded the general issue and set-off.

Appellee introduced no evidence to prove the items of account, but relied solely on an account stated, and it appears from his testimony that at the request of appellant he had submitted the account to him, and after an examination thereof appellant had conceded it to be correct, and had promised to pay it on the following day, but failed to do so, because his bank account was not as large as he thought it was, but promised to send the amount from England, as he was going there and had money on deposit in that country. Appellee further testified that at the request of appellant he mailed to him an itemized statement identical with the statement of account attached to the declaration. Appellee offered a copy of a letter dated October 12, 1898, addressed to appellant in New York City, inclosing a copy of the account.

The copy of another letter written by appellee to appellant, dated January 4, 1899, was objected to on the ground that the only proof of the delivery thereof was that it was the general custom of business men in Chicago to dictate letters to a stenographer, sign them when typewritten, and leave the addressing, stamping, and mailing to clerks, and that this was also the custom of appellant; that he dictated this letter, signed it after it had been written, and that it then took the usual course, and presumably was mailed to appellee by a clerk in the perform-

ance of the usual duties of employment. There was no direct evidence that this letter had been mailed. The letter expressed appellee's disappointment in not receiving the amount as per bill sent to appellant, and requested payment.

A copy of still another letter, dated November 1, 1898, written by Zimmerman to Dick, referring to the account and to an understanding that a check would be sent, and requesting appellant to remit the amount as he had agreed, was read in evidence. The testimony relied on to prove the delivery of this letter is that appellee dictated this letter to a typewriter, signed it, and mailed it himself.

Appellant, on his cross-examination of appellee, attempted to show the transaction out of which the account arose, and to show that the items were not correct; but the court refused to permit him to do so, stating that there was nothing to cross-examine him about except the interviews and the letters.

Appellant denied admitting the correctness of the account in his conversation with appellee, and testified to facts tending to show that the account, and the items included in it, were erroneous, and not owing to appellee.

Zach Hofheimer, for appellant. Dale & Francis, for appellee.

SCOTT, J. (after stating the facts). This suit was tried on the part of the plaintiff upon that count of the narr. declaring upon an account stated. He testified in his own behalf to interviews with the defendant in which the account was presented to the defendant, discussed between them, agreed upon as correct, and that in the last of these interviews defendant agreed to pay the balance shown by the statement of the account, and plaintiff also testified to the writing of three letters by himself to the defendant, copies of which were admitted in evidence, and to other matters tending to show that the defendant received each of the three letters. On cross-examination counsel for defendant sought to examine plaintiff regarding the correctness of certain items included in the account. The court sustained an objection, saying, "There is nothing to cross-examine him about except these interviews he has testified to and these letters;" and it is urged that the right of cross-examination was thereby improperly limited, and that, in any event, the remark of the court was improper, for the reason that the jury would conclude therefrom that the only matters for determination in the case were in reference to the interviews and the letters about which plaintiff had testified. The ruling was correct. Plaintiff was not asking to recover upon the original account, but upon the alleged agreement or account stated, by which the amount due was fixed. "In an action upon an account stated, the original

form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The action is founded, not upon the original contract, but upon the promise to pay the balance ascertained." *Throop v. Sherwood*, 4 Gilman, 92.

Plaintiff had testified only in reference to the interviews, resulting, as he said, in an agreement fixing the sum due, and in relation to the letters, and the cross-examination was properly confined to the same matters. The remark of the court was a terse and accurate statement of the law applicable to the situation, and could have had no prejudicial effect with the jury, because the defendant was afterwards permitted to offer evidence showing the condition of the accounts between the parties on his theory of the case.

It is also urged that the court erred in admitting in evidence copies of three letters written by plaintiff to defendant, for the reason that there was no proof of the delivery of the originals. The delivery of the letter of October 12, 1898, was shown by a letter written by the defendant acknowledging receipt thereof. The letter of November 1, 1898, is shown to have been properly addressed and mailed by the plaintiff himself, from which the presumption arises that it reached the addressee. The copies of these two letters were properly admitted. Whether the evidence offered raises a presumption that the letter of January 4, 1899, was received by the defendant is not material. That letter contained nothing bearing on this case except an expression of regret that Dick had not remitted the amount due, as he had agreed before he left Chicago. As each of the other letters contained similar statements, we do not think the admission of this letter would constitute reversible error in any event.

There was also admitted in evidence on the part of the plaintiff his declaration in this case, with the statement of the account and affidavit of merits thereto attached. This was unquestionably improper, but the defendant did not preserve an exception to the ruling of the court in admitting these documents, and cannot, therefore, now have any advantage thereof. The action of the court seems to have been based upon the theory that the statement attached to the declaration was the original statement of account which plaintiff testified the parties had agreed to as correct.

The defendant on his part sought to show that there had been no agreement in reference to the amount due, and that the items in the account were in part incorrect, and that as to the remainder plaintiff was indebted to him in a greater sum on account of transactions arising prior to the time when, according to the testimony of the plaintiff, the affair passed into an account stated. The

jury were properly instructed, and returned a verdict in favor of the plaintiff for the full amount claimed. The judgment rendered thereon has been affirmed by the Appellate Court, and, as there was evidence tending to prove that this amount was due from the defendant to the plaintiff, we are precluded by the judgment of the last-mentioned court from considering the objection urged upon us now, to the effect that the verdict was contrary to the weight of the evidence. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(207 Ill. 423)

CITY OF ROCKFORD v. MEAD.

(Supreme Court of Illinois. Feb. 17, 1904.)

CONTRACT—CONSTRUCTION—PROPOSITION—ACCEPTANCE.

1. Where, in a detailed written proposition, a contractor offered to furnish a city either three 3,000,000-gallon pumps and engines, or two 6,000,000-gallon pumps and engines, for a water-supply plant, and the proposition was incorporated in a contract between him and the city, there was an acceptance by the city of the offer specified, though supplemental contracts were entered into, dealing with a proposed increase of the water supply, but not with the capacity of the machinery.

Appeal from Appellate Court, Second District.

Action by Daniel W. Mead against the city of Rockford. From a judgment of the Appellate Court (106 Ill. App. 278) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

O. O. Carbaugh, A. E. Fisher, and Chas. W. Ferguson, for appellant. E. P. Lathrop and R. K. Welsh, for appellee.

RICKS, J. This is a suit in *assumpsit* brought by Daniel W. Mead against the city of Rockford in the circuit court of Winnebago county, Ill. The record discloses the following state of facts: Prior to January 18, 1897, appellee, Daniel W. Mead, submitted to the city of Rockford a written proposition to increase the water supply of the city. This proposition included the sinking of a shaft, the construction of tunnels, the furnishing of pumps and engines, and all mechanical appliances to take the water from wells or tunnels and deliver it to a pumping pit or reservoir, and the construction of a suitable building to protect the shaft and machinery. On the date named the city entered into an agreement with appellee in accordance with the terms of said written proposition, a copy of which proposition was incorporated in, and made a part of, the contract. By the provisions of the contract, the appellee agreed that he would do the necessary work and supply materials and machinery for the development and delivery into the present pumping pit or reservoir of the city of a supply of artesian water amounting to 5,500,000 gallons per day; that, to do this, he would

sink a vertical shaft into the stratum of clay below the sand and gravel deposits, to be connected with the various artesian wells existing and such additional wells as appellee might sink to obtain the guaranteed amount of water; that at or near the base of the shaft he would erect three pumps, each of a capacity of 3,000,000 gallons in 24 hours, or two pumps, each of a capacity of 6,000,000 gallons in 24 hours, to be operated by engines at the surface; that there should be three engines, each connected with and capable of operating one of the pumps, or two engines, each arranged for and capable of operating any two of the pumps, or if only two 6,000,000-gallon pumps were furnished, then there should be two engines, each arranged for and capable of operating one of said pumps; that the contract was made on the guaranty that appellee should furnish a system of water supply having a capacity of 5,500,000 gallons per day of 24 hours, and that the machinery should be capable of raising 6,000,000 gallons per day into the pumping pit or reservoir at the city waterworks; that, upon the completion of the contract and fulfillment of the guaranty, the city should pay appellee the sum of \$22,000, and should thereafter pay him, in addition, the sum of \$8,000 for the shaft, tunnels, and building; that upon the completion of the contract the same should be construed and regarded as a lease between the parties for two years, for the use of the engine, pumps, machinery, and fittings of all kinds furnished by appellee for the operation of the pumping plant, and payment was provided to be made therefor, the price paid for rental to be applied on the purchase price upon terms stated in the contract; that the title and ownership of said engines, pumps, and machinery, and all fittings of all kinds provided by appellee for said shaft and building, should be and remain in said appellee until the same should be purchased by the party of the first part, and until payment in full by it of all sums, and interest thereon, payable, or which should become payable, to appellee under the contract. Thereafter said parties entered into a supplemental contract providing for connecting the shaft above mentioned with another well of the city, and they later entered into another contract providing for sinking a new well, and connecting the same with the shaft in question, instead of making the connection contemplated in the first supplemental contract. The original and supplemental contracts also provided for certain extra sums or bonuses to be paid under certain conditions, the most important of which was to accrue to appellee in case the supply of water furnished by him should equal or exceed 7,000,000 gallons per day, pumped from all the wells. Appellee installed the system of waterworks as proposed by the agreement, placed at the bottom of the shaft three pumps guaranteed to have a capacity of at least 3,000,000 gallons for 24 hours, and furnished three engines capable

of operating same. Upon a test of the pumps and engines, it was shown that each of the pumps had a capacity of 6,000,000 gallons in 24 hours. Soon after appellee learned the capacity of the pumps, and before final payment was made by the city, and while the plant was still in the custody of the appellee, he notified the mayor that each of said pumps had 6,000,000-gallons capacity, and that he proposed to remove one of the engines and pumps from the plant, but the mayor refused to permit the same to be removed. Afterwards appellee laid the claim before the mayor, the waterworks committee, and the superintendent of waterworks, and a proposition of settlement was made to the city council, but no settlement was arrived at. The city made all the payments provided for by the contract, but refused to surrender the pump and engine in question, or to pay any additional amount for the same, as demanded by appellee, and this suit was brought to recover the value thereof. Appellee filed a special count upon the contract between the parties, and the common count, and there was a plea of the general issue. The trial resulted in a verdict and judgment for appellee for \$8,000, from which the city appealed to the Appellate Court, where the judgment was affirmed, and the present appeal prosecuted.

Appellant insists there was error in the giving of instructions and the admission of certain evidence. The instructions complained of are the third, fifth, sixth, seventh, and eighth given at the request of appellee. These instructions told the jury that appellee, under the contract and lease between him and appellant, had the option to furnish and deliver to the appellant city either three 3,000,000-gallon pumps and engines, or two 6,000,000-gallon pumps and engines, and that two pumps of 6,000,000 gallons each, connected with two engines of sufficient capacity to operate said pumps, would fulfill that part of appellee's contract. By these instructions the court was placing a construction upon the contract between the parties. Appellant claims they are erroneous, for the reason that, although such was the legal effect of the proposition as made by appellee to appellant, appellant refused to adopt that part of appellee's proposition, and provided for suitable pumps and engines for the delivery into the pumping pit of 7,000,000 gallons per day; such machinery to be of a certain efficiency and test. Appellant, in its brief, speaking of the instructions complained of, says: "If that part of the proposition of appellee which provided for the furnishing of three three million gallon pumps and engines or two six million gallon pumps and engines is the contract between appellant and appellee, then, as to that feature, the court construed the contract aright." Appellant admits that the supplemental contract deals only with the increase of the water supply, and not with the capacity of pumps and machinery.

and that, by the express provisions of the supplemental contract, it was in no way to affect the other provisions of the original contract.

The contract between appellant and appellee was made after and founded upon a proposition in writing made by appellee to appellant, and comprising six type-written pages of the record, and which is embodied literally and in extenso in the contract. The first clause of the contract states the parties and date, followed by a statement of the desire of appellant to increase its water supply, and that "said Mead has heretofore submitted to said city a detailed proposition, in writing, for doing the necessary work and supplying materials and machinery for the development and delivery into the present pumping pit or reservoir of said city of a supply of a capacity of not less than five and one-half million gallons of artesian water per day of twenty-four hours." The third paragraph reads:

"And said city has accepted the said proposition of the said party of the second part for the construction of the necessary shaft, tunnel, and building mentioned in said second party's proposition, a copy of which said proposition is hereinafter set forth, and made a part of this contract."

The fourth paragraph is:

"And said Mead proposes to provide proper engines, pumps and machinery to equip and operate the shaft and tunnel system proposed to be constructed by him, and shall, and will, lease such machinery and pumps to said first party for the time and upon the rental herein set forth." Then follows the proposition as made by appellee, with the preface: "The proposition of said Mead to said city, showing the detail of construction, is as follows."

The first paragraph of the proposal states, in a general way, the work to be done, and the second paragraph is as follows:

"The general features of the works shall consist of a vertical shaft into the stratum of clay which lies below the sand and gravel deposits at the present pumping works. From the bottom of this shaft one or more tunnels will be excavated to such of the present wells as the contractor may desire to utilize and to such additional wells as he may sink to obtain the guaranteed amount of water. At or near the base of the shaft shall be erected three pumps, each of a capacity of three million gallons per twenty-four hours, or two pumps, each of a capacity of six million gallons per twenty-four hours. These pumps shall be operated by engines located at the surface, and shall be arranged to discharge into the pumping pit and into the reservoir, as desired. A suitable building will be provided to protect the shaft and machinery, and all necessary connections will be made with the present buildings, and everything done to complete a good, substantial and economical plant."

In the proposal, under the head of "Machinery," it is said: "The machinery shall include the pumps, engines, and all mechanical appliances necessary to take the water from the wells or tunnels and deliver it to the pumping pit or reservoir. * * * There shall be three engines, each connected with and capable of operating one of the pumps, or two engines, each arranged for and capable of operating any two of the pumps, or if only two six million gallon pumps are furnished, then there shall be furnished two engines, each arranged for and capable of operating one of said pumps, as is found most desirable and as the contractor may elect." There are no further particulars in the proposition in reference to the pumps and engines, and the only provision following the proposition, and contained in the contract based upon the proposition, relates to the capacity or power of the pumps, and is, in effect, that, if the pumps shall develop more than 80,000,000 foot pounds of duty, appellant shall, in addition to the stipulated price, pay \$300 per 1,000,000 foot pounds, up to 70,000,000, so developed.

Having thus gone extensively into this contract, we are unable to agree with the contention of appellant that it did not accept the proposition of appellee in reference to the pumps and engines. The doctrine is too familiar to require citation of authorities that one cannot accept a proposition in part, but must accept it as a whole or reject it; and, while this rule does not preclude parties from agreeing that a proposal shall only be accepted in part, the contract in question is so lacking in any specific declaration of the intention of the parties that the proposition of appellee should only be accepted in so far as it related to the sinking of the shaft and the production of the desired amount of water, that we are entirely satisfied with the construction placed upon it by the trial and appellate courts. We think there was no error in giving the instructions complained of.

It is complained that appellee was permitted to detail a conversation had between him and the mayor at the time appellee announced to him the result of the test of the pumps, and stated his (appellee's) intention to remove one of the pumps. The reply particularly complained of, as detailed by the witness, was: "Mr. Brown [the mayor] said that he would not permit any engine to be removed, and, if the engines were of that capacity, he preferred the city should retain it, and pay me what it was worth." Of this it is said that, as the mayor had no authority to bind the city, the testimony was incompetent. In the view we have taken of this contract, we cannot regard the admission of this evidence as reversible error, if it be deemed to be error at all. The contract was in writing, and the remark of the mayor neither tended to enlarge nor change it to the benefit of appellee. Besides, the mayor was allowed to testify in regard to the same con-

versation, and gave quite a different version of it.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(207 Ill. 253)

RABBERMANN v. CARROLL.

(Supreme Court of Illinois. Feb. 17, 1904.)

EJECTMENT—ADVERSE POSSESSION—LEASE OF LAND—EXTENT—EFFECT—INSTRUCTIONS—ASSUMPTION OF FACTS.

1. In ejectment to recover a strip of land, an instruction that the jury should not include any time that the defendant or his grantor had possession of the strip in question as tenants of plaintiff or his grantor in making up the period of continuous possession on the part of defendant or his grantor, required to defeat plaintiff's record title, was erroneous, as assuming that defendant's grantor had possession of the strip of land in question during part of the statutory period as tenant of the title owner, which, under the evidence, was for the jury.

2. Where, in ejectment to recover a strip of land, the evidence showed that the land south of the division fence was used for pasture, and that north for farming, and defendant and his grantor had cleared the timber from the land in dispute, and for nearly 20 years, at the time of an alleged tenancy under plaintiff's grantor, had occupied and used it as their own land, and continued so to do during such tenancy, which was under an oral letting to defendant for use as pasture, for the payment of the taxes, without any description including the strip in controversy south of the fence, such tenancy did not bar the running of limitations, or militate against defendant's claim of ownership of the strip by adverse possession.

Appeal from Circuit Court, Madison County; B. R. Burroughs, Judge.

Action by Thomas Carroll against Frederick Rabbermann. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Burton & Wheeler, for appellant. Springer & Buckley and E. B. Glass, for appellee.

RICKS, J. This is a suit in ejectment, filed October 7, 1898, in the circuit court of Madison county, by Thomas Carroll against Frederick Rabbermann. The land in dispute is a small strip lying between the farms of plaintiff and defendant; Carroll claiming the property by reason of record title, and Rabbermann claiming by reason of adverse possession for 20 years. The property owned by Rabbermann was previously owned by Alvis Hauskins, and that owned by Carroll was previously owned by a man by the name of Long. In 1867 Hauskins built the first fence between the two farms, and, as there were no corners established, and the land being timber land, he was compelled to guess at the line, and from the survey afterwards made it appears he went too far south, and onto the Carroll tract. The fence remained in the same place until the year 1876 or 1877, when Hauskins moved it north about 25 feet, making a road south of the fence for his own convenience. About this time Hauskins rented the Long tract, now owned

by Carroll, for pasture, and paid the taxes for the use of the same until he sold to Rabbermann, in the year 1880. Rabbermann, after purchasing the Hauskins land, had possession of the Long tract upon the same terms as his grantor, for a year or so. There have been two trials of this case in the circuit court, the first resulting in a verdict in favor of appellant. Appellee, paying the costs, obtained, under the statute, a new trial, upon which trial a verdict and judgment were obtained in favor of appellee. Appellant prayed an appeal, and assigns of record various errors, but, inasmuch as the error assigned relative to the court giving appellee's sixth and seventh instructions is fatal to the whole proceeding, under our view of the law it alone will require our attention.

Appellee's sixth and seventh instructions are as follows:

"(6) The court instructs the jury that they are not to include any time that the defendant or his grantor, Alvis Hauskins, had possession of the strip of land in question as tenants in making up the period of continuous possession on part of the defendant or his grantor required by law to defeat the record title of plaintiff, as explained by the instructions of the court given you in this case.

"(7) The court instructs the jury that if they believe, from the evidence, that the defendant's grantor, Alvis Hauskins, became a tenant of the premises owned by the plaintiff's grantor, and occupied it for several years as such tenant before the full period of twenty years had elapsed, then the continuity of possession became broken, and the jury should find for the plaintiff, unless the jury believe, from the evidence, that the defendant and his grantor, Alvis Hauskins, had adverse possession of the land in dispute for a period of twenty years after the expiration of such tenancy, and prior to the bringing of this suit, March 22, 1889."

Of the sixth instruction, *supra*, it may be said that it assumes that the evidence shows that Hauskins, appellant's grantor, had possession of the strip of land in question during part of the period of the statute of limitations as tenant of the title owner thereof, instead of submitting to the jury that question as a question of fact, as the instruction should have done. The seventh instruction tells the jury that if Hauskins, appellant's grantor, "became a tenant of the premises owned by the plaintiff's grantor, and occupied it for several years as such tenant before the full period of twenty years had elapsed, then the continuity of possession became broken, and the jury should find for the plaintiff, unless the jury believe, from the evidence, that the defendant and his grantor, Alvis Hauskins, had adverse possession of the land in dispute for a period of twenty years after the expiration of such tenancy, and prior to the bringing of this

suit." All that is stated in this instruction might be true, and appellant still be entitled to recover. The question was, what was the extent of the ownership of plaintiff's grantor and of the plaintiff? If the plaintiff only owned south of the fence in question, as shown by the evidence, and appellant's grantor only leased and used that portion south of the fence as tenant, or if, in any event, Hauskins only leased that portion of the land south of the fence, then it must be apparent that the lease would in no way affect his right or the right of his grantee, appellant. The principle of law which makes the leasing of land by one claiming ownership by virtue of adverse possession from the title owner thereof a bar to his right to so claim as adverse holder during such tenancy goes upon the ground that by so leasing the tenant recognized the title of the lessor to the premises, and holds subservient to the lessor's title, and therefore cannot assert that he holds adversely to the lease which he has accepted and holds under. If the evidence in this case shows, as we think it tends to show, to say the least, that appellant and his grantor had the strip of land in controversy fenced in with and as a part of the lands owned by appellant's grantor and by appellant as grantee, and that appellant's grantor simply leased that portion of appellee's land from appellee's grantor that lay south of appellant's and appellant's grantor's fence, not leasing by any legal description, but leasing simply that within the inclosure for pasture purposes, then it cannot be said, as we think, that such leasing had anything whatever to do with the strip of land in controversy; and upon such state of facts as is supposed in the latter case the instructions above mentioned were erroneous, and in direct conflict with the rule laid down by this court in the case of *O'Flaherty v. Mann*, 196 Ill. 304, 63 N. E. 727, in which case, on page 308, 196 Ill., and page 728, 63 N. E., we said: "The mere fact that Mann entered into possession of lot 1 under a lease or by license of the appellant five or six years after he had inclosed with lot 3 the strip in controversy would constitute no reason why the running of the statute should be suspended, when the original holding of this strip was open and adverse, and distinct acts of ownership were continuously exercised by Mann over it up to the time of his death. * * * Had there been no partition fence or acts of ownership exercised by Mann over the strip, there might then have been no adverse possession for twenty years, but from his conduct it is plain that he claimed ownership over this strip, inclosed it with his own, laid it out and improved it," etc. In the case at bar the evidence tends to show the conditions were similar to those in the case above cited. The land south of the division fence was used for

pasturage, and that on the north was used in farming, being cultivated in wheat and corn, and used in common as a part of appellant's farm. Appellant and his grantor had cleared the timber from the land in dispute, or from a considerable portion of it, and had for nearly 20 years, at the time of the alleged tenancy, occupied it and used it as their own land, and continued so to hold and use it during the alleged tenancy. As we have said, the tenancy was simply for appellant's use as pasture, and the rent was merely the payment of the taxes. There was no written lease or other lease giving a legal description of it, and in such case it cannot be said that such use and occupancy of that portion of the land that was south of the fence could legally or necessarily affect the question of ownership of the disputed tract in any way, and we can see no reason, under the circumstances here disclosed, why the tenancy of the Carroll tract by appellant and his grantor could operate as a bar to the running of the statute of limitations, or militate against appellant's claim of ownership, by reason of adverse possession.

The appellant further complains of the refusal of the court to give his fifth and sixth refused instructions. We think neither of these instructions was accurately drawn. While, in the main, they stated correct legal propositions, the fifth instruction was defective, in that it did not state what elements were necessary to create an adverse holding, such as would constitute ownership by the running of the 20-years statute; and the sixth refused instruction contained the same vice with appellee's sixth instruction that was given, in that it assumes that the evidence shows that appellant's grantor and appellant leased or rented only that part of the ground south of the old fence. It was a question for the jury as to what lands were in fact held under the lease, and the instructions should not have assumed anything upon that question unless the evidence was all one way and undisputed.

What is said in relation to the facts in this opinion is not to be regarded as a finding of fact by this court. For our discussion of the instructions we merely assume the facts as contended by the parties, but express no opinion as to what facts are established by the record, inasmuch as the case must be remanded generally for a trial *de novo*.

We regard the giving of the above-mentioned sixth and seventh instructions in behalf of appellee as such error as must reverse the judgment, which is accordingly done, and the cause is remanded to the circuit court of Madison county for such further proceedings as to law and justice shall appertain.

Reversed and remanded.

(207 Ill. 621)

TORSELL et al. v. EIFFERT.

(Supreme Court of Illinois. Feb. 17, 1904.)

APPEAL — JURISDICTION — AMOUNT — ENJOINING EXECUTION—EQUITY—PRESERVATION OF EVIDENCE—APPEAL.

1. An appeal lies from the Appellate Court to the Supreme Court, under Appellate Court Act, § 8 (Hurd's Rev. St. 1901, p. 547, c. 37), in a suit to enjoin the collection of a judgment, though the judgment is for less than \$1,000, and no certificate of importance has been granted; it not being a suit to recover money or chattels.

2. Where, in chancery cases, the party who obtains a decree fails to preserve the evidence by a certificate or otherwise, and the decree does not find the specific facts proven, it will be reversed on appeal.

Error to Appellate Court, First District.

Suit by Jacob A. Eiffert against Amalie Torsell and others. From a decree in favor of plaintiff (108 Ill. App. 67), defendants bring error. Reversed.

James H. Hooper, for plaintiffs in error. Bulkley, Gray & More, for defendant in error.

HAND, J. This is a bill in chancery filed in the circuit court of Cook county by defendant in error to enjoin the collection of a judgment rendered in the county court of Cook county against him, in favor of plaintiff in error, for \$129 and costs. The bill alleges that the plaintiff in error recovered a judgment against the defendant in error, by fraud, before one of the justices of the peace of Cook county; that the plaintiff in error took an appeal to the county court of said county, where a judgment in trover was entered for the above amount; and that the sheriff of Cook county, by virtue of a ca. sa. issued from said court, is about to arrest the defendant in error, and confine him in the jail of Cook county, in accordance with the command of said writ—and prays that the plaintiff in error and the sheriff, and those claiming under or through them, may be enjoined from enforcing the collection of said judgment, and that the same may be set aside. The case was tried in open court, and a decree entered in accordance with the prayer of the bill of complaint. The case was taken by writ of error to the Appellate court for the First District by plaintiff in error, where the decree of the circuit court was affirmed, and the record has been brought to this court for a further review.

A motion was made by defendant in error to dismiss the writ for want of jurisdiction in this court to hear and determine the same, on the ground that the amount involved in the controversy was less than \$1,000, and that the Appellate Court had granted no certificate of importance, which motion was reserved. The purpose of this action is not to recover money or property, but to enjoin the collection of a judgment claimed to have been wrongfully obtained. In the case of *Richards v. People*, 100 Ill. 423, which was a bill

to enjoin the obstruction of a road, where it was insisted this court was without jurisdiction to entertain an appeal from the Appellate Court, it was said (page 425): "The statute making the right of appeal from the Appellate to this court depend, in certain classes of cases, upon the amount in controversy or of recovery in the court below, has no application where the object of the suit is not to recover a debt or damages, or some specific article of property, either personal or real. In all other cases, by the express provisions of the eighth section of the Appellate Court Act (Hurd's Rev. St. 1901, p. 547, c. 37), an appeal lies to this court." And in *Chalcraft v. Louisville, Evansville & St. Louis Railroad Co.*, 113 Ill. 86, which was a bill to enjoin the construction of a bridge for a farm crossing over a railroad track, in passing on a motion to dismiss for want of jurisdiction to entertain the writ of error, the court said (page 87): "This is not a suit to recover money or chattels, and is not, therefore, affected by the statute limiting appeals and writs of error to \$1,000; and the writ hence lies, without regard to the magnitude of the interests involved." And in *Tosetti Brewing Co. v. Koehler*, 200 Ill. 369, 65 N. E. 636—a proceeding to enjoin the levy upon a sale of a lot under execution, and to remove a cloud upon the title arising by the apparent lien of the judgment—a motion to dismiss was made for the same reason as here suggested. It was held (page 371, 200 Ill., and page 637, 65 N. E.) that "the purpose of the suit is not the recovery of money or property, but it is to enjoin the levy upon and sale of the lot under execution, and to remove the cloud from the title, and in such case the right to an appeal is not determined by the amount of the judgment." The motion to dismiss the appeal is denied.

It is insisted by the plaintiff in error that this case must be reversed for the reason that no certificate of evidence is contained in the record, and no findings of fact were incorporated in the decree. The decree finds "that the court has jurisdiction of the parties and of the subject-matter in this cause; that all the material allegations of the said bill are true"—and nothing further. Such finding is but a conclusion, and is not sufficient, under the decisions of this court, to supply the place of a certificate of evidence. The case having been tried in open court upon oral testimony, it was the duty of the complainant, not of the defendant, to preserve the evidence, either by certificate of evidence or specific findings of fact in the decree. In the case of *Village of Harlem v. Suburban Railroad Co.*, 202 Ill. 301, 66 N. E. 1050, where the finding of facts was the same as in this decree, the cause was reversed. It was there said (page 302, 202 Ill., and page 1051, 66 N. E.): "In chancery cases the practice is well settled in this state that the party in whose favor a decree granting relief is entered, to maintain it, must preserve the

evidence by a certificate of evidence or otherwise, or the decree must find the specific facts that were proven on the hearing, and that it is not the duty of the party against whom the decree granting relief is rendered to preserve the evidence." Having failed properly to preserve the evidence upon which the decree in this case is based, under the foregoing decision, and cases therein cited, the decree must be reversed.

The judgment of the Appellate Court and decree of the circuit court will be reversed, and the cause remanded to the circuit court of Cook county. Reversed and remanded.

(207 Ill. 352)

PEOPLE ex rel. HILLEL LODGE, No. 72, I. O. B. B., v. ROSE, Secretary of State.

(Supreme Court of Illinois. Feb. 17, 1904.)

CORPORATION — ANNUAL REPORT — DUTY TO MAKE — FORFEITURE OF CHARTERS — STATUTES — CONSTRUCTION — CONSTITUTIONALITY — IMPAIRMENT OF CONTRACT OBLIGATIONS — CHANGE OF RULES OF EVIDENCE.

1. Act May 10, 1901 (Laws 1901, p. 124), providing that corporations, other than railroad, banking, building, and loan, and insurance companies, shall annually report to the Secretary of State the location of their principal offices, whether or not the corporation is pursuing an active business, and the kind of business engaged in, applies to corporations not for pecuniary profit, as well as to strictly business corporations, as the term "active business" merely means the exercise of corporate powers.

2. Act May 10, 1901 (Laws 1901, p. 124), providing for the filing of annual reports by corporations, and providing that "a failure to make said report and pay said fee shall be prima facie evidence that said corporation is out of business and shall work a forfeiture of the charter of such corporation," is not unconstitutional, as providing for a legislative or administrative forfeiture of corporate franchises, as it expressly declares a failure to make the report required prima facie evidence of nonuser, and leaves the question of forfeiture to be determined from the fact of nonuser by a competent court; the further clause providing for forfeiture being merely a statement of the effect of nonuser.

3. Act May 10, 1901 (Laws 1901, p. 124), providing for annual reports by corporations, and declaring the failure to make such reports prima facie evidence of nonuser, and to authorize a forfeiture of the charter, is, as applied to corporations organized under the general incorporation act (Hurd's Rev. St. 1901, c. 32, § 9), not objectionable as impairing the obligation of a contract, for section 9 of the latter statute gives the General Assembly power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions will be binding on corporations formed under the act.

4. That Act May 10, 1901 (Laws 1901, p. 124), providing for annual reports by corporations, makes the failure to report evidence of nonuser, which before the passage of the act would not have been proof on that subject at all, is not a valid constitutional objection to the act.

5. It is not within the legislative power to declare what shall be conclusive evidence, as that would be an invasion of the province of the judiciary.

6. Act May 10, 1901 (Laws 1901, p. 124), provides for the filing of annual reports by corpo-

rations, and provides that "a failure to make said report and pay said fee shall be prima facie evidence that the said corporation is out of business, and shall work a forfeiture of the charter of such corporation." *Held*, that since, if the statute should be construed as authorizing the Secretary of State to declare an absolute forfeiture of the charters of defaulting corporations, it would be unconstitutional, it should be construed as merely establishing a new rule of evidence of nonuser, namely, that a failure to make the report provided for should be prima facie evidence of that fact.

Magruder, J., dissenting.

Petition for mandamus by the people, on the relation of Hillel Lodge, No. 72, Independent Order Bnai Brith, against James A. Rose, Secretary of State. Denied.

This is a petition for mandamus, filed in this court at the October term, 1902, by Hillel Lodge, No. 72, Independent Order Bnai Brith, in the name of the people of the state of Illinois, against James A. Rose, secretary of state of Illinois. The petition alleges that petitioner is a corporation not for pecuniary profit; that its charter issued on February 21, 1900, and was duly recorded in the recorder's office of Cook county, Ill., on March 8, 1900; that petitioner is organized and existing under the laws of this state; that it complied with all the laws applicable to its incorporation, and has ever since complied with the provisions of its charter and the laws of Illinois. It further alleges that respondent, as Secretary of State, has informed petitioner that its charter has been canceled and forfeited by him because of its failure to comply with the act of the Legislature entitled "An act requiring corporations to make annual report to the Secretary of State, and providing for the cancellation of articles of incorporation for failure to do so, and to repeal a certain act therein named," approved May 10, 1901 (Laws 1901, p. 124); that respondent claims the right to forfeit and cancel the charter because of the violation of section 2 of the act, and for failure to make a report and pay the fee mentioned in said section 2. The petition then alleges that respondent has informed petitioner that he will reinstate it upon his records upon payment of \$20 to him by it, and upon petitioner filing in his office an affidavit stating the facts required by section 2 of the act, and stating the further fact that petitioner was at the time of default, and still is, engaged in "active business" under its charter; and the petition then alleges that petitioner refuses to comply with sections 2 and 7 of said act, because it is not engaged in "active business," and cannot make affidavit to that fact, but is a nonprofitable and quasi-charitable corporation. The petition avers that the act has no reference to corporations not for pecuniary profit, and also alleges that the act is unconstitutional. It sets out that the charters of 25,000 corporations have been canceled by respondent, acting under said act, and that the petition is filed on behalf of all of them; that respondent is still Secretary of State,

¶ 5. See Constitutional Law, vol. 10, Cent. Dig. § 59.

and has it within his power to revoke the cancellation of petitioner's charter, but that he refuses so to do. The prayer of the petition is that the court order and command said James A. Rose, as such secretary of state, to cancel on his records the forfeiture and cancellation of petitioner's charter without the payment of \$20. To the petition of the lodge, James A. Rose, secretary of state, filed a general demurrer. The questions presented for determination are: First. Does the act apply to corporations not organized for pecuniary profit? Second. Is the act constitutional?

Adolph Moses, for petitioner. H. J. Hamlin, Atty. Gen., for respondent.

SCOTT, J. (after stating the facts). The first and second sections of the statute (Laws 1901, p. 124) under consideration are as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly: That every corporation hereafter organized under the laws of this state shall, before receiving a certificate of complete organization, file with the Secretary of State a statement setting forth the post-office address of its business office, giving street and number.

"Sec. 2. Every incorporated company, other than railroad, banking, building and loan and insurance companies, existing by virtue of any general or special law of this state, or hereafter organized by virtue of any law of this state, shall annually, between the first day of February and the first day of March, report to the Secretary of State the location of its principal office in this state, with town, street and number; the name of its officers, with their residence, stating the town, street and number, with the date of the expiration of their respective terms of office; whether or not the corporation is pursuing an active business under its charter and the kind of business engaged in, if any, which said report shall be made under the seal of the corporation and shall be signed and sworn to by the president, secretary or other officer of the corporation, and in case said corporation is in the hands of an assignee or receiver, then such report shall be signed and sworn to by such assignee or receiver, which said report, together with a fee of one dollar for filing the same, shall be sent to the Secretary of State, in whose office it shall be filed. The Secretary of State shall in no case receive or file said report until said fee is paid, and a failure to make said report and pay said fee shall be prima facie evidence that said corporation is out of business, and shall work a forfeiture of the charter of such corporation. And it is hereby made the duty of the Secretary of State to enter upon the records of his office, as soon as practicable after default in making such report, the cancellation of the charters of all

corporations failing to make said report at the time and in the manner herein provided."

Section 3 provides that the Secretary of State shall furnish blanks for making the report contemplated by section 2 to each corporation whose address is disclosed by the records of his office, with a notice stating the effect of a failure to make the report, and provides for notice by publication to corporations whose addresses are not so disclosed.

Sections 4 and 5 provide for proof of publication, and fix the rate of compensation for publication of such notice.

Section 6 provides for filing with the recorder of deeds in each county a list of the corporations complying with section 2 of the statute, together with the names and addresses of their principal officers, and the location of the principal business office of the corporation in this state, and a list of those failing to comply with section 2 after having in one or more years made the report required by that section.

Section 7 is as follows: "It is further provided, that any corporation which is pursuing an active business under its charter, failing to make said report at the time provided by law may, at any time, within one year from such default, be re-instated upon the records in the office of the Secretary of State upon the payment of a fee in the sum of \$20 for such re-instatement and filing in said office an affidavit stating all the facts required in section 3 [2] of this act, and in addition thereto, the fact that it was at the time of such default, and still is, engaged in active business under its charter."

The remaining sections provide for the payment of expenses of publication, and repeal an earlier act.

The language of this act is broad enough to include corporations not for pecuniary profit. The first section applies to "every corporation." The second is in reference to "every incorporated company," other than railroad, banking, building, and loan and insurance companies, now existing or hereafter organized under the laws of this state. It is conceded that these general terms include corporations of the class to which the petitioner belongs, but it is argued that they are restrained by the general context and by the spirit of the law, and that the act, when considered as a whole, indicates that the Legislature meant only business corporations; and, in support of this position, attention is called to the fact that in section 2 the corporation is required to report whether it "is pursuing an active business under its charter," and, by section 7, when it desires reinstatement it is required to show by affidavit that at the time of its default it was, and still is, "engaged in active business under its charter"; and it is said that corporations not for pecuniary profit ordinarily are not engaged in active business, whence the conclusion that

the act was not intended to apply to them. The term "active business," as used in this statute, means the exercise of corporate powers—the doing of those things which the corporation is by its charter authorized to do. We are confirmed in this view of the meaning of these words by the fact that, in section 29, c. 32, Hurd's Rev. St. 1901, persons desiring to organize a corporation not for pecuniary profit are required to file with the Secretary of State a certificate stating "the particular business and objects for which it is formed," and by the succeeding section it is provided, "upon complying with the foregoing conditions, the corporation, society or association shall be deemed fully organized, and may proceed to business." It is apparent that the word "business," as used by the Legislature in the statute of 1901 under consideration, refers not alone to those things which the corporation for pecuniary profit may do.

The constitutionality of the act is attacked upon the ground that the Legislature has no power to dissolve a corporation or to declare a forfeiture of its franchise, nor has the Legislature the power to prescribe a state of facts under which this may be done through an administrative officer, because such an act is the exercise of judicial power, which, under the Constitutions of the state and of the United States, is vested in the judicial, and denied, by implication, to the legislative, department; and, as petitioner was organized prior to the passage of the act of 1901, we are cited to the Dartmouth College Case, and to other cases of like character, holding that a franchise of a corporation is property, in the law, and is protected by the Constitutions of the state and of the United States as a contract which cannot be impaired by the Legislature. The accuracy of petitioner's propositions, as abstract statements of the law, is beyond question, but we think them inapplicable here, because based upon a misconstruction of the statute now before us. One of the purposes of the present statute evidently was to facilitate the taxation of corporations, and to provide information for the taxing officers in reference to the existence and location of corporations organized under the laws of the state, and owning property in the state. The purpose of this statute, further, is to require evidence once each year that the corporation is exercising the powers granted, and its failure to make such proof is made prima facie evidence of nonuser. The thing that works a forfeiture of the corporation is the fact of nonuser, which can be finally determined only by a court of competent jurisdiction (*Bruffett v. Great Western Railroad Co.*, 25 Ill. 353; *Baker v. Administrator of Backus*, 32 Ill. 79; *Board of Education v. Bakewell*, 122 Ill. 339, 10 N. E. 378); and the cancellation which the Secretary of State is required to enter upon the records of his office would, in such proceeding, make a prima facie case for the people. If the cor-

poration is in fact engaged in active business, and fails to make the report, it is not by reason of that failure deprived of its charter, but may, in a suit brought against it, show the fact, and thereby defeat the proceeding. It is, no doubt, true, as suggested by petitioner, that if, with the records in the office of the Secretary of State in their present condition, petitioner desired a certified copy of the documents filed by its incorporators as a basis for its charter, such copy would show the cancellation contemplated by section 2 of the statute. This condition of affairs, and the fact that such entry on the record is a perpetual and continuing notice that its corporate powers are ended, misleading though such notice may be in some instances, are incentives of the most potent character for a compliance with section 2 of the act. The effect of the act is simply to make a failure to report, as required, prima facie evidence; and the clause providing that the failure to report and pay the fee therefor "shall be prima facie evidence that said corporation is out of business, and shall work a forfeiture of the charter of such corporation," was merely intended to be a statement of the effect of a condition, namely, nonuser, of which condition the failure is made prima facie evidence.

It may be suggested that this construction of the statute places upon the corporation an additional burden—one not contemplated by its charter, which is the contract between it and the state—and that the statute is therefore obnoxious to the Constitution, for the reason that it impairs the obligation of a contract.

Petitioner is organized under the general incorporation act passed in 1872. Section 9 of that act provides: "The General Assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act: and, provided, further, that this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation." Hurd's Rev. St. 1901, p. 455, c. 32, § 9.

In *City of Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118, 69 Am. St. Rep. 304, we considered this section 9, and said in reference thereto (page 306, 178 Ill., page 121, 53 N. E., 69 Am. St. Rep. 304): "By organizing under the general incorporation act, the defendant in error agreed to submit itself to, and to be bound by, such regulations and provisions as the Legislature should deem it advisable to make. . . . The language of section 9 is different from, and broader in its scope than, the language contained in many charters which reserve to the state the power to repeal, alter, amend, or modify the charter itself. We apprehend, therefore, that the decisions restricting the power of the state as to charters which are

given subject to the right of the state to repeal, alter, amend, or modify them, do not apply to such broad language as is used in section 9. By the terms of section 9, it is something more than the mere right to change the charter of the corporation, which is reserved to the Legislature. The authority is thereby reserved to provide the regulations and provisions under which the corporation may proceed in the transaction of its business. We have held that the Legislature may impose duties on corporations, the same as on individuals, in the absence of special enactments. We have also held that the Constitution of 1848 by implication reserved to the Legislature the right to change or increase the liability of a shareholder in a corporation. *Illinois Central Railroad Co. v. City of Bloomington*, 76 Ill. 447; *Weidenger v. Spruance*, 101 Ill. 278; *Diversey v. Smith*, 103 Ill. 378 [42 Am. Rep. 14]; *Arenz v. Weir*, 89 Ill. 25; *Butler v. Walker*, 80 Ill. 345."

We think it apparent from the language just quoted that this statute of 1901, as we construe it, is within the terms of section 9, *supra*, which must be deemed to be a part of the charter of every corporation organized under the act of 1872, and that, while it is true that neither the Legislature nor a ministerial officer can declare a forfeiture, still it is within the power of the Legislature, under section 9, *supra*, to require corporations to make the reports required by section 2 of the act of 1901, and to provide that a record of their default, made by a ministerial officer, shall be *prima facie* evidence of nonuser, and to authorize, *prima facie*, a forfeiture of the charter.

It is true that this statute makes that, *viz.*, failure to report, evidence of nonuser, which before the passage of the statute would not have been proof on that subject at all; but this is not a valid constitutional objection. "No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract. They are subject to control and modification by the Legislature, whether affecting proof of existing rights or rights subsequently acquired. Changes in them may be made applicable to existing causes of action. *Cooley's Const. Lim.* (6th Ed.) p. 451; *Gage v. Caraher*, 125 Ill. 447 [17 N. E. 777]." *Chicago, Burlington & Quincy Railroad Co. v. Jones*, 149 Ill. 861, 87 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278.

It is not, however, within the legislative power to declare what shall be conclusive evidence, as that would be an invasion of the power of the judiciary. 8 Cyc. p. 820; *Corbin v. Hill*, 21 Iowa, 70; *White v. Flynn*, 23 Ind. 46; *United States v. Klein*, 13 Wall. 123, 20 L. Ed. 519; *Missouri, Kansas & Texas Railway Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248.

To give to this statute the meaning con-

tended for by petitioner is to say that the purpose of the Legislature was to make the failure to report conclusive evidence that a forfeiture has taken place, although the statute expressly says it shall be *prima facie* evidence, merely. This construction of petitioner finds support, it is true, in the fact that the statute provides that the failure to report shall work a forfeiture of the charter, thereby attempting to give to the evidence, which it says is *prima facie*, the effect of evidence that is conclusive. The provisions of this statute are in that respect inconsistent with each other, and the meaning of the act must be determined by the construction placed thereon by the courts. To say that it merely provides what shall be *prima facie* evidence of nonuser, and for recording that evidence, is to uphold it; to say that the act of the Secretary of State which it directs absolutely forfeits the charter of the defaulting corporation is to destroy it. Where a statute may receive either of two constructions, one of which would result in its being upheld, and the other of which would bring it within the inhibition of the Constitution, that construction will be adopted by the courts which will avoid conflict with the Constitution. *Newland v. Marsh*, 19 Ill. 376; *People v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175. It becomes our duty, therefore, to construe this statute, not as a law authorizing the Secretary of State to declare absolute forfeitures of the charters of defaulting corporations, but as merely establishing a new rule of evidence against these artificial persons.

The corporation which has defaulted in making this report can, within a year thereafter, have affirmative relief, and clear the records in the office of the Secretary of State of the evidence against it, by complying with section 7 of the act of 1901. What its right, if any, is to affirmative relief after the expiration of that year, if it does not avail itself of the right given by that section, it is unnecessary now to determine.

The facts averred by the petition do not entitle the petitioner to the relief sought. Writ denied.

MAGRUDER, J. (dissenting). I do not concur in all of the opinion of the majority, as prepared by my Brother SCOTT, and submit the following views:

1. In the petition for mandamus herein filed, the petitioner alleges that the act of May 10, 1901 (Laws 1901, p. 124), when properly construed, has no reference to corporations organized not for pecuniary profit, or to religious corporations. It is then alleged that the petitioning corporation herein is a corporation not for pecuniary profit, and therefore does not come within the purview and requirements of the act. This contention cannot be maintained. The act is broad enough in its terms to include all corporations, whether religious corporations, or cor-

porations organized not for pecuniary profit, as well as corporations organized for pecuniary profit. The first section of the act provides "that every corporation hereafter organized under the laws of this state shall * * * file with the Secretary of State a statement," etc. This language is broad enough to embrace every corporation organized under the laws of the state, and makes no distinction between those organized for pecuniary profit and those organized not for pecuniary profit. Again, section 2 provides that "every incorporated company, other than railroad, banking, building and loan and insurance companies, existing by virtue of any general or special law of this state, or hereafter organized by virtue of any law of this state, shall annually * * * report to the Secretary of State." The language of this section is broad enough to embrace corporations organized not for pecuniary profit, as well as corporations organized for pecuniary profit. Every corporation, except railroad, banking, building and loan and insurance companies, is embraced within the requirements of the act. Consequently the petitioner could not escape obedience to the requirements of the act upon the alleged ground that it is a corporation organized not for pecuniary profit. By reason of its character in this regard, it is not taken out of the terms of the act.

It seems to be contended that corporations organized not for pecuniary profit are not embraced within the terms of the act, because the report mentioned in section 2 is required to state "whether or not the corporation is pursuing an active business under its charter, and the kind of business engaged in, if any," and because, in section 2, "a failure to make said report and pay said fee shall be prima facie evidence that said corporation is out of business," etc., and because, in section 7, it is provided "that any corporation, which is pursuing an active business under its charter, failing to make said report at the time provided by law may, * * * be re-instated," etc. It does not necessarily follow that the words "active business" and "business," as here used, refer only to corporations organized for pecuniary profit. These words are not confined to corporations which do business for the purpose of making money, but refer to the carrying out of the objects of its charter by any corporation. When the corporation is required to report whether or not it is pursuing an active business under its charter, it is merely required to report whether or not it is a going concern, or is doing such acts as it is authorized to do, and for the doing which it was clothed with corporate existence. For instance, the petitioner alleges that its corporate object, as shown by its charter, is, among other things, "to alleviate the wants of the poor and needy; to visit and attend the sick; to rescue the victims of persecution; to provide for, protect

and assist the widow and orphan," etc. The accomplishment of these ends, though they may be ends proposed to be accomplished by a corporation organized not for pecuniary profit, may require the employment of agents, and the distribution and delivery of supplies. The carrying out of the charitable objects proposed by the charter might require the employment of such means and agencies as would constitute a business, though not a business pursued for pecuniary profit, and pursued only for the purpose of accomplishing such charitable ends. It cannot be said, therefore, that the broad language used in section 1 and section 2 of the act is so far limited and restricted by the subsequent use of the words "active business" and "business" as to eliminate altogether from the purview of the act such corporations, like the petitioner, as are organized not for pecuniary profit.

Judicial notice is taken of the fact that section 2 of the act of May 10, 1901 (*Laws* 1901, p. 124), was amended by an act approved May 13, 1903. *Sess. Laws Ill.* 1903, p. 123. By the latter act, section 2 was amended by inserting after the words "insurance companies" the following words: "religious corporations and corporations not organized for pecuniary profit." Section 2, as thus amended, reads as follows: "Every incorporated company other than railroad, banking, building and loan and insurance companies, religious corporations, and corporations not organized for pecuniary profit, existing by virtue of any general or special law of this state, or hereafter organized by virtue of any law of this state, shall annually, between the first day of February and the first day of March, report to the Secretary of State," etc. In other words, the amendment to section 2 takes religious corporations and corporations not organized for pecuniary profit, as well as railroad, banking, building and loan and insurance companies, out of the operation of the act of 1901. This amended act, however, has no effect upon the present suit, and does not bring it within the doctrine announced in the case of *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173, for the reason that the forfeiture and cancellation hereinbefore set forth were complete before the passage of the amended act, and the time has passed when, by the provisions of the act of 1901, the petitioning corporation can be reinstated. This being so, if the act of 1901 is a valid act, the forfeiture and cancellation complained of by the petitioner must stand. The act of 1901, before it was amended, and as amended, is not an act which gives a special remedy, but is an act which imposes a penalty. The penalty, having been incurred under the act of 1901 before amendment, cannot be remitted by the amendment to the act passed in 1903. That amendment, by its terms, refers to future, and not past, action, as clearly appears from

the words "every incorporated company * * * shall annually * * * report to the Secretary of State," etc. The report to be made refers to future reports; that is to say, all reports made after the passage of the amendment in 1903. Whether or not, therefore, the petitioner is entitled to the writ of mandamus prayed for, depends upon the question whether the act of 1901 is a constitutional law.

2. The petition further alleges that even if the act of May 10, 1901, does include corporations organized not for pecuniary profit, yet that "it is unconstitutional and void, and is no warrant in law for the Secretary of State to cancel and forfeit petitioner's charter, or to demand money for its reinstatement." This allegation of the petition presents for consideration the constitutionality of the act of May 10, 1901. And the observations hereinafter made apply as well to the act as amended in 1903, as to the original act of 1901; that is to say, as well to the act since religious corporations and corporations not organized for pecuniary profit have been excluded from its operation as when they were included.

By the act in question the Legislature requires every corporation in the state, with the exceptions specified, to make a report annually to the Secretary of State, and to pay to him a fee of \$1, and makes the failure to make such report and pay such fee operate as a forfeiture of the charter of the corporation; and the Secretary of State is required, upon default by the corporation in making such report, to enter upon the records of his office the cancellation of the charter of the corporation so making such default. Has the Legislature the power to forfeit the charter of a corporation for failure to perform a specified act, without any ascertainment of such failure by a judicial proceeding? The charter of a corporation is an executed contract between the government and the corporators. *Dartmouth College v. Woodward*, 4 Wheat. 513, 4 L. Ed. 629; *Coles v. Madison County*, Breese, 154, 12 Am. Dec. 161; *Bush v. Shipman*, 4 Scam. 186. The Legislature has no power to repeal, impair, or alter such a contract, against the consent of the corporation. *Bruffett v. Great Western Railroad Co.*, 25 Ill. 353. The first clause of section 10 of article 1 of the Constitution of the United States provides that "no state shall * * * pass any * * * law impairing the obligation of contracts." Section 14 of article 2 of the Constitution of 1870 of Illinois provides that "no * * * law impairing the obligation of contracts * * * shall be passed." A law which, like the one here under consideration, authorizes such a ministerial officer as the Secretary of State to enter upon the records of his office the cancellation of the charter of a corporation, without a judicial determination that such corporation has been guilty of some act which authorizes a forfeiture of

its charter, impairs the obligation of the contract between the state and the corporation, as embodied in its charter. *Bruffett v. Great Western Railroad Co.*, 25 Ill. 353.

If, however, there could be any question as to the correctness of the proposition already stated, there can be no question as to the unconstitutionality of this act, for another reason. The fourteenth amendment to the Constitution of the United States provides, among other things, as follows: "Nor shall any state deprive any person of life, liberty, or property without due process of law." Section 2 of article 2 of the Constitution of 1870 of Illinois provides as follows: "No person shall be deprived of life, liberty, or property without due process of law." The franchises granted to a corporation by the act of incorporation are property. *Regents v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72. Such franchises being property, they cannot be taken away from the corporation without due process of law. What is due process of law? The expression "due process of law" means the same as the expression "the law of the land." *Cooley's Const. Lim.* (6th Ed.) p. 430; *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329. "The law of the land" has been defined to be "the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." *Cooley's Const. Lim.* (6th Ed.) p. 431. In *Regents v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 99, it was said: "By 'the law of the land' is meant, by the due course and process of the law." In *Campbell v. Campbell*, 63 Ill. 462, we held that the phrase "due process of law," in the clause of the Constitution forbidding divestiture of title except by due process of law, "has reference to judicial proceedings according to the course and usage of the common law, and must always be based upon notice." In *Board of Education v. Bakewell*, 122 Ill. 339, 10 N. E. 378, we quoted and adopted the definition of "due process of law," as given by Mr. Justice Edwards in *Westervelt v. Gregg*, 12 N. Y. 209, 62 Am. Dec. 160, which definition is as follows: "'Due process of law' undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such an act as the Legislature may, in the uncontrolled exercise of its power, think fit to pass, is in no sense the process of law designated by the Constitution." In the case of *Board of Education v. Bakewell*, supra, we said (page 350, 122 Ill., page 384, 10 N. E.): "To ascertain that a deed is conditional, that there has been a

breach of condition, and to enforce forfeiture for the breach, are judicial functions, which it is not within the competency of legislative power to exercise. * * * A private corporation created by the Legislature may lose its franchises by a misuser or a non-user of them, and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce a forfeiture. *Terrett v. Taylor*, 9 Oranch, 51 [3 L. Ed. 650].” In *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329, we said (page 605, 149 Ill., page 949, 36 N. E., 24 L. R. A. 152, 41 Am. St. Rep. 329): “The phrase ‘due process of law’ is the equivalent of the words ‘law of the land,’ as used in *Magna Charta*, and means ‘in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.’ *Board of Education v. Bakewell*, 122 Ill. 339 [10 N. E. 378]; *Rhinehart v. Schuyler*, 2 Gilman, 473; *Davidson v. New Orleans*, 96 U. S. 97 [24 L. Ed. 616]; *Cooley’s Const. Lim.* (5th Ed.) marg. p. 356, top p. 435. An act of the Legislature is not necessarily the ‘law of the land.’ A state cannot make anything ‘due process of law’ which by its own legislation it declares to be such. An act of the Legislature which transfers the property of one man to another without his consent is not a constitutional exercise of legislative power, because, if effectual, it operates to deprive a man of his property without ‘due process of law.’ *Davidson v. New Orleans*, supra; *Taylor v. Porter*, 4 Hill, 140 [40 Am. Dec. 274]; *Rohn v. Harris*, 130 Ill. 525 [22 N. E. 587]; *Ervin’s Appeal*, 16 Pa. 256 [55 Am. Dec. 499]; *Hoke v. Henderson*, 4 Dev. 1 [15 N. C. 1, 25 Am. Dec. 677].”

Inasmuch as “due process of law,” or “the law of the land,” are expressions which have reference to judicial proceedings according to the course and usage of the common law, then an act of the Legislature which deprives a person or a corporation of property without providing for any judicial proceeding is a violation of the Constitution, because it is an attempt to confer judicial power upon the Legislature.

Article 3 of the Constitution of 1870 is as follows: “The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.” Section 1 of article 6 of the Constitution of 1870 provides that “the judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns.” In *Bruffett v. Great Western Rail-*

road Co., 25 Ill. 353, where this court had under consideration an act of the Legislature whose design appears to have been to repeal the charter of a railroad company, and to confer its property rights and franchises upon a different body of incorporators, we said (page 355): “If, however, this act might be regarded as an effort to declare a forfeiture of the chartered rights of the company then in existence, it is urged that it would violate the second article of our state Constitution. The second section of that article divides the powers of government, and confers them upon three distinct bodies of magistracy—the legislative, the executive, and the judiciary. The second section expressly prohibits any person or collection of persons, being one of these departments, from exercising any power properly belonging to either of the others, and it declares all acts in violation of that section void. * * * We are informed by Mr. Justice Blackstone, in his Commentaries, that amongst the different modes by which a corporation may be dissolved is that of a forfeiture of its charter by negligence or abuse of its franchises. In such a case the law judges that it has broken the condition upon which it was incorporated, and thereupon it has become void. He also informs us that the regular course in such a case to deprive the body of its powers is to bring an information in the nature of a quo warranto, to inquire by what warrant its members exercise their corporate powers; having forfeited the charter by the acts complained of in the information. Another mode of judicial proceeding is by *scire facias*, which under some circumstances is the appropriate remedy to have the forfeiture ascertained and declared. These are the remedies in Great Britain, notwithstanding the Parliament, in theory, possesses the same power to declare a forfeiture as the courts. Chancellor Kent, in his Commentaries (volume 2, p. 305), lays down the doctrine that the Legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter, against the consent and without the default of the corporation, judicially ascertained and declared. * * * It is not doubted that the Legislature is prohibited by the Constitution from exercising the power of judicially determining and declaring that a contract is forfeited, between individuals. And no reason can be perceived why it should be exercised when the state itself is a party to the agreement. The power in either case is by the Constitution devolved upon the courts, and is consequently prohibited to the legislative department. It then follows that this act, so far as it may have been designed to declare a forfeiture of the charter of the Great Western Railroad Company, and to dissolve that body, is prohibited by the Constitution, and is inoperative and void.” So here the act of May 10, 1901, inasmuch as it makes the failure to file a report and pay a

fee of \$1 prima facie evidence that the corporation is out of business, and makes such failure operate as a forfeiture of the charter of the corporation, and furthermore makes it the duty of the Secretary of State—a mere ministerial officer—to enter upon the records of his office, as soon as practicable after default in making such report, the cancellation of the charters of all corporations, failing to make such report at the time and in the manner therein provided, is in contravention of the Constitution, and is inoperative and void.

In *Regents v. Williams*, supra, the court had under consideration an act of the Legislature which professed to discontinue and abolish the corporation of the regents of a university, and to appoint a board of trustees, composed of different persons, under the corporate name of the trustees of the University of Maryland, and to transfer to the new corporation thus attempted to be created all the franchises and property of the corporation intended to be abolished; and it was held that this act, "if effectual, would amount to a legislative ouster; a legislative judgment of dissolution; an exercise of judicial power not warranted by the Constitution; a sentence of ouster or of dissolution—being strictly a judicial act—for some imputed delinquency ascertained on proceedings at law instituted for that purpose, which, though assuming the garb of a law, the Legislature, not being invested with a judicial power, is not competent to pass without the consent of the corporation." In the case of *Regents v. Williams*, supra, it was also said: "It cannot be denied that the franchises granted by the act of incorporation are vested rights, and can they be taken from the regents by any act of the Legislature without impairing the obligation of the contract that they shall be possessed and enjoyed by them and their successors in their corporate character? It is very clear that they cannot, and that no act of the Legislature of the state can effect that object without the assent of the corporation, if the prohibitory clause of the tenth section of the first article of the Constitution of the United States is applicable to such a contract as this; and no reason is perceived why it should not be held to apply as well to such contract as to any others, considering and treating this as a private corporation. * * * The Legislature has no right, without the consent of a corporation, to revoke or alter its charter, or take from it any of its franchises or property. They are alike beyond the reach of legislative power here, and the high prerogative power of the crown of England, which may create, but cannot at pleasure dissolve, a corporation, or, without its consent, alter or amend its charter. * * * To say that the Legislature possesses the power to pass capriciously or at pleasure a valid act taking from one his property, and giving it to another, would be, in this age, and in this state, a startling proposition, to

which the assent of none could be yielded; and yet there is nothing to forbid it, if it is once conceded that they have power to dissolve one corporation, and take from it its franchises and property, without its consent, and transfer them to another. * * * The Legislature, executive, and judiciary are all creatures of the Constitution, each confined in its action to the circumscribed sphere assigned to it, and cannot rightfully exercise any power which is repugnant to that instrument, or not within their respective spheres of action."

It cannot be said that the Legislature would not have power to require any corporation created under the laws of Illinois to make such report as is required by this act. In default of making such a report, it might impose a fine, and authorize the proper officers of the government to institute a judicial proceeding in consequence of the violation of the statute. But to hold that the Legislature has the power to cancel the charter of the corporation, and take away its corporate franchises, without a judicial investigation of the question whether the corporation has been guilty of any act to justify a forfeiture of its charter, would be to clothe the Legislature with the power not only to impair the obligation of a contract, but also to deprive the corporation of its property without due process of law, and to confer upon the Legislature the power to exercise judicial functions.

Judge Cooley, in his work on Constitutional Limitations (6th Ed.) p. 443, says: "A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Where it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away. And every man is entitled to a certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice, or to submit to conditions not imposed upon his fellows as a means of obtaining it. Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void, as not being due process of law." In the case at bar the petitioner herein failed to make the report and pay the fee required by section 2 of the act of May 10, 1901. If this failure be regarded as "misconduct," it could not so far forfeit the right of the petitioner to be a corporation that that right could be taken from it without judicial proceedings declaring the forfeiture in due form. The Legislature cannot declare a forfeiture of property by an act of its own, and, if this is so, it cannot confer the power to declare such forfeiture upon a minis-

terial officer, like the Secretary of State. All the authorities and text-books to which the briefs refer announce this doctrine. "The charter of a corporation cannot be forfeited for misuse or abuse of charter powers, except by direct judicial proceedings." 12 Am. Dig. (Cent. Ed.) p. 2422, and cases there cited.

Undoubtedly, under section 9 of the Illinois corporation act, the General Assembly has power "to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act," etc. 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 1006, c. 32, par. 9. But the power to prescribe regulations and provisions which shall be binding upon a corporation does not include the power to repeal its charter without a judicial proceeding; nor does that section of the act in regard to corporations confer any authority upon the Secretary of State, under a state of facts created by the General Assembly, to cancel and forfeit the charters of corporations.

In Thompson's Commentaries on the Law of Corporations (volume 5, § 6584), the doctrine is thus clearly announced: "Except where the power to repeal the charter of a corporation, or to revoke the franchises which it has conferred upon the co-adventurers, is expressly reserved, as already stated, it is not, in general, competent for the Legislature of a state to dissolve a corporation, or to declare a forfeiture of any of its franchises. The reason is that such an act is an exercise of judicial power, which by all American Constitutions is vested in a separate body, which consequently is denied by implication to the Legislature, and which in some states is denied to it in express terms. The franchises of a corporation are property, and, in view of this fact, there is no room for doubt upon the proposition that an act of the Legislature annulling the franchises of a corporation, where the power to do so has not been reserved so as to become a part of the contract embodied in the grant itself, would be a deprivation of property without due process of law, within the inhibition of the fourteenth amendment to the Constitution of the United States." Id. §§ 6608, 6700; *People v. Mallary*, 195 Ill. 582, 63 N. E. 508, 88 Am. St. Rep. 212.

For the reasons above stated, it seems to me that the act of May 10, 1901, is unconstitutional.

Complaint is made that mandamus is not the proper remedy to secure the relief here sought. No objection is made as to the form of the present proceeding, nor as to the tribunal in which it has been begun. The Reports are full of cases where the question of the constitutionality of an act of the Legis-

lature has been determined in a proceeding by mandamus. High on Ex. Legal Rem. (3d Ed.) § 124a; *Giddings v. Blacker*, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; *People v. Thompson*, 155 Ill. 451, 40 N. E. 307; *People v. Hutchinson*, 172 Ill. 486, 50 N. E. 599, 40 L. R. A. 770; *Marbury v. Madison*, 1 Cranch, 149, 2 L. Ed. 60; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *People v. Rose*, 187 Ill. 147, 47 N. E. 547; *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422; *People v. Van Cleave*, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795.

Counsel for the respondent says that the legality, or, rather, the existence, of a corporation, cannot be questioned in mandamus, but must be raised and determined by a direct proceeding in the nature of a quo warrant or a scire facias. The object here is not to determine the legality or the existence of a corporation. It is not denied that the petitioner herein was properly organized as a corporation. The question here is whether, under an act of the Legislature, the Secretary of State has the power to cancel the charter of a corporation already existing and legally organized. When a corporation is organized under the corporation act of this state, the statement which announces the purposes of the organization is filed with the Secretary of State. The license to the commissioners to open books for subscription is issued by the Secretary of State. The report of the commissioners is filed in the office of the Secretary of State. The certificate of organization of the corporation is issued by the Secretary of State. This act itself, in section 7, authorizes the Secretary of State to reinstate a corporation which has failed to make the report required by section 2, upon the records of his office, upon the payment of a fee in the sum of \$20 for such reinstatement, and filing an affidavit, etc. The prayer of the petition for mandamus in this case is substantially a prayer that the petitioning corporation be reinstated by the Secretary of State without the payment of the fee of \$20. Involved in the reinstatement of the corporation, necessarily, is the cancellation of the forfeiture which has been placed upon the records. There can therefore be no objection to the prayer of the petition, which asks that the cancellation which has been made under the provisions of section 2 be removed, or, in other words, that the corporation be reinstated upon the records of the Secretary of State. 2 *Spelling on Ext. Rem.* § 1455 et seq.; *Ellis v. County Com'rs*, 2 Gray, 370; *People v. Matteson*, 17 Ill. 167; *People v. Brinkerhoff*, 68 N. Y. 259; *In re Bradley*, 7 Wall. 364, 19 L. Ed. 214.

I think that the writ of mandamus should be awarded in accordance with the prayer of the petition.

(208 Ill. 85)

PRUSSING v. JACKSON.

(Supreme Court of Illinois. Feb. 17, 1904.)

DAMAGES—EXCESSIVE DAMAGES—APPEAL—REVERSAL—LIBEL—PROVING LIBELOUS LETTERS—COMPETENCY OF EVIDENCE.

1. In an action for libel the jury found that plaintiff suffered no actual damages, but returned a verdict for \$20,000, and on appeal the Appellate Court affirmed the judgment in the event that \$8,000 be remitted. On appeal to the Supreme Court it was contended that, as the verdict showed that it was the result of passion and prejudice, and it could not be known but that the same influences entered into the finding of other facts, the cause should have been reversed and remanded. *Held*, that the question as to whether the verdict was the result of passion, and, if so, whether the jury were influenced by passion on all the points, were matters of fact, the conclusion of the Appellate Court on which was binding on the Supreme Court.

2. In an action for libel consisting of a letter written by defendant, which had been published in a newspaper, the city editor of the paper testified that he had seen a letter similar to that published in the paper, which was brought to him by one of the reporters, who was told to keep it, but there was no evidence showing the destruction of the letter, or any search for it, or effort to produce the reporter. *Held* insufficient to justify the admission of secondary evidence as to the contents of the letter.

3. In an action for libel consisting of a letter written by defendant, which was published in a newspaper, the reception in evidence of the published article as secondary evidence of the letter was not justified by evidence that defendant had admitted that the statement published in the newspaper was the same as the letter written by him.

4. In an action for libel consisting of a letter written by defendant, which had been published in a newspaper, plaintiff caused defendant to be sworn, and asked if he knew who wrote the letter which appeared in the printed article. *Held* that, the letter itself not having been introduced, or its destruction or any search for it shown, it was error to overrule an objection to the question put to defendant.

Error to Appellate Court, First District.

Action by Lewis B. Jackson against Alexander Prussing. From a judgment of the Appellate Court (85 Ill. App. 324) affirming a judgment in favor of plaintiff, defendant brings error. Reversed.

Ernest Saunders, for plaintiff in error.
Collins & Fletcher, for defendant in error.

BOGGS, J. This was an action for libel against the plaintiff in error by the defendant in error. The declaration charged that the plaintiff in error composed and caused to be published in the Chicago Times-Herald, a daily newspaper published in the city of Chicago, a certain false, scandalous, defamatory, and libelous article, set forth in *hæc verba*, with appropriate innuendoes, in the declaration. The article is quite lengthy, and it is not necessary to the proper disposition of the case it should be recited in this opinion. In substance, the article charged "the crushed-stone dealers and cement manufacturers" had formed a combination for the purpose of procuring the passage of an ordinance by the city council of the city of Chicago providing

for the sole use of concrete made from crushed stone and cement in the building of Chicago sewers; that "a large sum of money—nearly \$100,000"—was said to have been raised and placed in escrow to purchase the necessary votes of aldermen in the city council to secure the passage of the bill, and "that the bill will be recommended by" the defendant in error, as city engineer, and "that it is said that said city engineer [the plaintiff] was to be liberally taken care of" by said combination, and imputed to said defendant in error that he had been guilty of the crime of bribery and corruption in office. The plaintiff in error filed the plea of not guilty, and the cause was submitted for trial before the court and a jury. The jury returned a general verdict finding the plaintiff in error to be guilty, and assessing the damages of defendant in error at the sum of \$20,000. The jury also returned answers to certain interrogatories; among others, the third, finding that the defendant in error did not suffer any actual damages by reason of the alleged libelous publication. A writ of error was sued out of the Appellate Court for the First District in behalf of the present plaintiff in error, and upon a review of the case in that court it was adjudged that there was error in the record, but that, if the sum of \$8,000 should be remitted from the judgment, the error should be regarded as cured, and a judgment entered affirming the judgment in the sum of \$12,000, and assessing the costs against the defendant in error, Jackson. The defendant in error thereupon entered a remittitur in the sum of \$8,000, and the judgment was affirmed in the sum of \$12,000. This is a writ of error sued out by the plaintiff in error to reverse the judgment of the Appellate Court.

We are advised by the judgment of the Appellate Court that it was the opinion of that tribunal that the verdict and judgment were excessive—so flagrantly excessive that, unless two-fifths of the amount should be remitted, the judgment would be reversed. Counsel for the plaintiff in error insists that it appears from the special finding of the jury that the verdict of \$20,000 was wholly for vindictive damages, and that it was shown without dispute in the record that the total value of all the property of the plaintiff in error did not exceed \$11,600, and that a verdict so grossly excessive evinces that the jury were moved by passion, prejudice, or a total misconception of the case; and that it is the settled rule that when it is manifest the elements of passion and prejudice or misconception controlled the action of the jury, and shaped their general verdict, it cannot be known but that the same improper influences entered into the finding of other facts important to the issue, if not to the issue itself, and in such state of case the error cannot be and is not removed by a remittitur. It is therefore argued that we should declare as matter of law that the error in the record

could not be cured by the remittitur, and that the Appellate Court erred in not reversing and remanding the cause. It is, however, a question to be determined from all the facts established by the evidence whether the verdict is so grossly excessive as to evince that it resulted from passion, prejudice, or total misconception on the part of the jury. We must therefore accept the conclusion of the Appellate Court as to this question of fact.

The argument that, if the ends of justice demanded that \$8,000 should be remitted from a judgment in the sum of \$20,000, rendered, in the main, if not wholly, as vindictive damages, the conclusion indisputably arises that the jury which rendered the judgment were moved by passion, prejudice, or a total misconception of the rights of the parties, must be conceded to be entitled to great force. But the conclusion does not arise as a matter of law, but out of and depending on the facts; hence we cannot say it was error to allow the remittitur and affirm the judgment as reduced thereby.

We think, however, the plaintiff in error has lawful right to complain of an erroneous ruling of the court as to the admissibility of evidence. It was sought to maintain the action against the plaintiff in error as the author of the alleged libelous publication which appeared in the Chicago Times-Herald. He was in no wise connected with the management, control, or publication of the newspaper, and had no interest therein. The action was against him on the alleged ground that he was the author of a statement in the form of a letter, which appeared as a part of the publication, and that he had given, or permitted one Varian, a reporter for the newspaper, to take, the letter under such circumstances as that he should be held to have procured it to be published. The cause was tried before the court and a jury.

The defendant in error (plaintiff below) was produced as a witness in his own behalf, and, among other things, testified that he, together with one William B. Kent, had an interview with the plaintiff in error, during which he called plaintiff in error's attention to the publication in the newspaper, and asked him what he knew of this article himself, and he said that it was from information given him; that he asked for his information, and he declined to give it there; that he stated that he would give it to plaintiff in person, which he did afterwards; that the greater part of the discussion was between Kent and Prussing; that Kent asked Prussing if he knew things stated of his own knowledge, and Prussing said he didn't know it himself; that he was asked, "Who is your informant?" or "Where did you get your information?" and said, "This report—this letter—is exactly what I was informed;" that the letter that appeared in the article of March 12th in the Times-Herald was the article discussed, besides reportorial remarks or statements in the paper—the letter being

in small type; that something was said about how the communication came in the Times-Herald, and Prussing stated the letter that appeared was the one given to the reporter. Counsel for the defendant in error then produced a copy of the newspaper which contained the alleged libelous publication, and asked the witness if that was the statement about which they were talking. The plaintiff in error then objected, and a colloquy occurred between the court and counsel for the respective parties, which, together with the objections of counsel, rulings of the court in the nature of remarks, and the notation of exceptions, occupies substantially four printed pages of the abstract.

We think the objections preferred by counsel for the plaintiff in error called upon the court to rule whether the printed publication was admissible in evidence without the production of the writing of which the plaintiff in error was the author, and which it was asserted had been reproduced in the printed article, and which, so reproduced, constituted the alleged libel. Counsel for the defendant in error insist that no definite and specific objection of that nature was made. This contention might be disposed of by incorporating at length in this opinion that which appears on the four printed pages of the abstract relative to the occurrences in court and the remarks of court and counsel relative to the matter; but it may also be sufficiently answered by saying that it appears from the abstract that counsel for the plaintiff in error made his objection so sufficiently clear and specific that counsel for the defendant in error, in order to secure from the court a ruling which would admit the printed article to be received in evidence, demanded of counsel for the plaintiff in error that counsel should produce the original manuscript in pursuance of notice previously served by defendant in error on plaintiff in error to bring into court the original writing. Counsel for the defendant in error read to the court the notice which had been served calling for the production of the original writing in court. In response to this, counsel for the plaintiff in error stated in open court that the document was not in their possession, or in the possession of their client, and had never been in their possession, and had not been in the possession of their client since it was taken from his office by a Mr. Varian, a reporter for the Times-Herald. The court then remarked, "Well, that entitles you to introduce secondary evidence." But after further remarks by counsel, and further reflection by the court, it is evident that the court was in doubt as to the admissibility of the newspaper publication, and counsel for the defendant in error proposed that he should be permitted to read the printed article in evidence, and would "undertake to connect it with the defendant; so, if we fail, of course your honor will exclude it." The court consented to allow it to be read with that under

standing, but counsel for plaintiff in error objected, and excepted to this ruling. The printed article was then received in evidence and read to the jury.

In further confirmation of the view that the objections preferred by counsel for the plaintiff in error specifically brought to the attention of the court and counsel the insistence that the writing was the primary evidence, and that secondary proof of its contents was not admissible, in the absence of such writing, except on proof of its destruction, or of due and diligent but unsuccessful search for it, and that the printed article was received in evidence conditionally on the promise of counsel for the defendant in error that the necessary proof to render the printed article admissible would be supplied, we find that the defendant in error produced as a witness one Herman L. Reiwitich, city editor of the Chicago Times-Herald, for the purpose of laying the foundation for the introduction of secondary evidence of the contents of the manuscript, which was in the handwriting of the plaintiff in error, by showing that the original had been lost, or that it was not in the power of the defendant in error to produce the same. The testimony of this witness was received by the court as sufficient to justify the admission of such secondary proof. In this the court was in error. This witness, after stating that he had charge of the department of the Times-Herald office in which the printed article in question was prepared, testified further, to quote from the abstract, as follows: "I saw something similar to it in the afternoon preceding the day of the publication. One of the reporters brought it to me. His name was Varian. I do not know where Varian is now. It is about one and one-half years since he has been connected with Chicago Herald. I don't recall whether letter was in manuscript or typewritten. Q. Is that Exhibit 1 that you hold in your hand a copy of a communication that Mr. Varian brought you, or not? (Objection by defendant. Sustained.) Q. Of what is that a copy, if you know? (Objection by defendant. Overruled, and exception.) A. To the best of my recollection, it is a reproduction of that letter brought in by Mr. Varian. I don't recall whether any name was appended to that letter. Q. What was done with the communication that you have there by you? (Objection by defendant. Overruled, and exception.) A. It was printed as brought in. (Objection to answer by defendant and motion to strike out. Overruled, and exception.) The Court: Brought in by whom? A. Brought in by the reporter. Judge Collins: Have you made search for that paper writing? (Objection by defendant as leading. Overruled, and exception.) A. No, sir. Q. Have you ordered a search made? A. No, sir; it would be absolutely impossible to find it now. (Answer objected to by defendant as not responsive.) We destroy manuscripts

of that kind within a few days after they are used, unless there is some particular occasion for saving it. (Motion to strike out by defendant. Denied, and exception.) This was saved for, I think, some little time. Can I state the circumstances under which it was saved? A. Yes. A. The letter was of a peculiar character, of course, and I thought perhaps it might be questioned. (Objection by defendant, and ordered stricken out.) And I told the reporter to keep that letter. (Answer objected to by defendant.) The Court: What did you do with it? Have you got it now? A. No, sir. Judge Collins: It has been destroyed, has it? A. So far as I know, it is destroyed. Mr. Saunders: You don't know whether it is destroyed or not, do you? A. No, sir. The original letter was kept by the reporter. There is no particular place in the Herald office where such matters are kept. Q. If this has been preserved by the Herald Company, where would you go to find it? (Objection by defendant. Overruled, and exception.) A. It would be in my possession, most likely. (Answer objected to by defendant, with motion to strike out.) Q. This article is not now in your possession? A. No, sir. Q. I will ask you if, in making up the paper, would that article be preserved as a whole in the composing room, if you know? (Objection by defendant as leading.) The Court: Are you going to deny this line of testimony? Mr. Saunders: I am waiting for them to prove their case; that is all. Judge Collins: I don't care anything particular about that—to show that they cut it up in strips, that is all." This evidence was insufficient to justify the admission of secondary evidence as to the contents of the communication which was written by the plaintiff in error. The witness testified that search had not been made for the writing; that, while it was the custom to destroy manuscripts of that kind, there was an exception to that custom when occasion required, and that under this exception the manuscript in question was saved, and not destroyed; that it was given to Varian, the reporter, to be kept by him; that, if it had been preserved by the Herald Company, it would most likely be in his (witness') possession; but that it was kept by said Varian. No effort to procure the manuscript from Varian was proven. It was shown that Varian was not in the employ of the Times-Herald, but no attempt was made to show but that he continued to reside in the city, or that he could not be found, or that any effort had been made to find him, or to get the paper from him. The rule is, in order to let in secondary evidence of the contents of a written instrument, the person in whose possession it was last traced must be produced, unless shown to be impossible, in which case search among his papers must be proved, if that can be done. In all events, search must be made for the paper with the utmost good faith, and be as thorough and vigilant as if the rule were

that all benefit of the paper would be lost unless it be found. *Mariner v. Saunders*, 5 Gilman, 113; *Sturges v. Hart*, 45 Ill. 103; *Chicago & Northwestern Railway Co. v. Ingersoll*, 65 Ill. 399; *Williams v. Case*, 79 Ill. 356; 4 Ill. Cyc. Dig. pp. 245-247.

Counsel for the defendant in error, however, insist that the judgment should not be reversed because of the reception in evidence of the printed article, for the reason that previous to its reception in evidence declarations of the plaintiff in error had been proven, in substance, that the letter which appeared in the publication was the one which the reporter had received in the office of the plaintiff in error. The defendant in error, as a witness, had testified that the plaintiff in error admitted to him that the statement published in the newspaper was the same statement which the reporter, Varian, received in the office of the plaintiff in error. Counsel now insist—to quote from their brief—that “It is a well-settled principle of law that admissions of a party against himself as to the contents of a writing are primary evidence.” This contention cannot be regarded as an open question in this state. *Strader v. Snyder*, 67 Ill. 404, was an action on the case brought by Snyder against the appellants for an alleged libel published in a newspaper called the *Macomb Eagle*. The defendants were in no way connected with the newspaper establishment, and the prosecution was on the theory that they had prepared the manuscript, and delivered it to the editor for publication. The court permitted the plaintiff's counsel to read the printed article in evidence without first producing the original manuscript. We there held it was error to permit the printed publication to be read to the jury without first producing or accounting for the manuscript. In that case the evidence that the printed article and the writing were the same was stronger than in the case at bar. It was there said (page 408, 67 Ill.): “The evidence tends to show that Cracraft, one of the defendants, prepared, for the purpose of publication, a manuscript, which the other two defendants signed; and Cracraft put it into the hands of Dr. Fugate to copy, with directions to sign his (Cracraft's) name to it when copied. The evidence tends to show that this was done, and the manuscript, so copied, was sent to the editor of the paper, and that the other defendants admitted that they had signed it. Evidence was also given tending to show that in setting up the article there were changes made in the phraseology, but none altering the sense in respect to the alleged libelous words.” But we there said that this evidence was secondary, and that the manuscript was the higher and better evidence, and should have been produced. In *Clifford v. Drake*, 110 Ill. 135, the notes made by a reporter of a newspaper of the conversation had with the defendant, and the article prepared by the reporter, from the

notes, for publication, were held to be primary evidence; and the rule was there recognized that the printed article was secondary evidence, and was competent to be received in evidence only after proof had been made excusing the production of the primary evidence. We think this rule has the support of the greater weight of authority. In 18 *American and English Encyclopedia of Law* (2d Ed.) p. 1078, the rule deducible from the authorities is stated as follows: “In an action for libel the publication itself is, of course, the best evidence of the charges made in it, and the original document containing the defamatory matter must be produced, if possible; but where the original has been destroyed or lost beyond a reasonable hope of finding it, or is in the hands of an adverse party, who refuses to produce, secondary evidence of the contents is admissible.” In *Simpson v. Wiley*, 4 Port. (Ala.) 215, it was held that the admissions of a defendant, made in a letter, as to the publication of a libel, cannot be proved where the letter is not produced or its absence accounted for.

To hold the testimony of the plaintiff that the defendant said to or in the hearing of such plaintiff that a writing material to be produced in evidence contained certain statements to be sufficient to deprive the defendant of the right to be judged by the writing itself is to abrogate in its entirety the rule that the contents of a written instrument cannot be proved by parol in the absence of proof accounting for and excusing the nonproduction of the writing. Such testimony is proper as secondary proof of the contents of an instrument which has been shown to be lost, or its production in some legal manner excused. It is true, the defendant in error caused the plaintiff in error to be sworn as a witness, and, over the objection and exception of the plaintiff in error, asked him if he knew who composed that letter which appeared in the printed article, and the witness, being required by the court to answer, replied, “Yes, sir; I did.” On cross-examination he said he could not say whether he wrote the article as it appeared in the newspaper, but that he wrote a letter “similar to it,” which he allowed Mr. Varian, the reporter for the *Times-Herald*, to take from his office; that he did not authorize the publication of the article, and had never seen the original since the reporter took it. The court erred in overruling the objection to the question propounded to the plaintiff in error by counsel for the defendant in error. The primary evidence of the contents of the writing was the instrument itself, and the court erred in forcing the plaintiff in error to become a party to an effort to prove the contents of such writing by the preponderance of parol proof as to the statement which appeared in the writing.

The judgment of the Appellate Court and that of the circuit court are each reversed,

and the cause will be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain.

Reversed and remanded.

(207 Ill. 516)

YATES, Ins. Supt., v. PEOPLE ex rel. ANDERSON.

(Supreme Court of Illinois. Feb. 17, 1904.)

INSURANCE COMPANIES—LEGISLATIVE CONTROL—CONSTRUCTION OF STATUTES.—AUTHORITY TO DO BUSINESS—CERTIFICATE—MANDAMUS.

1. It is sufficient to decide a case on the pleadings after the court has sustained a demurrer to the answer, and it is not necessary to allow plaintiff to introduce the answer as his own evidence.

2. A party introducing as its own proof the pleadings of the adverse party is bound by the allegations therein.

3. Even if the charter of an insurance company, as originally enacted, constitutes a contract which cannot be altered by any subsequent legislation, the subsequent acceptance by the company of an amended act, providing that the amendatory act and the act to which it is an amendment shall not exempt the company from the operation "of such general laws as may be hereafter enacted on the subject of life insurance," gives the Legislature control over the company.

4. The provision of an act amending the charter of an insurance company, stipulating that the company shall not be deemed exempt "from the operation of such general laws as may be hereafter enacted on the subject of life insurance," does not merely subject the company to legislation which might be passed defining the duties and obligations of the company regarding its business and the control of its corporate affairs, but also subjects it to the subsequent Act of 1874 (2 Starr & C. Ann. St. 1896 [2d Ed.] p. 2285, c. 73, par. 270), providing that the charter of all insurance companies incorporated in the state which shall cease to do business for one year shall be held extinct.

5. Where, in proceedings to compel the Insurance Superintendent to issue to a company a certificate authorizing it to transact insurance business in the state, the company demurs to an answer alleging that the company is not entitled to a certificate, because its charter is extinct by reason of its failure to transact any business for a period for more than one year, the question whether the state has waived the forfeiture of the company does not arise.

6. Mandamus will not issue to compel the Superintendent of Insurance to issue a certificate to do business to a company, subject to the provisions of the statute declaring that companies which for a year shall do no business shall be extinct, where the company demanding the certificate had ceased to do business for 16 years prior to the commencement of the mandamus proceedings.

Error to Superior Court, Cook County; Axel Ohytraus, Judge.

Petition for mandamus by the people, on the relation of Frank O. Anderson, against Henry Yates, as Insurance Superintendent to compel defendant to issue a certificate authorizing an insurance company to transact business. From a judgment awarding the writ, defendant brings error. Reversed.

This is a petition for mandamus filed in the superior court of Cook county on January 17, 1903, by the people upon the rela-

tion of Frank O. Anderson, defendant in error, against Henry Yates, as Insurance Superintendent, plaintiff in error, praying that the writ of mandamus be directed to the Insurance Superintendent, requiring him to issue a certificate of authority to the Continental Insurance Company to transact the business of insurance according to the provisions and privileges granted in the several acts of the Legislature of Illinois herein-after mentioned, and also requiring him to issue certificates of authority to certain persons, 33 in number, therein named, appointed by said company as agents. Plaintiff in error, as Insurance Superintendent, entered his appearance on January 30, 1903, and filed his answer to the petition on February 5, 1903. On March 4, 1903, a general demurrer was filed by the relator to the answer of plaintiff in error. On the same day (March 4, 1903) plaintiff in error filed an amended answer, and afterwards, on March 17, 1903, was granted leave to withdraw his original answer, and, the same being done, the amended answer was ordered to stand as the answer to the petition. On the same day the defendant below (plaintiff in error) had leave to amend the amended answer instant, and, the same being done, it was ordered, on motion of defendant in error's attorney, that the demurrer of defendant in error to the amended answer stand as a demurrer to the amended answer as amended. The demurrer to the amended answer as amended was sustained. Thereupon, on the same day, to wit, March 17, 1903, the court ordered that a writ of mandamus issue to the plaintiff in error, requiring him to issue a certificate of authority to the Continental Insurance Company to transact the business of insurance in this state upon the payment of the usual fee therefor, and also to issue certificates of authority to persons appointed by said company as agents in this state, upon payment of the usual fees therefor, within three days, according to the prayer of the petition. To the judgment and order of the court, plaintiff in error made objection, which objection was overruled, and exception taken. Motions for new trial and in arrest of judgment were overruled. The present writ of error is sued out for the purpose of reviewing the judgment, so entered by the trial court, granting the writ of mandamus in accordance with the prayer of the petition.

The petition for mandamus alleges that the relator, Frank O. Anderson, is the president of, and a stockholder in, the Continental Insurance Company; that the Continental Insurance Company is an organized and existing fire insurance company by virtue of the following acts of the Legislature of Illinois, to wit: "An act to incorporate the Tornado Insurance Company," approved February 22, 1861 (Laws 1861, p. 429); "An act to amend an act entitled 'An act to incorporate the Tornado Insurance Company,'" approved February 12, 1863 (Laws 1863, p. 197); "An

act to amend the charter of the Fire and Tornado Insurance Company of Freeport, Illinois," approved February 16, 1865 (1 Laws 1865, p. 653); "An act to amend the charter of the Fire and Tornado Insurance Company," approved March 7, 1867 (2 Laws 1867, p. 229); and "An act to amend the charter of the Continental Insurance Company," approved March 30, 1869 (2 Laws 1869, p. 599). The first act creates the Tornado Insurance Company, with power to insure against tornadoes, storms, and winds. The second act, of 1863, changed the name of the corporation to the Fire & Tornado Insurance Company, and extended its powers to insure against fire and lightning, and provided that its capital stock should consist of premium notes, and cash premiums, and the 10 per cent. lien of the company by virtue of its charter, the act of 1861 having provided that each policy holder should be a member of the company, and that the company should have, to the extent of 10 per cent. of the amount insured, a lien upon the building insured, to secure the payment of the insured's shares of the company's losses and expenses. The third act of 1865 authorizes the company to receive, for the better security of policy holders, a guaranty capital of not more than \$500,000; such capital to consist in hypothecated stock, mortgages, or real estate, satisfactory to the board of directors or executive committee, and divided into \$100 shares; each share having a vote in the election of board of directors. The fourth act, of March 7, 1867, changed the name of the company from that of the Fire & Tornado Insurance Company to the Continental Insurance Company; and the third section of the act of 1867 provided as follows: "Nothing in this act, or in the act, of which this is an amendment, shall be construed so as to permit said company to do banking business, or exempt said company from the operation of such general laws as may hereafter be passed upon the subject of insurance companies." The fifth act of 1869, being "An act to amend the charter of the Continental Insurance Company," provided that the board of directors of said company should be authorized and empowered to remove the principal office of the said company to the city of Chicago, whenever the best interests of said company might require said removal to be made. The petition alleges that the principal office of the company was moved to the city of Chicago in October, 1902, 33 years after the passage of the act of March 30, 1869.

The petition further alleges that the company has maintained a full quota of officers and directors, and is engaged in the business of fire and marine insurance; that it has a guarantied capital of \$100,000, and a surplus of \$20,000; that on November 22, 1900, it filed the statutory statement of condition with the Insurance Superintendent; that, upon its request, it was examined by said superintendent, and a report filed, approving its

condition; that it is a practice of the Insurance Superintendent to issue certificates of authority to any company entitled thereto, and to issue certificates to each agent appointed by duly organized companies, and to receive, as compensation therefor, 50 cents each, and that it is the duty of each superintendent to issue such certificates to such agents; that the company has appointed agents, and applied to the Insurance Superintendent for such certificates for them, and paid 50 cents in fees for each certificate; and that the superintendent has refused to issue certificates to such agents, and also to issue a certificate of authority to the company.

The amended answer stated that Anderson assumed to be the president and a stockholder of the company; that the company was at one time organized under said acts of the Legislature, and was at one time legally in the insurance business, but that it is now engaged in such business without warrant of law, in this: that its charter is extinct. The answer denies that the company filed with the superintendent a statutory statement of its condition, and denies that examiners appointed by the superintendent passed on and accepted its condition; that the company tendered to the superintendent on or about November 24, 1902, a pretended statement of its condition, which he refused to file for reasons hereinafter stated. The amended answer admits that it has been the practice of the superintendent to issue certificates to the companies and to the agents, and to receive the fees therefor, as alleged in the petition, and that it is the superintendent's duty to issue such certificates upon the payment of the fees, but only when the companies are legally authorized to do business in the state; and it alleges that the said pretended insurance company is not entitled to certificates because its charter is extinct; that it has attempted to appoint agents, but has no power to make such appointment. The amended answer denies that the company ever paid the superintendent any fees, but states that it has sent him checks, which he has not accepted. The amended answer admits that the superintendent has refused to issue agents' certificates.

The amended answer contains the following allegation, to wit: "That said company has for a period of more than one year, and has for a period of more than one year prior to the beginning of this suit, ceased to transact the business for which it was organized; and further says that the charter of said company should be deemed and held extinct in all respects, as if said charter had expired by its own limitations; and further says that said charter of said company, prior to the beginning of this suit, was, and now is, extinct, in all respects, as if said charter had expired by its own limitations; and further says that this court should by decree

fix the time within which said company should close its concerns; that, for the reasons aforesaid, the said company has usurped, intruded into, and unlawfully exercised, and is usurping, intruding into, and unlawfully exercising, a franchise in this state improperly and without warrant of law."

The amendment to the amended answer sets up that the Continental Insurance Company, above named, on or about 1887, ceased to transact any business whatever for which it was organized, and remained out of business for 16 years thereafter, and did no business after it ceased business, except as set forth in the amended answer; that said company then and there abandoned its charter, and ceased for 16 years prior to the beginning of this suit to exercise any of the corporate powers granted to it by its charter, and thereby omitted necessary acts, and that such omission amounted to a surrender of its privileges and rights as a corporation; that said corporation now exercises powers not conferred upon it by law, and has never since the organization of the Insurance Department of this state (in 1893) transacted any business within the state with the approval of the department.

F. H. Rowe, for plaintiff in error. J. H. Westover, for defendant in error.

MAGRUDER, J. (after stating the facts). The main question presented by the record in this case is whether or not, at the time of the filing of the petition for mandamus herein, and prior thereto, the charter of the Continental Insurance Company had become extinct. The plaintiff in error claims that he, as Insurance Superintendent, was under no obligation to issue the certificates of authority applied for, because, under section 3 of the act of 1874 entitled "An act in regard to the dissolution of insurance companies," in force July 1, 1874 (2 Starr & C. Ann. St. 1896 [2d Ed.] p. 2285, c. 73, par. 270), the charter of the Continental Insurance Company was as extinct as though it had expired by its own limitation. Section 3 of said act of 1874 is as follows: "The charters of all insurance companies incorporated in this state, which, either from neglect or by vote of their members or officers, or in obedience to the decree of any court have ceased, or shall hereafter cease, for the period of one year, to transact the business for which they were organized, shall be deemed and held extinct in all respects, as if they had expired by their own limitation; and the circuit court shall have authority, upon application, by the petition of the Auditor of State, or of any person interested, to fix, by decree, the time within which such companies shall close their concerns: provided, that this section shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors." Id.

The amended answer of plaintiff in error to

the petition for mandamus alleged that the Continental Insurance Company had for a period of more than one year, and for a period of more than one year prior to the beginning of the mandamus suit, ceased transacting the business for which it was organized; and the amendment to the amended answer alleged that said insurance company, on or about 1887, ceased to transact any business whatever, for which it was organized, and remained out of business for 16 years thereafter, and abandoned its charter, and ceased, for the period of 16 years prior to the beginning of the mandamus suit, to exercise any of the corporate powers granted to it by its charter. Defendant in error (the petitioner below) demurred to the amended answer, and to the amended answer as amended, and thereby admitted the truth of the allegations, thus made in the answer. In effect, the plaintiff in error (defendant below) elected to stand by his amended answer, after having duly objected and excepted to the ruling of the court sustaining the demurrer thereto. After so sustaining the demurrer to the answer, the judgment or order allowing the writ of mandamus in accordance with the prayer of the petition necessarily followed. The court seems to have called the case for hearing, after sustaining the demurrer to the amended answer, as amended, and to have permitted the petitioner below to put in evidence the amended answer of the defendant below, and the amendment thereto. This was unnecessary. It was sufficient to decide the case upon the pleadings. The same result, however, followed, as the consequence of permitting the amended answer and the amendment thereto to be introduced in evidence, as would have necessarily followed if the cause had been heard merely upon the pleadings after the demurrer to the answer was sustained. The petitioner below, having introduced in evidence, as its own proof, the amended answer and the amendment thereto, is bound by the statements therein that the company had, for a period of more than one year prior to the beginning of the suit, ceased to transact the business for which it was organized, and had remained out of business for 16 years after 1887. *Fish v. McGann*, 205 Ill. 179, 68 N. E. 761.

Did the court below decide correctly in sustaining the demurrer to the amended answer as amended? Defendant in error insists that section 3 of the act of July 1, 1874, as above quoted, has no application here, upon the alleged ground that it impairs the obligation of the contract between the state and the Continental Insurance Company, as embodied in the charter of the latter company, and that therefore said section 3, as applied to the company, is unconstitutional. In other words, the doctrine is invoked that the Legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter of a corporation, against the consent and without the default of the corporation, judicially ascertained

and declared. *Bruffett v. Great Western Railroad Co.*, 25 Ill. 310.

It is not necessary here to discuss the question, whether the act of 1874 applies to special charters, like that of the Continental Insurance Company, where legislative control is not reserved in such charter. This is so for the reason, as will hereafter be seen, that the special charter of the Continental Insurance Company did contain such reservation of legislative control.

In *Ward v. Farwell*, 97 Ill. 593, the constitutionality of the insurance act of July 1, 1874, was under consideration by this court, and, in its main features, the act was there held to be constitutional. Subsequently, in *Chicago Life Ins. Co. v. Auditor*, 101 Ill. 82, we said (page 87): "The point is made that the statute under which this proceeding is had is, as applying to this company, unconstitutional. This question of constitutionality is fully settled by the recent decision of this court in *Ward v. Farwell*, 97 Ill. 593, where it was decided that this act of 1874 was constitutional, and that it was so as applied to the Republic Life Insurance Company, incorporated under a special charter granted before the passage of the act of 1874, to wit, March 22, 1869, in whose charter no specific reservation of legislative control was contained. By section 5 of an act amending the charter of the present company, approved February 21, 1867 (2 Laws 1867, p. 153), it is provided as follows: 'This act and the act to which this is an amendment shall not be deemed to exempt said company from the operation of such general laws as may be hereafter enacted by the General Assembly on the subject of life insurance.' Afterward, on March 29, 1867, said amendment to the charter, of which the foregoing was a part, was formally adopted by the company. This strengthens the application of the decision in *Ward v. Farwell* to the present case."

Under the decision in the case of *Ward v. Farwell*, supra, as interpreted by the subsequent case of *Chicago Life Ins. Co. v. Auditor*, supra, it might well be contended that the act of 1874 is constitutional, as applied to the Continental Insurance Company, incorporated under a special charter granted before the passage of the act of 1874, even though no specific reservation of legislative control had been contained in that charter. But it is not necessary here to so hold.

By the act of March 7, 1867, entitled "An act to amend the charter of the Fire and Tornado Insurance Company," the name of the latter company was changed to the "Continental Insurance Company," and section 3 of said act of 1867 provided as follows: "Nothing in this act, or in the act of which this is an amendment, shall be construed so as to * * * exempt said company from the operation of such general laws, as may hereafter be passed upon the subject of insurance companies." By adopting the change of name provided for in the act of 1867, the

insurance company adopted the act, and made it a part of its original charter. Indeed, this is not denied by counsel for defendant in error. In the brief of defendant in error it is said: "For the purposes of this argument it may be admitted that the amendatory act of March 7, 1867, was accepted by the company and its stockholders, and thereby constituted a valid reserve power in the Legislature to subject the company to certain legislative control." Even, therefore, if it were held that the charter of this Continental Insurance Company was a contract which could not be altered or changed by any subsequent Legislature without the consent of the company, yet it must be regarded as a fact that here the company has given such consent. It consented by section 3 of the act of 1867, which was an amendment of its charter, that nothing in the act of 1867, or in the act of which the act of 1867 was an amendment, should be construed to exempt the company from the operation of such general laws as might thereafter be passed upon the subject of insurance companies. Consequently the charter of this company stands on the same footing as though full legislative control had been reserved in the original act. All general laws on the subject of insurance companies are applicable to the Continental Insurance Company. It follows that the act of 1874, providing that the charters of all insurance companies which have ceased for the period of one year to transact the business for which they were organized shall be deemed and held extinct in all respects as if they had expired by their own limitation, is fully applicable to the Continental Insurance Company. The latter company appears upon this record as having ceased for the period of one year to transact the business for which it was organized, and therefore, under the act of 1874, which was a general law passed after the act of March 7, 1867, its charter must be deemed and held extinct in all respects as if it had expired by its own limitation.

It is said by counsel for defendant in error that the object of section 3 of the amendatory act of March 7, 1867, reserving to the Legislature the power of control, was merely to subject the company to legislative control, so far as subsequent legislation might be passed, defining the duties and obligations of the company regarding its business, and the control of its corporate affairs. We think, however, that the language of section 3 is broad enough to indicate something more than legislative control over the mere business of the corporation. By the terms of section 3 of the act of 1867, the company is not to be exempt from the operation of such general laws as may thereafter be passed upon the subject of insurance companies. Surely the provision in section 3 of the act of 1874 is a general law upon the subject of insurance companies. It provides that the charter of any company which from neglect shall cease

for the period of one year to transact the business for which it was organized shall be deemed and held extinct, in all respects, as if it had expired by its own limitation, and, by accepting the act of March 7, 1867, the Continental Insurance Company consented to be subject to the provisions of this general law. As upon the present record, as it stands, it is admitted to have ceased to transact business for the period of one year, it comes within the terms of section 3 of the act of 1874.

Defendant in error claims that at the time when plaintiff in error refused a certificate of authority to the Continental Insurance Company, and licenses to its agents, on the ground that the charter of the company was extinct under the act of 1874, the state had waived any right to declare such a forfeiture, if it ever existed. In view of the allegations, contained in the answer, and of the admission of their truth by the filing of a demurrer, it cannot be said that the Continental Insurance Company was in the exercise of the privileges and in the performance of the functions claimed to have been exercised and performed by it. Whether or not the nonuser of corporate franchises for a fixed period creates a cause of forfeiture of the charter, so that no advantage can be taken of such nonuser by any one except the state in a suit brought for that purpose, is a question which does not arise here, because, by the terms of section 3 of the act of March 7, 1867, the Continental Insurance Company consented that its charter should become extinct if it ceased for the period of one year to transact the business for which it was organized.

It is well settled that a writ of mandamus will not be issued unless the petitioner shows a clear legal right to the writ, nor will such writ be issued unless the party applying for it shall show a clear obligation on the part of the person or body sought to be coerced, to do the thing whose performance is asked for by the issuance of the writ. *People v. Sellars*, 179 Ill. 170, 53 N. E. 545; *People v. Town of Mt. Morris*, 145 Ill. 427, 84 N. E. 144; *People v. Johnson*, 100 Ill. 537, 39 Am. Rep. 63; *Springfield & Illinois Southeastern Railway Co. v. County Clerk*, 74 Ill. 27. Moreover, "the party who seeks to compel the performance of an act must set forth every material fact necessary to show that it is the plain duty of such party to act in the premises, before the courts will interfere." *People v. Sellars*, supra. "In doubtful cases it [the writ of mandamus] should not be granted." *Springfield & Illinois Southeastern Railway Co. v. County Clerk*, supra. Certainly, in view of what is said, it is at least doubtful whether or not the petitioner herein has a clear right to the writ, and whether or not the plaintiff in error is under a clear and undoubted obligation to do the thing prayed for in the petition.

For the reasons above stated, we are of

the opinion that the court below erred in sustaining the demurrer to the amended answer as amended. Accordingly the judgment of the court below is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(207 Ill. 512)

YATES, Ins. Supt., v. CONTINENTAL INS. CO.

(Supreme Court of Illinois. Feb. 17, 1904.)

INSURANCE COMMISSIONER—POWERS AND DUTIES—INJUNCTION—CROSS-BILL—PRACTICE—EXCEPTIONS.

1. Exceptions to an amended answer on the ground that defendant does not set up any matter constituting a defense are in the nature of a special demurrer.

2. Where exceptions to an answer are allowed, and the remainder of the answer presents no material issue, and the defendant makes no further answer, it is proper to decree that the bill be taken as confessed.

3. Laws 1893, p. 108, § 3, provides that the Insurance Superintendent shall have all the powers and may perform all the duties in regard to the business of insurance which were then attached to the offices of Auditor and Attorney General, and that he shall exercise the same control over insurance companies, and may institute and prosecute in his name all suits theretofore required to be prosecuted by the Auditor or Attorney General. Act Feb. 17, 1874 (Rev. St. 1874, p. 612, c. 73), authorized the State Auditor to file a bill asking for an injunction to restrain an insurance company from prosecuting its business. *Held*, that in a suit by an insurance company to enjoin the Insurance Superintendent from denying that complainant was licensed by the Department of Insurance, or refusing to grant complainant the same privileges granted other companies, the defendant was entitled to file a cross-bill asking an injunction restraining complainant from further prosecuting its business, and for the appointment of a receiver.

Appeal from Superior Court, Cook County; Axel Chytraus, Judge.

Suit by the Continental Insurance Company against Henry Yates, as Insurance Superintendent. From a judgment for complainant, respondent appeals. Reversed.

This is a bill in chancery filed on January 23, 1903, in the superior court of Cook county by the Continental Insurance Company against Henry Yates, as Insurance Superintendent of Illinois, which, as originally filed and as amended, prayed that said Yates should be enjoined from setting out by letter, or otherwise causing to be published, any statement derogatory to the interests of complainant, and denying that complainant is licensed by the Department of Insurance of Illinois, or by him, or by any means or manner saying or doing anything which may tend to induce the Insurance Department, or other citizens of this state, to believe that complainant is not fully authorized to transact the business of insurance in the state of Illinois, and from in any manner refusing to grant to complainant the same privileges as are by him and by the custom of his office

granted and accorded to other insurance companies organized under the laws of Illinois, and transacting business therein. The bill sets out the acts of the Legislature mentioned in the petition for mandamus in the case of *Yates v. People ex rel.*, 69 N. E. 775, and makes substantially the same allegations as are made in said petition for mandamus, except that in addition thereto the bill here alleges that the Insurance Superintendent had written certain letters, to parties making inquiries of him, stating that the Continental Insurance Company had no authority from the Insurance Department to transact business, and that no license or authority had been issued by the department to it to carry on the insurance business. The bill was answered by appellant, the Insurance Superintendent, admitting that the letters complained of were written, and making substantially the same allegations as were made in the answer to the petition for mandamus in the other case. In the case at bar the Insurance Superintendent, in his answer and amended answer, and amendment to the amended answer, to the bill, sets up that said insurance company has for a period of more than one year ceased to transact the business for which it was organized, and that its charter should be deemed and held extinct in all respects as if it had expired by its own limitation, and that the court should fix the time within which said corporation should close its concerns, and that on or about the year 1887 the company ceased to transact any business whatever for which it was organized, and remained out of business for 16 years thereafter, and, after it ceased to do business, did no business whatever under its charter, except as set out in the answer and amended answer, and then and there thereby abandoned its charter, and ceased for a period of 16 years prior to the beginning of this suit to exercise any of the corporate powers granted to it by its charter, etc. The Insurance Superintendent also filed a cross-bill, an amended cross-bill, and an amendment to the cross-bill, setting up the same allegations as to the cessation of business and abandonment of the charter as are specified in the answer, and praying in said cross-bill, as originally filed and as amended, that the defendant below, the Continental Insurance Company, should be enjoined from further proceeding with its business, and asking for a receiver. The Continental Insurance Company filed a demurrer to the answer and the cross-bill of the superintendent, demurring to so much thereof as stated that said corporation had for a period of more than one year ceased to transact the business for which it was organized, and that its charter should be deemed as extinct, etc. The company also filed an answer to so much of the cross-bill as was not demurred to. Subsequently the company filed a general demurrer to the cross-bill as amended. On March 4, 1903, the Continental Insurance Company filed excep-

tions to the answer of appellant to the bill of complaint, and one of the exceptions was that "defendant does not set up any matter constituting a defense to the matters alleged in the bill." On March 17, 1903, it was ordered, on motion of appellee's solicitor, that the exceptions filed by appellee to appellant's amended answer to the original bill, and to such amended answer as amended, be sustained, to which there was objection and exception by appellant; and at the same time it was ordered that the demurrer to the amended cross-bill, as amended, be sustained. Thereupon, upon final hearing, the cross-bill was dismissed for want of equity, to which there were objection and exception by the cross-complainant; and it was further ordered, adjudged, and decreed that the original bill, as amended, be taken for confessed as against appellant, and that he, as Insurance Superintendent, be enjoined in accordance with the prayer of the bill and amended bill. The present appeal is prosecuted from the decree so rendered by the court below.

Fred H. Rowe, for appellant. J. H. Westover, for appellee.

MAGRUDER, J. (after stating the facts). The questions in this case are substantially the same as the questions already discussed and disposed of in the case of *Yates v. People ex rel.*, 69 N. E. 775. The exceptions filed to the amended answer, as amended in the present case, were in the nature of a special demurrer to the answer. *Story v. Livingstone*, 13 Pet. 359, 10 L. Ed. 200; *Stone v. Moore*, 28 Ill. 165. By sustaining the exceptions to the answer, the court held that the defense set up in the answer was insufficient. That defense was that the charter of appellee had become extinct for the reason stated in *Yates v. People ex rel.*, *supra*. In the brief filed in this case for appellee, it is said: "The only question which arises in this case is whether, under the act of the Legislature of the state of Illinois entitled 'An act in regard to the dissolution of insurance companies,' in force July 1, 1874 [Rev. St. 1874, p. 612, c. 73], the charter of the appellee is extinct." As this question is decided in the other case, it is not necessary to rediscuss it here. We have held that where exceptions to an answer are allowed, and the remainder of the answer presents no material issue, and the defendant makes no further answer, it is proper to decree that the petition or bill of the complainant be taken as confessed for want of an answer. *Work v. Hall*, 79 Ill. 193; *Craig v. People*, 47 Ill. 487; *Bauerle v. Long*, 165 Ill. 340, 46 N. E. 227. The trial court having allowed the exceptions to the answer as having been well taken, the decree pro confesso upon the original bill followed as a matter of course; the appellant having failed to file a further answer, and having stood by the answer, to which the exceptions were sustained. But, for the reasons stated

in the other case, we are of the opinion that the defense set up in the answer was a good one, and that the court erred in sustaining the exceptions to the answer, and in entering a decree in accordance with the prayer of the original bill.

We are also of the opinion that the court erred in dismissing the amended cross-bill, as amended, for want of equity. Section 3 of "An act to provide for the establishment of an Insurance Department and the appointment of an Insurance Superintendent," approved June 20, 1893, in force July 1, 1893 (Laws 1893, p. 108), provides as follows: "The Insurance Superintendent shall possess and have all the powers, and he may perform all the duties in regard to the business of insurance in this state, which are now attached by law to the office of Auditor of Public Accounts, and the Attorney General. And he shall exercise the same control over the insurance companies, their officers and agents in this state, * * * and may institute and prosecute in his name all suits and do all things heretofore required to be done by the laws of this state by the Auditor of Public Accounts, and the Attorney General." Under the act of February 17, 1874, entitled "An act in regard to the dissolution of insurance companies," in force July 1, 1874, the State Auditor had the right to file a bill asking for an injunction to restrain the company from further prosecuting its business; and therefore the present appellant, as Insurance Superintendent, had the same right which was by the last-named act vested in the State Auditor. We see no reason why the Insurance Superintendent could not file his cross-bill in the present suit, asking for an injunction to restrain the company from further prosecuting its business. A receiver also should have been appointed under the cross-bill, as provided in section 5 of said act of July 1, 1874.

Accordingly the decree of the court below sustaining the exceptions to the amended answer as amended, and granting the relief asked by the original bill, and dismissing the cross-bill for want of equity, is reversed, and the cause is remanded to the superior court of Cook county, with directions to proceed in accordance with the views herein expressed. Reversed and remanded.

(208 Ill. 73)

TRUSTEES OF SCHOOLS et al. v. BOARD OF SCHOOL INSPECTORS OF CITY OF PEORIA.

(Supreme Court of Illinois. Feb. 17, 1904.)

SUPREME COURT—JURISDICTION—CASE INVOLVING REVENUE.

1. A bill to compel a township treasurer to turn over to the school inspectors of a city certain money collected by taxation, and claimed by the directors of school districts lying in part within the city limits, does not "involve the revenue" so as to give the Supreme Court jurisdiction of an appeal.

Appeal from Circuit Court, Peoria County; L. D. Puterbaugh, Judge.

Suit by the board of school inspectors of Peoria against the trustees of schools and others. From a judgment for plaintiff, defendants appeal. Appeal dismissed.

Arthur Keithley, for appellants. McCullough & McCullough, for appellee.

RICKS, J. On October 27, 1902, appellee filed its bill in equity in the circuit court of Peoria county to require Alfred A. Phelps, township treasurer of Richwoods township, in said county, to pay over something like \$2,000 which was received by said treasurer of the school taxes collected for the year 1901, levied in parts of Peoria township and Richwoods township.

The bill alleges that prior to the present constitution the city of Peoria was chartered by a special act of the Legislature, and that in 1869 (2 Laws 1869, p. 168), by like special act, the charter was amended by creating a board of school inspectors of the city of Peoria, which was declared to be a body corporate, with, among others, powers to erect, hire, and purchase school buildings suitable for schoolhouses, to furnish schoolhouses and furniture, to buy or lease grounds for school purposes, to maintain public schools in said city, and to determine the rate of taxation and levy taxes; that by the charter of said city the said board of school inspectors consists of the mayor and two members from each ward of said city; that, at the time of the organization and charter of the city by the special act and the amendments, the entire township in which said city was situated was included within the boundaries of said city, and the board of school inspectors exercised jurisdiction over all of it; that in 1887 the city of Peoria adopted the general city and village act, and organized under the general law; that in the north portion of said Peoria township a village was organized, under the general law, called North Peoria; that said village extended into and included the south three-fourths of sections 33 and 34, in Richwoods township; that in the year 1900 the village of North Peoria was annexed to the city of Peoria, and that the city of Peoria, through its board of school inspectors, claims jurisdiction in matters of school taxation over the territory of Peoria township and that portion of Richwoods township that was included in the village of North Peoria; that section 33 in Richwoods township constituted a school district, formerly known as No. 5, and now known as No. 115, and that section 34 in said township constituted a part of District No. 114, and that each of the latter districts, after the adoption of the general law by the city, included portions of North Peoria, and in each of said districts, and in the corporate limits of North Peoria, was a schoolhouse; that both the said board of school inspectors and the local boards of directors of the Districts

114 and 115 made school-tax levies for the year 1901, but that the county clerk, in extending the tax, recognized the certificates of the local boards of directors instead of the board of school inspectors of said city of Peoria; that the rates of levy by the local boards and by the city were the same, and that there was no difference in the tax; that the tax was collected and was in the hands of said Phelps, as treasurer, who refused to turn the same over to the appellee board of school inspectors of the city of Peoria, which alone claims to have jurisdiction over and control of the schools of the city of Peoria and its addition. The bill prays that the court may determine that the board of school inspectors of the city of Peoria has jurisdiction over the annexed territory, and the sole right to levy and collect taxes for school purposes in such territory, and that the said Phelps may be required to account for and pay over to said appellee the proportion of the tax belonging to it. Appellants demurred to the bill, and the demurrer was overruled, and, they electing to abide their demurrer, a decree was entered for appellee as prayed, and appellants prosecute an appeal to this court.

From the above statement it would seem that there is nothing in the bill or proceedings of the court below for this court to pass upon as a court of appeal or review. We presume that this appeal is brought to this court upon the theory that the revenue is involved, and if that were true this is the proper forum. As we view the matter, however, the revenue is not involved in this litigation. The taxes have all been paid, so far as we are advised by the bill, and there is no controversy between the taxpayers and any corporate body insisting upon its right and authority to levy and collect school taxes in the territory mentioned. The money is in the hands of the treasurer, and the controversy is whether he shall hold it and apply it under the direction of the local boards of directors, or whether he shall pay it over to the city, to be expended according to the direction of appellee.

Reed v. Village of Chatsworth, 201 Ill. 480, 66 N. E. 217, is a case very similar in principle, and was a controversy, between a village and the highway commissioners of the township in which the village was located, with reference to the road and bridge tax, which had been collected and paid over to the county treasurer. The village was claiming a portion of the tax, and the township officers the whole of it. The treasurer filed an interpleader, and asked that the township and the village litigate and settle the controversy. In that case it was said (page 482): "Our view is that the question of revenue can only be at issue when some recognized authority of the state, or some of the municipalities authorized by law to assess and collect taxes, are attempting to proceed under the law, and questions arise between them

and those of whom the taxes are demanded." That case was followed by that of *People ex rel. v. Helt*, 203 Ill. 111, 67 N. E. 741, which was a mandamus between school districts, and was to compel the school treasurer to credit the funds in his hands to a certain district when he was insisting upon the right to credit them to another district.

We are of the opinion that appellants have misapprehended the powers of this court, and that their appeal should have been to the Appellate Court. The appeal will be dismissed.

Appeal dismissed.

(207 Ill. 337)

MURPHY v. PEOPLE ex rel. RAYMOND,
County Collector.

(Supreme Court of Illinois. Feb. 17, 1904.)

JUDGMENTS—AMENDMENTS—ORDERS—REVIEW
—ERROR.

1. Where an order was made sustaining all objections to an application for judgment for nonpayment of special assessments, and judgment refused, from which no appeal was taken, a subsequent order amending the record of the judgment in a manner which did not affect it, except to show that the judgment was not based on a finding in the objector's favor as to "all" the objections filed, was not a final judgment reviewable on error.

Error to Cook County Court, O. N. Carter, Judge.

Action by the people, on the relation of Samuel B. Raymond, county collector of Cook county, against James A. Murphy. Judgment for defendant. From an order granting a motion to amend the record of the judgment, defendant brings error. Dismissed.

W. J. Donlin (George A. Mason, of counsel), for plaintiff in error. W. P. Thornton (Fred H. Rowe, of counsel), for defendant in error.

CARTWRIGHT, J. The writ of error in this case was issued to the county court of Cook county to bring up the record of that court amending, on December 30, 1902, its record of a judgment entered on July 20, 1899, in favor of the plaintiff in error. The errors assigned are that the court erred in admitting improper and incompetent evidence upon the hearing of the motion of the defendant in error to amend the record, and in entering the order amending the same.

The record certified to this court shows the following proceedings: On June 16, 1899, the county collector of Cook county applied to the county court for judgment and order for sale against the lots of plaintiff in error, James A. Murphy, for the delinquent fifth installment of special assessment No. 26 levied by the village of Park Ridge, in said county. To the application Murphy entered his special appearance for the sole and only purpose of contesting the jurisdiction of the court, for the reasons set forth in 10 written objections then filed. The objec-

tions challenged the jurisdiction of the court on the ground that the return of the delinquent list was not made as required by law, that the publication of the delinquent list was not made according to statute, that the application was not made in the manner required by law, that the court confirming the assessment acquired no jurisdiction for want of sufficient publication made or notice given, and because the ordinance for the improvement was void, and that the land of Murphy had been arbitrarily subdivided. On July 20, 1899, the objections so made to the jurisdiction of the court coming on to be heard, the court entered the following order: "It is ordered by the court that all of said objections be and are hereby sustained, and that application for judgment is hereby refused." On December 30, 1902, the county collector filed his motion to amend said record, as was afterward done. Murphy resisted the motion, and upon the hearing the court received in evidence, against his objection, the minute book of the clerk written at the time the judgment was entered, as follows, "Thursday, July 20, 1899.—162 spcl. obj.; obj.s. sust. & j. refused," and also the testimony of the record writer that at some time afterward he wrote the record from those minutes. He testified that "spcl." meant special, "obj.s." objections, "sust." sustained, and "j." judgment, and that the whole thing appearing in the minute book meant, "Objections sustained, and judgment refused." The court sustained the motion, and entered an order amending the record nunc pro tunc as of July 20, 1899, so as to read as follows: "It is ordered by the court that objections be and the same are hereby sustained, and said application for judgment is hereby refused."

Appeals from judgments of the county court either giving or refusing judgment for taxes and special assessments, and writs of error to review such judgments, are allowed by section 192 of the revenue act (Hurd's Rev. St. 1899, p. 1426, c. 120). In the case now under review an issue was made as to the jurisdiction of the county court to entertain the application and render judgment against the lots of plaintiff in error, and that issue was decided in his favor, and final judgment was entered on July 20, 1899. The collector took no appeal from that judgment, and it stands in full force, not reversed, modified, or set aside. Of course, plaintiff in error does not now seek to reverse the judgment in his favor, but he asks us to reverse an order which did not in any manner affect such judgment, but which amended the record so that it no longer shows that the judgment was based on a finding in his favor as to all of the objections filed. If there had been an appeal or writ of error to review the judgment, that finding would not have affected the decision one way or the other. The jurisdiction of the court was challenged on several distinct grounds, and,

if either of them was sufficient to defeat the application and was properly sustained, the judgment would have been affirmed, regardless of the finding of the court sustaining all of the objections. Judgment against the lands of the plaintiff in error was refused, and there has been nothing done by way of amendment under which the lands could be sold, and even the conclusive effect of the judgment as an adjudication that the court was without jurisdiction has not been destroyed. An order made subsequent to a judgment may be final and appealable where it changes or sets aside a judgment or affects the substantial rights of the parties in its enforcement, but nothing of that kind has been done in this case. It does not even appear that in any pending or future proceeding the rights or interests of the plaintiff in error can be in any manner affected by the amendment.

We are of the opinion that the order of the county court is not such a final judgment as can be reviewed upon a writ of error, and the writ is therefore dismissed. Writ dismissed.

(207 Ill. 150)

CITY OF ALTON v. FOSTER.

(Supreme Court of Illinois. Feb. 17, 1904.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—INVALIDITY—RELEVY—REFUSAL—LIABILITY OF CITY—TRIAL BY COURT—PROPOSITIONS OF LAW—EXCEPTIONS—STATUTES—CONSTRUCTION—APPEAL—HARMLESS ERROR—REVIEW.

1. Hurd's Rev. St. 1899, c. 110, § 61, provides that exceptions taken to decisions of the court on trials without a jury shall be deemed to have been properly taken and allowed, and the party excepting may assign for error any decision so excepted to, whether such exception relates to receiving improper or rejecting proper testimony, or to the final judgment of the court on the law and evidence. Section 42 declares that, on the trial of both matters of fact and law by the court, either party may submit to the court written propositions to be held as law in the decision of the case, on which the court shall write "Refused" or "Held," to which either party may except; and section 90 provides that the Supreme Court shall re-examine cases as to questions of law only, and that no assignment of error shall be allowed which shall call in question an inferior court's determination of controverted questions of fact, except those enumerated in the preceding section, which relates to cases in which appeals may be taken directly to the Supreme Court. *Held*, that section 61 must be construed in connection with the other two sections, and hence, in a case other than those enumerated, tried to the court by consent, in which no propositions of law were requested, the Supreme Court could not review any questions outside of those arising during the progress of the trial on rulings relating to the pleadings, evidence, etc.

2. The practical effect of Hurd's Rev. St. 1899, c. 110, § 61, providing that exceptions taken to decisions of the court in cases tried to the court without a jury shall be deemed properly taken and allowed, and authorizing the excepting party to assign for error any decision so excepted to, whether relating to the reception or rejection of testimony, or to the final judgment of the court on the law and evidence, is to obviate the necessity of a motion for a new

trial in case proper exceptions are taken during the progress of the trial, whether such exceptions be to the exclusion or admission of testimony, or to the holdings of the court on propositions of law submitted by the parties.

3. A stipulation of facts made and used in the trial of a former action between the same parties, which had been finally determined, was inadmissible in a subsequent action.

4. Where a stipulation between the same parties in a former action, which had been determined, was erroneously admitted in a subsequent suit, but contained nothing not contained in a stipulation in the case at bar, and added nothing material to the statements made in plaintiff's declaration in the pending suit, its admission was harmless.

5. An exception to the judgment rendered in an action tried by the court without a jury is sufficient to preserve the question whether the declaration states a sufficient cause of action to sustain the judgment.

6. A city ordinance for a sewer construction provided that the contractor should have no lien on the city, in any event, above the amount provided to be raised for the improvement by general taxation; and the contract declared that the contractor should make no claim against the city, except for the city's share of the cost; and he agreed to take all risks of the invalidity of such special assessments, but the city agreed, in case any of the assessments were declared void, to levy a new assessment therefor. Certain of the assessments were declared void by the Supreme Court, which at the same time held that the ordinance under which they were levied was valid, so that new assessments might be validly levied thereunder. Held that, since the contractor could maintain mandamus to compel the city officers to levy such new assessments, their refusal to do so did not entitle him to sue the city in assumpsit therefor.

Appeal from Appellate Court, Fourth District.

Action by Robert F. Foster, revived after his death in the name of his executrix, Sophia M. Foster, against the city of Alton. From a judgment in favor of plaintiff, affirmed by the Appellate Court (106 Ill. App. 475), defendant appeals. Reversed.

This is a suit in assumpsit, brought to the March term, 1900, of the Madison county circuit court, by Robert F. Foster against the city of Alton. Foster has since died, and his executrix, Sophia M. Foster, prosecutes this suit. The action is for the recovery of a balance alleged to be due the plaintiff from the city for the construction of a certain sewer. Trial was had before the court without a jury, under section 61 of chapter 110 of Hurd's Revised Statutes of Illinois of 1899. The ordinance for the improvement was set out in the declaration, section 7 thereof being as follows: "Sec. 7. Said contract shall contain, among other things, a covenant in substance to the effect that the contractor or contractors shall have no lien upon the city in any event, over and above the amount hereinbefore provided to be raised for said improvement by general taxation, if any, except from the collection of the special assessment ordered to be levied, assessed and collected by the city council for said improvement." The contract between the plaintiff and the defendant was also set out in the declaration, and contained the following: "The said party of the first part

further agrees to make no claim against the city in any event, except for the city's share of the cost of the sewer, as above specified, and from the collection of the special assessments ordered to be collected for said improvements, and agrees to take all risks of invalidity of special assessments. The city shall in no event be liable by reason of the invalidity of said special assessments or of the proceedings therein, or for a failure to collect the same: provided, however, that in case said assessments, for any cause whatever, be declared invalid and void, the city hereby agrees to make a new assessment to pay for said improvements." The declaration further avers that, under the direct supervision of the city engineer and committee on sewage, Foster constructed, according to the ordinance and contract, a sewer along Second street, from a sewer in Piase street to the junction of Third street and Second street; that, by the order and under the direction of the city engineer and committee, he connected said sewer with the sewer in Piase street and with a sewer at the junction of Second and Third streets, which extended along Second street, and that the sewer so constructed was accepted by the city; that the city filed its petition in the county court against the property abutting on Second street from the east line of Piase street to the west line of Ridge street, asking that the cost of the sewer mentioned in said ordinance should be assessed in the manner prescribed by law, and such proceedings were thereupon had in said county court that commissioners were appointed by said county court to make such assessment, and said commissioners, having duly qualified, made and reported to said court such assessment, and afterwards, at the August term, 1892, of said county court, the owners of certain pieces of said property so assessed filed objections to the confirmation of said assessment, and said county court rendered judgment at its October term, 1892, sustaining said objections, and thereupon said city of Alton appealed from said judgment to the Supreme Court of the state of Illinois, and afterwards, on the 16th day of October, 1895, the Supreme Court affirmed said judgment of said county court, and held the assessment null and void; that on the 29th day of March, 1896, Foster instituted an action of assumpsit against the city to recover the balance of \$1,245.65 due him for the construction of said sewer, basing his action on the allegation in his declaration that the ordinance was void, and that no valid assessment could be made under it; that the city filed its plea to the declaration, in which it averred that since the assessment was held invalid it has stood ready and willing to make and levy a new assessment for the balance, and to do all things necessary and proper to collect from the property owners along the line of said improvement such sum or sums as may be required; that upon the trial of said cause the circuit court rendered judgment in favor of Foster

for \$1,245.65, the balance due him; that the city appealed to the Appellate Court, where the judgment was reversed; that Foster then appealed to the Supreme Court, where the judgment of the Appellate Court was affirmed, on the ground that, although the assessment was invalid, the ordinance was not void, and that the city might make a valid assessment, as in its plea it had declared its willingness and readiness to do. The declaration further avers that, after the decision of the Supreme Court holding that the city had the power to make a valid assessment to pay the balance due, Foster repeatedly and urgently petitioned and requested the city to provide a new and valid assessment, but that it has failed and refused to do so. The city pleaded nonassumpsit and the statute of limitations. No demurrer was interposed to the declaration, nor were any propositions to be held as law submitted by either party. Plaintiff obtained judgment in the circuit court, which judgment, on appeal to the Appellate Court, was affirmed, and defendant prosecutes this appeal. The errors assigned are: First, the circuit court erred in admitting improper evidence on the part of the plaintiff; second, the judgment is contrary to the law and the evidence; third, the circuit court erred in rendering judgment in favor of the plaintiff and against the defendant, when by the law the judgment should have been in favor of defendant, and appellant therefore prays the judgment of the circuit court be reversed.

Alex. W. Hope and B. J. O'Neill, for appellant. Levi Davis, for appellee.

RICKS, J. (after stating the facts). The bill of exceptions in this case contains the following recital: "It was agreed by the parties that a jury be waived, and the issue tried by the court, under section 61 of chapter 110 of the Revised Statutes of Illinois;" and, under this stipulation, appellant contends that all matters of law and fact are, by virtue of the provisions of said section 61 of the practice act, open for review by this court. Appellee does not controvert the position of appellant upon this question of practice, and it is therefore plain that counsel on each side of this case misapprehend the scope and application of said section so relied upon. Said section is as follows: "Exceptions taken to decisions of the court, upon the trial of causes in which the parties agree that both matters of law and fact may be tried by the court, and in appeal cases, tried by the court without the intervention of a jury, shall be deemed and held to have been properly taken and allowed, and the party excepting may assign for error, before the Supreme Court, any decision so excepted to, whether such exception relates to receiving improper, or rejecting proper testimony, or to the final judgment of the court upon the law and evidence." While the language of this section is broad, it must be construed

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with sections 42 and 90 of the practice act, as found in Hurd's Revised Statutes of 1899. Section 42 provides: "In all cases, in any court of record of this state, if both parties shall agree, both matters of law and fact may be tried by the court; and upon such trial either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write, 'Refused' or 'Held,' as he shall be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court." By section 90 it is provided: "The Supreme Court shall re-examine cases brought to it by appeal or writ of error as to questions of law only, and no assignment of error shall be allowed which shall call in question the determination of the inferior or appellate courts upon controverted questions of fact in any case, excepting those enumerated in the preceding section." The cases enumerated in the preceding section are criminal cases; cases involving a freehold, franchise, the validity of a statute or construction of the Constitution; and cases relating to the revenue—in which cases appeals lie directly to this court. In cases coming from the Appellate Court to this court, such as the case at bar, the finding of that court is conclusive upon this court upon all matters of fact, and by section 90 this court is precluded from considering any question other than questions of law; and it has been uniformly held by this court that outside of the questions arising during the progress of the trial upon the rulings of the court, upon the pleadings, the admissibility of evidence, and such matters, questions of law can only be preserved and presented to this court, when the trial is before the court without a jury, by written propositions, as provided for in section 42 of the practice act. As early as 1881, in the case of *Tibballs v. Libby*, 97 Ill. 552, this question was fully considered, without making special application to section 61, and it was there held that questions of law could only be preserved by the submission of written propositions, and such has been the holding through a long line of cases to the present time. *American Exchange Nat. Bank v. Chicago Nat. Bank*, 131 Ill. 547, 22 N. E. 523; *Commercial Nat. Bank v. Cauniff*, 151 Ill. 829, 37 N. E. 898; *Barber v. Hawley*, 116 Ill. 91, 4 N. E. 770; *Hardy v. Rapp*, 112 Ill. 359; *Farwell & Co. v. Shove*, 105 Ill. 61; *Swain v. First Nat. Bank*, 201 Ill. 416, 66 N. E. 220.

Appellant, however, very earnestly contends that this court has placed on this section 61 the construction now contended for, and cites *Jones v. Buffum*, 50 Ill. 277; *Sands v. Kagey*, 150 Ill. 109, 36 N. E. 956; *Bailey v. Smith*, 168 Ill. 84, 48 N. E. 75; and *Union Ins. Co. v. Crosby*, 172 Ill. 337, 50 N. E. 200. In *Jones v. Buffum*, supra, the question arose upon the contention of the appellee that the

bill of exceptions did not preserve the motion for a new trial, and that it was not shown that any exception was taken to the decision of the court overruling such motion; and, in passing upon the case, *Metcalfe v. Fouts*, 27 Ill. 110, was referred to by the court and quoted, as follows: "In *Metcalfe v. Fouts*, 27 Ill. 110, it was urged the appellant could not assign error on the judgment, because no reasons for a new trial were filed in the circuit court. This court said: 'Under the twenty-second section of the practice act, parties are authorized to assign error on the final judgment, upon both the law and the evidence, in cases of trial by the court without a jury; and, if error could not be assigned for overruling a motion for a new trial in such case, yet, as error may be assigned on the final judgment, there can be no force in the objection; the court, under that section, being authorized to consider both the law and the evidence, and determine whether error has intervened in rendering the judgment.' " Both of those cases were decided before the creation of the Appellate Courts, and, as this court at that time was authorized and required to consider appeals both in matters of law and evidence, there may be found in those opinions remarks that would lead counsel to infer that all that was said was in the construction of what was then section 22 of the practice act, and is almost identical with our present section 61. The substantial point decided on both of those cases was that where a case was tried, by consent, by the court, without a jury, both matters of law and fact being submitted to the court, no motion for a new trial was necessary, but if exceptions had been taken to the decision of the court, and exception to the judgment taken and noted, then all exceptions so taken should be deemed to have been properly taken and allowed, and the party excepting might assign for error any decision so excepted to. *Sands v. Kagey*, supra, was an action of ejectment upon an agreed state of facts, which being appealed to this court, the same contention was made as in the case of *Metcalfe v. Fouts* and *Jones v. Buffum*, supra, as stated in the opinion (page 114, 150 Ill., page 957, 36 N. E.): "The bill of exceptions does not show that the defendants excepted to the decision of the court overruling a motion for a new trial, and it is claimed that this court, in the absence of that fact from the bill of exceptions, will not review the decision of the circuit court." Section 61 of the practice act is then set out, and the court states that under this statute no motion for a new trial was required. It must be borne in mind that the *Sands* case, being an ejectment suit, was one that came directly to this court, and in which the court had authority to investigate both questions of law and fact, so far as they were presented by the record. *Bailey v. Smith*, supra, was also an action of ejectment which came directly to this court; and all that was decided in that case was

that because there were no exceptions to the finding and judgment of the court, upon which matters, only, were errors assigned, we could not consider the same. *Union Ins. Co. v. Crosby*, supra, was an action of assumpsit. It appeared from the record in that case that no exception was taken to the judgment, but there was a motion for a new trial, which was overruled, but exception not taken to the overruling of such motion. It was insisted by appellant in that case that making a motion for a new trial was equivalent to excepting to the judgment, and this court held that it was not, and that there was nothing before the court for consideration.

The only practical effect, as far as we are able to see, to be given to said section 61, is that by its provisions a motion for a new trial becomes unnecessary; that, if proper exceptions be taken during the progress of the trial, whether those exceptions be to the exclusion or admission of testimony, or to the holding of the court upon propositions of law submitted by the parties, if exception be taken to the entry of the final judgment all the questions are saved, and assignments of error may be made upon them, as though a motion for a new trial had been made in those cases tried before a jury. In the case at bar, proper exception was taken to the entry of judgment; but, under the views herein above expressed, the only question open for our consideration, so far as relates to the proceedings of this trial, is the alleged error in the admission of certain evidence offered by appellee.

It appears that upon the trial of this case a stipulation of facts that had been made and used in the trial of the former case between the same parties, but which had been finally determined, was admitted in evidence in the case at bar on the offer of appellee, and over the objections of appellant. This was improper, and, if the evidence was of such character that it could be said that the appellant was injured thereby, the case should be reversed. But upon looking to the agreement, it contains no more than the stipulation in the case at bar. It is practically agreed, by express stipulation, the declaration in this case truly states the case, and the matters that were offered and covered by the former stipulation added nothing material to the statements made in plaintiff's declaration in the present suit.

Objection is also made to the testimony of certain officers of appellant with reference to the completion and acceptance of the work. The extent of the authority of these officers and the recognition of their acts by the city were not wholly questions of law, but were mixed questions of law and fact; and we think the evidence was properly submitted to the court, that he might determine that, although the work may not have been done in its entirety and according to the original contract, whatever deviation there

was from the contract was not at the instance and request of appellant or by its express consent.

The only remaining question that we are permitted, under the views that we entertain of this record, to consider, is whether the declaration in this case states a sufficient cause of action to sustain the judgment. By excepting to the judgment, this question was preserved. 8 Ency. of Pl. & Pr. 197; Chicago & Alton Railroad Co. v. Clausen, 173 Ill. 100, 50 N. E. 680.

As has been seen, the declaration, by proper averments, sets out the ordinance for the improvement in full, the contract between the parties, and the former judgment of this court holding that the ordinance for the improvement in question was not void, but only defective, and that a supplemental or new assessment could be made upon the same. The ordinance contained the provision that the contract that should be made with the appellee should contain "a covenant in substance to the effect that the contractor or contractors shall have no lien upon the city in any event, over and above the amount hereinbefore provided to be raised for said improvement by general taxation, if any, except from the collection of the special assessment ordered to be levied, assessed and collected by the city council for said improvement." This provision of the ordinance was but the city's declaration of the requirement of the statute as declared by section 49, art. 9, c. 24, Starr & C. Ann. St. 1896, wherein it is provided: "All persons taking any contracts with the city or village, and who agree to be paid from special assessments, shall have no claim or lien upon the city or village in any event, except from the collections of the special assessments made for the work contracted for." And the contract between appellee's intestate and appellant contained the express stipulation that the contractor would "make no claim against the city in any event, except for the city's share of the cost of the sewer, as above specified, and from the collection of the special assessments ordered to be collected for said improvements, and agrees to take all risks of invalidity of special assessments. The city shall in no event be liable by reason of the invalidity of said special assessments or of the proceedings therein, or for a failure to collect the same." All these matters, except the statutory provision, appear from the declaration. It also appears from the declaration that recovery is not sought for any portion of the fund that was by the provisions of the ordinance to be paid by the city from general taxation, but that the money sought to be recovered is a deficit arising from the failure and inability to collect portions of the special assessment upon the property benefited, because such assessments were declared illegal and void by the county court upon objections there made, and the same objections were sustained by this court

upon appeal. City of Alton v. Middleton's Heirs, 158 Ill. 442, 41 N. E. 926.

The ground of recovery insisted upon is the neglect and refusal of the city council of the appellant city to levy and collect, or make some effort, at least, to do so, a new or supplemental special assessment upon the property benefited, to meet the deficit above mentioned. The question is, then, for the first time directly presented to this court, whether, under an ordinance and contract and the statute, all providing that the city shall not be liable to the contractor for the amount to be raised by special assessment, the city may nevertheless be held liable for such deficit, upon the ground that its officers and agents have neglected or refused to levy such special assessment. No reason is suggested why the city might not, by the ordinance, provide for the exemption claimed, or that the contractor has not made a valid and binding contract upon a sufficient consideration, or that there is any public policy or constitutional inhibition against the restriction of the right as found in the statute quoted; but, notwithstanding the plain language of the ordinance, the contract, and the statute that the city shall not be liable for such special assessment in any event, it is sought to read into the contract an exception to the terms and provisions of the ordinance, the statute, and the contract itself, not there contained, and to declare that there is an event that may arise, and has arisen, namely, the failure and refusal of the city council to proceed to levy the new assessment, by which the appellant city becomes liable. The inauguration of the system of local improvements by special assessments was doubtless designed to enable localities requiring them, and able to build and pay for the same, to have improvements not common or general to the city, and for which the city generally would not need to incur an obligation or direct liability. From such local improvements the citizens generally, and those remote from the improvement, receive little or no benefit, and usually the portion that the public pays for by general taxation is at the street intersections and the places exclusively the property of the public, and not bounding the property of any individual, and, as at present, the cost of the proceedings and collection of the assessment; and it would seem to be an injustice to the public or general taxpayers of the city if the municipality and the contractor could by some act, as between themselves, or by the failure of the one or the other to do some act required by the contract or the law, render the general taxpayers, or the general fund of the city, which is derived from the general taxpayers, liable upon a contract for which the city was not primarily liable, and which it was expressly agreed it should not be liable for in any event. It must be apparent that, if such rule be adopted, such municipalities may become the easy prey of negligent or corrupt

councils, and, under the guise and form of local improvements by special assessments, such improvements may be made in such localities as favoritism or other motive may direct, and the feigned or actual neglect or obstinacy of the official representatives of the municipality place upon the city the entire burden of the cost thereof.

When the former case involving the same matters in controversy here was before this court, we held that the ordinance was not void, and that a proper assessment could be levied under it (*Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76); and, with that declaration of this court of the sufficiency of the ordinance to support a further or supplemental assessment, there can be no question but that the particular fund which, by the terms of the contract of the parties, was to pay the claim now sought to be recovered, could have been availed of by appellee by the writ of mandamus, as was held in a case almost identical to the one at bar in all its features, viz., *People v. City of Pontiac*, 185 Ill. 437, 56 N. E. 1114; and we now hold that mandamus was appellee's proper remedy.

The case last above cited, in its history, is very similar to the case at bar, and is interesting. The Talbot Paving Company sued the city of Pontiac, in assumpsit, in the United States Circuit Court for the Northern District of Illinois. The ordinance and contract were almost identical in terms with those in the case at bar. The declaration stated as the ground of action against the city its failure to collect the special tax, and assigned as a reason therefor, in the first instance, the prosecution of appeals by the lot owners, and the holding of this court that said ordinance was invalid, and that it was impossible to collect said special tax from the property liable to pay the same—citing *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794; and it further alleged that after this decision the Talbot Paving Company presented its petition to the city council for the adoption of a supplemental ordinance for the assessment of a special tax upon the property contiguous to said improvement to pay the balance due, but the city council negligently and willfully refused and failed to make provision to that end, whereby the right of action was claimed. The Circuit Court rendered judgment for the paving company, and, on appeal to the Circuit Court of Appeals of the Seventh Circuit, the judgment of the circuit court was reversed upon the ground that the declaration stated no cause of action; and, in a very clear opinion, the court holds that the action of assumpsit will not lie, and that the proper remedy is by a mandamus. *City of Pontiac v. Talbot Paving Co.*, 94 Fed. 65, 36 C. C. A. 88, 48 L. R. A. 326. Following that decision, a mandamus case for the same purpose, as is stated above, was brought, and the writ ordered by this court.

Appellee cites and relies upon *Mahe* v.

City of Chicago, 38 Ill. 266; *City of Chicago v. People*, 48 Ill. 416; *City of Chicago v. People*, 56 Ill. 327; and *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76. These cases were all cited and distinguished in the case of *Village of Park Ridge v. Robinson*, 198 Ill. 571, 65 N. E. 104, 92 Am. St. Rep. 276, which was another case upon precisely the same contract as is in the case at bar, but was for the building of a sidewalk under the act of 1875. The work was done in accordance with the terms of the ordinance and contract, but in that case the ordinance for the work was held wholly void; and the *Mahe* Case, supra, was relied upon as authority for the proposition that in such case the action of assumpsit would lie against the village, and it would be required to pay the amount out of its general fund. There, as here, the contractor had agreed to make no claim against said village in any event, except from the collection of special taxes made or to be made for the said improvements, and to take all risks of the invalidity of said special taxes, or any of them, or of the proceedings therein, or for failure to collect the same; and this court held that under such contract, although the ordinance was void, the contractor could not recover against the city, and that the case of *Mahe v. City of Chicago*, supra, was not controlling. *City of Chicago v. People*, 48 Ill. 416, above mentioned, was an application for a writ of mandamus against the city of Chicago to compel payment for a local improvement out of the general fund of the city, which by the contract was to be paid for by special assessment, and was not an action of assumpsit. The circuit court granted the writ, but this court reversed the case on the ground that the contract provided that the contractor should be paid from the assessment then levied and to be thereafter levied, and that the evidence disclosed that the city was already proceeding to make the new assessment, and that the writ should be denied. *City of Chicago v. People*, 56 Ill. 327, was a proceeding in mandamus to compel payment to the relator for a certain local improvement. In that case there was a stipulation that, if the court should find the city was liable in any form of action, the judgment should go for the relator. The contract was that the relator should be paid by special assessments levied or to be levied, but there was no express provision that the city should not be liable in any event. A special assessment was made, which proved insufficient, and there was at that time no provision of law for making supplemental assessments; and the court in that case, following the case of *Mahe v. City of Chicago*, supra, held that, as the city had contracted to pay with an assessment it could never make, therefore it would be liable for the balance over the assessments collected for the improvement. The *Foster* Case, which was the former case about the matter now before the court, would

seem to be in support of the present view of the court, instead of the contention of appellee. It was not said there, as seems to be the view of counsel, that the city would be liable in this action of assumpsit if it failed or refused to make the assessment; but the contention of Foster, who was the appellant there, was that the ordinance was absolutely void, and, that being so, the city was liable under the rule announced in *Maher v. City of Chicago*, supra. and *City of Chicago v. People*, 56 Ill. 327. This court denied that contention, and held that the ordinance was not absolutely void, and as the Appellate Court, in its special findings of fact, found that the city, at the time the suit was brought, was proceeding and taking the initial steps to make an assessment, the judgment of the Appellate Court reversing the judgment of the circuit court in favor of Foster was affirmed by this court.

The views herein expressed find support in *People v. City of Syracuse*, 144 N. Y. 63, 38 N. E. 1006; *Fletcher v. City of Oshkosh*, 18 Wis. 248; *City of Greencastle v. Allen*, 43 Ind. 347; *Reock v. Mayor of Newark*, 33 N. J. Law, 129; *McEwan v. City of Spokane*, 16 Wash. 212, 47 Pac. 483; *Northwestern Lumber Co. v. City of Aberdeen*, 20 Wash. 102, 54 Pac. 935.

Under the views above expressed, the declaration in this case must be held so insufficient that it cannot support the judgment rendered for appellee. The judgments of the circuit and appellate courts are therefore reversed, and the cause remanded to the circuit court for further proceedings in conformity with the views herein expressed. Reversed and remanded.

(207 Ill. 296)

MAYER v. GERSBACHER et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

STORAGE OF WHEAT—ACTION FOR CONVERSION—INSTRUCTIONS—EVIDENCE—SUFFICIENCY—REVIEW.

1. Evidence considered, and held sufficient to show an agreement on the part of a miller to keep other wheat in store for a depositor, to take the place of that delivered.

2. Plaintiff delivered wheat to defendant's mill for storage until ready to sell, when defendant was to have the privilege of buying if he would pay as much as any other. Before all was sold, the mill and all wheat in it burned. Plaintiff claimed his wheat had been mixed with defendant's and ground, and that there was much less wheat burned than the balance due him. Defendant claimed that plaintiff agreed that the identical wheat should be ground on defendant's keeping enough on hand to cover the receipts, and that there was always enough for that purpose. The court instructed that, if there was an agreement in reference to the mixing or grinding, it made no difference whether it was made when the wheat was deposited or after that and prior to the fire; and it was objected that the instruction left out of consideration the fact that there might have been a conversion before the agreement was made. Held, that the inaccuracy did not injure plaintiff, the agreement being the main issue, and

there being evidence tending to show that the deposit was preserved intact until it was made.

3. There being evidence in an action for the conversion of wheat deposited in defendant's mill to sustain the conclusion that he was but a bailee without reward, an instruction that defendant was bound only to use ordinary care in keeping and caring for the wheat accurately stated the law, notwithstanding it did not limit the degree of care to an issue as to defendant's liability for its loss if destroyed by fire.

4. The court instructed that in determining the question as to whether or not defendant had in his mill a sufficient quantity of wheat of like grade and character as that deposited by plaintiff they should take into consideration all the facts and circumstances proven in the case. Held not to obscure the material issues which were presented by other instructions.

5. Where, in an action for conversion of wheat deposited in defendant's mill, there was no evidence that plaintiff desired or demanded the return of wheat prior to the time the mill was burned, plaintiff could not object to an instruction that, if defendant was to have the right to return the number of bushels deposited, of like grade, whenever plaintiff desired, and that when the mill burned he had therein such amount, of like grade, ready for delivery, and used ordinary care to prevent its destruction, plaintiff could not recover.

6. In an action for the conversion of wheat deposited in defendant's mill there was testimony that plaintiff said in regard thereto, "All I want is as good wheat as I put in there, if I do not sell it to you," and that his agent in charge of the last wheat delivered said in response to an objection that there was no place to store it, and that it would have to be mixed with other wheat and ground, "We don't care anything about the wheat; we never expect to move the wheat out of here, but if we do we only want wheat just as good as we put in." Held, that it was proper to base an instruction thereon assuming an agreement authorizing defendant to mix the wheat with his own, or grind it, and dispose of it, and keep in store an equal amount of the same grade to be delivered on demand.

7. An instruction in an action for the conversion of wheat deposited in defendant's mill "that it was the duty of one who receives grain in storage to use reasonable diligence to keep such grain in the condition in which it was received, and if he mixes such grain with his own grain or with that of another, or uses the same, without the consent of the depositor, such act amounts to a conversion," cannot be construed to mean that the bailee need only use reasonable diligence to prevent the grain being mixed with other grain, or from being converted to his own use.

8. In an action for conversion of wheat deposited in defendant's mill the court charged that, if it was agreed that defendant might mix the wheat with other wheat, or use it and keep on hand other wheat of like quality and amount, subject to plaintiff's order, they could not find for defendant unless they further believed from the evidence that he kept stored in his mill wheat of a like amount and quality to meet plaintiff's demands; and that if they believed from a preponderance of the evidence that defendant converted it to his own use, and did not keep in store, and have at the time the mill was burned, wheat in equal amount and quality subject to plaintiff's order, the verdict should be for plaintiff. Held, that this did not attempt to place the burden on either party as to the agreement, which was the subject of another instruction, expressly telling the jury that the burden was on defendant.

9. An instruction based on a theory of the case not supported by the evidence, and ignoring evidence qualifying the supposed facts, was properly refused.

10. The instruction of an abstract proposition of law having no application to the case was properly refused.

11. No error can be predicated on the refusal of an instruction contained in another instruction given.

12. In passing on the sufficiency of the evidence on an appeal from an affirmation of a judgment by the Appellate Court, its weight will not be considered, and, if the record shows evidence to support the judgment, verdict, and instructions, the judgment of the Appellate Court must be affirmed.

Appeal from Appellate Court, Fourth District.

Action by A. Mayer against J. W. Springer. Pending the same, defendant died, and the action was revived against his administrators, William Gersbacher and another. A judgment for defendants was affirmed by the Appellate Court (106 Ill. App. 511), and plaintiff appeals. Affirmed.

Jesse E. Bartley and Geo. B. Parsons, for appellant. Parish & Parish and C. S. Conger, for appellees.

RICKS, J. This is an appeal from a judgment of the Appellate Court for the Fourth District affirming a judgment of the circuit court of White county in favor of John W. Springer, appellees' intestate, in a suit brought by appellant to recover for certain wheat deposited in defendant's mill, and which, with the mill, had been destroyed by fire. The case has been twice tried in the said circuit court, and judgments entered in favor of defendant, and on appeal each time affirmed by the Appellate Court. The first appeal to the Appellate Court is reported in 95 Ill. App. 173. An appeal from the decision therein rendered was taken to the Supreme Court, and the decision there obtained is reported in 192 Ill. 270, 61 N. E. 348, to which reference is made for a more extended statement of the pleadings. On said appeal to the Supreme Court the judgments of the lower courts were reversed on the ground of an erroneous instruction.

The evidence shows that there was deposited in intestate's mill, in 1898, 3,247 bushels and 22 pounds of wheat belonging to appellant, and the following receipts were taken:

"Shawneetown, Aug. 18, 1898.

"Received from A. Mayer 2142 bushels and 25 pounds of No. 2 red wheat, to be held in storage for him (A. Mayer) in the Riverside mills. J. W. Springer & Co.,

"By J. M. White."

"Shawneetown, Sept. 24, 1898.

"Received from Mr. A. Mayer the following lots of wheat: 798⁴⁰/₁₀₀ bushels of wheat, testing 56 pounds; 164⁴⁰/₁₀₀ bushels of wheat, testing 55¹/₂ pounds; 151 bushels of wheat, testing 50¹/₂ pounds.

"J. W. Springer & Co."

It seems to be agreed that by the terms of the contract of storage appellant was to pay nothing for storing the wheat, and appellees' intestate was to have the option of

purchasing the wheat when appellant concluded to sell, provided said intestate would pay as much as any one else. In July, 1899, appellant made a further deposit of 498 bushels and 12 pounds, making in all 3,745 bushels and 44 pounds. Of this amount appellant sold to appellees' intestate in January, 1899, 1,000 bushels, and in July, 1899, 380 bushels, all of which was paid for, and is not in controversy here. There was left a balance of 2,365 bushels and 44 pounds, the subject of this litigation. For the deposit in 1899 no receipt was taken, and as to the terms on which it was received, M. W. Carter, assistant manager of defendant's mill, testified that when the wheat was brought in he told one Karcher, who had charge of it, that the mill was full, and there was no place to put it, but that, as the wheat was dry, they could mix it with other wheat, and use it in that way, but they had no place to store it unless they emptied out the sacks, and it was there agreed that they were to use and grind the wheat if they wanted to, Karcher stating: "We don't care anything about the wheat. We never expect to move the wheat out of here, but, if we do, we only want just as good as we put in." The testimony on the part of defendant was to the effect that about the 1st of December, 1898, the weevil got into the wheat, and when appellant was so informed it was agreed that defendant (appellees' intestate) should reclean and grind the wheat, making such disposition of it as he saw fit, and keep on hand for appellant an amount of like quantity and quality. On the part of appellees' intestate it is claimed that he in all respects carried out this agreement, and at all times up to the time the mill was burned kept on hand sufficient wheat of the same grade as appellant's, and subject to his order, to replace the wheat deposited. This alleged agreement, and the contention of the appellees' intestate as to his compliance therewith, were denied by appellant, and formed the main question in dispute upon the trial.

In addition to the plea of general issue filed to the declaration at the first trial, defendant, on the present trial, filed notice of his defense, in writing, as follows: "The plaintiff will take notice that on the trial of this cause the defendant will give in evidence and insist that previous to the time when the said mill and the wheat of said plaintiff was destroyed by fire, an agreement had been entered into by and between said plaintiff and said defendant by which said defendant was authorized to mix the said wheat of plaintiff with that of said defendant, and to grind up and dispose of the said wheat of said plaintiff as said defendant might desire, and to keep in store for said plaintiff an equal amount of wheat of the same grade as the wheat of plaintiff, subject to the plaintiff's order and demand; and that in pursuance of said agreement said defendant did grind up and dispose of the

wheat of said plaintiff, and in lieu and place thereof the said defendant did keep in store in his said mill an equal amount of wheat to that received by defendant from said plaintiff, and of the same grade, at all times subject to the demand of said plaintiff from and during and at all times after the said wheat of plaintiff was received by defendant in his said mill up to the time the said mill and its contents were destroyed by fire, and that such quantity of wheat was actually in said mill at the time the said mill was so destroyed by fire, and was burned up and destroyed by fire; that said defendant at all times used proper care for the safety of said wheat and the prevention of the fire which destroyed the said mill and wheat."

The errors assigned are the giving of instructions for defendant and the refusal and modification of instructions for plaintiff. The instructions for defendant are all objected to. They are eight in number, and cover several pages, and we deem it unnecessary to set them out in full, for, while minor inaccuracies may be imputed to them, they contained no such error as would necessitate a reversal of this case. Counsel for appellees insist that all of their instructions were framed with direct reference to the language of this court on the former appeal of this case, and based upon the evidence. The language of the court referred to is: "If there was an agreement by which defendant [Springer] was authorized to mix the wheat with his own grain or grind and dispose of it, and to keep in store for the plaintiff [Mayer] an equal amount of wheat of the same grade, the question would be whether he complied with his agreement, and kept in store the requisite amount of the same grade, and whether he used proper care for its safety and prevention of fire." Appellant's objections to the first of said instructions are that "there is no evidence to support the proposition that there was an agreement for the defendant to keep in store for appellant other wheat"; and "the instruction is misleading for the further reason that it does not fix the time of the agreement and limit the time of keeping other wheat in store for appellant to the time subsequent to the agreement."

J. M. Springer testified in behalf of appellees that in the summer of 1898 he was running the Riverside Mill, belonging to J. W. Springer & Co.; that he was overseer and manager; that he remembered about appellant putting wheat in the mill in 1898, and that about the 1st of December weevil got into this wheat; that he notified appellant of the weevil, and that he would have to do something, as the weevil would ruin the mill, and that he would have to reclean it, or do something with it. "He asked me if we could reclean the wheat in the mill, or ship it, or do something with it, and I told him I did not know, but we probably could reclean part of it. Mayer said: 'Go ahead and reclean the wheat and grind it, or do whatever

you want to with it. I have no room to clean it, and whatever you do is all right with me. Wheat is wheat, and all I want is as good wheat as I put in there, if I don't sell it.'" Witness further testified that on January 21st, after the weevil got into the wheat, he bought 1,000 bushels of this wheat from Mayer, and on July 22d bought 380 bushels more. He further testified that on the night of the fire there was enough wheat in the bins to answer all deposits, of as good grade as that deposited by Mayer, and some of it better, and that he bought wheat of other parties for grinding, as they did not want to grind their deposit wheat. "I was at the mill when the first wheat was put in there by Mayer in 1898. Up to the time the weevil got into it the wheat was kept distinct from the other wheat, and had not been mixed with other wheat." As to the wheat deposited by appellant in 1899, this witness stated that he directed Mr. Carter to make the contract.

John W. Springer, appellees' intestate, testified that his brother, Jim Springer, and one White, were in charge of the mill in 1898 and 1899, and in a conversation with appellant after the fire in regard to a settlement between them as to the lost wheat he asked appellant, "Didn't you give my brother, Jim, permission to re-store it or reclean the wheat or ship it?" and in reply "he said he had told Jim to do that; 'Take the wheat and reclean it, as I can't do that,' said he had been a good friend to him, and wanted him to help him along, is about his language, as well as I remember it now."

M. W. Carter testified in behalf of appellees: That in 1898 and 1899 he was employed at the Riverside Mill as assistant manager and bookkeeper. That he was there in 1899 when the Mayer wheat was brought in. That it was not received under any agreement when brought in, and after some conversation had about not receiving the wheat because the mill was full said: "This wheat is dry and all right, and we have got wheat that we can mix with it and grind it, and if you will let us do so we can use it that way. But we have got no place to store it at all unless we empty it out of the sacks," and the agreement between Mr. Karcher [the man in charge of the wheat] and I was that we were to use the wheat and grind it if we wanted to. He said: 'We don't care anything about the wheat. We never expect to move the wheat out of here, but, if we do, we only want wheat just as good as we put in.'" Witness further testified, in response to the inquiry of whether there was kept on hand at all times, while he was at the mill, sufficient wheat to meet the demands of depositors, "Yes, at all times, of the same grade and quality that Mayer had in the mill." This was objected to unless the witness knew the grade of the Mayer wheat of 1898. Witness then stated that he did test the wheat brought in 1899 himself, and that

brought in in 1898 was pointed out to him when he first went in the mill by Jim Springer. The latter part of this answer was also objected to, and objection sustained.

Under the above evidence we think appellant's objection to the instruction, for the reasons stated, cannot be sustained.

The second instruction was as follows: "The court instructs the jury that if you believe, from a preponderance of the evidence, that there was an agreement entered into between the plaintiff and defendant, or their authorized agents, in reference to the mixing or grinding up of plaintiff's wheat, then it makes no difference whether such agreement was made at the time the wheat was deposited in the mill or at any time after that and prior to the fire." Appellant's objection to this instruction is that it leaves out of consideration the fact that there might have been a conversion of the wheat before the making of the alleged agreement. The fact of such agreement was the main issue, and, notwithstanding plaintiff's denial, the jury must have given credence to the defendant's contention. There was evidence tending to show that, until the question about the weevil in appellant's wheat arose, the deposit was preserved intact; and when that question arose the evidence indicates, at least, that there was a new arrangement between the parties. At least we think there was evidence tending to support such a conclusion. It is true concerning this arrangement there was a direct conflict in the evidence, but the finding of the jury was favorable to appellees. The instruction is, in a sense, open to the criticism appellant suggests, yet we do not think he was injured by the inaccuracy referred to; for, unless the jury accepted defendant's whole version of the matter, which was that, until the question about the weevil arose, the deposit remained intact, and then a new arrangement was effected, we do not think it at all probable they could have found in favor of defendant; and, if the jury did take such view, the inaccuracy of the instruction did not injure appellant.

The third instruction was: "The court instructs the jury, if you believe from the evidence that the plaintiff stored wheat in defendant's mill for safe-keeping, then defendant is bound only to use ordinary care in keeping and caring for said wheat." Of this instruction appellant says that, although it announces a correct principle of law upon the issue as to whether or not the defendant is liable for the loss of the wheat if occasioned by the destruction of the mill by fire, yet it is calculated to mislead the jury on the other issues involved in the case, in that it does not limit the degree of care to that issue; that under this instruction a jury might infer that, if defendant used only ordinary care in keeping the wheat or in caring for it so as to prevent its being mixed with wheat of defendant, he would not be

liable, even though the manager of defendant may have, without authority from plaintiff, mixed it with other wheat. There is evidence to sustain the conclusion that the appellees' intestate was but a bailee without reward, and in such case he was only held to reasonable diligence in caring for the wheat, and the instruction accurately stated the law.

The fifth instruction was: "The court instructs the jury that in determining the question as to whether or not the defendant had in his mill a sufficient quantity of wheat of like grade and character as that deposited by the plaintiff, you should take into consideration all the facts and circumstances proven in the case." Appellant's counsel say this instruction was erroneous because it singled out a fact immaterial in itself, and directed the jury's attention to it; that, in the absence of an agreement that the defendant might use the wheat of plaintiff and keep in store for him other wheat of like grade, it was immaterial whether defendant had other wheat of like grade or not; that this instruction might cause the jury to infer that the only issue involved was, did defendant have other wheat? and thus divert their attention from other material issues. Other instructions presented to the jury the material issues, and we do not think they were obscured by the giving of this instruction.

The sixth instruction was as follows: "The jury are instructed that if you believe, from a preponderance of the evidence, that the plaintiff deposited the wheat with the defendant in his mill, and that the defendant was to have the right to return to the plaintiff the number of bushels of wheat so deposited, of like grade, at any time the plaintiff so desired, and that at the time the mill burned the defendant had in his mill the amount of wheat of like grade ready to be delivered to the plaintiff, and that the defendant used ordinary care to prevent the fire or destruction of wheat, then, in such case, the plaintiff cannot recover." Under the evidence we cannot see that appellant was harmed by this instruction. There is no evidence that plaintiff desired or demanded the return of any wheat prior to the burning of the mill, and if at that time the defendant had on hand, subject to plaintiff's order, the required wheat, then, under such an agreement as the instruction requires the jury to first find in order to exempt the defendant from liability, the appellant has no cause for complaint.

The eighth instruction given for defendant was: "The court instructs the jury that if you believe, from a preponderance of the evidence, that there was an agreement by which the defendant was authorized to mix the wheat of plaintiff with his own grain, or grind it and dispose of it, and to keep in store for plaintiff an equal amount of wheat of the same grade, to be delivered to plaintiff at any time upon demand, then, if you

further believe, from the preponderance of the evidence, that the defendant complied with his agreement, and kept in store, and had in the mill at the time of the fire, the requisite amount of wheat of the same grade of that delivered by plaintiff, and that he used proper care for the safety of the wheat and the prevention of fire, the defendant would not be liable for its loss, and the jury should find the issues for the defendant." Appellant contends that this instruction is erroneous because not stating the law applicable to the case as determined by the agreement pleaded in the notice of special matter, nor as determined by the subsequent agreement attempted to be proven by the evidence. We think there was evidence upon which this instruction might properly be based. Appellant contends that there was nothing in the language of the alleged agreement, as testified to by witnesses for defendant, to the effect that any wheat was to be kept in the mill subject to appellant's order. We are of the opinion, however, that such an inference might fairly be drawn from the words, "All I want is as good wheat as I put in there, if I don't sell it to you," and "We don't care anything about the wheat. We never expect to move the wheat out of here, but, if we do, we only want wheat just as good as we put in."

Complaint is made of the modification and refusal of certain instructions offered by appellant. Appellant's third, fifth, and seventh instructions, as offered, were modified and given, and his ninth, tenth, and eleventh instructions were refused.

There was no error in the modification of appellant's third instruction. As given, it conformed to the rule as stated by this court on the former appeal.

The fifth instruction, as modified, told the jury that it was the duty of one who receives grain in storage to use reasonable diligence to keep such grain in the condition in which it was received, and, if he mixes such grain with his own grain, or with that of another, or uses the same, without the consent of the depositor, such act amounts to a conversion of the grain. The instruction, as offered, made the duty absolute, and the modification was the insertion of the expression to use reasonable diligence to keep, etc. It is complained that this instruction, as modified, told the jury that the bailee need only use reasonable diligence to prevent the grain being mixed with other grain or from being converted to the bailee's own use. We do not think the language of the instruction, or the purport of it, would bear such interpretation. The first portion of the instruction tells the jury that, as bailee, he should use reasonable diligence to care for it, and that he would be liable if he mixed it or converted it without the consent of the owner.

The seventh instruction, as modified, was that, if it was agreed between the plaintiff and defendant that the defendant might mix

the wheat of plaintiff with other wheat, or use the same, and keep on hand other wheat of like quality and amount, subject to the order of the plaintiff, the jury could not find for the defendant unless they further believed from the evidence that the defendant did keep stored in his mill wheat of a like amount and quality to meet the demands of the plaintiff; and that if the jury believed, from a preponderance of the evidence, that defendant converted the wheat to his own use, and did not keep in store and have at the time the mill was burned wheat in equal amount and quality, subject to the order of the plaintiff, the verdict should be in favor of the plaintiff. It is contended by appellant that, as defendant gave notice that he would rely upon the defense of authority to mix the wheat and pay in other wheat in like quality and amount, and that he was always ready to perform that agreement, the burden, under this notice, was cast upon the defendant to establish this defense, but the instruction in question cast the burden upon appellant. We are unable to see how the instruction attempted to place the burden upon either of the parties. It simply told the jury, if they found, from a preponderance of the evidence, the matters stated in the instruction, they should find for the plaintiff, but did not tell the jury who should make the preponderance; nor did the instruction, as originally offered, tell the jury that the burden rested upon the defendant upon this issue. Appellant's fourth instruction told the jury expressly that the burden upon the issue of a new contract, made after the wheat was stored, by which appellees' intestate might mix the wheat with his own, or grind it and replace it with other wheat, was upon defendant. We do not think the instruction misleading as modified.

The ninth refused instruction offered by appellant was, in substance, that, even if the jury believed, from a preponderance of the evidence, that the plaintiff agreed with the defendant that he could clean the wheat and grind it, and that in pursuance thereof the wheat was ground and shipped out by the appellees' intestate, then such transaction amounted to a sale, and the defendant was liable for the value of the wheat. This instruction was properly refused. There was no evidence tending to support it. It wholly ignores the evidence, forming part of the statement of appellant or his agent which authorized the grinding of the wheat, that all appellant wanted was wheat as good as that put in there.

The tenth refused instruction was purely an abstract proposition of law. While we do not think it was error to refuse it, as we regard it as inherently bad, we would not reverse the case if it were good, as it was not applied to the case.

Appellant's eleventh refused instruction stated a proposition of law applicable to the case, and, so far as we can see, stated it cor-

rectly; yet we do not regard it as error to refuse it, because the same proposition is contained in appellant's seventh instruction as given.

Appellant's main contention seems to have been that there was not sufficient evidence to sustain the verdict or on which to predicate the instructions already discussed. It is not our province now to consider the weight of the evidence, but only to look into the record far enough to ascertain whether the evidence is of a character to support the judgment and verdict and on which to predicate the instructions; and, having arrived at the conclusion that there is, we are bound to affirm the judgment of the Appellate Court, which is done.

Judgment affirmed.

(207 Ill. 258)

GRAY et al. v. LAMB et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

DEEDS—REGISTRATION—POSSESSION—BONA FIDE PURCHASER—EVIDENCE—SUFFICIENCY.

1. A grantee in possession of land under an unrecorded deed died in 1843, and the widow and children remained in possession until 1845, when she married. In 1847 the husband secured a deed to himself from the original grantors, which was recorded in 1854. In 1855 he and his wife joined in a conveyance, and the property was held under this title until 1895, when it was conveyed to defendant. *Held*, that the possession of the widow after her second marriage was not such as would give notice to others of rights inuring to herself and children under the unrecorded deed, and defendant was a bona fide purchaser.

2. The wife, by joining in the deed with her second husband, gave notice that she had no latent equities.

3. In a suit to set aside a conveyance by plaintiffs claiming under an unrecorded deed, evidence examined, and *held* that there had been no such possession of the premises under the unrecorded deed as would save plaintiffs' rights thereunder.

Appeal from Circuit Court, Kendall County; Geo. W. Brown, Judge.

Bill by Lorena Lamb and others against Andrew Gray and others to set aside a deed. From a decree for plaintiffs, defendants appeal. Reversed.

Sears & Smith, for appellants. A. C. Little, for appellees.

RICKS, J. The bill in this case was filed by Lorena Lamb and Ruth Strausman, daughters, Isaac Bartlett, son, and Perly and Wallace Bartlett, children of John Bartlett, a deceased son, claiming as heirs of Aaron Bartlett, deceased, in the circuit court of Kendall county, Ill., on or about the 17th day of July, 1900, to set aside a warranty deed purporting to have been made, executed, and delivered by Sylvanus Bartlett to one Andrew Gray, to lots 5 and 8, in block 14, in the original village of Oswego, Kendall county, Ill., and dated on or about October

28, 1895, and also to compel Gray to account for the rents and profits for the use of said lot 8, of which Gray, by his tenant and son-in-law, Hildebrandt, has been in possession since about April, 1897.

The record shows that about 1840 Aaron Bartlett, with his family, settled in Oswego, Kendall county, Ill., on the premises in controversy in this suit, and in 1842 obtained, but never recorded, a warranty deed for said lots 5 and 8, in controversy here. He immediately proceeded to build a house on lot 5, into which he moved with his family, where he resided until his death, in 1843. On lot 8 he built a blacksmith shop. He died intestate and his estate was never probated. After his death his wife, Phebe, and children, continued to occupy said premises until April, 1845, when she married Sylvanus L. Bartlett, a bachelor brother of the deceased, Aaron Bartlett, who came to Oswego a year or so after said deceased. After the marriage of Sylvanus and Phebe they continued for some time to reside on the premises in question. In 1847 Sylvanus obtained a warranty deed from Lewis B. Judson and wife, original grantors in the deed to Aaron, to said lots 5 and 8, and also a strip of land 12 feet wide off the southwest side of lot 4, in the same block. This deed was filed for record February 1, 1854, and duly recorded. In 1855 Sylvanus Bartlett and wife conveyed said lots 5 and 8, by warranty deed, to Jane C. Gibbs, having traded said lots for a 60-acre farm, to which they moved, and where they resided until 1859. The property thus conveyed to Gibbs, and in question in this proceeding, was thereafter conveyed several times by warranty deeds, until, in 1859, Sylvanus Bartlett repurchased lots 5 and 8 from Abraham B. Staut, who, his wife joining therein, executed and delivered to Sylvanus a warranty deed for the premises conveyed. On January 12, 1859, Sylvanus had conveyed to him, by warranty deed from Paul G. Hawley and wife, a strip 12 feet wide off the southwest side of lot 4, in block 14, in Oswego, and also the alley between lots 4 and 5, in said block, which deed was duly filed and recorded. The record title to this property remained in Sylvanus Bartlett until March, 1895, when he and his wife, in consideration of future support, conveyed the same, by warranty deed, to William H. Marlon, a grandson; but shortly thereafter said Marlon concluded that he did not wish to assume such responsibility, and in April, 1895, by warranty deed, he reconveyed said property to Sylvanus Bartlett. In July, 1895, Phebe, wife of Sylvanus, died, after which the old man, Sylvanus, continued to hold the record title to and resided on said property until October, 1895, when, in consideration of future support for the balance of his life and Christian burial at his decease, he conveyed said property, by warranty deed, including lots 5 and 8, the 12-foot strip and said alley, to Andrew Gray, the principal defend-

ant herein, and nephew by marriage to Sylvanus.

Andrew Gray defends this suit on the theory that he is an innocent purchaser for value and claims a perfect record title; that if complainants ever had any rights herein they have lost them by the 7 and 20 year statutes of limitation; and claims that complainants are guilty of laches. The position of complainants is that Aaron Bartlett had a paper title to lots 5 and 8 when he died; that on his death his children became the owners thereof, subject to the homestead and dower rights of the widow; that her possession, as the wife of Sylvanus, until 1895, with Sylvanus, prevented the statute of limitations from running until her death, in 1895; and that within seven years thereafter this suit was instituted, and that therefore the sole possession of Sylvanus, after the death of his wife, has not precluded the assertion of title by the heirs of Aaron Bartlett, the complainants in this suit.

The case was referred to the master to take the evidence and report his conclusions. The master found that Aaron Bartlett had title, at the date of his death, to lots 5 and 8; that the widow of Aaron continued to reside on the property until her death, she having married Sylvanus, a brother of Aaron; that after her death, in 1895, the title became absolute in complainants. To the findings of the master Andrew Gray filed objections, which were overruled, and by agreement said objections stood as exceptions before the trial court. The court affirmed the master's report, with the exception of the allowance to Andrew Gray of one item of expense disallowed by the master, and entered a decree fixing the title to said lots 5 and 8 in the complainants, and setting aside the deed to Gray.

Upon a review of the record in this case we are of the opinion that the findings and conclusion of the master and the decree of the trial court are erroneous, and that said decree should be reversed. Andrew Gray assumes the position of an innocent purchaser for value of premises in the possession of his grantor, and who held a straight record title, with no apparent imperfections. From the evidence we are able to glean nothing that substantially controverts this position. The record title of Sylvanus Bartlett was absolutely clear, running back to the government without a break. The occupancy of these lands by Phebe, the widow of Aaron, after her marriage with Sylvanus, was no such possession as would require other persons to take notice of rights that may have inured to her as the widow of Aaron Bartlett and through the unrecorded deed. "Possession, before it can be held to operate as notice of an unrecorded deed, must be 'open, visible, exclusive, and unambiguous, such as is not liable to be misunderstood or misconstrued.'"

* * * Such a possession must be of an open and visible character, which will be cal-

culated to apprise the world that the property has been appropriated and is occupied, and the occupancy must be exclusive. 'If only used and enjoyed in common with others, or with the public in general, it could not be regarded as hostile to others claiming title.'" *Robertson v. Wheeler*, 182 Ill. 503, 44 N. E. 870. The wife of Sylvanus Bartlett, whatever may have been her equitable rights under the unrecorded deed to her former husband, by joining, as wife, in the warranty deed executed to Jane C. Gibbs, in 1855, by Sylvanus Bartlett, who held a clear record title, gave notice to the world that she possessed no latent equities in the premises conveyed.

The evidence shows conclusively that Sylvanus Bartlett, in 1859, under the warranty deeds from Abraham B. Staut and Paul G. Hawley, went into possession of the lands conveyed in the deed to Gray; that until the execution of the deed to Gray, Sylvanus treated said lands, so far as the world could discern, as his own. Complainants, however, contend that they, or some of them, paid the taxes on said premises for a considerable portion of this time, and that for the last 15 years of the time that Sylvanus held the record title to this property William H. Marion, grandson of Sylvanus, paid the taxes. There is nothing, however, to show that the complainants, in furnishing such money as they did to pay the taxes, did so to protect any rights possessed by them, but the evidence does indicate that such contributions were donations to their stepfather, as a good deal of the time, at least, the money was paid to Sylvanus and he paid the taxes himself. As to Marion, he did not have, or claim to have, any interest whatever in the land.

Andrew Gray swore that he had no knowledge of the old unrecorded deed to Aaron Bartlett, nor of complainants' alleged rights under it. The complainants themselves testified that they never said anything to Gray or to Sylvanus about said deed or their claims under it. Sylvanus testified that he never saw the old deed from 1842 until 1900, when it was produced in the trial of a forcible detainer suit brought by Gray against Sylvanus and Morris B. Lamb, husband of Lorena Lamb, one of the complainants in this suit, who were at that time living on a portion of this property. Sylvanus testified that he used the property as his own for nearly 40 years, and that he thought it was his. The evidence shows that several, if not all, of the complainants, within a month thereafter knew of the contract between Sylvanus and Gray, and that Gray had been deeded this property under the agreement to take care of Sylvanus during the balance of his life and give him Christian burial at his decease, and knew that Gray was furnishing provisions under this contract, yet they never hinted to him anything of their claims to the property in dispute until the filing of their bill, nearly five years there-

after, and they permitted Gray to go ahead and defray the funeral expenses at Sylvanus' decease. William Marion, to whom this property was deeded in 1895 for the same purpose that it was conveyed to Gray afterwards, testified that he supposed Sylvanus owned the property; that he took a warranty deed therefor from Sylvanus, but tiring of his responsibility under the agreement he reconveyed the property to Sylvanus. He was a grandson, and was certainly in as good a position to know the rights of his relatives in the premises in dispute as would the defendant Gray. Gray testified that Sylvanus was begging for the necessities of life, and applied to him for assistance, and against his inclinations forced on him the deed and contract in question for the purpose of securing the necessities of life and decent burial at his death. It does not appear from the evidence that the expectation of life of Sylvanus and the value of the property at the time the deed was made to Gray were such as to render the bargain entered into by Gray a one-sided or unconscionable one.

We think the evidence in this case conclusively shows that the defendant Gray was an innocent purchaser for value, and what was said in *McNab v. Young*, 81 Ill. 11, is applicable to the facts disclosed in the record in this case (page 15): "For aught appearing, the purchase by Clayton was in good faith, and those made of him by his co-defendants were also in good faith, and with no notice of any infirmity in the title offered to be sold. How could purchasers know from the record there was fraud in the transaction or invalidity in deeds? They all appeared fair on the record, and there was nothing dehors the record to admonish those desirous of purchasing of any danger or doubt. Appellant knew for four years the legal title had passed to Parsons, but made no effort to divest him. He must have known of Parsons' sale to Clayton, and of Clayton's various sales, as he was frequently in Chicago, but he made no objection. He did not interfere until the property had passed into various hands and become very valuable."

With the undisputed evidence showing that in 1855 Sylvanus Bartlett was joined by his wife, Phebe, in a conveyance to Jane C. Gibbs of the property in question, and moved away from said premises on to a farm owned by Sylvanus, where they remained four years, during which time the property in question was conveyed several times, until the title finally rested in one Staut, who conveyed the same back to Sylvanus Bartlett in 1859, for the consideration of \$1,200, we are unable to see how the master or chancellor reached the conclusion, as a matter of fact, that Phebe Bartlett held possession of the premises in controversy from the death of her first husband, Aaron, to the time of her death, as the foundation of the claim of the

appellees. Moreover, the record shows that when Aaron Bartlett died he left five children: Sarah, who was then about 12 years of age, and who died somewhere near the age of 20; Ruth, one of appellees, now aged 60; Lorena, another of appellees, aged 61; Isaac, another of appellees, aged 66; and John, who died about the year 1899, aged 68, who was the father of appellees Wallace and Perly Bartlett; and the record shows that the ages of the latter two grandchildren are above 24 years. There is no pretense that any of the children or grandchildren had any continuous residence on this property since about the close of the war, and then, about that time, the daughter Lorena and the son John occupied a little house, aside from the home house, on one of the lots, but surrendered the same when requested by Sylvanus, that the same might be used by him for a shop; so that there is no evidence of such possession by any one as could be said to have saved or preserved the rights of appellees in this property, or as having a tendency to give notice to or put upon inquiry Andrew Gray, the purchaser, of any equities they had or might have had by reason of the unrecorded deed mentioned in the bill. And the evidence very clearly shows that, although the children of Aaron had knowledge of the existence of the old unrecorded deed, it also shows that they made no claim or had any idea that they had any rights under or by virtue of this deed until shortly before the bringing of the suit in question. We regard the evidence in this case as wholly inadequate to sustain the decree rendered herein. To hold otherwise would be to render nugatory the recording laws of this state and titles to lands unstable.

It is not necessary for us to discuss other contentions made in this case, as, for the reasons stated, the decree will be reversed, and the case remanded to the circuit court of Kendall county, Ill., with directions to dismiss complainants' bill.

Reversed and remanded, with directions.

(208 Ill. 20)

ILLINOIS CENT. R. CO. v. BEHRENS.

(Supreme Court of Illinois. Feb. 17, 1904.)

MASTER AND SERVANT—PERSONAL INJURIES—NEGLIGENCE—EVIDENCE—SUFFICIENCY—VARIANCE—HOW RAISED.

1. The decision of the Appellate Court that the verdict is not inconsistent with and contrary to instructions given for defendant is conclusive on the Supreme Court, unless it concludes that there is no proof tending to support the allegations of the declaration.

2. The question of variance between the pleadings and proof cannot be raised on appeal either in the Appellate Court or in the Supreme Court, unless the variance was specifically pointed out on the trial.

3. A motion for the direction of a verdict on the ground of a variance between the pleadings and the evidence is insufficient to raise the question of variance, unless the motion indicates specifically in what the variance consists.

¶ 2. See Pleading, vol. 39, Cent. Dig. § 1438.

4. There is no variance between a declaration alleging that a boiler exploded and evidence showing that it was the fire box which exploded, the fire box being a part of the boiler.

5. Witnesses who were at the place of the explosion of a boiler soon after it occurred, and testified that they found pieces of the fire box and boiler with broken bolts, describing their appearance as "they looked like the threads were drawn out of the sheet or boiler," "looked like there was a fresh break," etc., were not expert witnesses, but merely described what they saw as a matter of common observation.

6. The Supreme Court, in determining the question whether the court erred in refusing to direct a verdict for defendant, is confined to the single question whether the evidence introduced by plaintiff, and all reasonable inferences arising therefrom, fairly tend to support the allegations of the declaration, the decision of the Appellate Court settling all questions depending on the mere preponderance of the testimony.

7. Evidence in an action by an employé against a railroad company for injuries sustained by reason of the exploding of a locomotive engine, examined, and held to show that the boiler was out of repair and unsafe, and that the engine was negligently managed and cared for, as alleged in the declaration.

Appeal from Appellate Court, Fourth District.

Action by Fred Behrens against the Illinois Central Railroad. From a judgment of the Appellate Court (106 Ill. App. 471) affirming a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Barr (J. M. Dickinson, of counsel), for appellant. James A. Watts (Judge Geo. Vernor, of counsel), for appellee.

WILKIN, J. This is an appeal from a decision of the Appellate Court for the Fourth District affirming a judgment of the circuit court of Washington county for \$3,000 in an action by appellee against appellant for personal injuries. The declaration consisted of two counts, the first alleging that the injury was occasioned by reason of the unsafe condition and lack of proper repair of an engine and boiler in the use of the defendant, in consequence of which it exploded. The second, that an engine operated by the defendant was so carelessly and negligently managed and cared for that the same exploded, causing the plaintiff's injury. The plea was the general issue, and the trial by jury. An instruction to the jury to find for the defendant was asked and refused, both at the conclusion of the testimony offered by the plaintiff and at the close of all the evidence.

It is contended that the verdict of the jury and the judgment of the circuit court are inconsistent with and contrary to instructions given on behalf of the defendant. But that was a question for the Appellate Court, unless we shall conclude that there is an entire absence of proof in the record fairly tending to support the material allegations of the declaration.

It is again insisted that there is a variance between the evidence and the first count of the declaration, in that the count avers that

the boiler exploded, while it is said the evidence shows that it was the fire box which exploded. Unless the variance now complained of was specifically pointed out by the defendant on the trial it could not be raised on appeal, either in the Appellate Court or here. A motion to instruct the jury to find for the defendant on the ground of a variance between the pleadings and the evidence is not sufficient to raise the question of variance, unless the defendant, by its motion, indicates specifically in what the variance consists, so as to enable the court to pass upon it intelligently, and also to enable the plaintiff to so amend his declaration as to make it conform to the evidence. *Probst Construction Co. v. Foley*, 186 Ill. 81, 46 N. E. 750, and cases there referred to. Counsel for the appellant fail to point out in the record wherein this inflexible rule of practice was complied with. There was, however, no material variance. The fire box, as we understand the evidence, may be called and is a part of the boiler.

A single instruction was given at the instance of the plaintiff, and it is insisted that it does not correctly state the law of the case. It was intended to direct the jury as to what elements of injury might be taken into consideration, in case it found the issues for the plaintiff, in estimating his damages. We do not regard it as subject to the criticism made by counsel, but are of the opinion that it announces substantially the correct rule of law.

Witnesses examined on behalf of plaintiff, who were at the place of the explosion soon after it occurred, testified that they found a piece of the fire box and boiler with broken bolts, and described the appearance of them, using such expressions as "they looked like there was a few that were off, and others looked like the threads were drawn out of the sheet or boiler—the ends just stripped off; looked like they were dark color, and a few—a part of them—looked like there was a fresh break, because they looked bright; the others looked dull." It is argued that this testimony was in the nature of expert evidence, and, inasmuch as the witnesses did not qualify as experts, it was error to allow their testimony to go to the jury. The objection seems to have been general, rather than specific as to any particular question or answer, but, aside from this, we think the point is without merit. The testimony was in no sense expert evidence, nor did the witnesses testify as such. What they saw and described was a matter of common observation.

It is urged with much earnestness that the trial court erred in refusing to instruct the jury to find the issues for the defendant. In determining whether the instruction should have been given we must confine ourselves to the single consideration whether or not the evidence introduced on behalf of the plaintiff, as shown by the record, with all its reasonable inferences and intendments, fairly tended to support the material allegations of

his declaration, the decision of the Appellate Court having conclusively settled all controverted questions of fact adversely to the defendant, so far as such facts depend upon the mere preponderance of the testimony. In the discussion of this question it must be conceded that it was the duty of the defendant company to use all reasonable care to furnish proper and safe locomotives in the operation of its road, and a question is raised whether the plaintiff made a *prima facie* case by proof of the explosion, under the previous decisions of this court. We do not regard that question important or material in the decision of the case, as plaintiff did, we think, introduce competent affirmative proof tending to support the allegations of the declaration.

We are somewhat embarrassed in the consideration of the evidence of the witnesses testifying in the case from the fact that upon the trial a model of the locomotive engine which exploded was used by counsel both for plaintiff and defendant in attempting to demonstrate the facts at issue, and reliance seems to have been placed upon the examination and inspection of such model by the jury and the explanations made by the witnesses. Not having that model before us, with the accompanying explanations, it is difficult to clearly understand some of the testimony in the record. There is no controversy, however, as to the following facts:

The plaintiff was a section hand employed by the defendant, and on the 17th day of May, 1900, while engaged in the line of his duty, assisted in pushing a hand car from the main track upon a side track on the defendant's right of way near the village of Du Bois, in Washington county, for the purpose of allowing a mail train to pass. As the engine of the approaching train came alongside the handcar, it exploded, destroying the engine, and throwing the fragments of the fire box, crown sheet, and other parts in different directions, one of which struck the plaintiff upon his right knee, inflicting a serious injury, for which he sues. The engine, which was numbered 915, had been in the use of defendant for several years. It was placed in the roundhouse of the company at Centralia about the 6th of May for repairs, and remained there until the 12th of that month, during which time, according to the testimony of employees of the defendant, it was repaired. One of the defects at that time was that a number of the bolts necessary to hold the fire box together had become cracked and broken. The division master mechanic, J. H. Pollard, testified that the engine was taken into the roundhouse on the 6th day of May, and says: "All the stay bolts were renewed in the front sheet of the fire box, and three on the right side and four on the left side of the fire box." A great many of the bolts were not renewed, but the testimony of the defendant's witnesses is to the effect that by the application of

usual and proper tests they were found to be in a safe condition. From the time the engine left the roundhouse on the 12th, prior to the explosion, it was not inspected.

It is well known that locomotive engines and boilers, when properly constructed, in good repair, and skillfully handled, do not explode. It is true that the particular defects or mismanagement resulting in explosions cannot always be ascertained; but even that is not the common experience, and whenever an accident of that kind occurs the effective cause is usually discoverable. As before stated, witnesses who testified on behalf of the plaintiff in the present case examined the fragments or pieces of the fire box and crown sheet, and they testified that they found in them bolts which indicated, by their appearance, that they had been broken some time prior to the explosion, and also that they found bolts which had the appearance of what they call "slips"—that is, the threads of the bolts had pulled off. The fire box consists of two parts, the inner box in this case being several feet in dimensions either way, which was surrounded by an outer covering, there being a small space between the two plates. The top of the inner box is called the "crown sheet," and the two surfaces or plates are bolted firmly together by stay bolts passing through both plates, with screw threads on either end and projecting beyond the plates, on which heads were riveted, thus holding the parts firmly together both by the screws and riveted heads. These staybolts, of which there were a large number, were placed about four inches apart. Plaintiff's witnesses describe some of them as showing indications of having been broken prior to the explosion, and the evidence shows that in all railroad locomotives, as they are operated, the stay bolts are liable to become broken or cracked. It was that defect, as already stated, in part, at least, which made it necessary to put the engine in question in the roundhouse on May 6th. Notwithstanding the testimony of the defendant's witnesses tended to prove that the defects were all removed, and the locomotive put in good repair, the fact remains that within a short time after it was again put in service it exploded, and, if the testimony of the plaintiff's witnesses is to be believed, several of the bolts showed that they had been previously cracked or broken. Taking these facts into consideration, we are of the opinion that it was a question for the jury to determine, under proper instructions, whether or not the broken bolts and slips, as testified to by those witnesses, caused, or contributed to the cause of, the explosion, and whether or not the defendant's mechanics, by the exercise of reasonable care, could have discovered their true condition, and whether or not those making the repairs between the 6th and 12th of May used all reasonable care and skill to discover, remove, and replace with new bolts all those which

may at that time have been defective; and it was also a question of fact for it to determine whether or not a sufficient number of the bolts were broken before the explosion to render the operation of the engine unsafe. Although a fire box and boiler may be supplied with a larger number of bolts than are really necessary to render the locomotive safe, as testified to by defendant's witnesses, still, how many bolts might be dispensed with without rendering it unsafe would always be a question of fact.

There was also testimony offered on behalf of the plaintiff to the effect that after the accident there was a deposit of mud found on the top of the crown sheet from one-eighth of an inch to two inches in thickness, which had become very hard and dry, and which one witness testified he was unable to remove with his knife. The plaintiff's evidence also showed that some of the bolts had become so heated that when the explosion occurred the tops of them were pulled through the crown sheet, inverting the heads. This deposit of mud was found on a part of the crown sheet left inside the boiler as well as on that part of it that was blown some distance away. The fire box is constructed, as above indicated, so as to allow the water from the boiler to circulate freely between the outer and inner plates, thus preventing the crown sheet from becoming overheated. Any accumulation of mud or other substance on the crown sheet which obstructs the effect of the water upon it allows it to become intensely heated, and so soft and ductile as to allow the stay bolts to "slip" the threads and pull the heads through the plates. Inevitably, when this condition exists, the boiler becomes unsafe, and liable to explode. All the testimony, both of the witnesses for plaintiff and defendant, is to the effect that when the boiler of a locomotive is clean, and full of water, the crown sheet does not become overheated. From the fact that the top of this crown sheet was incrustated with mud, which had become baked and hard, the reasonable inference is that the engine had not been kept reasonably clean, supplied with water, and free from mud and sediment. It is true that witnesses on behalf of the defendant contradict, in the main, those of the plaintiff as to the appearance of the bolts and the condition of the crown sheet, but such testimony had no other effect than to raise a conflict in the evidence. In fact, a Mr. Boyce, an employé of the defendant, testified that he was at Du Bois the next morning after the explosion for the purpose of examining the wreck; that he saw the crown sheet lying west of the bank (which was evidently the one spoken of by witnesses for the plaintiff), and that he found no indications of "any dangerous condition in the

metal of any kind." He does, however, say: "The piece of the side sheet, or almost the whole of the right side, that went out with the explosion, there were a few bolts near the center of the side sheet, and the balance of the bolts were sticking on the outside of the boiler sheet, and a few showed up as though they were fractured. There were six or eight bolts sticking in that sheet that showed that they were partly cracked at that time, but it showed a difference between the old and new bolts very plainly. I couldn't find any bolts entirely broken off before the explosion. Those six or eight bolts that were partly broken before the explosion were on the inside sheet of the fire box that blew out. That would indicate that they were partly broken or partly cracked on the outside when they came out with the explosion, or they would have torn out like the rest had, and remained in the side sheet. That showed that they had a slight crack in them, because the breaks are always on the outside sheet. The bolts that stuck to the outside sheet indicates that they were first-class bolts, in perfect order. If they had been cracked, the crack would have been next to the outside sheet. They would have followed the sheet that came out. I examined the top of the crown sheet that remained in the engine. There was no mud there any more than you can find in any engine running any length of time; simply a little scale—hard scale—there. I examined it particularly, as I did all other parts." We do not mean to be understood as saying that the witness did not testify that in his opinion the fire box, crown sheet, and boiler were in a safe condition, but only that he stated facts which, at least in some degree, corroborate the testimony of the witnesses for the plaintiff.

We think any one carefully reading the testimony in this case, and giving credence to that of plaintiff's witnesses as to the broken bolts, and especially the crown sheet being covered with mud, would rationally conclude that the explosion was caused by those defects, and that a careful and skillful operation of the locomotive would have discovered and removed the mud before it had accumulated and hardened to the extent described. At least we are not able to say that there was no evidence before the jury tending to support both counts of plaintiff's declaration, and therefore hold that the trial court committed no error in refusing to instruct the jury to find for the defendant.

Our examination of the various assignments of error upon which a reversal is asked leads us to the conclusion that there is no reversible error in this record. The judgment of the Appellate Court will accordingly be affirmed.

Judgment affirmed.

(207 Ill. 448).

SEIBERLING v. MILLER et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

FIXTURES—REMOVAL BY EQUITABLE TITLE HOLDER—FORFEITURE OF CONTRACT—EXECUTION LEVY—POSSESSION OF PURCHASER—CORPORATIONS—CONTRACT—EXECUTION—SIGNATURE—SEAL.

1. The owner of land contracted with manufacturers to erect a building and convey title to them in consideration of their maintaining a factory for a certain period. The building was erected, and the manufacturers placed therein engines, etc. These appliances were afterwards sold on sheriff's sale under a judgment against the manufacturers, the purchaser transferring his title to a corporation. The corporation entered the premises under an agreement for purchase with the then holder of the legal title to the land, which had never been conveyed to the manufacturers, as provided in the original agreement. *Held*, that the fixtures were, in such corporation's hands, a part of the freehold, as much as if it had actually placed the property on and attached it to the freehold under the contract of purchase, and neither it nor its successors in interest could remove them without the consent of the owners of the legal title.

2. A corporate signature employing the letters "Mfg." instead of the word "Manufacturing" is sufficient.

3. The seal of a corporation is not essential to the validity of a contract to which it is a party.

4. A purchaser at a sheriff's sale directed against fixtures as personal property, who places a custodian in possession of them after his purchase, cannot thereby be deemed to be in possession of the real estate, nor can he transfer such possession on a sale of the fixtures to another.

5. Where one takes possession of property under a contract by which, on his compliance with certain conditions, the legal title is to be transferred to him, and fulfills his contract, he may, on default of the other party, sue in equity to compel him to convey the fee-simple title, or he may abandon the possession and his equitable ownership and sue at law for damages, in which case he would cease to be the equitable owner of the property.

6. On the issue as to whether fixtures in a building in possession of one occupying under a contract of purchase, who defaulted in his payments and surrendered possession to the legal title holder, became a part of the realty, the question as to whether the legal title holder formally declared a forfeiture was immaterial.

7. Error, if any, in holding certain propositions of law, cannot be reviewed where the record does not show any exception.

Appeal from Appellate Court, Second District.

Replevin by Joseph Miller and another against Monroe Seiberling. From a judgment of the Appellate Court (106 Ill. App. 190) affirming a judgment for plaintiffs, defendant appeals. Affirmed.

In 1889, Rouse, Hazard & Co., a corporation, engaged in the business of manufacturing bicycles in the city of Peoria. On August 3, 1895, S. B. Hazard and Harry G. Rouse owned the entire stock of the corporation. On that date these men entered into a contract with Theodore J. Miller, by which Miller agreed to erect a factory building upon 10 acres of a tract of land, the title to which he seems to have acquired in fee

10 days after making this contract, and to give to them, on or before November 1, 1896, a clear title to the 10 acres, in consideration of which Hazard and Rouse agreed to occupy the factory as soon as completed, to proceed forthwith to manufacture 10,000 or more bicycles for the market of 1896, and to operate the factory for a term of 5 years from November 1, 1895. The object Miller had in making this agreement seems to have been to increase the value of the surrounding property, to sell enough of it to pay for the erection of the factory building and the original cost of the entire tract, and to have some property remaining out of which to make a profit on the transaction. It appears that Joseph Miller and Frank Miller, appellees, erected this building in question and had the same completed in the fall of 1895. Rouse, Hazard & Co. furnished and installed in the building engines, pumps, boilers, shafting, heating apparatus, water system and electric light system, including dynamo, and machinery and tools, at a cost of over \$60,000 in pursuance of the contract above referred to, for the purpose of manufacturing bicycles, and moved into the building in January or February of 1896. The evidence showed that it carried out its part of the above contract in every respect for a period of 2½ years, when it became bankrupt.

It appears that Theodore J. Miller on January 2, 1896, conveyed the 10 acres involved in this litigation, by trust deed, to Nicholas Ulrich, in trust for Joseph Miller & Sons, a partnership composed of Joseph Miller and Frank Miller, to secure the payment of certain notes, among them being notes signed by Rouse and Hazard and Theodore J. Miller. On June 30, 1898, Theodore J. Miller conveyed the same property to O. J. Bailey, subject to the aforesaid trust deed, and recites that it includes the buildings and railroad facilities, but does not include the machinery in said buildings, which belongs to Rouse, Hazard & Co. On the same day Bailey executed a declaration of trust in reference to the property, stating that he merely held the legal title for the purpose of executing deeds, collecting money from the sales of lots in said 10 acres from purchasers furnished by Rouse and Hazard, and turning such money over to Joseph Miller & Sons, to be credited by them upon their indebtedness against the property, until the said indebtedness is paid. On October 24, 1898, the sheriff, under an execution against Rouse, Hazard & Co., sold to William Jack, acting for the judgment creditors, the fixtures involved in this suit, together with bicycles, office furniture, machinery, etc., then located in the building heretofore mentioned, and executed a bill of sale to Jack therefor. The sheriff took possession of the property levied upon at the time of making his levy, and remained in possession until the sale. Jack was notified at the sale, before the property

¶ 2. See Corporations, vol. 12, Cent. Dig. § 1801.

was bid off to him, by a representative of appellees, that appellees claimed the property in controversy as fixtures attached to the building. On November 4, 1898, appellees and Nicholas Ulrich, trustee, filed a bill in the circuit court of Peoria county to foreclose the trust deed of January 2, 1896, in which it is alleged that the fixtures here involved are part of the realty and are covered by said trust deed, sets up the sale by the sheriff to Jack, alleges that Jack claims the right to remove them and asks for an injunction against him for the purpose of preventing such removal. On January 8, 1899, William Jack, trustee, sold to the Peoria Rubber & Manufacturing Company the property purchased by him at the sheriff's sale. On January 6, 1899, Theodore J. Miller, Charles W. Constantine (who is not shown to have had any title), and Oliver J. Bailey, by quitclaim deed, conveyed to Joseph Miller and Frank Miller the said 10 acres, and on the same date the two persons last named, appellees here, entered into an agreement with the Peoria Rubber & Manufacturing Company for the sale to it of said 10 acres and the delivery of a deed therefor upon its making certain payments thereon for the period of two years. By stipulation in the record it is agreed that this company did not make the payments as required. On January 24, 1899, the foreclosure suit above referred to was dismissed by the complainant. On April 27, 1899, the Peoria Rubber & Manufacturing Company sold to A. G. Seiberling the property bought by it from Jack, which sale was evidenced by a bill of sale, and on October 27, 1901, A. G. Seiberling sold to Monroe Seiberling, the appellant, the same property, and a bill of sale was given therefor.

By a stipulation of record between the parties to this suit, dated November 7, 1901, it was agreed that Monroe Seiberling surrendered the possession of the premises in question without prejudice to the rights of the parties to try the question of title as to the fixtures mentioned in the declaration, and by another stipulation, made on the same day, the property is to be treated as severed from the real estate by appellant.

On November 7, 1901, appellees commenced a suit in replevin in the circuit court of Peoria county against appellant for certain boilers, engine, smokestack, condensers, heaters, boiler feed, pumps, dynamo, wiring, heating system, shafting, belting and pulleys, fire hydrants, fire extinguishers, and water pipe, being a part of the property covered by the various bills of sale. The declaration alleges that defendant took and unjustly detains said goods. Pleas of non cepit, non detinet, property in defendant, property in A. G. Seiberling, property in the Peoria Rubber & Manufacturing Company, and property in the Consolidated Motor Vehicle Works, were filed, and replications filed by plaintiffs to these pleas. The case was tried before the court without a jury, and judgment of guilty ren-

dered against the defendant. A motion for a new trial was made and overruled, an appeal taken to the Appellate Court for the Second District, and the judgment of the circuit court there affirmed, and a further appeal taken to this court.

The evidence is conflicting as to whether the fixtures in question can be removed without material injury to the buildings. Only two witnesses testified in reference thereto—one for the plaintiffs and one for the defendant. Plaintiffs' witness gave a detailed description concerning the manner in which the different fixtures were fastened to the floors and walls of the buildings, and stated that they could not be removed without tearing down the walls and materially injuring the buildings. Appellant's witness, without detailing the manner of fastening, stated that in his opinion all the articles could be removed without injuring the buildings. They have never been actually severed from the freehold since they were attached by Rouse, Hazard & Co.

Numerous propositions of law were offered by both parties. The court held those offered by appellees, and refused those offered by appellant. The errors relied on for a reversal here are the holding and refusing of these propositions by the court and the admission of improper evidence.

For the purposes of this suit, in accordance with the stipulation of the parties, the property in controversy is regarded as having been severed from the land by appellant.

Jack, Irwin, Jack & Danforth (Stevens, Horton & Abbott, of counsel), for appellant. Winslow Evans, for appellees.

SCOTT, J. (after stating the facts). It is unnecessary to determine whether Rouse, Hazard & Co. or William Jack had the right to sever from the freehold the property involved in this suit. In January, 1899, the Peoria Manufacturing Company succeeded to such rights as Jack had, and entered into a contract with the appellees for the purchase of the real estate on which the property involved was located, and thereafter continued in possession of such real estate under that contract until it made default in payment of installments of the purchase price. It was a vendee in possession and the equitable owner of the real estate. The property in question was at the same time on this real estate, and attached to the freehold in the most substantial manner. Much of it could not be removed except by destroying masonry and cutting through brick walls. The fiction, based upon an implied condition in the contract between Rouse, Hazard & Co. and Theodore J. Miller, whereby it is claimed this property had continued to be personal property up to that time, if it ever had any legal existence, was then at an end. After the execution of the contract between the Peoria Manufacturing Company and appellees, it is

not charged that appellees, who were the vendors, were guilty of any default in the performance of that contract. The situation is no more favorable to appellant than if the Peoria Manufacturing Company had actually placed this property upon and attached it to the freehold under its contract of purchase.

The authorities cited by appellant in reference to the right of a vendee to remove improvements of this character placed by him upon the real estate, where the vendor fails to perform his contract by conveying the title, are not in point so far as this transaction is concerned, for the reason that appellees did not fail or refuse to perform their contract.

"Articles annexed or structures erected by a vendee of land who is in possession by virtue of his contract of purchase, but who has not yet obtained title to the premises, cannot be removed by him without the consent of the vendor, the presumption being, from his interest under his contract and expectation of acquiring absolute title, that he intended the articles or structures to be part of the land." 13 Am. & Eng. Ency. of Law (2d Ed.) p. 672; *Dooley v. Crist*, 25 Ill. 551; *Smith v. Moore*, 26 Ill. 392; *Ogden v. Stock*, 84 Ill. 522, 85 Am. Dec. 332; *Salter v. Sample*, 71 Ill. 430.

The objections urged to this view are, first, that the alleged contract between appellees and the Peoria Manufacturing Company was improperly admitted in evidence because it does not purport to be signed by that company. The basis of this objection is that in the signature the letters "Mfg." appear instead of the word "Manufacturing." This objection is too technical. The letters are an abbreviation of the word, and are no more subject to criticism than the use of the abbreviation "Co." for the word "Company." A further objection to the admission of the contract was that it is not under the seal of the corporation. This objection is held not well taken in the opinion of this court in *B. S. Green Co. v. Blodgett*, 159 Ill. 169, 42 N. E. 176, 50 Am. St. Rep. 146.

It is then said that at the time this contract was made the Peoria Manufacturing Company was in possession of the real estate, and that appellees never had possession and never had title, and could not give possession nor comply with their contract of sale; consequently the contract was without consideration, and void. The answer to this is twofold: The company was not, in any legal sense of the term, in possession of the real estate. The possession of Rouse, Hazard & Co. was never transferred by it to any one, nor did Jack transfer any possession of the real estate to the Peoria Manufacturing Company. It is true, he says he had a custodian in possession of the property he purchased; but his possession was in no wise different from that of one who has personal property stored on the real estate and in the building of another. His possession was no more than

that of the sheriff, who levied on the property on the theory that it was personal property. He could not be held to be in possession of the real estate by virtue of such a levy. One of the managers of the manufacturing company testified that it was in possession of the real estate for about two years under the contract of purchase, which shows that they were in possession by virtue of that contract. The contract itself provides that if the company fails to make any two of the payments mentioned within two years from February 15, 1899, appellees shall have a right to take possession of the premises.

It is urged that when Rouse, Hazard & Co. took possession of the real property under its contract it became the equitable owner thereof, and that it, or its trustee in bankruptcy, so continues to the present time, and that consequently the manufacturing company had a right to act on the theory that appellees were not the owners of the real estate, could not convey the title thereto, and that it therefore was under no obligation to perform its contract, and had a right to remove the property involved in this suit. Rouse, Hazard & Co. had a right to bring a suit in equity to compel Theodore J. Miller to convey to it the fee-simple title to this property. It also had a right to abandon the possession and equitable ownership, and rely upon a suit at law for damages on the contract with Theodore J. Miller, the performance of which by him was guaranteed by one Constantine and by Selberling, the appellant herein, neither of whom is shown to be insolvent. Under such circumstances, Rouse, Hazard & Co. would cease to be the equitable owner of the real estate. It is apparent that it did abandon the possession, and under the evidence in this case we cannot hold that it continued to be the equitable owner of the real estate. The record fails to show that appellees could not convey a good title to the manufacturing company.

It is said that no forfeiture of this contract with the manufacturing company was declared. That was wholly unnecessary. The question is whether this property became a part of the freehold. It is stipulated that the manufacturing company defaulted in its payments. The possession of the realty was surrendered to appellees. Whether they formally declared a forfeiture is immaterial.

Upon the undisputed facts of this case these fixtures are part of the real estate.

Six propositions of law were held at the request of appellees. The record does not show any exception to this action of the court, and we are therefore precluded from reviewing it.

The propositions submitted by appellant are fourteen in number, and occupy seven pages of the abstract. They were all refused. We have carefully examined each. Their number and length forbid a detailed discussion of them in this opinion. It follows from the views which we have above

expressed that the first, second, third, fourth, fifth, sixth, ninth, tenth, eleventh, and twelfth of these propositions, if they be otherwise correct, are neither of them controlling in this case, and their refusal was therefore not error. The eleventh is also objectionable for the reason it presents a mixed question of law and fact. We regard the seventh, eighth, thirteenth, and fourteenth as incorrect statements of the law.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(207 Ill. 607)

CHICAGO UNION TRACTION CO. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Feb. 17, 1904.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—BENEFITS—EVIDENCE—PRIMA FACIE CASE.

1. In an action to recover on a special assessment for a street improvement levied on city lots used by defendant under a lease for 999 years, for street railway purposes, evidence that for the uses to which the company put the property the pavement would be of no benefit to the same, and that defendant had no intention to change the use of the property, was inadmissible, as the liability for benefits depended not on the use, but on the extent the market value of the property was enhanced by the improvement.

2. In an action to recover on a special assessment for street improvements, the assessment roll and evidence of a witness that the property was benefited to the full extent of the assessment, taking into consideration the uses to which it was put, were sufficient to establish a prima facie case.

Appeal from Cook County Court; L. C. Ruth, Judge.

Action by the city of Chicago against the Chicago Union Traction Company to recover special assessments for a street improvement. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Williston Fish and Louis Bolsot (John A. Rose, of counsel), for appellant. Robert Redfield and Charles M. Walker, Corp. Counsel (Edgar Bronson Tolman, of counsel), for appellee.

RICKS, J. This is an appeal from the county court of Cook county confirming a special assessment for curbing, guttering, grading, and paving North Park avenue from the north curb line of Sigel street to the south curb line of Menominee street. The estimated cost of the proposed improvement is \$3,300. Sublots 1, 2, and 3, in subdivision of lots 33, 36, and 27, and that part north of Eugenie street of lot 34, in North's Addition, and the east 125 feet of subplot 4 and the west 267 feet of subplot 4, both in lot 38, in North's subdivision, were specially assessed to appellant. All this property is located in a single block lying east of and abutting on North Park avenue, and between Tell court on the north and Eugenie street on the south. Through this block, north and south, runs a small street called Hammond

street, beginning in Eugenie street and terminating at Tell court. Lots 1, 2, and 3 and the east 125 feet of subplot 4 lie east of Hammond street and abut on North Park avenue, and are used by appellant as a yard for the storage of paving blocks, gravel, and other track material except rails, and are called "East Yard on Hammond Street." The west 267 feet of subplot 4 lies west of Hammond street, and is used for like purposes of storage, and is called "West Yard on Hammond Street." There are no street railroad tracks on either of these yards or leading to them, and they are not used for railroad purposes, except in that they are used for the storage of material with which the railroad company paves its tracks. Lot 1 is assessed at \$157.75 and lots 2 and 3 at \$125.05 each, and subplot 4 was assessed at \$261.85.

Numerous objections were filed by appellant, but the single objection (No. 22) that "the said assessment upon the property of said objector exceeds the benefits which will accrue to said property from the proposed improvement" is insisted upon. The trial was by the court, a jury being waived.

It is stipulated between the parties that the fee to this property belongs to the North Chicago City Railway Company, and was in 1886 leased for 999 years to the North Chicago Street Railroad Company, and by the latter company, in 1899, leased to the appellant for the unexpired period of the North Chicago Street Railroad Company's lease. All the above companies are corporations organized under the laws of this state.

Appellee made the formal proofs, including the offer of the assessment roll, and rested. Appellant placed upon the stand one Charles Caul, who testified that for the last 15 years there has been, and is now, a tight-board fence between North Park avenue and the property in question, without any gate or entrance from Park avenue to such property, and that all the materials stored upon the property came in through Hammond street, and further testified that for the uses to which the company put the property the pavement on Park avenue would be of no benefit to the same, and it was agreed that one J. J. Murphy, a witness for objector, would testify to the same effect. Appellant also offered to prove that there is no intention on the part of the company to alter the use of the property above objected for from its present use. This evidence was excluded by the court, and objection made and exception taken. H. Goldstein, a witness on behalf of the appellee, testified that the property would be benefited to the full extent of the assessment, taking into consideration the uses to which it was put.

This was all the evidence, and appellant then offered nine propositions of law, which it requested the court to hold. The court held the eighth and refused all the others. The eighth holding was to the effect that the burden of proof rested upon appellee to show

that the property objected for would be benefited to the extent of the assessment, and that as to any lot concerning which the objector had offered competent and material evidence that it would not be benefited to the amount assessed against it on the assessment roll, the assessment roll itself could not be considered as the testimony of any witness on the question of benefits. The eight refused holdings, as offered by the appellant, were all upon the theory that the property in question is street railroad property, and is held by said company for street railroad uses and purposes only, and that said company cannot lawfully apply said property to any other uses or purposes than such as are necessary or proper for the operation and maintenance of its street railways, and that the only basis upon which benefits can be assessed to it upon said property is that of the uses to which appellant puts the same.

The briefs and arguments in this case in all essential features are the same as were those in the case of Chicago Union Traction Co. v. City of Chicago, 204 Ill. 363, 68 N. E. 519, each taking the same position as to the basis for the assessment, and each relying upon the same authority in support of the contention. The holdings, too, offered in the latter case, were practically the same as those here offered; so that the main question here presented has already received the full consideration of this court, and has been decided adversely to the contention of appellant, and, as upon that phase of the case the case last cited is exhaustive and controlling, we deem it unnecessary to further discuss and consider the main question here presented, but are satisfied to adhere to the views expressed in the former case.

The evidence offered by appellant as to the extent of benefits was upon an erroneous theory of the rule governing such benefits, and did not, as we think, overcome, or even tend to contradict, the prima facie case made by the assessment roll, which, together with the oral testimony offered on behalf of appellee, we regard as amply sufficient to show that the property was benefited to the extent of the assessment. Nor was there error in refusing to permit appellant to show that it was its intention to continue the same use of the property in question as that to which it had theretofore been put by it. That testimony was both incompetent and irrelevant, and could not in any manner affect the case.

There was no error in the action of the county court of Cook county, and its judgment is affirmed. Judgment affirmed.

(207 Ill. 611)

BIGGERSTAFF et al. v. VAN PELT et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

WILLS—CONSTRUCTION—DEVISE OF REVERSION—VALIDITY—CREATION OF ESTATE IN REMAINDER.

1. A testator having agreed with his wife to give her a life estate in the homestead, with

certain personal property and a life annuity, in lieu of all her claims against his estate, he thereupon executed his will, referring to the agreement, and providing that the annuity should be a charge on the remaining real estate after payment of his debts, and that all the rest, residue, and "remainder" of his estate should go to his five children. By a subsequent clause he declared that his three daughters should not take "their share of the real estate in fee," but as to them his bequest was for life, remainder to their children. *Held*, that the word "remainder" as first used therein included his reversion in the homestead, which could pass by devise, and it was therefore included in the subsequent clause, which obviated an objection that the prior provision was void as disposing of the estate as the law would have done, and the grandchildren were entitled to the homestead as against persons claiming by mesne conveyance from their mothers.

Appeal from Circuit Court, Knox County; Geo. W. Thompson, Judge.

Suit by C. B. Biggerstaff and others against Anna H. Van Pelt and others. From a decree in favor of complainants, defendants appeal. Affirmed.

P. H. Sanford, for appellants. Williams, Lawrence & Welsh, for appellees.

RICKS, J. Appellees filed their bill for partition in the Knox circuit court, making appellants and others parties defendant, for the partition of certain blocks and parts of blocks in the village of Wataga, in said Knox county. The property described in the bill, designated as the "Holyoke property," was the homestead of one Booker Pickernel, who was the grandfather of appellees. Booker Pickernel's wife was Amelia, and on the 30th day of June, 1884, he and his wife entered into an agreement under seal and acknowledged, by which a life estate to her in the real estate in question, together with certain personal property and a certain annuity, was, and was to be, accepted by Amelia Pickernel in full of her dower, homestead, widow's award, and all claims of every character against the estate of Booker Pickernel. Booker Pickernel had a large estate, consisting principally of land, and had five children—two sons and three daughters. On the same day that the contract was executed between himself and wife he made his will, which, after his death, was duly probated, and about which there is no controversy. The second, third, and fifth clauses of his will comprise all the parts of the will that in any manner make any disposition of his property. The first clause merely directs the payment of his debts, and the fourth appoints the executor. The will contains but five clauses. The clauses referred to are as follows:

"Second—Having agreed with my beloved wife, Amelia Pickernel, as to the portion of my estate which she shall take, I do hereby direct my executor hereinafter named, to pay her the sum of \$600 per year, to be paid her in equal installments, half-annually, as provided in a certain contract made with her on June 30, 1884; which sum of \$600 per annum I hereby direct shall be a charge

and lien upon all real estate remaining after payment of debts, so long as she shall live; which provision and other provisions made in said contract, and which I wish my executor to fully carry out, shall be taken and has been accepted by her in full of and as a substitute for her dower and distributive share in my estate.

"Third—All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath to my children, John U. Pickerel, Richard H. Pickerel, Mary Freet, Susan Lawrence and Dana Wright, share and share alike."

"Fifth—It is my will that my three daughters above named shall not take their share of the real estate in fee, but as to them my bequest is to them of such undivided share of such remainder for life only, remainder to their lawful children."

The testator died August 1, 1884, and Amelia, his wife, survived him, and took the real estate in controversy for her life, under the contract herein above mentioned. Amelia Pickerel died April 12, 1899. Prior to her death the two sons and the three daughters of the testator all joined in a conveyance conveying, by quit-claim deed, to the said Amelia Pickerel all their interest in the said Holyoke property, the property in controversy, and appellants, by mesne conveyances from Amelia Pickerel, claim as purchasers and owners in fee of said Holyoke property. Mary Freet, one of the daughters, died November 23, 1898, leaving appellee Anna B. Van Pelt her only child and heir at law. Appellees Maud Steel and Ray Wright are adult children of Mandane Wright, one of testator's daughters, and appellees Daisy Lawrence and Madge Lawrence are the adult children of Susan Lawrence, the third of testator's daughters.

Under a bill alleging the above facts appellees claim the right to partition the Holyoke property as owners of three-fifths of the interest of their grandfather, Booker Pickerel, therein, by virtue of the provisions of his will.

Appellants answered the bill, admitting the facts as alleged therein, but denying that by the will appellees took any interest in said real estate. General replication was filed to the answer, and the cause referred to the master. The testimony of but one witness was taken—George A. Lawrence, a lawyer of Galesburg—who testified that he prepared the contract between Booker Pickerel and his wife, Amelia, and the will of Booker Pickerel, on June 30, 1884. The contract was prepared, executed, and delivered before the will. This, together with the documentary evidence, was all the evidence heard by the master, who found and reported: "It is evident that the fifth clause was inserted as a modification of the third clause. By the third clause, standing alone, the five children would take this Wataga property subject to the life estate of Mrs. Pick-

erel therein. They did not take the property in fee. By the third clause, not modified, the five children would have taken the balance of his real estate alike in fee; but by the fifth clause he says, 'It is my will that my daughters above named shall not take their share of the real estate in fee'—that is, in so far as my daughters would take real estate in fee under the third clause, I direct that they shall take only a life estate in such real estate, remainder to their lawful children. The legal definition of a fee is: 'The largest possible estate which a man can have, being an absolute estate. It is where lands are given to a man and his heirs absolutely, without any end or limitation put to the estate.' By the third clause Pickerel gave these premises to the five children subject to the life estate of the widow. Did he give it to them in fee? We think not. He did not have it to give, as he had already given a life estate, and could only give them the premises subject to the life estate, as he had only that to give—a reversionary interest in the premises. Complainants claim only as remaindermen. By the will no remainder was created as to these premises. A remainder is defined to be 'the remnant of an estate in land depending upon a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on termination of that estate and not independent of it.' In construing this will we think the legal import and meaning of the words 'fee' and 'remainder' should be given to them. The remainder, and the particular estates upon which it depends, must together constitute the entire estate—that is, be equivalent to a fee simple estate in the premises. As to these premises this could not be under this will, as the testator had by another instrument and at a different time created a life estate in the premises to his wife."

The master, after expressing these views, held that as to the property in question the two sons and three daughters took alike, and that appellees had no interest in the property, and that their bill should be dismissed for want of equity. Objections were filed to the report of the master, and by him overruled, and exceptions filed before the chancellor, and by him sustained, except as to point 5, which was to the holding of the master that technical definitions should be applied to words used in the will, and that in construing it the technical meaning, rather than the plain meaning and intent of the testator, should be given effect. The chancellor granted the relief as prayed, and appellants prosecute this appeal, and urge that the court erred in sustaining complainants' exceptions to the finding of the master and in granting the relief.

The whole argument of appellants is predicated upon the contention that, as the testator had by the contract between himself and his wife carved out a life estate from the

property in question before the making of the will, therefore he had but the reversionary interest, which alone could pass by his devise, and that such interest was less than a fee, and that inasmuch as the fifth clause, which attempted to modify the grant to the devisees in the third clause by the use of the following language in the fifth clause, "It is my will that my three daughters, above named, shall not take their share of the real estate in fee," referred only to such portion of the estate as could by the devise under the third clause have passed in fee to the daughters, and that, as the property in question could not pass in fee to the daughters under that devise, therefore it was not affected by the fifth clause, and that the whole reversionary interest, whatever it was, being less than a fee, passed and vested absolutely in the sons and daughters. Appellants further contend that as by the express terms of the fifth clause the appellees take a remainder, and as there was other real estate than that in question which passed by the third clause of the will to the mothers of appellees, and in which appellees, by the fifth clause, did take a remainder, the word "remainder" should be given its strict legal definition and effect, and not be held to mean or include a reversion, and that by so doing the property in question would not pass.

This position is grounded upon the technical definition of the words "fee" and "remainder," it being said that a fee "is the largest possible estate which a man can have, being an absolute estate," and that a remainder is "the remnant of an estate in land, depending upon a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on determination of that estate, and not in abridgment of it"—citing 2 *Bovier's Law Dic.* 869; 2 *Washburn on Real Prop.* 585; 4 *Kent's Com.* 198; *Tiedeman on Real Prop.* § 396. In support of their position appellants invoke the rule of construction applicable to wills, that each word and term used must be given effect according to its legal import.

If a reversion could not be the subject of a devise, the position of appellants would be unassailable. Both at the common law and by the first section of our statute relating to wills a reversion is recognized as an estate or interest in land that may pass by devise. When a will is established, the presumption is that the testator intended to dispose of his entire estate, and not to leave any part of it as intestate property. By the second clause of the will in question the testator declares that he has made an agreement with his wife, Amelia, as to the portion of his estate she shall take, and directs that she be paid \$600 annually; in equal semiannual payments, and makes such annuity a charge on his real estate. By the agreement referred to in the will he gives her the Holyoke property for life, and also the household goods, and agrees, further, that his executors and

administrators will assume and pay to his wife an annuity of \$600 in half-yearly payments so long as she shall live. By the third clause of the will the testator grants to his five children, two sons and three daughters, naming them, "all the rest, residue and remainder of my estate, both real and personal, * * * share and share alike." As no part of his estate had otherwise been disposed of, except by the agreement with his wife and the second clause of his will, which disposition was made solely with reference to the portion that should be taken by his wife, it is entirely apparent that by the third clause the testator intended to give to his five children named all the remaining portion of his estate.

But it is said that, as the third clause only disposed of the estate in the same manner that the law of descent would have done without the will, therefore that clause is void; and in support of this contention is cited *Akers v. Clark*, 184 Ill. 136, 56 N. E. 296, 75 Am. St. Rep. 152, where it is said (page 137, 184 Ill., page 297, 56 N. E., 75 Am. St. Rep. 152): "A devise giving precisely the same estate and interest in property as the devisee would take by descent if the devise had not been made is void, for the reason that a title by descent is regarded as a worthier or better title than by devise or purchase." This rule would be applicable and controlling were it not for the fifth clause of the will. Neither the legal effect nor the intention of the testator is alone determined by a single clause of the will, and both must be determined from the entire will, giving each clause and each word thereof, if the same can be done, validity. When the fifth clause is read in connection with the third clause, and effect given to it, it appears that by the devise in question the testator did not give to his three daughters the same estate in any of his real estate that they would have taken in case of intestacy, but that the estate to each of them was limited to that of a life estate; and whilst it is true that the word "remainder," in a strict legal sense, as spoken of in the books when referring to estates, has a somewhat restricted meaning, it is also true that it has a broader meaning, as commonly and generally understood. As applied to estates, and under the restricted meaning, the definition of the word "remainder" is "a remnant of an estate in lands and tenements expectant upon and part of the estate created together with the same at one time"; and it would seem the greater weight of authority is that to be strictly a remainder it must be created not only at the same time, but by the same instrument, as the particular estate. "The term 'remainder' is sometimes used in a lax sense to define any kind of subsequent interest or the limitation thereof. But a limitation of a remainder, strictly so called, is a clause creating or transferring an estate or interest in lands or tenements which is limited, either directly or indirectly,

to take effect in possession or in enjoyment, or in both, subject only to any term of years or contingent interest that may intervene immediately after the regular expiration of a particular estate or freehold previously created together with it by the same instrument out of the same subject of property." Smith on Executory Interests, § 159. "An estate, then, in remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined." 2 Blackstone's Com. 164.

In the case before us the estate granted to the wife was one for life, and the estate remaining in the testator and susceptible of his disposition was just as great and just as certain as though the testator had by the will granted to his wife a life estate, and to each of his daughters a life estate in remainder, with remainder in fee to his grandchildren, the children of his respective daughters. The words "revert," "reversion," and "remainder" are sometimes interchangeably used, as was the case in *Dalrymple v. Leach*, 192 Ill. 51, 61 N. E. 443, where the testator gave to his wife two-thirds of his property, and by subsequent clause provided, "If at my wife's death there is any property then in her possession or control, I desire one-half the same shall revert to my nephew, Frederick Dalrymple." See, also, 24 Am. & Eng. Ency. of Law (2d Ed.) 420. And in the case of *Akers v. Clark*, supra, which was a devise of a reversion in land, Mr. Justice Phillips, in speaking of the devise, said (page 138, 184 Ill., page 297, 56 N. E., 75 Am. St. Rep. 152): "The remainder, after the expiration of her life estate, under the law as well as under the deed, reverted to the grantor or his heirs. He, being a reversioner first in order of time, might dispose of the fee absolutely by will or by deed." As in the case at bar an estate of the same extent would have passed by the devise whether it had been termed a "reversion" or a "remainder," and as we think there can be no doubt as to the intention of the testator, taking the provisions and language of the will as a whole, and that his intention was that the appellees should ultimately have the fee of the reversionary interest in the Holyoke property, we would not feel warranted in giving the word "remainder" the restricted meaning contended for, and thus defeat the plain provision of the will.

We think the conclusion of the chancellor was the correct one, and the decree of the circuit court is affirmed. Decree affirmed.

(207 Ill. 528)

DILCHER v. SCHORIK.

(Supreme Court of Illinois. Feb. 17, 1904.)

ELECTIONS—CONTEST—JURISDICTION—NOMINATIONS—PLEADING—AMENDMENTS.

1. Under Hurd's Rev. St. 1899, p. 804, c. 46, § 297, providing that certificates of nomination and nomination papers shall be deemed valid unless objected to, and in case of objection the

decision of the board shall be final, the court had no jurisdiction of an action which did not question defendant's election, but only the regularity of his nomination and his eligibility to the office, as the jurisdiction of the court in an election contest is limited to the question of who was elected, and the question as to the qualifications of a person elected could only be determined by information in the nature of quo warranto.

2. Under the statute requiring a verified petition, stating the points on which an election will be contested, to be filed within 30 days after the person whose election is contested is declared elected, a petition filed within time, but not stating any point on which the election was or could be contested, could not be amended after time, as any amendment which would give the court jurisdiction would necessarily constitute a new and different petition.

3. It is not error to refuse to allow an amendment which is not presented, and where there are no means of determining whether the amendment will be a proper and sufficient one or not.

Appeal from Circuit Court, Cook County; R. S. Tuthill, Judge.

Proceedings by Frank Schorik against George H. Dilcher. From a judgment for defendant, plaintiff appeals. Affirmed.

Charles A. Surine, for appellant. L. A. Kapsa and McClellan & Spencer, for appellee.

CARTWRIGHT, J. Appellant filed in the circuit court of Cook county his petition, verified by affidavit, stating that he was a candidate on the Democratic ticket for the office of constable at an election held April 7, 1903, in the town of West Chicago; that appellee was a candidate on an independent ticket; that appellee was declared duly elected, but was not eligible to the office on account of not being a resident of the town of West Chicago for a period of one year prior to the day of election; and that appellee, being an independent candidate, was not regularly nominated, for the reason that he did not file with the county clerk a certificate signed by the required percentage of the qualified voters of the town, as required by the statute. The petition did not question the election of appellee, but only the regularity of his nomination and his eligibility to the office. The court sustained a demurrer to the petition, whereupon appellant entered his motion for leave to amend the petition, which motion was denied by the court, and the petition was dismissed.

Appellant, by his petition, did not seek to contest the election of appellee, and the court had no jurisdiction of the question sought to be raised by it. Section 10 of the ballot law provides that certificates of nomination and nomination papers shall be deemed valid unless objected to, and in case of objection the decision of the board of town auditors, or of the board of election commissioners, where such board exists, shall be final. Hurd's Rev. St. 1899, p. 804, c. 46, § 297. The question whether a person elected to office possesses the necessary qualifications can only be determined by information in the nature of quo warranto. The jurisdiction of the

court in a contest of an election is limited to the question who was elected. *Greenwood v. Murphy*, 131 Ill. 604, 23 N. E. 421. The court did not err in sustaining the demurrer.

The only other question is whether the court erred in refusing leave to amend the petition. The statute requires a verified petition, stating the points on which the election will be contested, to be filed within 30 days after the person whose election is contested is declared elected. The petition, which was filed within the time required by statute, did not state any point upon which the election was or could be contested. It merely asked the court to declare appellant, who was not elected, entitled to the office, because appellee, who was elected, was not regularly nominated, or eligible to the office. Any amendment which would give the court jurisdiction would necessarily constitute an entirely new and different petition after the limitation had run. But, if the petition could have been amended, no amendment was presented, and the motion did not state in what respect appellant proposed to amend the petition. He does not even now suggest what amendment he desired to make or could have made, but says the amendment was presumably to meet some objection to the petition. A party is not entitled, as of right, to have leave to amend a pleading, regardless of what the amendment is to be. A party who desires to file an amended pleading should prepare and submit it to the inspection of the court. There is no presumption that a proposed amendment will be a proper one, and it is not error to refuse to allow an amendment which is not presented, and where there are no means of determining whether the amendment will be a proper and sufficient one or not. *Jones v. Kennicott*, 83 Ill. 484; *McFarland v. Claypool*, 128 Ill. 397, 21 N. E. 587.

The judgment is affirmed. Judgment affirmed.

(207 Ill. 291)

ELLIS v. CONRAD SEIPP BREWING CO.
et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

**CONTRACTS—LIABILITY OF DEBTOR—EXTENT
—PAROL EVIDENCE—ADMISSIBILITY.**

1. Where conversations occurring prior to the making of a contract in writing are merged in the contract, parol testimony of the conversations is inadmissible.

2. Complainant was individually indebted to a company. He and a third person were also jointly indebted to the company for money borrowed for the erection of a building on leased land. Subsequently the parties entered into contracts which provided that in consideration of complainant having conveyed his interest in the building to the third person the third person would assume the indebtedness due thereon, and would also assume the individual debt of complainant as soon as the building could be sold, and which further provided that on the third person paying the debts due to the company it would release the securities held to secure the debts. Held, that the contracts did not release

complainant from liability, and make the third person responsible for the debts.

3. Where the third person subsequently failed to pay the rent and the taxes on the land leased for the building, and the company paid the same, complainant was chargeable as security for the third person for the amount paid.

4. Complainant was chargeable for the amount of the attorney's fees stipulated for in the note given by the third person to secure the company for the payment of the rent and taxes in case judgment was entered on the note.

Error to Appellate Court, First District.

Suit by Jacob Ellis against the Conrad Seipp Brewing Company and another. From a decree of the Appellate Court (107 Ill. App. 189), affirming a judgment for defendants, plaintiff brings error. Affirmed.

This is a bill for an accounting and relief filed in the superior court of Cook county by the plaintiff in error, Jacob Ellis, against the defendants in error, Jacob Wolfe and the Conrad Seipp Brewing Company.

On July 6, 1891, Ellis became indebted to the brewing company in the sum of \$1,000, secured by trust deed to Theodore Oehne, trustee, conveying his homestead in the city of Chicago, at a place known as Roseland. Ellis had a brother who was also indebted to said brewing company in the sum of \$800, and on October 8, 1891, Ellis gave his note to secure this indebtedness. Upon these two notes \$400 was paid, leaving \$1,400 balance due. On October 4, 1892, Ellis and Wolfe leased certain vacant lots on Cottage Grove avenue, in Chicago, for a term of 15 years, and erected thereon a building, consisting of five storerooms on the ground floor and a hotel on the second floor. This building cost \$14,500, and \$5,000 of that amount was borrowed from the brewing company, to be repaid in five annual installments of \$1,000 each, three of which were paid as they became due, leaving \$2,000 unpaid. This last piece of property is known in this record as the "Burnside Property." On December 17, 1896, the brewing company obtained judgment against Ellis for the sum of \$2,043, being the balance due on the \$1,400 individual notes of Ellis, and an execution was levied upon the undivided one-half interest of Ellis in the Burnside property. This levy resulted in a conference between Ellis, Wolfe, and the brewing company, in which a settlement was agreed upon. Two written agreements were there signed. One was between Ellis and Wolfe, which provided that, in consideration of Ellis having conveyed to Wolfe all of his interest in the Burnside property, Wolfe was to assume all indebtedness due upon said property, and Wolfe was also to assume, as soon as said building could be sold by him, and not before, the judgment obtained by the brewing company against Ellis for \$2,043, and Wolfe was also to assume the payment of the \$2,000 which Wolfe and Ellis owed to the brewing company. The other agreement was between Wolfe, Ellis, and the brewing company, and provided that in consideration of Wolfe having on that

date delivered to the brewing company his note for \$3,596.25, secured by a chattel mortgage executed by him, also partly secured by the trust deed from Ellis and wife to the brewing company on their homestead, and also further secured by the judgment of said brewing company against Ellis for \$2,043, the brewing company, upon the payment by Wolfe of said note for \$3,596.25, was to release to Wolfe and Ellis each of said securities, and if, prior to the payment of said note for \$3,596.25 by Wolfe, Ellis should pay said brewing company the amount due it upon the trust deed executed by Ellis upon his home place, then the brewing company was to release to Ellis his homestead, and credit upon the note of \$3,596.25 the amount of the payment as made by Ellis. Ellis claims that it was his understanding that these contracts entirely liquidated his indebtedness to the brewing company, and that he made several requests for the return of his papers, but did not succeed in getting them. About six weeks after the contracts were executed Wolfe failed to pay the ground rent and taxes on the Burnside property, and the same were paid by the brewing company at Wolfe's request, and on May 7, 1897, Wolfe executed his note to the brewing company for \$675 to secure this payment, and also assigned the rents of the Burnside premises to the brewing company. Upon this note of \$675 and the note of \$3,596.25 default was made in payment, and on August 24, 1897, judgment was entered for \$4,472.96. In April, 1899, Ellis' homestead in Roseland was destroyed by fire, and the loss adjusted at \$1,407. Before the money was paid to Ellis the brewing company garnished the insurance companies upon the above judgment, and Ellis filed this bill for relief.

The bill alleges the facts as above set forth, prays for an accounting, and that Wolfe be ordered to pay whatever is found due, and that upon his failure so to do the brewing company be required to foreclose its trust deed upon the Burnside property, and if enough is not realized from said foreclosure complainant offers to pay the balance. A decree was rendered upon the hearing, adjusting the rights of the respective parties, from which decree an appeal was taken to the Appellate Court for the First District, where the decree was affirmed, and by this writ of error the cause has been brought to this court.

Samuel J. Howe, for plaintiff in error.
Winston, Payne & Strawn, for defendants in error.

WILKIN, J. (after stating the facts). The decree is quite lengthy, and finds the facts as above set forth. There are but three points raised in this court, and only such parts of the decree as involve these questions need be considered.

It is first insisted by plaintiff in error that

by the contract entered into between Ellis, Wolfe, and the brewing company Ellis was to be released of liability and Wolfe was to be responsible for the debt. In support of this contention plaintiff in error offered oral testimony as to certain conversations which took place prior to the making of the contracts, but the record shows that all of these conversations were merged into the two written agreements. The evidence does not show that these written agreements contained any mistake or were obtained by fraud. They are therefore binding upon the plaintiff in error, and the contracts, upon their face, do not sustain the contention in that regard.

The decree found that to the extent of \$1,830.36, with interest, Ellis was indebted to the brewing company as surety for Wolfe, and that the net amount of rents collected by the brewing company was \$391.03, and that this should be applied in paying the note of \$675 made by Wolfe. This part of the decree, it is insisted, is an attempt to hold Ellis' property to cover future advances made by the brewing company to Wolfe, and that to the extent of at least one-half of the net rents collected on the Burnside property Ellis was entitled to credit on the debt for which he was found to be security for Wolfe. We do not think this contention is sustained by either the law or the evidence. The contract released Ellis only upon certain conditions. Before these conditions were complied with, Wolfe defaulted in the payment of the ground rent and taxes to the extent of \$675. A part of this default was before the contracts were made. If this sum was not paid the whole property would be forfeited and lost to all parties. Wolfe had no money to make the payment, and to prevent the loss the brewing company made the payment and Wolfe assigned the rents as surety. It is the duty of a creditor to diligently guard and protect effects in his hands for the security of his debt, and the application by the brewing company of the rents towards the discharge of the note given for back ground-rent and taxes was a proper and lawful action on the part of the creditor to protect the surety held by it, and of this provision in the decree plaintiff in error had no ground to complain.

The decree further provides that if, upon the foreclosure sale ordered to be made, enough was not realized to pay the sum of \$4,495.20, with interest at 5 per cent, then Ellis' insurance money, or so much of it as should be necessary to cover the deficit, should be applied to that purpose. It is insisted that this part of the decree is wrong, for the reason that the judgment which was rendered against Wolfe on the note he gave at the time Ellis made the conveyance to him included \$100 attorney's fees, and it was manifestly improper to hold that Ellis should be charged with the payment of attorney's fees incurred in entering judgment against

Wolfe on his personal note for \$675. An examination of the assignment of error shows that this point was not made in the Appellate Court, and is raised in this court for the first time, and there is no assignment of error in this court upon which it can be based. We have, however, examined the decree in this respect, and find that the total amount due on said judgment, including attorney's fees, was found to be \$5,310.96, of which \$4,495.20 was due on account of the note representing the joint liability of Wolfe and Ellis, and the balance was due upon the note representing Wolfe's individual indebtedness. It does not appear how the attorney's fee of \$100 was charged on these notes. For anything appearing in the record, the fee may have been included in the \$815.76 found to be the amount due upon Wolfe's individual note. But even if the \$100 is charged as plaintiff in error claims, Ellis was clearly liable therefor, the note which he gave providing for an attorney's fee of \$100 in case of judgment being entered thereon. For these reasons we find no error in the decree in this respect.

The decree of the superior court and of the Appellate Court will therefore be affirmed. Decree affirmed.

(208 Ill. 31)

PEOPLE, for Use of ILLINOIS STATE BOARD OF HEALTH, v. SMITH.

(Supreme Court of Illinois. Feb. 17, 1904.)

MEDICINE—PRACTICE—TRAVELING OPTICIAN—APPEAL—REVERSAL WITHOUT REMAND—FINDINGS OF FACT.

1. In an action for a penalty for violating Laws 1899, p. 273—an act to regulate the practice of medicine—where the Appellate Court reverses the judgment of the circuit court, without remand, it is its duty to incorporate in its judgment a statement of facts.

2. Where a traveling optician in his advertisements invited persons afflicted with dizziness, neuralgia, etc., to visit him, but stated that he did not give medical or surgical treatment, and in fact his business consisted solely in fitting and selling spectacles, he did not treat, operate, or prescribe for any physical ailments of others, within Laws 1899, p. 275, § 7, defining the practice of medicine, or, as an itinerant vendor, profess to cure or treat disease by any drug or application, as prohibited by section 8.

Error to Appellate Court, Second District.

Action by the people, for use of Illinois State Board of Health, against Charles Lincoln Smith. From a judgment of the Appellate Court (108 Ill. App. 499) reversing a judgment against the defendant, the people bring error. Affirmed.

Whitmore, Barnes & Boulware, for plaintiff in error. I. O. Pinkney, for defendant in error.

WILKIN, J. This case was submitted at a prior term on appeal from the Appellate Court, and was remanded to that court, with directions, if it adhered to its judgment of reversal, to incorporate in it a statement of facts, in compliance with section 88 of the

practice act. See 199 Ill. 20, 64 N. E. 972. It has again reversed the judgment of the circuit court, without remandment, and certified in its judgment the following statement of facts: "We find that appellant was engaged in the business of traveling optician; that he went from place to place in this state, including Peoria, where the acts in question were performed; that he fitted spectacles to persons of defective sight, first ascertaining, by tests, the kind of lens required by his customer, then procuring glasses to be ground accordingly, and placed in a frame and delivered to his customers, and receiving payment therefor; that he advertised himself in the public press as 'the famous Chicago eye expert,' and in such advertisements he invited persons afflicted with blurring, dizziness, neuralgia, headaches, spots before the eyes, inflammation, granulation, winking, trembling spells, cataract, burning and smarting of the eyes, and various nervous brain affections, to call upon him; that these advertisements stated that he did not give medical or surgical treatment; that in these advertisements he stated that his glasses, fitted and ground by his method, benefited his patrons, and had cured headaches, blurring, itching, and burning of the eyes, etc. We find that appellant's glasses relieved such troubles while they were used, but did not cure them. We find that appellant had no license from the State Board of Health. We find that appellant did not practice medicine or surgery. We further find that appellant did not treat, or profess to treat, operate on, or prescribe for, any physical ailment or any physical injury to or deformity of another, except in the manner and to the extent above stated. We find that the foregoing were the acts for which appellee sought to recover and recovered from appellant in this cause the penalty prescribed by the act entitled 'An act to regulate the practice of medicine in the state of Illinois, and to repeal an act therein named,' in force July 1, 1899. Laws 1899, p. 273. We hold that these facts did not give appellee a cause of action against appellant."

Counsel for plaintiff in error have devoted a considerable part of their brief and argument to the contention that this is not a case in which the Appellate Court was authorized to incorporate in its judgment a finding of facts. But that question is settled by our repeated decisions to the contrary. Moreover, it was decided upon the former hearing of the case that, inasmuch as that court reversed the judgment of the circuit court without remanding the cause, it was its duty to find and recite in its judgment the facts, and the case was remanded for that purpose. It is also too well settled to be longer a matter of controversy that this court is concluded by the facts so found, and that we can only upon this writ of error determine whether or not the Appellate Court properly applied the law to the facts found

by it. *Hawk v. Chicago, Burlington & Northern Railroad Co.*, 147 Ill. 390, 35 N. E. 129, and cases there cited; *Schwartz v. Supreme Court of Honor*, 194 Ill. 844, 62 N. E. 777; *Davis v. Chicago Edison Co.*, 195 Ill. 31, 62 N. E. 829; *Hunter v. National Union*, 197 Ill. 478, 64 N. E. 356.

As we said in our former opinion, there is nothing in the record from which we can determine just what the complaint against the defendant below was; but, for the purposes of this decision, let it be assumed, as claimed by counsel, that the charge was a violation of sections 7 and 8 of the act of 1899 (Laws 1899, p. 275), to regulate the practice of medicine in this state—that is, by professing “to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another,” as provided in said section 7, and being an itinerant vendor of an appliance for the treatment of diseases or injuries, as prohibited by section 8. The finding of the Appellate Court is that all the defendant did was to fit spectacles to the eyes of persons of defective vision, and sell them to such persons. By so doing he did not treat, operate upon, or prescribe for any physical ailment or injury or deformity of another, within the meaning of section 7; nor did he, by advertising himself as an eye expert, and inviting persons afflicted with certain defects of vision to call upon him, profess to treat, operate on, or prescribe for any physical ailment or physical injury to or deformity of another, but in the same advertisement stated that he did not give medical or surgical treatment. All that he claimed by the advertisement was that glasses fitted and ground by his method benefited, and had cured, headaches, blurring, itching, and burning of the eyes, etc. We also think it clear that he was not, under the facts here found, an itinerant vendor of any drug, nostrum, ointment, or application of any kind intended for the treatment of diseases or injury; nor did he, by writing or printing, or other method, profess to the public to cure or treat diseases or deformity by any drug, nostrum, or application, within the meaning of section 8. It would be a strained construction of that section to hold that the mere fitting of spectacles to the eyes of a person is an appliance intended for the treatment of diseases or injury to another. As we have said, this statute is penal in its character, and must be strictly construed. It is a well-known fact that headaches, dizziness, and other similar ailments, often result from defective vision, which may be relieved by the use of spectacles; but it cannot be seriously contended that the person who sells such spectacles, or who tests the eyes and fits such glasses, practices medicine or surgery, or professes to cure or treat diseases or deformities thereby. While the statute under consideration is a wise and humane regulation for the protection of the public, and should be rigidly enforced, the construction

here contended for could have no other effect than to bring it into disrepute.

We think, on the facts recited in the judgment below, the Appellate Court ruled properly in holding that the evidence did not warrant a conviction. Its judgment will therefore be affirmed. Judgment affirmed.

(207 Ill. 583)

HARRIS v. DUMONT et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

DEEDS—VACATION—FRAUD—MISREPRESENTATIONS—EXISTING FACTS—MORTGAGES—MECHANICS’ LIENS—ENFORCEMENT—FRAUDULENT GRANTEE—PREJUDICE.

1. H. falsely represented to plaintiff that he was unmarried, and, after proposing marriage to her, and being accepted, he induced her to convey a valuable farm to G., his mother-in-law, in exchange for certain lots, which, to conceal his marriage, he and his wife had previously transferred to G. in order that she might transfer the same to plaintiff. G. thereafter conveyed the farm to H., who induced plaintiff to convey the lots to him in exchange for his note for \$3,500, and subsequently conveyed to his attorney certain land in Arkansas, of little value, which he induced plaintiff to accept in exchange for the note. G. had no interest whatever in the transaction, and H. acted as the agent and representative both of his wife and G. The marriage never took place, and plaintiff sued to recover the farm. *Held*, that under such facts plaintiff’s offer to restore the Arkansas land and a small amount of the cash received, which was all that she had received from the transaction, constituted a sufficient offer to place defendants in statu quo without an offer to reconvey the lots.

2. Where H. fraudulently induced plaintiff to convey certain land to another, which was ultimately conveyed to him by promising to marry plaintiff and by falsely representing to her that he was an unmarried man, such misrepresentations were sufficient to entitle plaintiff to have the conveyance set aside.

3. H. fraudulently induced plaintiff to convey a valuable farm to G., who was the mother-in-law of H., in consideration of a conveyance of certain lots which H. and his wife conveyed to G. in order that she might make such conveyance, and to conceal the fact that H. was a married man, so that he could not perform his promise to marry plaintiff, on which she relied in making the conveyance. Thereafter G., at the instance of H., executed two mortgages on the farm, which were both ultimately transferred to H.’s wife. One of the mortgages was without consideration, and the consideration for the other, if any, was thereafter satisfied. There was also evidence that H. in these transactions acted as agent for G. and his wife, and that they were mere tools to carry out the deception. *Held*, in a suit to set aside the conveyance of the farm, that it was proper for the court to decree a cancellation of the mortgages.

4. Where, in a suit to set aside a conveyance of a farm, the court rendered a decree setting the conveyance aside and enforcing certain mechanics’ liens thereon, to which plaintiff took no exception, the enforcement of such liens was not prejudicial to defendants, who claimed under the fraudulent grantee with notice.

Error to Circuit Court, Hamilton County; P. A. Pearce, Judge.

Bill by Catharine F. Dumont and others against Clara J. Harris and others. From a judgment in favor of plaintiffs and certain mechanic’s lien claimants, defendant Clara J. Harris brings error. Affirmed.

This litigation includes three separate and independent proceedings. On June 15, 1897, the defendant in error Catharine F. Dumont filed her bill in the circuit court of Hamilton county against John W. Harris, the husband of the plaintiff in error, Clara J. Harris, Rachael T. Goodwin, the mother of Clara J. Harris, M. H. Mundy and M. J. Boyd, which bill, by leave of court, was amended on March 16, 1898, by making Clara J. Harris a party defendant thereto. The bill so filed charges fraud, and asks for a decree canceling and annulling the deeds and mortgages upon the farm of 350 acres, described in the bill. Separate answers were filed to this bill by all the defendants. On July 6, 1897, John W. Thompson filed a petition in the same court to enforce a mechanic's lien against said farm, making said Boyd, Mundy, Catharine Dumont, John W. Harris, and others parties thereto. Answers were filed to this petition, which was a petition for a mechanic's lien for work and labor done in building a house upon said farm. Therein also, to the September term, 1897, of the court, an intervening petition was filed by Thomas B. Wright and John W. Wright, as partners, also claiming a mechanic's lien on account of materials furnished to said Thompson for the construction of said house. On January 7, 1898, the plaintiff in error, Clara J. Harris, filed a bill in said court to foreclose two mortgages executed by Rachael T. Goodwin, one for \$1,100 to Mrs. M. J. Boyd, and the other for \$5,000 to M. H. Mundy upon said farm of 350 acres, which mortgages are alleged to have been assigned to plaintiff in error, Clara J. Harris. To this bill to foreclose Rachael T. Goodwin, Catharine F. Dumont, John Thompson, John W. Harris, T. B. Wright, John W. Wright, and others, were made defendants. Answers were filed by Catharine F. Dumont and John Thompson to the bill to foreclose. After the original proceeding to set aside the deeds and mortgages on account of fraud, and the proceeding to foreclose the mortgages, and the proceeding to enforce the mechanics' liens were at issue by the filing of replications to the answers, the three proceedings were consolidated, and heard together. On September 28, 1898, a decree was rendered granting the relief asked for in the original bill, setting aside the deeds and mortgages therein mentioned as fraudulent and void, dismissing the suit to foreclose the mortgages, and finding liens in favor of the petitioning creditors in accordance with the prayers of their petitions. The present writ of error was sued out on June 30, 1903, for the purpose of reviewing the decree so entered by the circuit court of Hamilton county, it being sued out within about three months of the expiration of the five years allowed by the statute for taking out a writ of error.

The original bill, filed by Catharine F. Dumont, alleges that she was unmarried, and a widow, and the owner of a farm containing

350 acres, more or less, in Hamilton county; that about January 1, 1897, John W. Harris conceived the purpose of defrauding her by obtaining title to said farm through false and fraudulent pretenses and representations; that said Harris was, and still is, a married man, living in Evansville, Ind., of good address, agreeable manners, "a smooth scoundrel" capable by falsehood and deceit of winning her confidence; that, with intent to cheat and defraud her out of the title to said land, he proposed marriage to her; that she, being deceived by his false representations, in which she confided, and not knowing his ulterior purpose to cheat, accepted his proposition, not knowing that he was a married man, and agreed within a reasonable time to marry him; that immediately after obtaining her promise he insisted that she should sell and dispose of her real estate, and represented that upon their marriage they would reside in Evansville, Ind.; that he represented that he had great wealth, and that after their marriage it would be undesirable to have land in Hamilton county; that, relying upon his integrity, she agreed with him to exchange said farm in Hamilton county for real estate in Huntingburg, Ind.; that at his instance, on January 23, 1897, she executed a deed conveying the said farm to Rachael T. Goodwin, of Wabash county, Ill., and delivered said deed to said John W. Harris, and received from him a deed, executed by Rachael T. Goodwin, dated January 25, 1897, conveying to Catharine F. Dumont real estate in Huntingburg, Ind.; that as to the value of the latter she relied upon the fraudulent representations of said Harris; that said Goodwin was a relative of his, and conspiring with him to cheat and defraud her; that on February 1, 1897, he procured the said Goodwin to make a fraudulent mortgage on the farm of 350 acres to one M. J. Boyd for the pretended consideration of \$1,100, to become due in five years, which was filed February 16, 1897; that to further carry out his fraudulent scheme he procured said Goodwin on February 13, 1897, to execute and deliver to one M. H. Mundy a fraudulent mortgage on said farm for \$5,000, to become due in five years, which was recorded on February 15, 1897; that both said mortgages were without valuable consideration, and made at the instance of Harris for the purpose of cheating and defrauding her, and were received by said Boyd and Mundy knowingly for the same purpose; that said Harris, in pursuance of his intention to defraud her, falsely represented that, if she would convey to him the Huntingburg property, he would convert it into \$3,500 cash; that, expecting to marry him soon, and relying on his promise, and being deceived and duped, she conveyed to him the Huntingburg property a few days after it had been conveyed to her, for the purpose of having it converted into said sum of money, but he did not so convert it, but, conspiring with said Mundy to defraud her, procured a deed

from Mundy and his wife to be made to her, conveying to her 160 acres of land in Nevada county, Ark., for a pretended consideration of \$3,500; that she received said deed to the Arkansas land, and returned to said Harris his note for \$3,500, which she held for the Huntingburg property; that said Harris and Mundy represented to her that said Arkansas land was well worth \$3,500, when in fact it was almost worthless, and was used in pursuance of a scheme to defraud her out of the Hamilton county farm; that she offers to reconvey to said Mundy said Arkansas land; that on June 14, 1897, said Harris obtained a fraudulent deed from said Goodwin to himself of all of said Hamilton county land, being 350 acres, and the said Huntingburg property; that Harris, Goodwin, Mundy, and Boyd, in relation to said deeds and mortgages, separately and together conspired to defraud her; that the said transactions and conveyances were the results of such conspiracy. The bill prays that the deed of January 23, 1897, by which she conveyed the Hamilton county land, be annulled, and that said mortgages made by Goodwin to Boyd and Mundy be annulled; that said deed dated June 14, 1897, made by Goodwin to Harris, conveying said 350 acres, be annulled, etc.; and for general relief, etc. The final decree of the court found substantially in accordance with the prayer of the bill, and decreed that the deed of the 350 acres to Rachael T. Goodwin, and the deed of the same land, made by Mrs. Goodwin to John W. Harris, were null and void, and that the mortgages to Mrs. Boyd and Mr. Mundy were void and inoperative; that Catharine F. Dumont was the owner of the Hamilton county real estate, and should be let into possession thereof, etc.

El. B. Green and Theodore G. Risley, for plaintiff in error. T. B. Stelle, Leonidas Walker, and John R. Cross, for defendants in error.

MAGRUDER, J. (after stating the facts). In considering the question whether or not the decree entered by the circuit court was correct, we will refer only to the reasons urged by the plaintiff in error, Clara J. Harris, why the decree should be reversed, and in the order in which those reasons are presented in the argument of counsel.

1. It is contended by counsel for plaintiff in error that there was no equity on the face of the bill filed below by defendant in error Catharine F. Dumont, upon the alleged ground that she did not, upon the discovery of the alleged fraud, before filing her bill, offer to convey back to Rachael T. Goodwin the Huntingburg property received by her in exchange for the Hamilton county farm; in other words, it is said that there was no offer in her bill to place Mrs. Goodwin in statu quo. In support of this contention the rule is invoked that, before a court of equity will rescind an exchange of lands or a sale

of lands on the ground of fraud, it must be averred and proven that the party seeking the relief has offered, and is ready and able, to place the other party in statu quo. *Brady v. Cole*, 164 Ill. 116, 45 N. E. 438; *Dowden v. Wilson*, 108 Ill. 257. We are of the opinion that under the facts of this case it was not necessary for the defendant in error Dumont to restore to Rachael T. Goodwin the Huntingburg property. The bill offers to reconvey to Mundy the Arkansas property, and the decree requires Mrs. Dumont to execute to John W. Harris a deed conveying to him the Arkansas land, and also orders her to deposit the deed and the sum of \$92.51, paid to her, with the clerk of the court within 30 days. This was the only requirement which it was necessary to make of her in order to do complete justice.

John W. Harris induced Mrs. Dumont, a widow with two children, to deed her farm of 350 acres, worth about \$5,000, to Mrs. Rachael T. Goodwin, his mother-in-law, in exchange for certain lots in Huntingburg, Ind. There is testimony tending to show that at the time of the exchange in January, 1897, the Huntingburg property was worth only about \$500, and there is other testimony tending to show that it was worth from \$3,000 to \$4,000. The court below in its decree found that the Hamilton county farm was worth about \$3,500, and the Huntingburg property was not worth over \$500. While the evidence upon this subject of value was conflicting, we see no reason for disturbing the finding of the court below. But we do not regard the comparative values of the Hamilton county land and the Huntingburg land as being important factors in this case. When John W. Harris induced Mrs. Dumont to consent to the exchange, the title to the Huntingburg property was in Clara J. Harris, the wife of John W. Harris. On January 22, 1897, just after Mrs. Dumont's consent to the exchange, the Huntingburg property was conveyed by Clara J. Harris and John W. Harris, her husband, to Rachael T. Goodwin, the mother of Mrs. Harris. On the next day, January 23, 1897, Mrs. Dumont, at the instance of Harris, conveyed her farm to Rachael T. Goodwin. Mrs. Dumont swears that Harris told her that he was an unmarried man. Harris denies that he represented to her that he was an unmarried man. They contradict each other directly as to this representation. But there are many circumstances developed by the evidence which tend to confirm the statement of Mrs. Dumont upon this subject. One of them is the fact that, as soon as the exchange was agreed upon, Harris and his wife conveyed the Huntingburg property to Mrs. Goodwin, and then Mrs. Goodwin made the conveyance to Mrs. Dumont. As the title was in Mrs. Harris, there is no reason why Harris and his wife should not have conveyed the Indiana land directly to Mrs. Dumont, if it was not his purpose to conceal from her the fact that he

had a wife. She would have discovered his marriage if he had tendered her a deed executed by himself and Mrs. Harris. The fact that he caused the title to be conveyed to his mother-in-law, and to be deeded by the latter to Mrs. Dumont, would indicate an intention to conceal the fact of his marriage. But on March 2, 1897, Harris induced Mrs. Dumont to convey to him the Huntingburg property, and in exchange for such conveyance he gave to her his personal note for \$3,500, or, according to some of the testimony, for \$3,000. After having induced her to deed to him the Huntingburg land in exchange for his personal note, he then, on March 15, 1897, induced her to surrender to him his note, and to take in exchange for it a deed of 160 acres of land in Arkansas. This deed was executed to her by a lawyer by the name of M. H. Mundy. The title to the Arkansas land, it appears, had been conveyed to Mundy by Harris, and it is claimed that Harris and Mundy each owned an undivided half of the Arkansas land. It is proven beyond question that this Arkansas land was worth only from 50 to 75 cents per acre; that is to say, from \$80 to \$120. It is shown by a letter written by Harris to Mrs. Dumont, and by other testimony, that he falsely represented to her that a man named Wilkinson had offered \$2,750 for this Arkansas land. Wilkinson, however, in a letter, written by him, and dated May 23, 1897, advises Mrs. Dumont to keep the letter Harris wrote to her as evidence of fraud, and denounces Harris as "a liar and a thief."

It thus appears that Harris himself obtained the title to the Huntingburg land, and that Mrs. Dumont in fact received nothing in exchange for her farm except the Arkansas land, which was worth only from \$80 to \$120. When, therefore, she tendered to Harris a deed of the Arkansas land, she offered to restore all that she had, as matter of fact, received, except a small amount of money, which the court also required her to deposit in court. The evidence shows that Mrs. Goodwin had no interest in this transaction, except that she was entitled to the right to live on the Indiana land during her life. The evidence is conclusive to our minds that in all these matters John W. Harris was acting as the agent and representative of his wife and of his mother-in-law, and that they were mere tools in his hands to carry out his plans and obey his instructions. They must be held responsible for what he did. He swears himself that he acted in their behalf. While, therefore, the title to the Indiana lots was not actually conveyed back to Mrs. Goodwin, it was conveyed to her agent, John W. Harris.

2. It is claimed on the part of plaintiff in error that this transfer or exchange of lands cannot be rescinded by Mrs. Dumont upon the ground that he made no representation of an existing fact, but merely made a promise as to what he would do in the future. In

other words, it is said that he promised to marry her, and take her to a comfortable home in Evansville, where she would no longer need the Hamilton county lands; and that this constitutes no fraud, upon the alleged ground that a false representation, within the meaning of the law, must be as to a past or present state of facts, and not merely as to an intention to do something in the future. *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. 153; *Murphy v. Murphy*, 189 Ill. 360, 59 N. E. 796; *Brady v. Cole*, supra. We have no fault to find with the doctrine thus invoked that the false representation must be as to an existing or past fact, and not merely a promise to do an act in the future. But in the case at bar there was not merely a promise to marry the defendant in error Dumont at a future time, but there was a false representation by Harris as to an existing fact; that is to say, being a married man, he represented it to be a fact that he was an unmarried man. It was upon the false representation of the existing fact as to his marriage or nonmarriage that her promise to him was based. It cannot, therefore, be said that here was merely a representation as to what he intended to do in the future, but he went further and falsely represented that he was an unmarried man, and thereby gained her confidence. Not only did Harris obtain the Huntingburg property for himself by inducing Mrs. Dumont to convey it to him, but he also obtained the title to the Hamilton county farm, because it appears that, on June 14, 1897, that farm was deeded to him by Mrs. Goodwin; so that he finally himself obtained the title to both pieces of property involved in the exchange.

8. It is claimed on the part of the plaintiff in error that the court below erred in dismissing the bill to foreclose the two mortgages executed by Mrs. Goodwin to Mrs. Boyd and M. H. Mundy. As to the mortgage for \$5,000 to Mundy, there was no consideration for it whatever, and very soon after obtaining it Mundy transferred the mortgage and the note for \$5,000 secured thereby to Mrs. Harris. He says himself in his testimony that he had no interest in the note or mortgage, and took it because Harris requested him to do so, and assigned it to Mrs. Harris because Harris requested him to do so. As to the mortgage for \$1,100 made to Mrs. Boyd, that mortgage also was transferred by Mrs. Boyd to Mrs. Harris. There may have been some money advanced upon this mortgage by Mrs. Boyd to Harris, or his wife, or Mrs. Goodwin, but the testimony shows that a mortgage was executed to Mrs. Boyd upon the Huntingburg land as a substitute for the mortgage upon the Hamilton county land. Although the mortgage for \$1,100 on the Hamilton county farm was not actually released, yet the testimony tends to show that it was paid either in money, or by a mortgage upon the Indiana land, or by the personal obligation of Mrs.

Harris. We are of the opinion that the chancellor below correctly decided that these mortgages were fraudulent, and that their execution was merely a part of the scheme to defraud the defendant in error Catharine F. Dumont. The decree therefore properly directed that the bill to foreclose should be dismissed.

4. The plaintiff in error complains of the decree so far as it enforces the mechanics' liens in favor of the parties furnishing labor and material to construct a house upon the farm in Hamilton county. It appears that at some time during the progress of these transactions the house which had been occupied by Mrs. Dumont upon the farm was burned down, and Thompson was employed to build a house, and Wright and his son furnished the material for its construction. Whether this part of the decree enforcing the mechanics' liens claimed by the petitioners is correct or not it is not necessary to decide. Inasmuch as the decree restores to Mrs. Dumont her farm of 350 acres, and forbids the foreclosure of the mortgages against it, it can make no difference to the plaintiff in error, Clara J. Harris, whether the decree enforcing the mechanics' liens is correct or not. She has no interest in that matter, inasmuch as she is held to have no interest in the property against which the liens are enforced. The defendant in error Catharine F. Dumont does not complain of the decree enforcing the mechanics' liens, and assigns no cross-errors in relation thereto. If she chooses to take her property back, subject to the decree enforcing these liens, it is a matter which has no concern for the plaintiff in error, and of which the plaintiff in error cannot complain. Counsel for plaintiff in error in their brief say: "So far as the plaintiff in error, Mrs. Clara J. Harris, is concerned, the decree of the circuit court awarding a mechanic's lien on the Hamilton county lands is a matter of no interest to her, unless the decree rendered on the bill of Catharine Dumont, and on her bill to foreclose the mortgages, shall be reversed or modified so as to protect the mortgages, one or both." The law does not permit a litigant to complain of an error which does not operate to the prejudice of the litigant complaining.

We discover no good reason for disturbing the decree, entered by the chancellor upon the hearing had in the lower court. Accordingly, the decree of the circuit court of Hamilton county is affirmed. Decree affirmed.

(207 Ill. 308)

CHAMPION v. MYERS et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

DIVORCE—ALIMONY—RIGHT TO AWARD REAL ESTATE IN FEE—APPEAL—REVIEW—CERTIFICATE OF EVIDENCE—SUFFICIENCY.

1. Where the certificate of evidence in the record on appeal does not state that the evidence certified to was all the evidence, a specific finding of fact must prevail.

2. Where, in a suit for divorce instituted by the wife, it appeared that for a number of years after the marriage the wife clerked and worked for the husband's mother, and that the husband received her earnings, which, together with money of his own, he invested in real estate, the chancellor was warranted in vesting the wife with the title in fee to a part of such real estate as alimony.

Error to Circuit Court, Carroll County; James Shaw, Judge.

Suit for a divorce by Marianna Champion against Clarence A. Champion. From a decree granting the divorce and awarding alimony to the wife, defendant sued out a writ of error against Smith Myers, the administrator and surviving husband, and the heirs of the deceased plaintiff. Affirmed.

George L. Hoffman and Henry Mackay, for plaintiff in error. Ralph E. Eaton and C. W. Middlekauff, for defendants in error.

BOGGS, J. This is a writ of error brought to reverse the decree entered in the circuit court of Carroll county, awarding Marianna, the wife of the plaintiff in error, a divorce, and granting to her, as alimony, the fee title to two town or city lots in the town (now city) of Nanark, and also the title to the household and kitchen furniture in use in the dwelling house situate on one of said lots. Subsequent to the rendition of the decree for divorce, the wife intermarried with the defendant in error Smith Myers, and on the 17th day of July, 1903, departed this life, leaving as her heirs and legal representatives the defendants in error. This writ was sued out on the 2d day of October, 1903.

The bill charged the plaintiff in error with adultery with one Minnie Reed. The plaintiff in error was personally served with summons but did not appear, and default was entered against him. The court heard the testimony of witnesses taken orally in open court, and a decree was entered which recites that the court found, from the evidence heard, that all of the allegations of the bill were true; and the decree also recited, as a special finding of fact, that the plaintiff in error was guilty of the charge of adultery.

There is a certificate of evidence in the record, but the certificate does not state that that certified to was all the oral evidence that was heard. The specific finding recited in the decree that the plaintiff in error was guilty of adultery must prevail, in the absence of the preservation of all the evidence upon which the court acted. *Bowman v. Bowman*, 64 Ill. 75. Moreover, we have examined the testimony as preserved by the certificate, and think it amply supports the finding of the court.

The decree also recited that the court found from the testimony that the plaintiff in error owned three lots, namely, lots 2, 7, and 8, in block 5, Carry's Second Addition to Lanark, in Carroll county, on each of which lots was a dwelling house, and that the plaintiff in error was also the owner of household effects

and "of cash of large value," and that the wife had no means of support, was in delicate health, and wholly dependent. The decree awarded to the wife the household furniture and the title in fee simple to two of said lots, namely, lots 2 and 8, in lieu of and as alimony, and declared the plaintiff in error to be the owner of the other lot. These three lots, with the houses thereon, were of the value of \$800 to \$1,000 each. The principal contention is that the decree should be reversed in so far as it invested the wife with the fee of the two lots.

The right and power of a court of equity to assign as alimony to the wife a part of the real estate of the husband in fee has been frequently declared by this court. *Armstrong v. Armstrong*, 35 Ill. 109; *Ross v. Ross*, 78 Ill. 402; *Dinet v. Eigenmann*, 80 Ill. 274; *Robbins v. Robbins*, 101 Ill. 416; *Wilson v. Wilson*, 102 Ill. 297. If the wife has no other claim than that which arises from the existence of the marriage relation, an allowance payable in money at stated periods, which remains within the control of the court to increase or diminish, is the proper mode of granting alimony, to which may be added absolute transfer of articles of personal property, as household furniture, when such is shown to be proper and advisable, and peculiar conditions of the parties and of the property of the husband may render it best and proper that a money allowance in gross should be made. If the wife has, from equitable considerations, other and additional interests in her husband's property than such as attach to her status as a wife—as, if her money came to the hands of the husband, and has been invested by him in real estate to which he holds the title, or if her earnings or savings have gone into his possession and aided him in acquiring the real estate—the court may properly, when dissolving the marriage relation, decree that the wife shall be vested with the title in fee to such real estate or some other real estate belonging to the husband, in order to effect an equitable and fair adjustment of the property rights of the parties.

We think the evidence as preserved in the certificate disclosed special equities in favor of the wife in the case at bar. We find from the transcript of the oral testimony that it advised the court as to the condition and necessities of the parties, and to what extent the wife had contributed to the accumulation of property and the support of the family, which consisted of herself and her husband. It appeared from this testimony the parties were married in 1882 and lived together for 17 years; that the husband became infatuated with a Mrs. Reed, made many trips from home with her, and was much of the time in her company, and practically abandoned his wife. He was a carpenter, and his wife, for a number of years after their marriage, was employed as a clerk, and for a further period of time worked for his mother.

The husband received her earnings. While testifying, she was asked, "Where did the money come from that bought these properties?" to which she replied: "We used to work together. I worked a long time myself after we were married. I clerked for seven or eight years steady, and Clarence worked for a great deal of it. Of course, he fell heir to some of the money from his people of late years." She also said: "No money that I fell heir to went into these properties. I worked for his mother a year and a half. The proceeds of my labor went into the general fund, wherever it was needed to be used."

The testimony was not improperly regarded by the chancellor as establishing that special equities existed in favor of the wife, which warranted a departure from the general rule relative to the allowance of alimony to a wife whose right is only such as results from a legal effect of the existence of the marriage relation. Under such circumstances, it was within the power of the chancellor to invest the wife with the title in fee to the lots; and, the adjustment of the property rights of the parties appearing to us to have been fair and equitable, the decree will be affirmed. Decree affirmed.

(307 Ill. 452)

COBB CHOCOLATE CO. v. KNUDSON.

(Supreme Court of Illinois. Feb. 17, 1904.)

MASTER AND SERVANT—PERSONAL INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY—ASSUMPTION OF RISK—INSTRUCTIONS—MODIFICATION—ERASED INSERTIONS AND MARGINAL COMMENTS—DUTY OF FOREMAN—LIMITATION OF ARGUMENT—CONTINUANCE—DILIGENCE.

1. In an action by a servant for personal injuries, evidence considered, and *held* to justify submission to the jury of the issue of plaintiff's contributory negligence.

2. In an action by a servant for personal injuries, evidence considered, and *held* to justify submission to the jury of the issue of defendant's negligence.

3. Refusal of the trial court to examine or give more than 15 instructions for each party was not reversible error, where the substance of the only instructions offered and refused was contained in those given, and it is not shown that appellant was prejudiced, or wherein it was unable to cover the points involved in the number of instructions allowed.

4. In an action by a servant for personal injuries the court modified one of defendant's requested instructions by inserting the words, "and without special orders from defendant's foreman to do the work in question, and in doing which the accident happened to plaintiff." The court also wrote on the margin, "Refused as ignoring specific proof of specific orders to do the work in question and for other reasons," and "Insertions and erasures by the court." Another instruction was also marked on the margin, "Refused as ignoring specific proof of specific orders and for other reasons." A pen was drawn through all the written words in such a manner that the jury could still read what had been written, and the instructions were given in this condition. *Held* not to erroneously give undue prominence to certain features of the case or improperly influence the jury.

5. The first count of the declaration in an action by a servant for personal injuries al-

leged a negligent failure to warn plaintiff of the dangers of machinery about which he was directed to work, while the second count alleged negligent failure to guard the cogwheels by which plaintiff was injured. The evidence showed that the cogwheels were unprotected, and tended to show that plaintiff was specifically ordered to work close to the cogs. *Held*, that instructions based on the propositions of the cogwheels being unprotected, and that plaintiff assumed the risk of visible dangers, but not taking into account the effect of the specific orders, were properly limited by the court to the second count.

6. In an action by a servant for personal injuries it was alleged that defendant was negligent in failing to give warning of danger from exposed cogwheels which caused the injury, and in leaving such wheels exposed. The evidence showed that plaintiff was working around a chocolate-crushing machine moved by exposed cogs, which he did not have to approach very closely until ordered by his foreman to clean around them, in doing which with some waste under the foreman's supervision the waste became entangled, drawing plaintiff's hand into the cogs. *Held*, that an instruction that if plaintiff knew or could have known that the use of waste was dangerous, and yet voluntarily used it, defendant was not guilty, was properly refused.

7. A requested instruction that if plaintiff knew of the danger, and of defendant's failure to provide a safe place and materials in and with which to work, and nevertheless continued to work, defendant was not guilty, was properly refused because ignoring proof of the specific order to do the work in which plaintiff was injured.

8. A servant does not assume all the ordinary risks of his employment, but only such as are known to him, or so obvious that knowledge may be presumed.

9. In an action by a servant against the master for personal injuries: the declaration charged, and the evidence tended to show, that defendant's foreman ordered plaintiff to do the work in the course of which he was injured. The court instructed that if defendant's foreman gave such order he was chargeable with the specific duty of exercising reasonable care to see that the place where he ordered plaintiff to work was reasonably safe, and plaintiff had a right to rely on the performance of this duty. *Held*, that such instruction was not misleading, as other instructions stated that, in order to recover, plaintiff must have been in the exercise of reasonable care, and that obvious and understood dangers were assumed by him.

10. In an action by a servant for personal injuries, in which only six witnesses were examined, and their testimony was brief, it was not an abuse of discretion to limit argument to 30 minutes.

11. In an action by a servant for injuries caused by getting his hand caught in cogs while cleaning around them, plaintiff claimed that cleaning was not a part of his usual occupation of tending the machine which the cogs operated. A witness was asked what were the duties of one running the machine, and allowed to answer, "What he usually did, not what it was his duty to do." His answer that he cleaned a box underneath the machine, and cleaned the floor, but not the cogs, was stricken out on defendant's motion. *Held* not error.

12. In an action by a servant against the master for personal injuries alleged to have been received while doing work which he was directed to do by his foreman, evidence by defendant's president as to what he knew at or before the accident as to the carelessness and competence of the foreman was immaterial.

13. In an action by a servant against the master for personal injuries a motion for a continuance was made on the day of trial because of absence of a witness who had 16 days before re-

fused to return to the state to attend the trial. Movant's counsel was sick from the date of such refusal till 8 days before trial, but it did not appear that any effort was made to procure a deposition or postpone the trial. *Held*, that no such diligence was shown as to make it an abuse of discretion to refuse the continuance.

Appeal from Appellate Court, First District. Action by Alfred Knudson against the Cobb Chocolate Company. From a judgment of the Appellate Court (107 Ill. App. 668) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of trespass on the case by appellee, plaintiff below, against appellant, a corporation, defendant below, in the superior court of Cook county, to recover damages claimed by appellee for injuries sustained by him on September 15, 1899, while working for appellant in its chocolate factory in the city of Chicago. Appellee was injured by his fingers getting caught in the uncovered, revolving cogwheels of a machine at and about which he was working. Trial was had before a jury, resulting in a verdict and judgment against appellant for \$2,500, which judgment was affirmed by the Appellate Court. From the judgment of affirmance, appellant prosecutes this appeal.

The machine in question consisted of three granite rollers about 23 inches long and 9 inches in diameter. Above the rollers was a hopper, into which the chocolate was poured, and which then ran from the hopper onto the rollers. The rollers were revolved by means of gearing or cogwheels attached to the machine at the south side of the machine. The rollers were set in an iron framework. The clearance between the inside of the frame and the end of the roller at the south side of the machine was about three inches. The framework between the south end of the roller and the cogwheels which operated the rollers was three inches wide, and the distance between the south side of the frame of the machine and the nearest cog was about three inches. The belting which operated the machinery and the cogwheels was operated by means of a shifter, which was located a short distance from the machine. By moving the shifter in one direction the belt would be thrown off the pulley and the machine would be stopped; by moving the shifter in the opposite direction the belt was readjusted and the machine put in operation. About 10 days prior to the accident the appellee, then about 17 years of age, was employed by appellant to do various kinds of work about the factory, part of said duties being to attend these chocolate rollers at the machine about which he was injured; that in connection therewith he would shovel chocolate into the hopper above the rollers; that the chocolate, passing down onto the rollers, would at times run over the edges thereof, and in such event appellee was required to scrape it up with a knife and return it to its proper place. The cogwheels spoken of were on the outside of the machine frame,

and uncovered, but, in the performance of the duties spoken of, appellee was not brought in close proximity to the same.

The declaration contained two counts, the principal averments of the first being that plaintiff's employment was not attended with hazard or danger; that he was ordered to clean the rollers and wipe all the machinery around the rollers with a piece of waste; that the cogwheels and gearing, part of said machine, were unguarded, rendering it dangerous to work in close proximity thereto and to do the work ordered done; that plaintiff was ignorant of the danger, and it was defendant's duty to so notify him, but defendant negligently failed so to do; that while plaintiff was so engaged, exercising due care and caution, said waste was caught in said cogwheels, drawing in plaintiff's fingers and permanently injuring them. The second count averred substantially the same as the first, and, in addition, that the defendant carelessly suffered said revolving cogwheels to be and remain without any guard, protection, or shield, and negligently ordered the plaintiff to do such work of cleaning said machine near said cogwheels without in any way endeavoring to protect, guard, warn, or instruct the plaintiff of the danger of said work, and by reason of said negligence the plaintiff, while in the exercise of due care, etc., was injured, etc. The plea was the general issue. At the close of the entire case appellant presented and asked the court to give a peremptory instruction directing a verdict in its favor, which instruction was refused by the court.

Various errors are assigned by the appellant, and an effort will be made to discuss the same in the order presented in the brief of counsel.

Henry B. Bale and Cox, Heldman & Lipson (Frank M. Cox, of counsel), for appellant. Edmund S. Cummings, for appellee.

RICKS, J. (after stating the facts). The jury having returned a verdict in favor of appellee, on which judgment was duly entered by the court, and that judgment having been affirmed by the Appellate Court, all questions of fact are conclusively settled, except in so far as the same may be considered by this court for the purpose of determining whether there was evidence tending to support plaintiff's cause of action as alleged in his declaration, which question is presented by the presentation and refusal of appellant's peremptory instruction, and said refusal being assigned by the appellant as error.

The appellee testified: That he was 19 years of age. That he had worked for appellant about 10 days prior to September 15, 1899, the day of the injury. That he was hired by William Collins, who, to use appellee's words, "started me off with Jack Rush, foreman on the first floor. Rush put me to work running the chocolate rollers, sweeping,

going down for chocolate butter and to the ice-box, and doing everything—shoveling chocolate and doing everything all around the shop. Rush gave me instructions as to the different work I did." That on the 15th of September he was running the little chocolate roller. That he shoveled chocolate into the box on top of the rollers, and with a knife he would scrape the rollers when necessary. That on the outside of the frame of this machine were uncovered cogwheels, with which he had nothing to do in his work. That on the day in question he was injured a few minutes past 5 o'clock. That he was cleaning the rollers with a knife, when Mr. Cobb, the president of the corporation, came in, and, upon looking around, said, "This machine looks pretty dirty all around." That in a little while Collins, the superintendent, came to him and said: "The old man says it looks pretty dirty around here. You better clean up; you better clean around—clean up." That Collins then went over to Jack Rush, who was foreman and under Collins, and directly Rush came over and started telling how to clean up. Appellee said: "I was nearly done cleaning the machine, and he put me to work outside of the machine, on framework—at the other side of the belting, right near the cogwheels there. At this time Rush was at the other side of the machine, leaning on the shifter with his elbow. The shifter was on the right-hand side of him, and about five feet away from me. This was the shifter that started and stopped the machine. There are two cross-pieces. I started to clean one—to take the dirt out with a knife. I never saw it cleaned while I was there. I took that out with a knife, and started to wipe it out, and when I got through Rush was leaning on the shifter with his elbow, and he told me to wipe the space off right near the cogwheels. He was watching me and pointing out where I should clean. He says, 'Clean it right there,' and started pointing where I should clean. He said, 'Wipe off that there,' and then he would point to where I was to clean. He pointed at these spots, and they were near the cogwheels. I kept right on wiping one thing after another, and he stayed there watching me, and finally the waste got caught and pulled my hand in the cogwheels." He said Rush then stopped the machine and took him to the office, where the doctor came; that his first finger was crushed at the first joint, the second finger at the second joint, and the third finger at the third joint; that when he was cleaning around the gear Rush did not say anything "only just clean up the chocolate." He further stated that from where he was cleaning to where his fingers were caught was about an inch or two; that he got the waste from a box about 25 or 30 feet from where he was working; that Collins told him to get it; that he had a bunch of waste about as large as his hand, and used it as a mop to clean the framework; that he had to hold

the waste loose in his hand, and there were long pieces of it hanging down; that when his hand was caught he was leaning over, cleaning the frame. In his examination occurred the following questions and answers: "Q. Now, you knew that was dangerous, didn't you? A. No, I didn't think it was dangerous. Q. You didn't? A. No; I thought if it was dangerous he would shut the machine off, because he was leaning right on the shifter. Q. You mean that you did not know it was dangerous to work with your right hand close to the cogwheel with a piece of waste in your hand? A. No; I thought if it was dangerous he would have sense enough to shut the machine off. Q. Have you not as much sense as he? A. No; I was only a boy. I had not done much practical work then, and he was foreman in the place, and I thought he knew more about it than I did. Q. You were only seventeen years old? A. Yes, sir. Q. You let Rush do your thinking for you; is that right? A. Yes, that is right for the foreman." Appellee further stated that he had worked several different places where there was machinery, and manifested some knowledge of the dangers arising therefrom.

Elmer Jansen, on behalf of appellee, testified that on the day of appellee's injury he was working in appellant's factory, and about five or six feet from appellee; that the nature of his work was similar to that of appellee's. He corroborated appellee as to the visit of Mr. Cobb, and as to the direction of Collins to appellee to get the waste, and as to Jack Rush going over to appellee while he was cleaning his machine, and stated that Rush pointed where appellee should clean, but he could not hear what was said, and that Rush stayed there until the accident occurred.

William Falkenberg testified, in behalf of appellee, that he also worked on a machine just across from him; that Rush gave them directions as to what to do; that he saw plaintiff when he got hurt, being distant six or seven feet. He told of the visit of Mr. Cobb, of Cobb going over to Collins, then of Collins going and talking with plaintiff, and then to Rush, after which Rush came to witness and said, "Get a broom and sweep up around here;" that he started to do so, and presently heard some one holler; that he turned around and saw plaintiff was hurt, and that Rush at the same time shut off the machine; that, before Rush shut off the machine, he (Rush) was leaning on the shifter.

These three witnesses were all who testified in behalf of plaintiff. On behalf of the defendant, Jack Rush, Mr. Cobb, and John Fisher testified. Fisher worked for defendant at the time of the injury, and states that he saw plaintiff about 15 minutes before the injury, when he was cleaning the machine; that he did not see him again before the accident; that at the time of the accident he saw Rush jump and shift the belt; that he did not see where he jumped from, but he was probably four or five feet from the ma-

chine. Rush, defendant's witness, denied directing appellee as testified to by him, and also stated that he had told him not to clean the gears, and that he had also given instructions for the boys not to use waste. Mr. Cobb testified as to his visit to the factory on the day in question, but he had passed from the room where the accident occurred, prior thereto. He further testified as to the arrangement of the machinery.

The above-mentioned witnesses were the only witnesses who testified at the trial. There was a conflict between the evidence of the plaintiff and the defendant, but it was the jury's, and not our, province to weigh and reconcile the same. We are only called upon, in this instance, to determine whether there was evidence tending to support the plaintiff's declaration, and it is our opinion that there was adduced ample evidence that at least tended to show that appellee was acting under specific orders of appellant's foreman when he sustained the injury in question, and that, although the cogwheels wherein the appellee's fingers were caught were uncovered and plainly visible, there was nothing inherently dangerous in the work he was called upon to do. According to appellee's testimony the defendant's foreman was standing a few feet from him, pointing out just what he should do and where he should clean; that his arm rested upon the shifter, and in an instant he could stop the machine. Under such supervision it is but natural that appellee's attention was closely fixed upon his work. The waste that he says he had in his hand may have, without negligence on his part, so hung as to become entangled in the revolving cogwheels, and in an instant drawn his hand to the place of danger. Under such circumstances appellee was relieved of the responsibility that might otherwise have been his. Appellee testified that such work was not in the usual line of his employment, and he well may have failed to appreciate the extent of the danger thereof. Appellee was in a subordinate position, and obedience was his duty, unless in so obeying he acted recklessly and without that degree of prudence that would ordinarily have been exercised by an ordinary person of his age, experience, and understanding. It was the duty of appellant's foreman to take reasonable precaution for the safety of appellee when he ordered him to work where appellee claims he did and under the circumstances there existing. Whether appellee, under the circumstances disclosed by the testimony herein, acted recklessly, or as a reasonably prudent person under similar circumstances would have acted, were questions of fact to be determined by the jury. *Chicago Edison Co. v. Mor-en*, 185 Ill. 571, 57 N. E. 773; *City of La Salle v. Kostka*, 190 Ill. 180, 60 N. E. 72; *Western Stone Co. v. Muscial*, 196 Ill. 382, 63 N. E. 664; *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N.

IL. 572; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; **Illinois Steel Co. v. McFadden**, 196 Ill. 344, 63 N. E. 671, 89 Am. St. Rep. 319; **Offutt v. World's Columbian Exposition**, 175 Ill. 472, 51 N. E. 651.

In this case we would not be warranted in saying that there was no evidence tending to support the conclusion of the jury that appellee, by the testimony offered in his behalf, established the material averments of his declaration; hence we must hold that there was no error in the court's refusal to give appellant's peremptory instruction.

It is, however, urged by appellant's counsel that because of the relative position of appellee and the point of the machinery where the injury is said to have been occasioned, and because of the structure and arrangement of the machinery, it was physically impossible for the appellee to have been injured in the manner testified to by him. While the photograph of the scene of the accident that is in the bill of exceptions doubtless conveys to an observer a very good impression of the situation, and though the calculations of counsel may be without fault so far as may now be determined, although there is a conflict in the evidence as to the basis of such calculations, it would be folly for us, with our present imperfect means for determining such result, to say appellee could not have been injured in substantially the manner described by him. He was leaning over the machine, and if the waste claimed to be in his hand was hanging down far enough to reach the cogwheels underneath or to one side, and was caught therein, results might happen that it is now impossible to calculate. The inexplicability of accidents is a phase of life familiar to all.

After the jury were impaneled, and before the first witness was sworn, the court entered an order limiting the number of instructions to be given to 30—15 for plaintiff and 15 for defendant—and that no instructions in excess of that number would be examined or received by the court. Appellant insists that such order was reversible error. In the case of **Chicago City Railway Co. v. Sandusky**, 198 Ill. 400, 64 N. E. 990, an order substantially the same was entered, and while the court there deprecated the giving of a useless number of instructions, as is so often done, yet it was declared that it was not proper to lay down a hard and fast rule stating the number of instructions that should be given in a case, it being stated that many times a larger number of short, concise instructions were preferable to a limited number of long, diffuse, and complicated instructions. In that case the number of instructions was limited to 12 on a side and the appellant had introduced 20 in excess of that number, but in its argument only dwelt upon the injury alleged to have been sustained by the refusal of one of the 20 instructions not received, and the court, being of the opinion that the substance of that instruction was

contained in an instruction that was given for the appellee, refused to reverse the case. So in the case at bar, upon an examination of the instructions not received, 3 in number, we find that the substance of each of them was contained in instructions given. The witnesses in this case were few in number and the issues simple, so appellant was not unduly hampered by being allowed but 15 instructions. Nor do counsel for appellant, in their contention, point out wherein they were unable, in such number of instructions, to cover the points involved, nor have they shown wherein their cause was prejudiced by such restriction, and we do not see how it could have been, and regard the contention as not well taken.

It is next contended by appellant's counsel that the trial court erred in modifying instruction No. 7 offered for appellant by inserting therein the clause, "and without special orders from defendant's foreman to do the work in question, and in doing which the accident happened to the plaintiff," and in writing on the margin of said instruction the words, "Refused, as ignoring specific proof of specific orders to do the work in question, and for other reasons," and in also writing thereon the words, "Insertions and erasures by the court;" and by writing on the margin of appellant's eleventh instruction, "Refused as ignoring specific proof of specific orders, and for other reasons," and in then drawing a pen through all of said words so written in both of said instructions, and noted on the margins thereof, in such way as to leave them legible and plainly to be read by the jury. Appellant's contention is that by the interlineations and writing of the court, though a line was afterwards drawn through the same, undue prominence was given to special features, and that by such writing by the court the jury were erroneously influenced. A number of cases are cited by appellant to sustain this contention, but in our opinion they all fall short of such result. The words crossed out did not constitute a part of the instructions, and without them the instructions were, so far as this objection goes, as appellant desired, and not subject to objection. The instructions must have been read to the jury as presented by appellant, and if afterwards, upon inspection, they found in them certain interlineations which had been crossed out by the judge, in our opinion it is more reasonable to assume that they were especially impressed with the fact that the judge regarded such interpolations out of place, else he would not have crossed them out, and that they should not consider the same, than to assume that the jury were controlled by them to the prejudice of appellant. In the cases cited and commented on by appellant, the language which it was claimed gave undue prominence to a particular point was read to the jury, and in many of them, by means of italicized words or otherwise, special stress was given

to the particular language, or the particular part of the instruction that was crossed out was considered by the court to have been necessary to make the instruction good as a whole. In instruction No. 15 given to the jury they were specially instructed that the court did not "intend to indicate to the jury in any instruction, or language used therein, or by anything that may have been said by the court during the progress of the trial, what the fact or facts are upon any question in this case," and that in considering the case the jury "should look solely to the evidence for the facts and to the instructions of the court for the law of the case," and also that the "instructions given by the court must be accepted by the jury as the law governing the case, and the jury will not be justified in finding a verdict contrary to the law as laid down in the instructions." In the cases of *Union Railway & Transit Co. v. Kallaher*, 114 Ill. 325, 2 N. E. 77; and *West Chicago Street Railroad Co. v. Dedloff*, 92 Ill. App. 547, it was held that it was not likely that a jury would be misled by portions of instructions so imperfectly erased or crossed out as to leave them legible, and in the present case we think the objection is without merit.

The court limited instructions Nos. 7, 8, 9, and 11 to the second count of the declaration, and this the appellant insists was error. The first count of the declaration charged that appellee ordered appellee to work in close proximity to the revolving cogwheels, which work was attended with hazard and danger, of which hazard appellee did not know, and appellant negligently and carelessly failed to warn and instruct appellee with reference thereto. The second count charged that the cogwheels were wholly unprotected and unguarded, and that appellant carelessly and negligently failed to protect, guard, and shield said wheels. Instructions 8 and 9 were based upon the proposition of the cogwheels being unprotected and uncovered, and limiting said instructions to the second count of the declaration, on the charges of which they were especially based, was proper. Instructions 7 and 11 were based upon the proposition that appellee assumed the risk of dangers plainly visible and understood by him. The evidence clearly showed that the cogwheels by which the injury was caused were unguarded and unprotected, and the said instructions were then applicable to the second count of the declaration, based, as it was, upon the danger and hazards of unguarded and unprotected cogwheels; but the said instructions, as drawn, did not take into account the effect of specific orders, which there was evidence tending to show, from appellant to appellee to work in close proximity to unguarded and unprotected cogwheels—a place of particular hazard—and the risk assumed thereby, and so such instructions, in the manner given, were not proper under said first count, and the limitation by the court was not error.

The refusal of the court to give instructions 2e, 5d, and 13, offered by appellant, is by it assigned as error. Instruction 2e was to the effect that if plaintiff knew, or by ordinary care might have known, that the use of waste by him at the time of and in the work in question was dangerous, yet voluntarily used the same, the defendant was not guilty. This the court refused, as omitting the element of "causal relation, and for other reasons." Instruction 5d was to the effect that if plaintiff knew of the danger complained of in the declaration, and knew of defendant's failure to provide a safe place and materials in and with which to work, yet, notwithstanding such knowledge, continued in his work, etc., then the defendant was not guilty. This instruction was refused by the court because of "ignoring proof of specific orders to do the work in doing which plaintiff was injured, and for other reasons." Instruction 13 was to the effect that if plaintiff knew, or by the exercise of reasonable care might have known, of the danger and hazards of his employment, if any such existed, or that in the discovery of such danger and hazard the plaintiff failed to exercise such observation, skill, and judgment as he possessed, then the jury should find the defendant not guilty. This instruction was refused by the court "as omitting causal relation between such danger and hazard and the happening of the accident, giving proof of specific orders, and for other reasons." We think, under the evidence, for the reasons assigned by the court each of said instructions was improper, and the refusal thereof was no error.

Counsel for appellant next insist that the court erred in giving to the jury instruction No. 1 as modified, and in modifying the same. The modification consisted in telling the jury that appellee undertook and assumed all ordinary risks incident to his employment and known to him. The instruction as tendered left out of consideration the question of appellee's knowledge of the dangers and hazards of his employment, and was therefore entirely too broad to be accurate. As said in *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915, in speaking of a similar instruction (page 555, 170 Ill., page 917, 48 N. E.): The instruction "refused assumes to state, as an abstract principle of law, that every employé is presumed to understand and assume the ordinary risks and hazards of the employment, but it is so framed as to be open to the construction that the presumption includes every character of peril or danger that may possibly arise in the performance of the duty. An employé assumes the risks of known dangers, and such as are so obvious that knowledge of their existence is fairly to be presumed; but the law does not imply he has notice of dangers or perils not obvious to the senses, and arising solely out of extraordinary or exceptional circumstances. Wharton on Negligence, § 206." In *Lake Erie & Western Railroad Co. v. Mor-*

rissey, 177 Ill. 376, 52 N. E. 299, a modification of an instruction similar to the one here in question was approved, and we are of the opinion that in this instance no error was committed.

Counsel for appellant next contend that the court erred in giving to the jury plaintiff's instruction "A." Said instruction was as follows: "The court instructs the jury that if they believe, from the evidence, the foreman of the defendant ordered the plaintiff to work where he was working at the time of the accident in question, the said foreman was chargeable with the specific duty of exercising reasonable care to see that the place where he ordered the plaintiff to work was reasonably safe, and the plaintiff had the right to rely upon the performance of such duty by the foreman before he ordered the plaintiff to work."

The evidence tended to show that appellee was ordered by appellant's foreman to do the particular work in which he was engaged at the time the injury occurred, and in view of such evidence and the averments of the declaration said instruction appears to be in harmony with the cases cited in the beginning of this opinion. Other instructions given in the case told the jury that appellee, in order to recover, must have been in the exercise of reasonable care and caution for his own safety, and that dangers patent, obvious, and understood by him were assumed by the plaintiff, so the jury could hardly have been misled by said instruction, even though it did not define the relation of plaintiff and defendant as fully as it should.

Counsel for the appellant further complain that the court abused its discretion in limiting the appellant to 30 minutes in which to argue the case before the jury. There were only six witnesses—three on each side. The testimony of none of these witnesses was very extended, and that of some of them was very brief. We cannot say that the discretion of the trial judge, under such circumstances, was abused, nor perceive that the rights of appellant were unduly prejudiced by the rule.

It is objected that the court erred in the admission of improper testimony offered by appellee, and in permitting appellee to ask leading questions of the witnesses in rebuttal. The testimony objected to was that elicited by the question put to appellee's witness Jansen, "What were the duties of one running that machine?" Upon objection being interposed, counsel for appellee stated that his purpose was to show that the work in which plaintiff was engaged at the time he received his injury was not incidental to the work of running the machine. After some colloquy between the court and counsel the court replied, "Well, the witness may answer what he usually did about the machine—not what it was his duty to do." The witness then answered: "I cleaned the tin box underneath the machine, and whatever was

on the floor. I took a knife and scraped that away, but I never cleaned alongside of the cogwheels." The witness was here stopped, and, upon objection and request from counsel for appellant that the answer be stricken, the court said, "Yes, that may be stricken out." We do not think that the action of the court in the regard above mentioned, or in the latitude given counsel for appellee to ask, in rebuttal, a few leading questions, amounted to reversible error.

Counsel for appellant next insist that the court erred in refusing to permit Mr. Cobb, president of the defendant corporation, to answer the question, "What, if anything, do you know about the witness Rush, at or before the time of this accident, with reference to being a careful and competent foreman?" The question raised an immaterial issue and was upon an immaterial matter, and the objection to it was properly sustained.

Finally, it is contended that the court improperly refused appellant a continuance in the case. The ground on which the continuance was claimed was the absence of one Collins, who was superintendent of the appellant corporation at the time of the injury. Collins was, at the time of the trial, employed in Philadelphia, and refused to return to attend the trial. Of this fact appellant was apprised by letter February 24, 1902. It is said that appellant's counsel, Mr. Cox, was sick from the day after this notice was received until March 4, 1902. The motion for a continuance was made on the day of trial, March 12, 1902, prior to which time it does not appear that any effort had been made to procure the deposition of Collins or to postpone the trial. The affidavit does not state that Collins was a witness to the commission of the injury; hence he could not have testified as to what then took place; but the affidavit does state that Collins notified Rush to direct appellee to clean up around the machine, so, as far as the affidavit discloses, the evidence of Collins, if present, would not have materially militated against the theory upon which appellee's case was tried. At any rate, we cannot say that appellant exercised such diligence in the matter that the court's refusal to grant its application for the continuance amounted to an abuse of judicial discretion.

Upon a careful review of this whole case we are of the opinion that no reversible error was committed in its trial, and therefore the judgment of the Appellate Court will be affirmed. Judgment affirmed.

(307 Ill. 166)

SECURITY INS. CO. OF NEW HAVEN,
CONN., v. KUHN.

(Supreme Court of Illinois. Feb. 17, 1904.)

FIRE INSURANCE—CONSTRUCTION OF POLICY—
INTEREST OF INSURED.

1. A fire insurance policy on a building provided that it should be void "if the interest of the insured be other than unconditional and sole

ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." *Held*, that where the interest of the insured was a life estate in the property or its proceeds, united with the absolute right as an active testamentary trustee to dispose of the same as she saw fit for the purposes of the trust, the insured was the sole and unconditional owner in fee simple within the meaning of the policy.

Appeal from Appellate Court, First District.

Assumpsit by Catherine Kuhn against the Security Insurance Company of New Haven, Conn. A judgment for plaintiff was affirmed by the Appellate Court (108 Ill. App. 1), and defendant appeals. Affirmed.

Bates, Harding & Atkins, for appellant. Wm. M. & Wm. S. Johnston, for appellee.

CARTWRIGHT, J. Appellee brought this suit in assumpsit in the circuit court of Cook county upon a policy of fire insurance for \$1,250, issued to her by appellant on a building located at No. 140 North Union street, in Chicago, which had been destroyed by fire. The policy contained a provision that it should be void "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." The defense was that the interest of plaintiff in the property insured was not that of unconditional and sole ownership, and that the ground on which the building was situated was not owned by her in fee simple. A jury was waived, and the cause was submitted to the court upon an agreed statement of facts, together with the testimony of witnesses called and examined by the respective parties.

Plaintiff held title under the will of her deceased husband, Frank Kuhn, and, the nature of her estate being purely a question of law, the defendant submitted written propositions requesting the court to hold that the plaintiff was not the unconditional and sole owner of the property insured, nor the owner in fee simple of the ground on which the building was situated, but, on the contrary, held only a life estate in such property, and upon her death the title was to vest in others, and therefore the policy was void. Another proposition which the court was asked to hold was that there could be no recovery except for a share of the value of plaintiff's life estate proportionate to the whole insurance on the property. The court refused to hold these propositions as the law, but found the issues for plaintiff, and entered judgment for the full amount of the policy. The Appellate Court for the First District affirmed the judgment.

The provisions of the will of plaintiff's husband, Frank Kuhn, under which she derived title, are as follows:

"Second—All the rest and remainder of my estate remaining after the payment and discharge of said debts, real estate as well

as personal, and mixed estate and property, I give, devise, and bequeath to my executors hereinafter named, in trust, however, only to and for the use and purposes hereinafter mentioned. And for the purpose of facilitating the winding up and settlement of my estate and promoting the interest of my devisees, I do hereby fully empower and authorize my said executors, and the survivor of them, to let, sell, exchange, encumber, convey all, each and every part or portion of my real and personal property, and the proceeds of such sales or other disposition of the same, or any part thereof, again, in their discretion, to re-invest in the purchase of other real or personal estate, or in bonds, stocks or other securities, or to lend the same at interest upon real estate or other securities, as may by them be deemed most advisable, and the property and estate so acquired with such proceeds again to hold under the same restrictions and for the same uses and purposes hereafter particularly set forth, namely: The real and other estate herein above to my said executors given, devised and bequeathed, is to be held by them and the survivor of them in trust: First, to and for the exclusive use and enjoyment thereof, during the term of her natural life of my wife, Katharina, provided she shall so long remain my widow and unmarried, who is to have and retain the exclusive possession, use, enjoyment and control thereof, and shall have the use, enjoy the same and each and every the income, rents, profits and proceeds arising therefrom, as long as she shall remain unmarried after my death, to and for her own use and behoof. Should my said wife, however, marry again after my death, then, upon such re-marrying, the operation of the above provision in her favor shall at once cease and be of no further effect, and she shall thereby become and be entitled only to such dower in my real estate then remaining unsold or undisposed of, and other portion in my other estate, as she would in law be entitled to if I died intestate. Upon the re-marriage or death of my said wife the trust estate hereby created shall at once cease, and the trust property shall thereupon go to and the title to the real estate become vested in my children, as the whole of my estate remaining unconsumed and constituting such trust fund shall be divided equally between them, share and share alike; and if, in the meanwhile, any one or more of my children shall have died, leaving a descendant or descendants, such deceased child's share shall go to his or her issue, descendant or descendants."

By the will the plaintiff and Emil Kuhn, her son, were appointed executors, but Emil Kuhn refused to act, and plaintiff qualified and acted as executrix. The will was admitted to probate on June 30, 1890. An agreement was entered into by plaintiff and her children on March 9, 1896, by which the management of the estate was transferred

to the Security Title & Trust Company, which was authorized to make leases of the property in the name of the plaintiff, as executrix, to receive all rents, paying out of the same taxes, assessments, insurance, and repairs, and to pay the net income to plaintiff. In case of a sale of a portion of the real estate in order to give the plaintiff a comfortable support, the proceeds were to be received by the trust company and invested, and the income to be paid to the plaintiff. The title was not affected in any way by the agreement. Plaintiff was advanced in years, and the agreement merely committed the management of the property to the trust company to be exercised in her name.

The object of the stipulation in the policy was to protect the defendant against taking risks beyond the value of the interest insured, so that the insured would use all reasonable precautions to avoid the destruction of the property. It is not claimed that plaintiff did not have an insurable interest in the property, but it is insisted that her interest was only a life estate, which at 70 years of age was but a small share of the whole value. The question whether she had a mere life estate or a fee simple depends upon the construction of the will. That instrument did not give a mere power or authority over the real estate to the executors, but devised the entire estate, real and personal, to them. The devise was in trust, with power to lease, sell, exchange, incumber, and convey all, each, and every part or portion of the same, and to again, in their discretion, reinvest the proceeds, or any part thereof, or to lend the same, and to hold the property and estate acquired with such proceeds in trust for the exclusive use and enjoyment of plaintiff so long as she should remain unmarried after the testator's death. Upon her remarriage or death the provision in her favor was to cease, and the whole of the estate remaining unconsumed, and constituting the trust fund, was to be divided equally between the testator's children, and, if any one or more of such children should have died leaving a descendant or descendants, the deceased child's share was to go to his or her issue, descendant or descendants. Emil Kuhn having refused to act as executor, and plaintiff having accepted and qualified, the estate devised to the executors passed to her.

The provision of the will that the estate so devised should be held for the exclusive use and enjoyment of the plaintiff during life or until remarriage, and that she was to have and retain the exclusive possession, use, enjoyment, and control thereof, and have the use and enjoy the same, and each and every the income, rents, profits, and proceeds arising therefrom, if considered alone, would amount to a passive trust, executed by the statute of uses. By a prior provision, however, active duties were imposed upon the plaintiff, as executrix, as to the leasing, sale, exchange, or other disposition of the prop-

erty, and the investment, reinvestment, and management of the trust estate. But the precise character of the trust, in its different aspects, is not material in this case, since the estate for life, of whatever nature, and the estate devised to the executors, united in the same person. The entire legal estate became vested in the plaintiff. If she had an equitable life estate, she also had the legal estate as executrix and trustee. A cestui que trust acquires no property in law so long as the trust is subsisting, however he may be regarded in a court of equity. His estate is an equitable one, and equitable estates are such as are recognized and protected in courts of equity, and rest on beneficial ownership and the right to the use and income. The legal right and legal estate were in the plaintiff, and she would be the proper one to bring an action at law concerning such estate. The title of a trustee is commensurate with the powers given and the duties imposed upon the trustee, and in this case such powers and duties could not be exercised unless the plaintiff took a fee-simple title. She could not sell and convey the fee unless she had the fee. She was not invested with a mere power over the fee, but took a fee-simple title by the devise. *Kirkland v. Cox*, 94 Ill. 400; *Preachers' Aid Society v. England*, 106 Ill. 125; *Green v. Grant*, 143 Ill. 61, 32 N. E. 369, 18 L. R. A. 381; *King v. King*, 168 Ill. 273, 48 N. E. 582; *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918. There was a future contingency in the unconsumed portion of the trust property existing at the death of the plaintiff, which might be in the form of real or personal property. That interest was limited upon the death of the plaintiff or the uncertain event of her remarriage, and to dubious or uncertain persons who should be living and able to take the property at her death. It cannot be known who, if any, will be the surviving child or children, or the issue or descendant of any such child, to receive the future contingent interest. No one has a present vested estate or insurable interest except the plaintiff. In the action at law she must be regarded as the sole and unconditional owner in fee simple, although the property in her hands or the proceeds of the insurance are impressed with a trust which a court of equity will compel her to execute.

There was no error in refusing to hold the propositions of law as requested. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(207 Ill. 581)

IRWIN et al. v. NORTHWESTERN NAT. LIFE INS. CO. OF MINNEAPOLIS.

(Supreme Court of Illinois. Feb. 17, 1904.)

APPEAL—CONSIDERATION OF EXHIBIT—EXCEPTION.

1. Where the facts were before the court by stipulation, including an exhibit, and appellant offered no proposition of law as to whether the

exhibit should be considered, and did not except to the court's holding that it constituted part of the insurance policy in suit, he cannot complain that it was taken into consideration in determining the character of the contract.

Appeal from Appellate Court, Fourth District.

Action by Alta Irwin and others against the Northwestern National Life Insurance Company of Minneapolis. From a judgment of the Appellate Court reversing a judgment in favor of plaintiffs, they appeal. Affirmed.

See 66 N. E. 386.

A. W. Lewis, for appellants. Brown & Kerr and W. F. Scott, for appellee.

RICKS, J. This is an appeal from a judgment of the Appellate Court reversing, without remanding, a judgment obtained in the circuit court of Saline county in favor of appellants and against appellee. The action is assumpsit upon an insurance policy issued upon the life of the father of appellants. The trial was before the court without a jury, and upon a stipulation of facts. The case was formerly before this court, and a judgment of the Appellate Court was reversed, and the cause remanded to the Appellate Court, that the Appellate Court might make a special finding of facts, and recite the same in its judgment, as it appeared that the Appellate Court had reversed the judgment of the lower court because it found the facts differently from what they were found by the lower court. *Irwin v. Northwestern Nat. Life Ins. Co.*, 200 Ill. 577, 66 N. E. 386. It is not necessary that we restate the case here, as a complete statement is found in the report of the case when formerly before this court.

In the opinion remanding the case to the Appellate Court (page 581, 200 Ill., page 388, 66 N. E.), we said: "There were presented to the court for determination two questions of fact, or mixed questions of law and fact: First. Was Irwin engaged in the occupation of a coal miner at the time he lost his life? Second. Did the appellee tender appellants the amount due upon the policy prior to the day the suit was commenced?" Upon receiving the remanding order from this court, the Appellate Court further considered said cause, and adhered to its former opinion and judgment, reversing the judgment of the circuit court without remanding the cause, and recited in its judgment the following ultimate facts: "We find as facts of this case, to be incorporated in the judgment, that J. A. Irwin, the assured, was engaged in the occupation of a coal miner at the time he lost his life, and that the appellant did tender to the appellees the amount due upon the policy sued on prior to the day suit was commenced, and that the appellees accepted the full amount due them prior to the coming on of this case for trial in the circuit court." Under the facts so found, the only question for the determination of this court is whether

such facts are sufficient to support the judgment of the Appellate Court. *Purcell Co. v. Sage*, 189 Ill. 79, 59 N. E. 541; *National Linseed Oil Co. v. Heath & Milligan Co.*, 191 Ill. 75, 60 N. E. 834. Under this finding, no other judgment than the judgment entered by the Appellate Court would have been proper.

It is now urged by the appellants that both the trial and Appellate Courts, in determining the character of the contract between the assured and appellee, improperly took into consideration a certain exhibit, designated "Exhibit B" in the stipulation of facts, by which it was agreed that, if the assured should be injured or killed while in the occupation of mining coal, but one-half the amount provided by the policy should be paid. The facts were before the court by stipulation, and without objection or exception; and appellants offered no propositions of law to be held by the court with reference to the effect of the evidence, or as to which of the exhibits should be taken into consideration by the court in determining the effect of the contract. Appellee, however, did offer six propositions of law to be held or refused by the court, the first and second of which were held, and the others refused. The second proposition, as held by the court, was to the effect that the three papers—being the application, the stipulation contained in Exhibit B, and the policy mentioned in the agreed statement of facts—all combined to constitute the contract of insurance sued on, and that one of the provisions of such contract is that, if the assured should come to his death by reason of the hazards of the occupation of coal mining, then the defendant should only be liable for one-half the amount named in the policy. Appellants did not except to this holding, and cannot now urge that the trial and appellate courts improperly considered the evidence mentioned in the holding.

Other questions are urged, but, in view of the remanding order and the finding of the Appellate Court, we deem it unnecessary to further consider or discuss them.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(207 Ill. 199)

SCHUMACHER v. CHICAGO & N. W. RY. CO.

(Supreme Court of Illinois. Feb. 17, 1904.)

RAILROADS—BULK FREIGHT—UNLOADING CARS
—UNREASONABLE DELAY—RENTAL CHARGES
—REASONABLE TIME—EVIDENCE—LIEN.

1. The consignee of two car loads of coke was notified upon their arrival that a charge for rental would be made if they were not unloaded within 48 hours. The notification was in compliance with the rules of an association of railroads, organized for the purpose of facilitating the unloading of cars, and the charge made for the rental was much less than the average earning capacity of freight cars. The railroad com-

¶ 1. See *Carriers*, vol. 9, Cent. Dig. § 487.

pany had at the point of destination no warehouse for the unloading of bulk freight, such as coke. *Held*, that the railroad company was entitled to charge rental for the use of the cars after the expiration of a reasonable time for unloading.

2. On the issue as to what was a reasonable time, evidence as to the distance of the consignee's home from the station was not admissible.

3. The railroad was entitled to a lien upon the freight for the rental charges.

Appeal from Appellate Court, Second District.

Action by Bowen W. Schumacher against the Chicago & Northwestern Railway Company. From a judgment of the Appellate Court (108 Ill. App. 520) affirming a judgment for defendant, plaintiff appeals. Affirmed.

Louis Zimmerman, for appellant. Pam, Calhoun & Glennon, A. W. Pulver, and S. A. Lynde (Charles D. Clark, of counsel), for appellee.

RICKS, J. Appellant brought an action of replevin in a justice's court in Lake county against appellee for three tons of coke. Judgment was for appellee in the justice court. On appeal to the circuit court of said county a trial was had before a jury, and the court directed a verdict for appellee, and entered judgment thereon. Appeal was taken to the Appellate Court, where the judgment of the lower court was affirmed, and this appeal was prosecuted.

Appellant is a resident of Highland Park, and in June, 1902, purchased and caused to be shipped to himself at said place, over appellee's road, two cars of coke. The cars arrived in Highland Park on June 20th, at 7 o'clock in the morning, and at 9 o'clock in the morning of the same day appellee's station agent at said point mailed appellant notice of the arrival of the cars. Appellant is a practicing lawyer residing at Highland Park, and having his office in the city of Chicago, and on the same morning of the arrival of the cars, and shortly after the mailing of the first notice, appellee's agent saw appellant personally and informed him that said cars had arrived. At that time appellee's agent did not know the freight charges, and neither by the first postal card nor by verbal statement was appellant informed on that day of the freight charges. On the morning of the 21st, appellee's agent again notified appellant of the arrival of said cars, sending notice by postal card through the mail, which was received by appellant between 8:30 and 9 o'clock in the morning of that day. On the postal card so sent to appellant, after describing the freight, was the following: "Which is now at your risk; please pay charges and remove property within twenty-four hours, or same will be charged storage or delivered to warehouseman; all car-load freight shall be subject to a minimum charge for trackage and rental of one dollar per car for each twenty-four hours' detention, or

fractional part thereof, after the expiration of forty-eight hours from its arrival at destination." And across the face of said postal card was stamped the following: "If this car is not unloaded within forty-eight hours from 7 A. M., June 21, 1902, a charge of one dollar per day, or fraction thereof, will be made for car service, for which this company reserves a lien upon the contents of car." Upon the 21st of June, and after the receipt of the postal card by appellant on that day, he went to appellee's station and there paid its agent the freight, taking a receipt therefor, and on each of the freight bills was stamped a notice identical with the one last above quoted. When appellant received the freight receipts he called the attention of appellee's agent to the notice with reference to the charge for car service contained thereon, and stated to him that he could not get the cars unloaded within 48 hours, or anywhere near that time; also recalled the fact that he had had trouble a year or so previous to this shipment with this same company at the same station, growing out of appellee's insistence upon the enforcement of the above rule. Appellant then engaged one James H. Duffy, whose business was the hauling of coal and coke, to haul the same for him, but was informed by said Duffy that he could not begin the work until the following Monday, June 21st being on Saturday. One car was unloaded by Tuesday, June 24th. On Thursday, June 26th, the other car was only partially unloaded, and appellee, through its agent, notified Duffy, who was hauling the coke, that he could haul no more until the car service due from the delay in unloading had been paid. A controversy then arose between appellant and appellee, which resulted in the suing out of the writ of replevin on Monday, June 30th, there remaining about three tons of coke in one car, which appellee had sealed and refused to allow to be removed until the car service was paid.

The evidence further shows that the cars, on their arrival on Friday, June 20th, were placed on a stub track, where they could be approached from one side and unloaded, and on the 21st of June were placed at the end of another stub track, so that their removal was unnecessary until they were unloaded, and could be approached from both sides, for the purpose of unloading, without interference from switching so long as they remained at that point. The two cars in question came from and belonged to other railroad lines, one being from the Baltimore & Ohio Railroad Company and the other from the Illinois Central Railroad Company; that appellee had no warehouse for the unloading of bulk freight, such as car loads of coal and coke, at Highland Park Station, and that freight such as that in question is uniformly loaded and unloaded by the shipper and consignee.

The evidence further shows that in what was called "Chicago Territory," and embracing a considerable scope of country sur-

rounding the city of Chicago, and including Highland Park, was an association called the "Chicago Car Service Association," which was a joint association including all the railroads within that territory, all of which united in the selection of a single agent, known as the "Car Service Association Agent," the purpose and business of which association were to facilitate the loading and unloading of cars and for the securing of prompt service to shippers; that this agency or association had existed since 1888, and that appellee was a member of such association; that the United States, with reference to railroad traffic, was divided into 42 districts, each having a similar association; that certain rules, designed to effectuate the purpose of such association, were formulated and published by it, and observed by all its members and brought to the attention of shippers, as business between them arose and was conducted; that among the rules were rules 2, 4, and 5, as follows:

"(2) Forty-eight hours' free time will be allowed for loading or unloading all cars, whether on public tracks or on private tracks, at the expiration of which time a charge of one dollar per car per day, or fraction thereof, shall be made and collected for the use of cars and tracks held for loading or unloading or subject to the orders of consignors or consignees or their agents."

"(4) In calculating time, Sundays and the following holidays are excepted: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas."

"(5) On cars arriving after 6:00 P. M. of any day, car service will be charged after the expiration of forty-eight hours from 6:00 P. M. on the day following."

The evidence showed that in the city of Chicago alone there were shipped in, approximately, 75,000 cars of coal and coke every month; that the average earning capacity of freight cars upon 29 railroads in the association, for the year 1901, was \$2.42, and on appellee's road \$2.15 per day.

Under the above state of facts appellee contends that it was entitled to charge a car service or car track service of \$1 per day, after the expiration of 48 hours, upon these cars, and that it was entitled to a lien upon the coke, the same being the freight contained in them, for the payment of such charges. Both of these propositions are denied by appellant, and arise upon the peremptory instruction for a verdict, given by the trial court.

Under the Constitution and laws of this state, railroads are public highways and railroad corporations are quasi public corporations. They are chartered by the state, and may invoke the right of eminent domain for the acquirement of lands necessary for the conduct of their business. Regarding them as public agencies, discharging duties in which the public is interested, the state regu-

lates and controls their rates and tolls, both for the carrying of freight and passengers, and in many other respects regulates and controls their operation. Upon the payment or tender of the legal tolls, freight, or fare, such companies are required to furnish cars and transport freight and passengers within a reasonable time, and upon their failure to do so they are subject to treble damages to the party aggrieved, and, in addition thereto, a penalty or forfeiture to the school fund of the state. Hurd's Rev. St. 1890, c. 114, §§ 84, 85. They must receive and transport cars loaded and unloaded over their lines, and in doing so assume the liability of a common carrier as to both such cars and freight. *Peoria & Pekin Union Railway Co. v. Chicago, Rock Island & Pacific Railway Co.*, 109 Ill. 135, 50 Am. Rep. 605. They may not discriminate against shippers in rates or facilities for shipping, and are required to make special provision for the handling and shipping of grain. All of these regulations by the state are justified and sustained upon the ground that the state is interested in the prompt and proper carriage of its products and the commerce of its people, and it would seem that reasonable rules and regulations adopted by such corporations, conducive to the proper discharge of the public duty, should, where they are not in violation of some positive law, be sustained.

Railroads, as to freights committed to their charge, during the period of transport and until they are delivered, bear two well-recognized relations. While in transit, and for a reasonable time after reaching the point of destination, they owe the duties and bear the relation of common carriers; and when the car containing the freight is delivered to the consignee upon his own track, or at the place selected by him for unloading, if he have one, or to the consignee upon the company's usual and customary track for the discharge of freight, with reasonable and proper opportunity to the consignee to take the same, or when placed in the warehouse of such company, or the warehouse of another selected by them—in any and all such cases such companies then bear to such freight the relation of warehousemen. *Peoria & Pekin Union Railway Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; *Gregg v. Illinois Central Railroad Co.*, 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238. If the cars in which such freight is shipped are the property of another railroad than that of the company transporting the same to the point of destination, such latter company bears the same relation to such cars as to the freight therein. *Peoria & Pekin Union Railway Co. v. United States Rolling Stock Co.*, supra. Such are the duties of such companies appertaining to bulk freight in car load lots, which, it may be said, by the uniform rule and custom of this country are to be loaded and unloaded by the shipper and consignee. Small or

package freight of such character and bulk that that belonging to many distinct owners may be shipped in a single car is commonly loaded and unloaded by the transporting company or companies. When such freight reaches the point of destination and is placed in the freight depot or warehouse of such company, it is held by such company as a warehouseman, and when a railroad company carries freight to its point of destination and stores the same in its warehouse, and the relation of warehouseman is established by the failure to remove the property within a reasonable time, the liability of a warehouseman attaches, and not the liability of a common carrier. *Illinois Central Railroad Co. v. Alexander*, 20 Ill. 24; *Porter v. Chicago & Rock Island Railroad Co.*, 20 Ill. 408, 71 Am. Dec. 286; *Merchants' Dispatch Transportation Co. v. Hallock*, 64 Ill. 284; *Illinois Central Railroad Co. v. Friend*, Id. 303; *Rothschild v. Michigan Central Railroad Co.*, 69 Ill. 164; *Merchants' Dispatch & Transportation Co. v. Moore*, 88 Ill. 136, 30 Am. Rep. 541; *Anchor Line v. Knowles*, 66 Ill. 150.

'It is the duty of the consignee to take notice of the time of the arrival of freight shipped to him and to be present and receive the same upon arrival, and he is not entitled to notice from the company that the same has arrived, but the company is authorized to store such freight and to be relieved of its duty as a common carrier (*Merchants' Dispatch Transportation Co. v. Hallock*, supra), and when such freight is in the warehouse the railroad company may charge storage upon the same, and it has a lien upon the freight so stored for its storage charges, and this rule obtains although the company may have given the consignee notice to remove the property within 24 hours. *Richards v. Michigan Southern & Northern Indiana Railroad Co.*, 20 Ill. 405; *Porter v. Chicago & Rock Island Railroad Co.*, supra; *Illinois Central Railroad Co. v. Alexander*, supra.

When a railroad company delivering freight at its point of destination has no warehouse at that point suitable for the storage of bulk freight in car load lots, and the property is of such character that the cars in which it is transported furnish a proper and safe place for the same, so that it is not liable to damage or deterioration arising from heat or cold or the elements, there would seem to be no reason for requiring the transporting company to seek a warehouse of another, and add the cost of removal to the cost of storage, when said freight may properly be held in storage in the cars in which the same was carried; and after notice to the consignee, and a reasonable time to remove the same, reasonable storage charges may be collected therefor, and the freight held for the payment thereof. *Miller v. Mansfield*, 112 Mass. 260; *Miller v. Georgia Railroad Co.*, 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. Rep. 170; *Gregg*

v. Illinois Central Railroad Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238.

In *Gregg v. Illinois Central Railroad Co.*, the action was for damage to grain by water, which had been stored by the railroad company in a warehouse in Augusta, Ga. The grain was not received promptly upon arrival at its destination, and was stored, and while in storage was injured by a flood. In speaking of the duty of the company with reference to such freight, this court said (page 560, 147 Ill., page 346, 35 N. E., 37 Am. St. Rep. 238): "The railroad company was not required to keep the corn in its cars on track indefinitely, and, although the consignee was in default in not receiving the freight after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as warehouseman. In the exercise of such care it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might, with the exercise of like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the owner."

In *Miller v. Georgia Railroad Co.*, supra, it is said (page 563, 88 Ga., page 316, 15 S. E., 18 L. R. A. 323, 30 Am. St. Rep. 170): "It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them; and we think, where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its cars as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may in many cases be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself, or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier and the goods stored elsewhere at the consignee's expense. And if a customer whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car by requesting or permitting the carrier to continue holding

it unloaded in service, and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage, and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service."

In *Miller v. Mansfield*, supra, it was said: "It is not material that the goods remained in the cars instead of being put into a storehouse."

In the case at bar appellant did not discharge his duty to the appellee by being present and ready to receive his freight upon its arrival. Within two or three hours of its arrival he was notified thereof, and after it had lain there 24 hours, and said car was placed where appellant had full and fair opportunity to remove the freight without interference in any form, and to approach the car from both sides for that purpose, and when appellee's duty as a common carrier had ceased, appellant was notified that he must remove the same within 48 hours, or a car service or storage charge—which, under the circumstances, must be held to be the same thing—of \$1 per car would be insisted upon. Appellant also knew, by the previous dealings between himself and appellee, that such rule obtained, and, unless he could show that the limit of time was unreasonable or the charge excessive, it would seem appellee's contention to charge as for storage should be upheld.

It is also urged by appellee that the right to demand such charge and enforce the same by lien arises from the unreasonable detention of the cars in question by appellant, and that such charge is in parity with and in the nature of demurrage as it exists under the maritime law, and not based upon the theory of storage charges; that it was the duty of appellant to take notice of the arrival of his freight, and to be present and ready to receive the same when it did arrive, and that having failed to do this, he having notice of the rule of the company to charge for the detention beyond the period of 48 hours, a car and track service in the nature of demurrage may properly be demanded. The evidence in this case shows that, by the enforcement of the rule here insisted upon, the transportation facilities in the car-service territory here involved was increased practically 100 per cent., and that only about 7 per cent. of the shippers or consignees, through its operation, hold their cars overtime. If such common carriers must comply with our statute and must furnish transportation for people and freight when demanded, and such companies have made proper provision in equipping their roads with an ample supply of rolling stock, and yet, because of the dilatoriness or perversity of shippers and con-

signees, cars may be held indefinitely at loading and discharging points, contrary to the desires and interests of such companies, then it must be plain that the statute must either fall as a dead letter, or its enforcement must work great injustice to such companies.

This precise question seems not to have been before this court previous to the present case. In 1891 the Attorney General of this state, in an opinion to the Railroad & Warehouse Commissioners in complaint No. 64, *Union Brewing Co. of Peoria v. Chicago, Burlington & Quincy Railroad Co.*, and complaint No. 71, *Lyon & Scott v. Peoria & Pekin Union Railroad Co.*, said: "Section 5 of the act in relation to receiving, carrying, and delivering grain in this state provides that a consignee of grain transported in bulk shall have twenty-four hours, free of expense, after actual notice of arrival, in which to remove the same from the cars of such railroad corporation [Hurd's Rev. St. 1899, p. 1338, c. 114]. There would seem to be an implied right, under the statute, to charge for a longer detention than the twenty-four hours which the statute names. Indeed, no reason is perceived, in law or justice, why an unreasonable and unnecessary detention of cars by consignees should not be paid for; and the car-service association seems, from the proof before us, to be only an agency established to keep account of claims so arising and enforce them. The charges so made were thought to be reasonable under all circumstances. * * * Demurrage is an important subject, which has arisen in a practical way only within late years, and long after our statute for the regulation of railroads was passed. It does not, however, follow that because there is no statutory regulation of the question there is no law."

Mr. Elliott, in his work on Railroads (volume 4, § 1567) says: "But while it is probably true that this right is derived, by analogy, from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, 'we see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles, as well as carriers by sea.' After a carrier has completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse, and keeping them, after the consignee has had a reasonable time in which to remove them. Why, then, when its duties as a carrier have been performed and a reasonable time has elapsed, is it not as much entitled to additional compensation for the use of its cars and tracks as for the use of its warehouse? Certainly a customer whose duty it is to unload, or who unreasonably delays the unloading of a car, for his own benefit, ought not to complain if he is made to pay a reasonable sum for the un-

reasonable delay caused by his own act. But this is not all. The public interests also require that cars should not be unreasonably detained in this way." And to the like effect are *Miller v. Georgia Railroad Co.*, supra; *Norfolk & Western Railroad Co. v. Adams*, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. Rep. 916; *Darlington v. Missouri Pacific Railroad Co.* (Mo. App.) 72 S. W. 122; *D., G. H. & M. Ry. Co. v. Interstate Commerce Commission*, 74 Fed. 803, 21 C. C. A. 103; *American Warehouse Ass'n v. Illinois Central Railroad Co.*, 7 Interstate Com. Rep. 556.

Nor do we think it necessary to the existence of such lien that it arise from a specific contract providing for the same, but that such right and contract may arise by implication, as in the case of warehouse charges to a railroad company that has stored goods, transported by it, when not received by the consignee promptly at the place of delivery. *Miller v. Mansfield*, supra; *Merchants' Dispatch & Transportation Co. v. Moore*, 88 Ill. 136, 30 Am. Rep. 541; *Illinois Central Railroad Co. v. Alexander*, 20 Ill. 24; *Darlington v. Missouri Pacific Railroad Co.*, supra; *Barker v. Brown*, 138 Mass. 340.

It is claimed, however, by appellant that the case of *Chicago & Northwestern Railway Co. v. Jenkins*, 103 Ill. 588, lays down the rule contrary to the views we have above expressed, and that that case should be controlling in the present case. We think not. That case seems to have related to or grown out of the shipment of goods in less quantity than a car load lot. The character of the goods was of a perishable nature, and such, if removed from the cars, must be stored; and in distinguishing that case from cases under the maritime law, and denying that the rule applicable in contracts of shipment under the latter law applied to railroad companies, it was said (page 600): "But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee." Thus it will be seen that the court could not have had in mind the case of the shipment of goods of the character here involved by car load lots, and where the undisputed evidence shows that the rule is that such freight shall be loaded by the shipper and unloaded by the consignee, and that railroads do not have warehouses in which to store that class of goods.

Appellant contends that the trial court erred in not permitting him to show, as tending to show whether the coke was unloaded within a reasonable time, the distance from his house to the station where said car was placed for unloading. In this, we think, there was no error. If such is the rule, and as there was 57,000 pounds of coke in this shipment, and it should appear by the evidence that the distance from the consignee's

home to the station should be such that but one load of coke could be hauled a day, and that a ton at a load was all that could be hauled, taking the condition of the roads into consideration, then, according to appellant's contention, he would be entitled to hold the cars in question at this place, without charge, for more than a month. Such a rule would practically take out of business, under the supposed case, the rolling stock of a company for one-twelfth of the year, to the prejudice of other shippers and to the detriment of the public interests. The correct rule must be that the consignee shall have a reasonable time, after having knowledge of the arrival of his freight, to get the necessary help and means to remove the same; and it cannot be presumed that he is to do this by the employment of the fewest number of persons or teams that can be employed at such work, and at the same time have it said that any effort whatever is being made to remove the freight. No circumstance is shown here why a number of teams and abundance of help could not have been obtained, by proper effort, to have unloaded this coke within the 48 hours fixed by the rule, allowing for the Sunday; and if it could not, it cannot be maintained, as we think, that appellee should stand the loss of appellant's failure or inability to discharge his duty and perform his contract. Circumstances might arise, and doubtless will, in such cases, when, in determining what shall be a reasonable time, many things are necessary to be taken into consideration, but the distance that the commodity is to be hauled when removed from the company's cars, it would seem, should not be one of them.

It is urged, further, that a lien ought not to be accorded common carriers in such cases, but they should be left to their action upon the case or in assumpsit. There is no law preventing the sale, by the consignee, of the cargo, at the point of destination, to one or many persons who may be wholly irresponsible, and as against whom suits would be unavailing. The object of such a rule cannot be so much for the recovery of a revenue as the enforcement of a rule that is to the benefit of all the shippers, and thereby a public benefit. The charge must be said to be little more than nominal, and yet the evidence discloses that its imposition in such cases has had a highly beneficial effect. No question is made as to the reasonableness of the charge, and, if there were, it could have no effect in the case at bar, for the reason that appellant absolutely denies the right of appellee to any charge or compensation, and made no tender of any portion of it. *Russell v. Koehler*, 66 Ill. 459; *Hoyt v. Sprague*, 61 Barb. 497; *Schouler on Bailments*, § 125.

The views above expressed as to the rule obtaining to such charges, whether regarded as storage charges or demurrage or car service, seems to be in keeping with the weight of the modern decisions upon the questions,

and, we believe, will tend to the public welfare. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(208 Ill. 78)

MOODY v. FOUND.

(Supreme Court of Illinois. Feb. 17, 1904.)

WILLS—CONTEST—TRIAL BY JURY—CONSTITUTIONAL LAW—ADMISSION TO PROBATE—EVIDENCE—SUFFICIENCY.

1. Const. art. 2, § 5, providing that the right of trial by jury, as heretofore enjoyed, shall remain inviolate, does not confer on one contesting the probate of a will the right to demand a jury trial in the circuit court on an appeal from a judgment of the county court admitting the will to probate.

2. Where, in a proceeding contesting the probate of a will, the attesting witnesses testified to every fact and circumstance required by the statute to show that the will was duly executed, the admission of the will to probate by the circuit court will not be interfered with by the Supreme Court on the ground that the proofs were insufficient to justify its admission.

Appeal from Circuit Court, Iroquois County; R. W. Hilscher, Judge.

Controversy between George A. Moody and Alfred Found, executor of the will of George Moody, deceased. From a judgment of the circuit court admitting the will to probate, contestant appeals. Affirmed.

W. J. Brock and J. W. Kern (H. K. Wheeler, of counsel), for appellant. Daniel F. Higgins and A. F. Goodyear, for appellee.

HAND, C. J. The appellee, who was the executor therein named, presented to the county court of Iroquois county, for probate, the last will and testament of George Moody, deceased. The county court admitted the will to probate and ordered the same recorded. An appeal was perfected to the circuit court of said county, where the will was again held to be duly proven, and, the testator having died seised of real estate the title to which was transferred by said will, a further appeal has been prosecuted direct to this court.

The appellant moved the circuit court that the issues involved in said appeal be submitted for determination to a jury, which motion was overruled, and the hearing was had before the court without a jury, and the action of the court in declining to submit said issues to a jury has been assigned as error, and is urged as ground for a reversal in this court. The statute of wills in force in this state does not provide for a trial by jury in the county court upon the presentation of a will for probate, but the question whether or not an instrument in writing has been duly established as the last will and testament of a decedent, and is entitled to be admitted to probate, is left to the determination of the county court without a jury. Neither does the statute providing for appeals

from the judgment of the county court in admitting or refusing to admit wills to probate provide for a trial by jury in the circuit court, but the same issues are involved in the circuit court upon the appeal which were tried in the county court, and those issues, on appeal, are to be determined by the circuit court without a jury, the same as they were tried without a jury and before the court in the county court.

The jurisdiction to admit wills to probate has never been exercised by the common-law courts as a part of their common-law jurisdiction, but prior to the establishment of probate courts the ecclesiastical courts of England and the analogous courts of this country exercised that jurisdiction, and that jurisdiction, as now exercised by the county court of this state, is purely statutory, so that the constitutional provision that "the right of trial by jury as heretofore enjoyed, shall remain inviolate" (Const. art. 2, § 5), did not confer upon the appellant the right to demand a jury upon the trial of said appeal in the circuit court, as it has been uniformly held that such constitutional provision was designed only to secure the right of trial by jury as it had theretofore been enjoyed in those tribunals which exercised common-law jurisdiction, and was not intended to confer such right in any class of cases where it had not formerly existed. Nor was it intended to introduce the jury system into those special summary jurisdictions which were unknown to the common law. *Ross v. Irving*, 14 Ill. 171; *Johnson v. Joliet & Chicago Railroad Co.*, 23 Ill. 202; *Ward v. Farwell*, 97 Ill. 598.

As the statute does not provide for a jury trial in the circuit court upon an appeal from the judgment of the county court admitting, or refusing to admit, a will to probate, and as the constitutional provision providing for jury trials does not apply to a proceeding for the probate of a will, it is clear the circuit court did not err in disposing of the issues involved in said appeal without the intervention of a jury. Especially do we think this conclusion correct in view of the fact that the statute provides that any person in interest, within one year after the probate of a will in the county court, may contest, by bill in chancery, the validity of the will before a jury in the circuit court of the county wherein the will was proven and recorded. In *Claussenius v. Claussenius*, 179 Ill. 545, 53 N. E. 1006, on page 552, 179 Ill., page 1007, 53 N. E., it was said: "An appeal from a judgment in such a proceeding admitting the will to probate has no effect to broaden the inquiry in the court to which the appeal is taken nor to entitle the party to a trial by jury. Hence, upon the rendition of such a judgment, parties having the requisite interest, if they desire only to question the correctness of the ruling that the will was admissible to probate, could do so by appeal. But if a party so interested desired to broad-

¶ 1. See *Jury*, vol. 31, Cent. Dig. § 97.

en the inquiry and challenge the mental capacity of the testator to execute the instrument, or show he was unduly and improperly influenced to execute it, and to have such question tried by a jury, he must resort to a bill in chancery."

It is further contended that the proofs admitted on the hearing in the circuit court were not sufficient to justify that court in admitting the will to probate. The attesting witnesses testified to every fact and circumstance required by the statute to show the will was duly executed by the testator. The judge of the circuit court saw and heard them while testifying, and was in much better position than we to judge of the weight that should be given to their testimony. As said in the Claussenius Case, if the appellant wished to broaden the inquiry and challenge the mental capacity of the testator to execute the instrument, or show he was unduly and improperly influenced to execute it, he should have resorted to a bill in chancery, when he could have had those questions passed upon by a jury.

The judgment of the circuit court admitting the will to probate will be affirmed. Judgment affirmed.

(208 Ill. 9)

**CLEVELAND, C. & ST. L. RY. CO. v.
PEOPLE ex rel. SELBY.**

(Supreme Court of Illinois. Feb. 17, 1904.)

SCHOOLS AND SCHOOL DISTRICTS—TAXATION—JUDICIAL REVIEW—DIVERSION OF TAX—EXCESSIVENESS—BUILDING PURPOSES.

1. Where a tax levied by school directors does not exceed the statutory limit, the courts, in the absence of fraud, cannot enjoin the collection of the tax merely because more has been levied than the court might find was necessary.

2. The collection of a legally levied school tax cannot be enjoined on the ground that it is proposed to divert the tax when collected to a purpose other than that for which it was levied.

3. Under Hurd's Rev. St. 1901, c. 122, § 202, declaring that for the purpose of establishing free schools the directors of a district may levy a tax annually, not to exceed 2½ per cent., for building purposes, etc., the directors have no authority to levy a tax for building purposes merely to provide funds to be used in the future for the erection of a building which they have in contemplation, but the erection of which they have not fully agreed upon at the time the tax was levied.

Appeal from Moultrie County Court; E. D. Hutchinson, Judge.

Action by the people, on relation of Robert Selby, as county collector of Moultrie county, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Modified.

R. M. Peadro (Geo. F. McNulty, of counsel), for appellant. W. K. Whitfield (Geo. A. Sentel, of counsel), for appellee.

HAND, C. J. This is an appeal from a judgment of the county court of Moultrie county for certain delinquent taxes levied

against the property of the appellant in school district No. 29, in Whitley township, in said county. The board of directors of said school district made a tax levy of \$1,800 for "school purposes," and \$1,000 for "building purposes," upon the taxable property of said school district for the year 1902. The appellant paid all of said tax levied against its property except \$148.44 for "school purposes" and \$228.80 for "building purposes," and filed objections to judgment against its property on the grounds—First, that all of the levy for school purposes in excess of \$1,100 was illegal and void, for the reason that no greater sum was required for school purposes than \$1,100, and that the difference between \$1,800, the amount of the levy for school purposes, and \$1,100, had been illegally and fraudulently made, for the purpose of being used to pay bonded indebtedness and interest on bonds; second, that the \$1,000 levied for building purposes had not been levied for building purposes, as at the time of the levy it was not the intention or purpose of the board of directors to use the said sum, or any part thereof, for building purposes, for the reason no schoolhouse had been built or was being built, but said levy was made for the purpose of paying bonds and interest on bonds.

It was stipulated on the trial that the total assessed value of all the real and personal property in school district No. 29, at the last assessment for state and county purposes, was \$74,764, and that the total assessed value of the property of appellant in said school district was \$17,220, and that the levy as made for school purposes had been made at the rate of 2½ per cent., and that the levy for building purposes had been made at the rate of 1⅓/10 per cent.

It is contended that only \$1,100 was required for school purposes, and that the remaining \$700 of the \$1,800 levied for school purposes was to be used in paying the outstanding bonds of the district issued by it to obtain funds which had been used by the district with which to construct a schoolhouse. The evidence found in the record fails to sustain such contention. While it does appear that the district had outstanding bonds to the amount of \$1,500, the proceeds of which had been used by the district with which to erect a schoolhouse, it clearly appears from the evidence it was not the intention of the board of directors to use any part of the \$1,800 levied for school purposes with which to pay said bonds or the interest thereon. The levy for school purposes was only for 2½ per cent. of the taxable property of the district, and was within the limit allowed by the statute. Within that limit the board of directors were clothed with a large discretion in determining the amount necessary to be raised for maintaining free schools in the district, and with which to pay the ordinary and contingent expenses thereof, and when it appears that a tax levy is clearly within the statutory power conferred upon the board of directors

the courts, in the absence of fraud, are powerless to prevent the collection of the tax from the fact alone that more has been levied by the board of directors than the court might find was necessary to maintain free schools and meet the expenses of maintaining the same in the school district for the ensuing school year. Nor will the courts decline to enforce the collection of a tax legally levied by reason of the fact that it may be proposed to divert the tax, when collected, to a purpose other than the purpose for which it was levied, as, after the tax has been collected, equity will readily interfere at the suit of the taxpayer to prevent a misappropriation of the fund. *Town of Lemont v. Singer & Talcott Stone Co.*, 98 Ill. 94; *Lawrence v. Traner*, 136 Ill. 474, 27 N. E. 197. In the latter case, on page 483, 98 Ill., page 198, 27 N. E., it is said: "Within the limit prescribed by the statute the board of directors are necessarily clothed with a large discretion in determining the amount necessary to be raised for maintaining free schools within their district and to pay the ordinary and contingent expenses thereof. When, as here, the levy is clearly within the power conferred upon the directors, it will constitute no ground for a court of equity to interpose, and by injunction to prevent the collection of the tax, because more has been levied than the court might find was necessary for the authorized purpose. *Town of Lemont v. Singer & Talcott Stone Co.*, supra. It is also the well-established rule that when taxes levied for a proper purpose by a body authorized by law to impose them do not exceed the amount or rate allowed by law, the fact that it may be proposed to divert them to another purpose, even though such purpose be illegal, will not authorize a court of equity to restrain their collection. After the collection of the tax, equity will interpose and prevent its misappropriation." This case was a bill to enjoin the collection of a school tax, but what was there said applies with equal force to the case at bar.

The boards of school directors in this state are elected by the people to represent them in the matter of providing free schools in which to educate their children. The statute has conferred upon such boards the power to levy a tax up to the limit of 2½ per cent. upon the taxable property of the district for school purposes, and so long as such boards keep within that limit, and no fraud in the tax levy is shown, the discretion vested in the board of directors cannot be controlled by the courts.

It is next contended that the \$1,000 tax levied for "building purposes" is invalid, on the ground that the tax thus sought to be raised is to be used, when collected, to pay the bonded indebtedness, and interest thereon, of the district, or in the erection of a schoolhouse which had not been agreed upon by the board of directors at the time the tax levy was made. The evidence shows that

said district, at the time of the tax levy, had three bonds, of \$500 each, outstanding, which bore interest at 5 per cent. per annum, maturing, respectively, in 1904, 1905, and 1906, and that the proceeds of said bonds had been used by the district for the purpose of erecting a schoolhouse, which was then in use by the district. In *Chicago & Alton Railroad Co. v. People*, 205 Ill. 625, 69 N. E. 72, it was held the board of directors of a school district, under the power conferred upon such boards by section 202 of chapter 122 of Hurd's Revised Statutes of 1901, may rightfully levy a tax of not to exceed 2½ per cent. of the taxable property of the district for building purposes, and use the fund thus raised to pay the outstanding bonds, and interest thereon, of the district, the proceeds of which had theretofore been used by the district with which to erect a schoolhouse. Here, however, it was shown the board of directors did not intend to use the \$1,000 levy for "building purposes" with which to pay said bonds and interest, but that it was their intention to use the fund thus raised to erect a schoolhouse, the erection of which they then had in contemplation, but the erection of which they had not fully agreed upon. We think it clear the board of directors of a school district cannot levy a tax for "building purposes" with a view to accumulate a fund to be used at some time in the future with which to build a schoolhouse, the erection of which they have in contemplation, but which they have not decided to build at the time the tax levy is made, and which has an existence only in the minds of the several members of the boards of directors at the time of the tax levy. The section of the statute under which the levy for building purposes was made designates the levy as an "annual tax levy," and the section, as a whole, clearly indicates that the levy made by virtue thereof is intended to provide for the wants of the school district for the ensuing school year only, and not for its further future needs. The taxpayer has the right to be informed, when he is called upon to pay a tax, what the tax is levied for and how the money paid by him is to be expended by the board of directors. The record in this case shows no bonds of the district would mature in the year 1908; that it was not the intention of the board of directors to use the money raised for "building purposes" by said tax levy in payment of outstanding bonds of the district; and that the erection of a schoolhouse had not been determined upon by the board of directors at the time the tax levy for "building purposes" was made. There was therefore no basis for a valid tax levy for "building purposes" existing in said school district at the time the levy for that purpose was made; hence the tax of \$1,000 for "building purposes" was void.

The judgment of the county court will be reversed as to the tax levy for "building pur-

poses," and as to the tax levy for "school purposes" affirmed. In pursuance of section 192 of the revenue act (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3478, c. 120, par. 194), a judgment will be rendered in this court for the sum of \$146.44 (the amount of the said tax levy for "school purposes"), with 10 per cent. damages on that amount, and it is ordered that so much of the amount deposited by appellant with the collector upon the taking of this appeal as shall be necessary to pay and satisfy said judgment be credited upon the same, and that execution issue for any balance remaining unpaid. The clerk of this court will enter judgment accordingly, and transmit to the county collector a certified copy of the same.

Judgment in this court.

(207 Ill. 266)

RUDOLPH et al. v. RUDOLPH et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

WILLS—CONSTRUCTION—BEQUEST TO CLASS—LEGATEES—DEATH BEFORE TESTATOR—LAPSED DEVISE—STATUTES.

1. Statute of Descent, § 11 (Hurd's Rev. St. 1901, c. 39), provides that whenever a devisee or legatee in any will, being a child or grandchild of the testator, shall predecease the testator, and no provision shall be made for such contingency, the issue of such devisee or legatee shall take such estate devised or bequeathed as the devisee or legatee would have taken, had he survived the testator. *Held*, that such provision applied to a devise to a class, as well as to devisees in name, so that, where one of testator's sons died before testator, the son's children were entitled to his share under a provision of the will devising the remainder of the property to testator's "beloved children as their absolute property in fee simple to be equally divided between them."

Appeal from Circuit Court, St. Clair County; Wm. Hartzell, Judge.

Action by Eliza Rudolph and others against Corinne Rudolph and others. From a decree in favor of plaintiffs, defendant Corinne Rudolph appeals. Reversed.

This is a bill for partition, accounting, etc., filed on August 28, 1902, and afterwards amended on June 8, 1903, for the purpose of making Fannie Rudolph a party, by Eliza Rudolph, in her own behalf, and as conservatrix of the estate of Frederick W. Rudolph, deceased, and Minnie A. Rudolph and Edgar Rudolph, against Herman Rudolph, Aurelia Rudolph, Corinne Rudolph, and Fannie Thornbury Rudolph. It appears from the pleadings, proofs, and findings of the master and chancellor below that Frederick W. Rudolph died testate in the month of July, 1902, leaving a will dated March 15, 1875; that at the time of his death Frederick William Rudolph was, and for some years prior thereto had been, insane; that Eliza A. Rudolph on January 31, 1889, had been appointed by the county court of St. Clair county conservatrix of his estate, and continued to act as such conservatrix until his death; that Frederick William Rudolph left surviving him his widow, said Eliza A. Rudolph, and three

children, to wit, Minnie A. Rudolph, Edgar W. Rudolph, and Herman Rudolph, and two grandchildren, to wit, Aurelia Rudolph and Corinne Rudolph, children of Henry Rudolph, a deceased child of the said Frederick William Rudolph; that the said Henry Rudolph died July 7, 1900, before the death of his father, Frederick William Rudolph; that Henry Rudolph left surviving him a widow, named Fannie Thornbury Rudolph, and two children, to wit, Aurelia Rudolph and Corinne Rudolph; that the said Aurelia was the child of Henry Rudolph's marriage with one Annie Schubert, from whom he was divorced; that Corinne Rudolph was the issue of Henry Rudolph's second marriage with Fannie Thornbury Rudolph, his widow, who is still living; that Herman Rudolph is insane, and confined in an asylum at Anna; that Frederick William Rudolph died seised in fee simple of three certain lots in Belleville, one of which, to wit, the west half of lot 8, survey 378, is occupied, and has been occupied from a date prior to the insanity of Frederick W. Rudolph, as the homestead of the widow, Eliza A. Rudolph. Aurelia Rudolph, Corinne Rudolph, and Fannie Rudolph answered the bill, admitting the death of William Frederick Rudolph and the statement of heirship as alleged in the bill, but denied the allegations of the bill as to the extent of the interest of the parties. Guardians ad litem were appointed for the minor, Corinne Rudolph, and for the insane person, Herman Rudolph. A copy of the will of William Frederick Rudolph was attached as an exhibit to the bill. The second, third, and fourth clauses of the will are as follows:

"Second. I hereby give and devise to my beloved wife, Eliza A. Rudolph, in consideration of the love and affection, which she has always shown to me, and of the confidence which I repose in her, all of my real and personal estate and property, money, goods, chattels, demands and claims, which I may leave at the time of my death, for her lifetime; in order that my said wife, the said Eliza A. Rudolph may, during her natural life, enjoy the benefits, and draw the interest and rents of said real and personal property.

"Third. It is my will that my wife, said Eliza A. Rudolph, shall have power and be authorized after my death to sell any or all of said real and personal property at public or at private sale, if she should consider it to her interest to do so, and then enjoy the rents and interest of the proceeds of such sale during her lifetime.

"Fourth. After the death of my said wife, Eliza A. Rudolph, I give and devise all my real and personal estate and property, money, goods, chattels, demands and claims to my beloved children, as their absolute property in fee simple, to be equally divided between them."

The cause was referred to a master in chancery, who reported the facts and his conclusions. The master found in his report

that under clause 4 of the will, as above quoted, and by the bill and answer, it was put in issue whether or not the distribution of the estate should be confined to the three surviving children of said Frederick W. Rudolph, or whether the children of said Henry Rudolph, deceased, should participate in such distribution, and take the portion which their father would have taken, were he alive at the time such distribution was made; that the word "children," as used in this will, is intended to designate a class of persons or devisees, to wit, the immediate offspring of the testator, and that it should not be construed to include grandchildren, inasmuch as there is nothing appearing in the context of the will to show that such a construction would be consistent with the intention of the testator; that the distribution of the estate should be confined to those of this class who were in esse at the time the devise took effect, to wit, the death of the testator; that Aurelia and Corinne Rudolph, children of Henry Rudolph, deceased, do not belong to the class designated by the testator as and for his devisees; that the premises are subject to partition in the following proportion: Herman, Edgar, and Minnie Rudolph, children of the testator, are each entitled to an undivided one-third, subject to the life estate of said Eliza A. Rudolph in all of said premises, and her homestead in said west half of lot 8; that, Henry Rudolph not having been seised of any portion of said premises during his intermarriage with either Annie Schubert or Fannie Thornbury, neither of the latter persons is entitled to dower in any part of the premises. Exceptions were filed to the report of the master, which were overruled by the court, and a decree was entered in accordance with the findings of the master. The present appeal is prosecuted by Corinne Rudolph, who excepted to that part of the master's report which found that the children of Henry Rudolph took nothing under the will. The present appeal is prosecuted from the decree of the court overruling the exceptions to the master's report as above stated.

William P. Launtz and William U. Halbert, for appellant. R. W. Ropiequet, for appellees.

MAGRUDER, J. (after stating the facts). The question presented by the record is whether or not the circuit court decided correctly in holding that Herman, Edgar, and Minnie Rudolph, the children of the testator, Frederick William Rudolph, who were living at the time of his death, were each entitled to one-third of the premises sought to be divided, subject to the life estate of the widow, Eliza A. Rudolph, and in holding that Aurelia Rudolph and Corinne Rudolph took nothing under said will. In other words, the contention of the appellant is that Herman, Edgar, and Minnie Rudolph inherited each an undi-

vided one-fourth of the premises, subject to the life estate of the widow, Eliza A. Rudolph, and that Aurelia Rudolph and Corinne Rudolph, the children of the deceased son, Henry Rudolph, inherited the other one-fourth thereof; each being entitled to an undivided interest of one-eighth. The decision of the question involved requires a construction of the will and of section 11, c. 39, Hurd's Rev. St. 1901, being "An act in regard to the descent of property."

By clause 4 of the will of Frederick William Rudolph, it is provided as follows: "After the death of my said wife, Eliza A. Rudolph, I give and devise all my real and personal estate and property, money, goods, chattels, demands and claims, to my beloved children, as their absolute property in fee simple, to be equally divided between them." When the will was made, in 1875, the testator, Frederick William Rudolph, had four children, to wit, Herman Rudolph, Edgar W. Rudolph, Minnie A. Rudolph, and Henry Rudolph. But Henry Rudolph died in 1900, two years before his father, Frederick William Rudolph, died, so that at the time of the death of the latter there were only three children, instead of four, to wit, Minnie, Edgar, and Herman. The question is, did the children of Henry Rudolph, who died before his father, to wit, Aurelia Rudolph and Corinne Rudolph, take under the will the same interest which their father, Henry Rudolph, would have taken if he had lived until after the death of his father, the testator, Frederick William Rudolph?

On the part of the appellees it is claimed that by section 4 of the will the devise was to a class, to wit, the children of the testator, without a statement of the names of the children. The general rule is that, where the devise is to a class, the remainder vests in the survivors of that class who are alive at the death of the testator, as the estate vests and the class is determined at that time. A will takes effect at the death of the testator. *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 851. "It is believed to be universally true that where there is a simple devise to a class, and the will does not expressly or by necessary implication fix the time when the objects of the gift are to be ascertained or when distribution is to be made, the law itself will fix it at the testator's death; that being the time when the will first speaks. * * * Strictly speaking, in contemplation of law, the class to whom a gift or devise is limited consists in all cases exclusively of such persons coming within the description of the class as are in esse at the time the gift or devise, by its own limitation, takes effect in interest, and such as are born before distribution, where distribution is deferred to a subsequent period. Those that die before the gift takes effect in interest are not regarded as having ever belonged to the class. * * * Where the gift or devise is to a class, none will be permitted to take, except such as are

in esse at the time of distribution." *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210. Under the common law, as interpreted by this court, the whole estate in such case inures to the survivors of the class. *Lancaster v. Lancaster*, 187 Ill. 540, 58 N. E. 462, 79 Am. St. Rep. 234.

These principles are said to be applicable to the facts of the present case, and it is said that, the devise being to a class, to wit, the children of Frederick William Rudolph, those who belonged to that class at the time of his death took the property as the survivors of the class; that, although there were four children in existence at the time the will was made, in 1875, to wit, Henry, Herman, Minnie, and Edgar, yet, when the testator died, in 1902, there were only three children living, Henry having died before the death of his father, to wit, in 1900; and that the class which at the time of the making of the will consisted of four children consisted at the time of the death only of three children. It is then argued that inasmuch as the class is the devisee which takes, and not the individuals of the class, the three children who were survivors at the death of the testator took the property to the exclusion of the children of the son, who died before his father died.

There is no doubt that the position thus taken by the appellees is correct, unless section 11 of the statute of descent modifies it. Section 11 of the statute of descent is as follows: "Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate." 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 1433, par. 11. The language of the statute is, "Whenever a devisee or legatee * * * being a child or grandchild of the testator shall die before such testator," etc. It is said that the section contemplates a case where the legatee or devisee who dies before the testator is an individual, and as such is mentioned by name.

In some of the states, courts have held that statutes for the prevention of lapses, such as section 11 of our statute in regard to descents, do not affect the pre-existing rule upon the subject of gifts to classes; that is, that the whole estate inures to the survivors of the class, and that the will creates a vested remainder in those of the children who are alive at the death of the testator, the class being determined at that time. This is the common-law rule, and, in support of its continuance notwithstanding the statute for the prevention of the lapse, the doctrine is invoked that statutes are to be construed

in accordance with the principles of the common law, and that the Legislature will not be presumed to have intended to make any innovation upon the common law further than the case absolutely requires. *Smith v. Laatsch*, 114 Ill. 271, 2 N. E. 59; *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448. And it is insisted that in this class of cases the common-law rule continues to exist as to devises to classes, and that the statute must be construed to refer only to cases where the individuals of a class are mentioned by name. This construction seems to have support in the language of the section which refers to "a devisee or legatee."

In Page on Wills (section 551), after mentioning the common-law rule that, when a member of a class of beneficiaries dies before the time fixed under the will for determining the members of that class, the children and descendants of such deceased member could not take in place of their ancestor, it is said: "This rule is further modified by statutes, which have been passed in different jurisdictions, providing that, if certain named beneficiaries die before testator, or before their interests vest, their descendants shall take the share to which their ancestor would have been entitled. These statutes apply generally when the beneficiary is a descendant or blood relative of testator. In some states it has been held that these statutes do not affect the pre-existing rule upon the subject of gifts to classes. The reason which the courts give for this rule is that indicated by the preceding note (that is, that the statutes against lapse apply only where something is given by will to one who dies before testator), and, therefore, have no application to gifts to a class, where the gift is, in legal effect, only to the members of the class in existence at a designated time." In the same section, however, the same author makes the following statement: "In most states these statutes are held to apply to gifts to classes, as well as to gifts to individuals. It makes no difference whether the bequest is such to a relative by name, or whether he is designated in the will only by his relationship." A large number of authorities are referred to in the notes, which sustain the view that these statutes apply to gifts to classes, as well as to gifts to individuals, and the great weight of authority seems to be in favor of this construction.

In 18 Am. & Eng. Ency. of Law (2d Ed.) p. 757, it is said: "In the United States it is generally considered that statutes for the prevention of lapses apply in the case of a legacy or devise to several, as a class, though none be mentioned by name. * * * Statutes for the prevention of lapses are intended, not to defeat the will, but to supplement it, and ought not to control if it be inconsistent with the will to have them control. But it must be presumed that the testator made the will in view of the statute, and that he intended to have the statute prevail,

unless the contrary appears. The burden of showing the contrary is on the party claiming that the statute does not apply, and this burden is not lifted when it is made to appear that the legacies were prompted by personal regard for the legatees, for the fact that they were so prompted is not at all inconsistent with an intent to have them go to the descendants of the legatees in case the legatees themselves die before the testator. The person claiming that the statute does not apply must go further, and make it appear that the legacies were not only prompted by personal regard, but that they were intended to be purely personal gifts, and were intended not to go to the descendants of the legatees under the statute."

In the case at bar, section 11 of the statute in regard to descents was in force when Frederick William Rudolph made his will, in 1875; and it must be presumed that he made his will in view of the statute, and that he intended to have the statute prevail. Nothing to the contrary appears in the will. On the contrary, it would appear that it was the intention of the testator that his four children should take. At the time he made his will, he had four children, because at that time Henry was alive. He says: "After the death of my said wife, Eliza A. Rudolph, I give and devise all my real and personal estate," etc., "to my beloved children as their absolute property in fee simple to be equally divided between them." The words "to be equally divided between them" have a significance here, as indicating that the intention was to give the property to the individuals who constituted his children at that time. The case of *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704, is referred to by counsel for appellees as indicating that the word "children" denotes immediate offspring, and will not be construed to mean grandchildren unless a strong case of intention or necessary implication requires it. But the case of *Arnold v. Alden*, supra, has no application here, for the question is not in regard to the sense in which the word "children" is used in the will, but the question is as to the meaning of section 11 of the statute in regard to descents, which provides that the issue, if any there be, of such devisee or legatee, shall take the estate devised whenever such devisee or legatee, being a child or grandchild, shall die before the testator, and no provision shall be made for such contingency. No provision is made in the will in the case at bar for the contingency of the death of one of the legatees before the death of the testator. The four children of the testator were well known to him when he made his will, and are spoken of by him as his "beloved children." It does not appear that it was necessary to mention the four children by name, in order to indicate the persons who were to be the subjects of his bounty. Certainly justice and equity would require that the children of the deceased

child should take the same interest in the property as the three children living at the death of the father would take.

In *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183, the statute of Michigan there under consideration provided that "when a devise or legacy shall be made to any child or other relative of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate, so given by the will, in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will"; and it was there held that, under a will devising real estate in equal shares to the brothers and sisters of the testator, and to those of his wife, without naming them, the issue of the deceased brothers and sisters of the testator, who survived him, took the estate devised to their parents, respectively; such a devise being governed by the Michigan statute above quoted. It will be observed that the Michigan statute is similar in terms to our own statute, and we see no reason why the doctrine announced in the case of *Strong v. Smith*, supra, should not be applied to the case at bar. In *Strong v. Smith*, supra, the case of *Moses v. Allen*, 81 Me. 269, 17 Atl. 66, is referred to and commented upon, where it was held that it could make no difference, in the application of the rule, whether relatives were referred to by name, or described by their relationship to the testator.

In *Woolley v. Paxson*, 46 Ohio St. 307, 24 N. E. 599, in commenting upon the statute for the prevention of lapses, the court said: "The fact that the child or relative is not mentioned by name should not defeat the application of the statute, where the language, applied to the facts as they were at the execution of the will, designates a child or relative as an object of the testator's bounty with as much certainty as if it were mentioned by name. * * * They were all adults, and their names well known to him; and the devise that he makes is to Isaac for life, and then to his children in fee simple. This, in the light of the circumstances, must be taken in a distributive sense, and is a devise to each of Isaac's children of the fee simple in remainder, as definitely as if it had been to each by name. * * * Hence, as, under a devise to a class, each member who survives the testator would, independent of the statute, take an aliquot part of the devise as a tenant in common with the other survivors, therefore, under the statute, in such case the issue of a deceased member of the class surviving the testator must take what the deceased would have taken, had he survived. Any other construction would render the statute nugatory in a large class of cases to which its provisions are by its terms directly applicable."

In *Strong v. Smith*, supra, it was further said: "The devisees at the time of the exe-

cution of the will were all known to the testator. They had matured. The 'class' was liable to diminution only. The fact that the brothers and sisters of the testator were not named does not take them out of the statute. Indeed, under the authorities, the question 'whether a gift is one to a class does not depend upon the fact that the devisees are not named individually, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, the share of each being dependent for its amount upon the ultimate number of persons.' Here the body of persons was not uncertain in number. The gift was to a certain number in 'equal shares.' So in the case at bar the body of persons was not uncertain in number, because Frederick William Rudolph, at the time he made his will, had exactly four children, who were all well known to him at that time, and his gift is "to my beloved children as their absolute property in fee simple to be equally divided between them"; that is to say, the gift here, as in *Strong v. Smith*, supra, is to a certain number in equal shares. If the number of children had been uncertain at the time of the making of the will, and to be ascertained at a future time, so that the share of each would be dependent, as to its amount, upon the ultimate number of persons, a different case would be presented, but no such case is shown by the present record. See, also, in support of these views, the following cases: *Stockbridge*, Petitioner, 145 Mass. 517, 14 N. E. 928; *Bradley's Estate*, 166 Pa. 300, 31 Atl. 96; *Cheney v. Selman*, 71 Ga. 384; *Yeates v. Gill*, 9 B. Mon. 203; *Moore v. Weaver*, 18 Gray, 305; *Guitar v. Gordon*, 17 Mo. 408; *Moore v. Dimond*, 5 R. I. 121.

In *Missionary Society v. Pell*, 14 R. I. 456, the statute under consideration was as follows: "Whenever any child, grandchild, or other person, having a devise or bequest of real or personal estate, shall die before the testator, leaving a lineal descendant, such descendant shall take the estate, real or personal, as devisee or legatee, in the same way and manner as such devisee or legatee would have done in case he had survived the testator;" and it appearing there that the legatees died before the testator, leaving lineal descendants, it was held that the will must be presumed to have been made in view of the statute, the court saying: "We think it must be presumed that the testator made the will in view of the statute, and that he intended to have the statute prevail, unless the contrary appears. The burden of showing the contrary is on the plaintiff, and we do not think the burden is lifted when it is made to appear that the legacies were prompted by personal regard. The fact that legacies are prompted by a personal regard for the legatees is not at all inconsistent with an intent to have them go to the descendants of the legatees in case the legatees themselves

die before the testator. The plaintiff must go further, and make it appear that the legacies were not only prompted by personal regard, but that they were, as he claims, intended to be purely personal gifts; i. e., that they were intended not to go to the descendants of the legatees under the statute." In the case at bar it is said that the use of the words "my beloved children" indicated that the legacies were prompted by a personal regard for those children, and therefore that it could not have been the intention of Frederick William Rudolph that the property should go to the issue of the legatees. But we are of the opinion that, even if the words used in the will do indicate that the testator was prompted by personal regard for his children, that fact is not at all inconsistent with an intent to have the property go to the issue of the children, in case any of the devisees or legatees should die before the testator.

Inasmuch as the construction of said section 11 as applying to gifts to classes, as well as to gifts to individuals, conforms to the construction given to similar statutes in a large majority of the states, and harmonizes with the great weight of authority upon the subject, we are inclined to hold such construction to be the correct one; and we are of the opinion that the children of Henry Rudolph, to wit, Aurelia and Corinne Rudolph, are entitled to take the same interest in the estate as their father, Henry Rudolph, would have taken if he had not died before his father died, notwithstanding the fact that Henry Rudolph was not referred to in the will by name, but only as one of the testator's children, and as belonging to the class designated as "children." The adoption of this construction gives to Aurelia and Corinne Rudolph an undivided one-fourth interest in the property, or to each of them an undivided one-eighth interest in the property. As the decree of the court below gave them nothing, it is erroneous in that respect, under the views above expressed. It is correct, however, in holding that neither the widow of Henry Rudolph, nor his divorced wife, is entitled to dower, as he was not seised of any portion of the premises during his marriage with either of them.

Accordingly the decree of the circuit court of St. Clair county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(207 Ill. 48)

PEOPLE ex rel. KINSELLA, County Treasurer, v. OPEL, County Clerk.

(Supreme Court of Illinois. Feb. 17, 1904.)

TAXATION — OMITTED PROPERTY — BOARD OF REVIEW — REJECTION — EXTENSION OF TAXES — DUTY OF CLERK.

1. Where an assessment of omitted personal property made by the supervisor of assessments was removed by the board of review on the

ground that the property so assessed was exempt, and the board did not make or certify a statement of the facts to the Auditor of Public Accounts for his approval, as required by Revenue Act 1898, § 35 (Hurd's Rev. St. 1901, c. 120, § 329), so that the assessment book returned by the board of review to the county clerk showed that the property was not to be assessed, the clerk had no power to extend taxes on such omitted property on the roll.

Appeal from Circuit Court, Sangamon County; Jas. A. Creighton, Judge.

Mandamus by the people, on the relation of R. F. Kinsella, county treasurer of Sangamon county, against Charles E. Opel, county clerk. From a judgment in favor of defendant, relator appeals. Affirmed.

H. J. Hamlin, Atty. Gen., and W. E. Shutt, State's Atty. (John G. Friedmeyer, of counsel), for appellant. McAnulty & Allen (Alfred Orendorf, of counsel), for appellee.

WILKIN, J. The Franklin Life Insurance Company is a corporation organized under the insurance laws of the state of Illinois, and its headquarters are in Capital township, Sangamon county. In the year 1902 the company made and delivered to the assessor of Capital township its schedule for the purposes of assessment for taxation, setting out that on April 1, 1902, it had personal property belonging to it of the value of \$248,735. The property was assessed by the assessor at one-fifth of this amount, and returned by him to the supervisor of assessments of Sangamon county. The company had securities, consisting of notes and loans secured by the company's policies as collateral, amounting to \$913,918.70, and promissory notes on policies in force amounting to \$22,268.86, making a total of \$936,187.56, no part of which was included in the schedule furnished by the company to the assessor or included in his assessment. When the books were turned over by the assessor to the supervisor of assessments, the latter made a demand upon said company to list said notes and securities in its schedule for assessment and taxation. The company refused to make such schedule, whereupon, after notice to it, the supervisor of assessments made such schedule himself, and assessed said notes and securities at one-fifth of the value thereof, and the same as the personal property assessment of said company. At the subsequent session of the board of review the company presented its complaint and petition to said board, claiming that the premium notes and loans held by it and assessed by the supervisor of assessments were exempt from taxation, and asked the board to so hold. The board of review sustained the contention, and held that the said notes and loans were not subject to taxation, and ordered the amount stricken from the assessment rolls. The board did not make and certify to the Auditor of Public Accounts, for his approval, a statement of the facts in the case and its finding,

as required by section 35 of the revenue act of 1898 (Hurd's Rev. St. 1901, c. 120, § 329), and no certificate of approval of said action was given by the Auditor of Public Accounts. At the time the board of review adjourned, the assessment was left in that condition, and the county clerk of Sangamon county refused to extend the taxes upon the amount entered by the supervisor of assessments but removed by the board of review. Thereupon this petition for a writ of mandamus was filed in the circuit court of Sangamon county in the name of the people, on the relation of the county treasurer, as supervisor of assessments, against the county clerk, to compel him to extend the taxes upon the assessments made by the supervisor of assessments. A demurrer was interposed to the petition as filed, which was sustained by the court. There were six special causes of demurrer assigned, but the demurrer seems to have been sustained upon the second, namely, that the supervisor of assessments had no power, under the statute, to list said property for taxation. An appeal has been prayed and allowed from the order of the circuit court sustaining such demurrer.

We do not deem it necessary, in passing upon the case, to consider the question as to whether or not the supervisor of assessments had authority, under the statute, to list said property for taxation. The revenue law of 1898 specifies the powers and duties of the assessor, of the supervisor of assessments, and of the board of review. This assessment was made by the supervisor of assessments, and was removed by the board of review, and the petition avers that it was never certified to the Auditor, as required in section 35, nor had the question ever been determined as to the liability of the property for taxation. At the time the books were turned over to the county clerk the assessment had been removed, and the books showed that the property was not subject to taxation. The county clerk is a mere ministerial officer, and no judicial acts are required of him in extending taxes. It is his duty, under the statute, to merely extend the taxes as they appear upon the books. He has no right, nor is it his duty, to determine whether taxes have been legally assessed or not. In this case the books as returned by the board of review show that this assessment was not to be extended, and he had no power to go back and review either the acts of the board or of the supervisor of assessments; therefore the demurrer to the petition was properly sustained. The remedy by mandamus, if available at all, should have been against the board of review for a failure to certify to the Auditor its action in removing the additional assessment. The statute clearly points out the mode of procedure in such cases, and that mode should have been pursued.

The judgment of the circuit court will accordingly be affirmed. Judgment affirmed.

,207 Ill. 377)

GAGE v. PEOPLE ex rel. HANBERG, County Treasurer.

(Supreme Court of Illinois. Feb. 17, 1904.)

RECORD—PAPER LOST FROM FILES—SUBSTITUTED COPY—PAROL EVIDENCE—COLLATERAL ATTACK ON JUDGMENT—SPECIAL ASSESSMENT—VALIDITY OF ORDINANCE—SUBSEQUENT LEGISLATION—ESTIMATE OF COSTS—ABSENCE FROM FIRST RESOLUTIONS—EFFECT—REDUCTION OF ASSESSMENT OF OTHER PROPERTY OWNERS—JUDGMENT FOR SALE—PROPER FORM.

1. Where, on the remand of special assessment proceedings after the reversal of a judgment of confirmation, the record shows that the cause was redocketed on due notice as required by Practice Act, § 83 (Hurd's Rev. St. 1899, c. 110), parol evidence is not admissible to show that the original notice has been lost from the files, and that a certain paper is a correct copy thereof, the purpose being to lay the foundation for a collateral attack on the subsequent judgment of confirmation, on account of the absence from the notice of any mention of the filing of the mandate.

2. An ordinance for the erection of a sewer, valid when passed, and including the cost of making and collecting the assessment, is not rendered void by the subsequent act of May 9, 1901 (Laws 1901, p. 101), requiring such item to be omitted; since the act only affects it in that particular.

3. The fact that the engineer's itemized estimate of the cost of building a sewer is not included in the first resolution of the board of public improvements, not having been taken advantage of on the judgment of confirmation, cannot be urged against the judgment and order of sale.

4. Evidence that the assessment of other property owners, amounting to one-third of the whole assessment, had been reduced 20 per cent. by agreement, after their appeal from the judgment of confirmation, is not admissible to defeat an application for judgment and order of sale.

5. A judgment for sale in proceedings for collection of a special assessment for the building of a sewer is fatally defective unless it conform as nearly as possible to the judgment prescribed by Hurd's Rev. St. 1899, c. 120, § 191, for judgment and order of sale in general tax proceedings.

Appeal from Cook County Court; L. C. Ruth, Judge.

Proceedings by the people, on the relation of John J. Hanberg, county treasurer, against Henry H. Gage, for the collection of a special assessment. From a judgment and order of sale, defendant appeals. Reversed.

This is an appeal from the county court of Cook county, wherein a judgment and order of sale on delinquent city special warrant No. 30,512, for the first installment for a sewer in West Madison street, in the city of Chicago, was had upon the application of the county collector of said county. An appeal from the county court of Cook county was previously prosecuted to this court from the judgment of confirmation of the special assessment for said improvement, and such judgment of confirmation was reversed upon the ground that the costs of making and collecting the assessment were included in the special assessment, contrary to the provisions of the amendatory act of May 9, 1901 (Acts 1901, p. 101). The opinion reversing the

judgment of the county court was filed February 21, 1902, and the petition for rehearing was denied April 5, 1902. Gage v. City of Chicago, 195 Ill. 490, 63 N. E. 184.

Upon the application for judgment and order of sale for the delinquent assessment appellant filed objections that the lower court was without jurisdiction, either of the person or subject-matter, to enter judgment of confirmation, upon the grounds, first, that this court had reversed said cause because of an invalid estimate of the costs included in the ordinance, and the county court could not correct such error by a reduction of the assessment roll or otherwise; second, that on remandment said cause was redocketed without the statutory notice; third, that the ordinance, including the estimate of costs, was void, and the judgment of confirmation entered thereon was void; fourth, that no itemized estimate of the cost of the improvement was made a part of the record of the first resolution of the board of local improvements; fifth, that after the entry of judgment of confirmation in the original proceeding the lower court vacated the judgment entered against certain other objectors, on motion of the city, and voluntarily reduced the amount of the assessment of said last-mentioned objectors 20 per cent. without authority of law and to the prejudice of this objector; sixth, the judgment does not conform to the requirements of the statute.

F. W. Becker, for appellant. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

RICKS, J. (after stating the facts). 1. As to the first contention of appellant—that the county court could not eliminate from the assessment roll the costs of making and collecting the assessment, but that a new ordinance would be required in such case—it need now only be said that the question here raised was fully considered by this court in the case of *McChesney v. City of Chicago*, 205 Ill. 528, 69 N. E. 38, and decided adversely to appellant's contention.

2. It is next urged that the cause was redocketed, in compliance with the remanding order of this court, without the notice required by section 83 of the practice act (Hurd's Rev. St. 1899, c. 110), which provides that, upon a transcript of the order remanding the cause being filed, "and not less than ten days' notice thereof being given to the adverse party or his attorney, the cause or proceeding shall be re-instated therein." The record shows that a transcript of the order of this court remanding said cause was filed in the court below on the 20th day of April, 1902, and that on the 13th day of May, 1902, the cause was redocketed, and the order of court redocketing the same contained the recital: "And it appearing to the court that due notice, in accordance with the law, has been given to all parties concerned in rela-

tion to said notice, and the court being fully advised in the premises, it is ordered that the said cause be, and the same is hereby, redocketed, and the cause set down at the foot of the calendar, being No. 91, which is set for trial Tuesday, May 20, 1902." Appellant does not deny that he received 10 days' notice of the application to redocket the cause, but contends that the notice was insufficient and void, because it failed to state that appellee had filed, or that there had been filed, in said county court, the mandate of the court remanding said cause. The original notice was not in the files, and could not be found, and appellant asked leave to, or made a motion to be allowed to, supply the lost notice by placing on the files a notice in proper form, but omitting any mention of the filing of the mandate, with a supposed acknowledgment of service by appellant as of the 2d day of May, 1902, and called to the witness stand Robert Redfield, attorney for the collector, and he, having been sworn, testified that he did not know anything about the original notice; that he did not remember when he saw it, and his mind was blank in reference to its contents. The copy of the notice was offered in evidence, and objected to, and the objection sustained. Appellant then offered the various orders of the court, including the order redocketing the cause, the order of confirmation, showing that appellant was defaulted, and other orders entered in the cause, which were also objected to and excluded by the court.

The objection here urged is a collateral attack upon a judgment which recites proper service, and the recitals of which import a verity. *Glover v. People*, 188 Ill. 576, 59 N. E. 429; *Barnett v. Wolf*, 70 Ill. 76; *Young v. People*, 171 Ill. 299, 49 N. E. 503; *Perisho v. People*, 185 Ill. 334, 56 N. E. 1134. In such cases the alleged errors can only be corrected when they relate to errors and mistakes of the officer of the court, such as mistakes in the dates of the summons, or other like errors, or a mistake such as arises from defects or mistakes in the return of the officer; and in such cases the court can only take cognizance of such alleged errors when they appear from the record itself or the files which constitute a part thereof. *Coughran v. Gutcheus*, 18 Ill. 390; *Barnett v. Wolf*, supra. And where the defect appears upon the summons or other process, it cannot be aided by parol evidence. *Barnett v. Wolf*, supra. In the case at bar it is proposed by parol evidence to show that the original notice on file in the case is lost, and, likewise by parol evidence, to show that a certain writing offered in evidence is a copy of such original notice, and upon that to overcome the recitals of the judgment and avoid the same. If the rule that recitals of the judgment cannot be overcome by parol evidence is sound, then it must necessarily follow that an uncertified paper that must by parol evidence be

shown to be a copy of an original paper which has been lost from the files, and upon that paper so established to attack the judgment, must also be inadmissible, as it is but doing by indirection what is agreed by all the authorities cannot be done directly. While it is true that ordinarily courts will and should permit the restoration of a record, or any paper pertaining thereto, yet such application is addressed to the sound legal discretion of the court, and, unless there has been an abuse of that discretion, error predicated upon the refusal of the court so to do will not be sustained.

3. The ordinance in question was not void. It was a valid ordinance when passed, and the amendment to the law only affected so much of it as related to the costs for making the assessment and collecting the same. *McChesney v. City of Chicago*, supra; *Gage v. City of Chicago*, 195 Ill. 490, 63 N. E. 184.

4. The objection that an itemized estimate of the costs of the improvement, as made by the engineer, was not included in the first resolution of the board of public improvements, cannot be urged upon this application for sale, as such objection could properly have been urged in the proceeding for confirmation, and, not having been there urged, it now comes too late. *Steenberg v. People*, 164 Ill. 478, 45 N. E. 970; *People v. Talmadge*, 184 Ill. 67, 61 N. E. 1049; *Walker v. People*, 170 Ill. 410, 48 N. E. 1010.

5. From the original judgment of confirmation owners of property assessed \$25,000 for the improvement in question prayed and perfected an appeal. The estimated cost of the entire improvement was \$75,000. On September 23, 1901, the objectors who had thus perfected their appeal, and the city, by its counsel, appeared in court, and had said cause redocketed, and it was there represented to the court, by agreement of the parties, that on account of the number of questions of law and fact presented by said appeal the result was doubtful; that the construction of said sewer was of great public necessity for considerations of public health and the development of the district for residence purposes; that the objectors desired that the improvement be made, and were willing to withdraw their appeal if the assessment should be reduced 20 per cent.; that the objectors and the city regarded such settlement as proper and desirable. The court, reciting the foregoing matters at considerable length, thereupon set aside the original confirmation, and by consent of the parties heard the cause, without a jury, as to the question of benefits, upon oral and documentary evidence, and that, in view of the situation and location of the lands of the objectors, there were strong and equitable reasons why the said assessment should be reduced, and it accordingly reduced the assessment of such objectors 20 per cent., and confirmed the same for 80 per cent. thereof. The record of this proceeding was offered in evidence in the appli-

cation for judgment and order of sale at bar, and also the resolution entered at the public hearing before the board of public improvements, wherein the estimate of the cost of the improvement was fixed at \$75,000, and the original order of confirmation as to the lands of the objectors representing the \$25,000 of assessments. This evidence was objected to by appellee as immaterial, and the objection was sustained, and it is now urged that the court below erred in refusing to admit this evidence, and if it was admitted it would have shown that appellant was prejudiced by such proceedings. We think not. The case of *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573, is relied upon by appellant, and, as we view the case, refutes, instead of supports, his position. That case was an appeal from the judgment of confirmation, wherein a portion of the property therein that had been assessed was entirely released and discharged from the assessment. The release was by agreement between the city and the objectors. We there said (page 404, 171 Ill., page 574, 49 N. E.): "Under paragraph 147 of the city and village act (Rev. St. p. 236) the court is authorized at any time before final judgment to modify, alter, change, annul, or confirm any assessment, or cause the same to be recast by the same commissioners, whenever it shall be necessary for the attainment of justice. It cannot be doubted that the court, under this statute, upon a proper showing, had ample power to set aside the assessment as to the property of the West Side Elevated Railroad Company. * * * But it is said the court was not empowered to set aside the assessment by agreement. If the petitioner became satisfied that the railroad property was not benefited by the improvement, and that the assessment was unjustly spread upon its property, we see no reason why petitioner might not confess the fact in court, and thus save the cost and expense of a trial which would in the end result in setting aside the assessment. The mere fact, therefore, that the assessment was set aside by agreement, if the property was not benefited by the assessment, could not be relied upon by the appellants as a defense. Before they could properly object to the action of the court, it was incumbent on them to prove, or offer to prove, that they were in some way injured. This they failed to do." The appeal in the *Culver* Case was from the confirmation of the assessment, and was a direct attack upon the action of the court, and it is there very clearly held that the objection could not be sustained without showing that there was collusion between the petitioner and the objector, and in consequence of setting aside the assessment the appellant, *Culver*, was injured. The case of *Walker v. People*, 170 Ill. 410, 48 N. E. 1010, was, like the case at bar, an appeal from a judgment and order of sale. It was there urged, upon objection, that 95 lots included in the assessment dis-

trict, and which had been assessed for benefits, were, upon the hearing of confirmation, dismissed from the petition by the city. After referring to the authority of the court under paragraph 147 of the local improvement act, we said (page 416, 170 Ill., page 1012, 48 N. E.): "If appellants' property was assessed more than it will be benefited, or more or less than its proportionate share of the cost of the improvement, the proper place to raise that question and obtain the proper relief was in the county court, on the application to confirm the assessment. So, also, if the dismissal of the petition as to 95 lots which had been assessed by the commissioners resulted in making appellants' assessment greater than their proportionate share of the cost of the improvement, the proper place to obtain relief was in the county court, or by an appeal from the judgment of confirmation, but no relief can be obtained on the application for judgment against appellants' lands." We think the evidence offered under this objection was properly excluded.

6. It is urged that the judgment is not in proper form, and does not contain the elements as prescribed by the statute. We have examined the same, and find it subject to the objection made. The judgment should follow the statute as nearly as may be, applying the same to a special assessment instead of general taxes.

The judgment of the county court will be reversed for this error, and the cause remanded, with direction to that court to enter a proper judgment conforming to the provisions of section 191 of chapter 120 of *Hurd's Rev. St. 1899*.

Reversed and remanded, with directions.

(207 Ill. 334)

THOMPSON, v. PEOPLE ex rel. HANBERG,
County Treasurer.

(Supreme Court of Illinois. Feb. 17, 1904.)

STREET-PAVING ASSESSMENT—CONFIRMATION—REDOCKETING CASE AFTER REVERSAL—NOTICE—COLLATERAL ATTACK—RECASTING ASSESSMENT ROLL—ITEMIZED ESTIMATE OF COST—ABSENCE FROM FIRST RESOLUTION—SPECIFICATIONS FOR WORK—ALIEN LABOR CLAUSE.

1. The fact that the record shows that the order for redocketing proceedings for the confirmation of a paving assessment, after reversal of a judgment of confirmation on appeal, was entered on the day after that on which motion therefor was to be made according to the notice to redocket, is not available to impeach on collateral attack a judgment of confirmation reciting that due notice to redocket had been given; the presumption being that the motion was made on the day specified in the notice, and action thereon deferred until the following day.

2. A county court, in proceedings for the confirmation of a paving assessment after reversal of a judgment of confirmation on appeal on account of the wrongful inclusion of an item in the estimate of costs, has power to eliminate the property owner's proportionate share of such item, and recast the assessment roll, and then enter judgment of confirmation.

3. The fact that the engineer's estimate of the cost of a street-paving improvement was

not made a part of the record of the first resolution of the board of local improvements does not constitute a valid objection, when raised for the first time on application for judgment for sale.

4. The fact that specifications for street-paving improvements contain an alien labor clause would not justify refusing a judgment for sale to satisfy the special assessment, where the record shows that the bid was not based on such specifications, which in no way affected the cost of the improvement.

Appeal from Cook County Court; L. C. Ruth, Judge.

Proceedings for the confirmation of a special assessment for street paving by the people, on the relation of John J. Hanberg, county treasurer, against William Hale Thompson. From a judgment for sale, Thompson appeals. Reversed.

F. W. Becker, for appellant. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

HAND, C. J. This is an appeal from a judgment for sale entered in the county court of Cook county to satisfy the first installment of a special assessment for paving West Van Buren street from South Paulina street to South Kinzie avenue, in the city of Chicago. The appellant appeared and filed objections. The validity of the judgment confirming the original assessment was before this court at a former term (Thompson v. City of Chicago, 197 Ill. 599, 64 N. E. 392), when the judgment was reversed, and the cause remanded.

It is first contended that the judgment of confirmation upon which this judgment for sale is based is void for the reason that the county court was without jurisdiction to render the judgment of confirmation on the ground that the proceedings to confirm said special assessment, after the judgment confirming the same had been reversed by this court, was redocketed in the county court without proper notice to the appellant. The judgment of confirmation entered after the case was redocketed recites that due notice to redocket the proceedings had been given the appellant. We are of the opinion that finding was not overcome by the fact that a notice to redocket, found among the files in that proceeding, states that a motion to redocket the proceedings would be made on the 25th of July, 1902, and that the record shows the order redocketing the proceedings was not entered until the following day. In that state of the record the court, in case of a collateral attack upon the judgment of confirmation, will presume that the motion to redocket the proceedings was made on the 25th of July, and that action was deferred thereon until the following day, when the order redocketing the case was duly entered,

and that the court, by reason of such delay, did not lose jurisdiction to enter the order redocketing the case. The lack of jurisdiction must appear upon the face of the record in the confirmation proceeding, otherwise such lack of jurisdiction cannot be taken advantage of in a collateral proceeding. *Dickey v. People*, 160 Ill. 633, 43 N. E. 606; *Casey v. People*, 105 Ill. 49, 46 N. E. 7; *Young v. People*, 171 Ill. 299, 49 N. E. 503.

The original judgment of confirmation was reversed by this court by reason of the fact that the estimate of the cost of the improvement contained an item of 6 per cent. of the amount of the estimated cost of the improvement for making and levying the assessment. The county court, upon the proceedings being reinstated in that court, eliminated appellant's proportionate share of said item of cost, and recast the assessment roll, and then entered a judgment of confirmation; and it is contended that the county court was without power to eliminate said item of cost from the original assessment, and to then enter judgment confirming the assessment. This precise question was before this court in *McChesney v. City of Chicago*, 205 Ill. 523, 69 N. E. 38, where the question was decided adversely to the view of the appellant.

It is further contended that no itemized estimate of the cost of the improvement was made a part of the record of the first resolution of the board of local improvements. The fact that the engineer's estimate of the cost of the improvement was not made a part of the record of the first resolution of the board of local improvements, if raised upon the application for judgment of confirmation, would have been a good objection (*Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 161), but it does not constitute a valid objection when raised upon application for judgment for sale (*Gage v. People* [Ill.] 69 N. E. 635).

It is next contended that the specifications for the work contained the so-called "alien labor clause." The proof found in this record upon that question is the same as the proof found in the record in *Gage v. People*, supra, and shows that the bid was not based upon said specifications, and that the specifications in no way affected the cost of the improvement, and under the holding in that case furnished no ground to justify the county court to refuse judgment for sale to satisfy said special assessment. The judgment, as entered in the county court, is not in proper form, and for the reason assigned in the *Gage Case*, supra, it must be reversed.

The judgment of the county court will be reversed and the cause remanded, with leave to the attorney for appellee to move for, and with directions to the county court to enter a judgment in compliance with section 191 of chapter 120 of Hurd's Rev. St. 1899.

Reversed and remanded, with directions.

(207 Ill. 534)

HARRIS v. FERGUY et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

WILLS — TESTAMENTARY TRUST — BENEFICIARIES — SUFFICIENCY OF DESIGNATION — REPUGNANT PROVISIONS.

1. Property was devised to a trustee, to sell and convey, and invest the proceeds as he deemed best; and he was further authorized to hold, manage, control, care for, lease, and re-invest during a period of five years, and to pay the income to the children of testatrix. *Held* an active, not a dry, trust.

2. Testatrix devised property in trust for a certain period, at the termination of which the property was to be transferred to the then living children of testatrix in equal shares, provided that, if any child should marry and leave children, they should receive the share of the deceased child. Testatrix declared it her wish that her own children should get their share, and none be paid to the husband or wife of any who should marry and die, but that the share of any such should be paid to the remaining living children. In another portion of the will, testatrix provided that, if any child should die without leaving issue, such child's share should revert to the remaining children. *Held* not void for uncertainty as to who was entitled to take on distribution.

3. Where a clause of a will devised property directly to testatrix's children, but a later clause created a trust in the same property, the repugnancy did not affect the validity of the trust; the later clause prevailing.

Appeal from Circuit Court, Cook County; John Gibbons, Judge.

Action by Walter F. Ferguy and others against Squire Rush Harris. From a judgment for plaintiffs, defendant appeals. Reversed.

Kerr & Kerr, for appellant. George F. Mulligan (William Dillon, of counsel), for appellees.

RICKS, J. February 5, 1903, appellees filed their bill in the circuit court of Cook county against appellant, praying for his removal as trustee, and for the appointment of a successor, and an accounting by said appellant as such trustee. The bill alleged that appellant was trustee under the will of appellees' mother, and, as such trustee, was possessed of certain real estate in the city of Chicago and in Waukegan, in which appellees had the beneficial use, and that appellant refused to account to them, or to pay them the proceeds of such property, or any part thereof, and was converting the same to his own use; that appellant had not given a sufficient bond, and that he had threatened to sell the trust property under the supposed power given him by the will; and that appellant was irresponsible. Appellant answered the bill, admitting that he was trustee and possessed of the properties mentioned in the bill, but denying the allegations of the bill as to his refusal or failure to account to appellees, and alleged, on the contrary, that he had paid them the monthly rents, or such portion thereof as was in excess of the taxes, insurance, and repairs, and in his answer rendered an account. The cause was heard, as far as we can tell from the record, before the court;

but there is no certificate of evidence, and no question of fact raised. The court construed the will, and held that, by its terms and provisions, appellees had a vested estate in fee simple in the real estate held by said trustee, and that appellees were the owners thereof in equal shares in common, and that the supposed trust created by the will in favor of appellant, and under which he assumed to act, was in the nature of a naked trust, to continue which would be to needlessly and without reason separate the legal from the beneficial or equitable interest in such real estate, and required the trustee to account, and ordered his removal, and enjoined him from disposing of any of the real estate under the provisions of the will. From this order, appellant appeals, and insists that the court erred in holding that the will created in him only a naked trust, and in requiring him to convey said real estate to the appellees, and in not holding that the trust was valid, and to continue for the space of five years from the probate of the will.

From allegations of the bill and the decree, it appears that Mary Ferguy, the mother of appellees, died testate December 25, 1900, and that her will was filed and admitted to probate in the probate court of Cook county January 2, 1901, and that the appellant accepted the duties and office of executor and trustee under the will; that appellees are the sole heirs at law and next of kin of the said Mary Ferguy, the testatrix. The will contained six general clauses. The first clause provided for the payment of debts and funeral expenses; the second provided for the payment of a certain sum for masses; the third provided for a monument for the testatrix and her husband; and the remaining portions of the will are as follows:

"Fourth. I order and direct my executor, as soon after my death as he thinks it advisable, to sell my real estate which I own in Waukegan, Lake county, Illinois, and Chicago, Illinois; also all other property, where-soever found, which I may die possessed of, and to reinvest the same as in his judgment may seem best for my estate, and to convey by a good and sufficient deed of conveyance any property, both real and personal, for the purpose of carrying out my requests.

"Fifth. I give and devise to each of my children, Mary Ferguy and Walter F. Ferguy and Loretta Ferguy and William F. Ferguy, the remainder of my estate to share alike equally, each to have one-quarter, but should any child die without leaving issue or living children, that child's share shall revert to my remaining living children and to be divided equally, for it is my will and desire that should any of my children get married and leave no living children, the child so married, husband or wife, as the case may be, shall not be paid any portion of my estate, as I only desire my own children to get the benefit of my estate.

"Sixth. I hereby give, devise and bequeath

unto Squire Rush Harris, of Chicago, as trustee, both all of my real estate and personal property wheresoever found, in trust for and upon the following trust purposes and conditions, to wit:

"(1) To hold, manage, control, lease, care for and invest, and reinvest from time to time, said trust property for and during a period of five years from the time of my demise.

"(2) To pay the net income from said trust property after two years, at the end of each quarter year, over to my own living children only, to share alike equal, and after having first paid all fair, reasonable costs and charges of carrying, protecting and managing the said property.

"(3) To sell, convey and dispose of any of the trust estate during the life of the trust, when, from time to time, the trustee shall deem such disposition and sale expedient or necessary, the proceeds of said sales to be reinvested by the trustee in such income-bearing property, real or personal, as the trustee shall deem best.

"(4) Immediately upon the end of five years to transfer and turn over all the said trust property then held by the trustee to my own then living children, share and share alike equally, but should any of my own children named herein, Mary Fergus, Water F. Fergus, Loretta Fergus and William F. Fergus, get married and leave children or child, it is my desire that the child so born and living shall be paid the share of my deceased child, should there be any, for it is my wish that my own said children get their equal share and none to be paid to the husband or wife of any of my children, should any of them get married and die, but that child who should die, her or his portion must be paid to the remaining living children in equal portions.

"Lastly, I make, constitute and appoint Squire Rush Harris (and direct that he give only his individual bond) to be executor as well as trustee of this my last will and testament, hereby revoking all former wills by me made."

We are not advised upon what theory the chancellor found that the trust provided for by the sixth clause of this will was a naked trust. By the fourth clause of the will, the executor and trustee (who are the same person) is ordered and directed to sell and convey all the real estate of the testatrix, and reinvest the proceeds as in his judgment might seem best; and, by the sixth clause, after declaring that the property is conveyed in trust to appellant, the first provision is: "To hold, manage, control, lease, care for and invest, and reinvest from time to time, said trust property for and during a period of five years from the time of my demise." By the second paragraph of the sixth clause, the trustee is to pay the net income from the trust property for two years to the children of the testatrix in equal shares; and, by the

third paragraph of the sixth clause, as trustee, he is given power to convey and dispose of any of the trust property, at any time during the trust, that he shall deem expedient or necessary, and reinvest the proceeds in any income-bearing property.

The general rule seems to be that, where control is to be exercised or duty to be performed by the trustee, or when he is to exercise discretion in the management of the estate, or in the investment of the proceeds of the property, an active trust is created. *Perry on Trusts*, § 300; *Kirkland v. Cox*, 94 Ill. 400; *Kellogg v. Hale*, 108 Ill. 164; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246. On the other hand, a simple, passive, or dry trust, as it is variously called in the books, is one in which the trustee is a mere passive depositary of the property, with no active duties to perform, which is executed by the statute of uses, and nothing remains for the trustee but to convey the property upon the request of the beneficiaries. *Silverman v. Kristufek*, 162 Ill. 222, 44 N. E. 430; *Kellogg v. Hale*, supra; *Kirkland v. Cox*, supra. And unless the clause of the will providing for a trust should be held void for uncertainty of its objects, or from some cause arising from its provisions, we know of no ground upon which this decree can be sustained.

Appellees urge that this latter ground is sufficient to sustain the decree, because, it is argued, by the fourth paragraph of the sixth clause it is uncertain who is to take at the period of distribution. We think, upon reading the clause and the whole will, it is entirely apparent that it was the intention of the testatrix that her children and their issue should be the only persons who could take under any of the provisions of the will; that the first objects of the testatrix's bounty were her children; the second objects, the issue of such children as died before the expiration of the trust period; and that the one main purpose to be effected by the will was the shutting out or precluding the husbands or wives of her sons and daughters from any benefit in the estate.

Appellees further say that the sixth clause of the will, providing for the trust estate, is repugnant to the fifth clause, which is, in terms, a devise directly to the living children of the testatrix; and this must be admitted to be true. But it does not avail appellees if this contention is well founded, as the rule is well established that, if there be such repugnancy between two clauses of a will that the one or the other must fall, the later clause, being regarded as the last expression of the testatrix, must prevail. The will in question bears evidence of having been written by the testatrix, and indicates that she became uncertain what would be the result if no further provision than that in the fifth clause were made; and she conceived the idea of creating the trust provided by the sixth clause, which, in its legal effect, is materially different from that of the fifth clause.

Under the fifth clause, the estate of appellees would be vested upon the death of the testatrix. Under the sixth clause, as it is, the estate could not vest until the expiration of five years from the death of the testatrix, because the direction is that the trustee shall, after the end of five years, transfer the trust property to the "then living children, share and share alike," and, if any child shall be dead, leaving issue, the issue of such child shall take the deceased child's part, and, if a child shall be dead without issue, the surviving brothers and sisters shall take.

We do not see any ground upon which this decree can be sustained. We think this trust an active one, and that it should endure for the time mentioned in the will; that is, five years from the demise of the testatrix.

The decree of the circuit court is reversed, and the cause remanded to that court for such further proceedings as are in conformity with this opinion, and to justice may appertain. Reversed and remanded.

(208 Ill. 28)

HICKOX et al. v. CITY OF SPRINGFIELD.

(Supreme Court of Illinois. Feb. 17, 1904.)

ABSTRACT OF RECORD—DUTY OF APPELLANT—RULE OF COURT—JUDGMENT—AFFIRMANCE.

1. Under rule 14 (47 N. E. vi) of the Supreme Court, requiring the party appealing to furnish such an abstract of the record as will fully present every error and exception relied on and sufficient for the examination and determination of the cause without any examination of the written record, the judgment appealed from will be affirmed where appellant makes no attempt whatever to abstract the evidence of the witnesses or the contents of documents offered in evidence at the hearing.

Appeal from Sangamon County Court; Geo. W. Murray, Judge.

Proceeding by the city of Springfield for street improvement and assessment of benefits. From an order of the county court affirming the order of a commissioner appointed to make the assessment, Lee Hickox and other alleged property owners appeal. Affirmed.

R. L. McGuire and T. J. Condon, for appellants. Arthur M. Fitzgerald, City Atty., and Albert Salzenstein, Corp. Counsel, for appellee.

WILKIN, J. On October 31, 1902, a petition of property owners was presented to the board of local improvements of Springfield, Ill., praying that the brick pavement on Fourth street, in said city, from Madison street to Jackson street, be covered with asphalt. The estimate of the cost of the said improvement as made by the city engineer was \$12,350.50, and the board of local improvements passed a resolution to grant the prayer of the petition. November 14, 1902, was set as the day for hearing objections, and at that time a petition was presented by

certain persons who had signed the original petition, asking to withdraw their names. The hearing upon this request was adjourned until November 17, 1902, when the request of the petitioners was refused. January 12, 1903, the ordinance was submitted to the city council and passed. The county court appointed a commissioner to make the assessment, and his roll assessed the benefits to the property owners at \$8,712.50, and to the public at \$4,188.92. Objections were filed, in the county court to this assessment. The objectors waived a jury as to benefits, and the court confirmed the assessment roll as made by the commissioner. From that order an appeal has been taken to this court by property holders.

Two questions are presented for our decision: First, had the persons who signed the original petition the right to withdraw their names from it before it was finally acted upon by the board of local improvements; and, second, were the persons who signed the original petition in fact the legal owners of the property for which they signed, and, if they were not, was the petition signed by persons owning one-half of the frontage on the proposed improvement. These questions can only be determined by a consideration and review of the testimony produced upon the hearing. Witnesses there testified as to the total frontage and the amount signed for, and also as to the request of certain petitioners at a particular time for leave to withdraw their names. The abstract filed in this court shows none of that testimony. No attempt whatever is made to abstract the evidence of the witnesses or the contents of certain documents offered in evidence at the hearing. Rule 14 (47 N. E. vi) of this court requires the party appealing to furnish such an abstract of the record as will fully present every error and exception relied on, and sufficient for the examination and determination of the case, without any examination of the written record. Where a manifest attempt has been made to comply with this rule, and the abstract is merely defective, it will be accepted by the court as sufficiently presenting the matters in issue; but if the opposing party is not satisfied with such abstract he may file an additional one, and have the cost of the same taxed to the party filing the principal abstract, if the court shall finally determine that the additional abstract was necessary. This right of the opposing counsel, however, has never been construed to justify the filing of an abstract which does not pretend to comply with rule 14, and thereby compel the other party to do what the appellant or plaintiff in error should have done. As we said in *Gibler v. City of Mattoon*, 167 Ill. 18, 47 N. E. 319, "It is not our duty to perform this work of counsel, which, in detail, as to them is inconsiderable, but when imposed upon us, in the aggregate, extremely burdensome."

The judgment of the court below must be

affirmed for want of a complete abstract. *Staudé v. Schumacher*, 187 Ill. 187, 58 N. E. 318.

Judgment affirmed.

(208 Ill. 448)

REINHARDT v. SEAMAN et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

DECEDENTS' ESTATES—SALES TO PAY DEBTS—PURCHASE BY WIDOW—FRAUD—ADEQUACY OF PURCHASE PRICE—HOMESTEAD—EXTINGUISHMENT.

1. A widow is entitled to ask for the sale of her deceased husband's real estate other than the homestead to pay her award.

2. A widow may bid at a sale of her deceased husband's property had in order to pay her award.

3. Where the estimated value of a decedent's property was from \$6,000 to \$6,500, and it was subject to a homestead estate of the value of \$1,000, and also to an indebtedness of \$3,300, a sale for \$1,400, the title acquired being subject to the debt, dower, and homestead, could not be avoided on the ground of inadequacy of purchase price.

4. An administrator's report of a sale of decedent's property that he had sold the premises for cash was not rendered fraudulent by the fact that he only received a receipt acknowledging payment of the widow's award.

5. The failure to set off the homestead of the widow and children on a sale of the decedent's property by the probate court to pay debts of the estate was a mere irregularity, which, while it might have been urged on appeal from a decree of the probate court or writ of error to reverse the same, was not a jurisdictional defect, and did not constitute a valid objection to the probate court's decree in a collateral proceeding.

6. Where a widow purchased at a sale all her deceased husband's property, her dower interest became merged in the fee thus acquired, and she became vested with the absolute right to dispose of the homestead estate in the property without the concurrence or consent of her children.

Appeal from Circuit Court, Cook County; *E. O. Brown*, Judge.

Bill to foreclose a trust deed by *Sophia Seaman* and others against *Martha Reinhardt* and others. From the decree rendered for complainants, defendant *Martha Reinhardt* appeals. Reversed in part.

Ludmil Kandlik, for appellant. *David Eichberg* (*Charles L. Bartlett*, of counsel), for appellees.

BOGGS, J. *Bernhard Reinhardt* died December 15, 1893, in Cook county, leaving a widow, *Pauline*, and six children, all of whom, including the appellant, *Martha*, were minors. At the time of his death, and for some years prior thereto, said *Bernhard* owned lot 24 in *Webb's* subdivision of lots 7 and 8, in block 2, of *Cochran's* subdivision of the west half of the southeast quarter of section 6, town 39 north, range 14 east, in the city of Chicago. On the premises were situate a stone and brick flat building, three stories high in the front, and a two-story brick flat building in the rear. The said *Bernhard*, together with his said wife and

children, resided in one of the flats of the building, and had for many years made such flat his home. The other flats were rented to tenants. He and his wife had executed two trust deeds on the premises, both to *Charles H. Fleischer*, as trustee; one to secure an indebtedness evidenced by a note for \$3,000, the other to secure a note in the sum of \$300. Each of these trust deeds was acknowledged by the said *Bernhard* and his wife, and in the body of the deeds and in the acknowledgments thereof the homestead rights and interests of the makers of each of the trust deeds were duly and legally waived and relinquished. The entire property was of the value of about \$6,000 or \$6,500. After the death of said *Bernhard* his widow and children continued to reside in the said flat.

In June, 1895, *Frank A. Stauber*, administrator of the estate of the said *Bernhard Reinhardt*, filed a petition in the probate court of Cook county for a decree to sell the said lot and the building thereon to pay the debts of the decedent. The widow and heirs of the deceased were made parties defendant to the proceeding, and were served with process. The petition set forth the existence of the two trust deeds, recited the amount of the indebtedness secured by each of them, the rate of interest secured to be paid, the date of the maturity of each indebtedness, and prayed for a decree ordering sale of the premises subject to the two trust deeds, and subject also to the dower interests of the said widow, and also the homestead rights of the widow and children of the deceased. The widow suffered a default. *Isadore H. Himes* was appointed guardian ad litem to litigate and defend for the minor defendants, including *Martha*, the appellant. The guardian ad litem filed an answer for the minors, neither admitting nor denying the allegations of the petition, but reserving all rights, and praying for strict proof of all matters and things alleged against them. On the hearing a decree was entered directing the premises to be sold by the administrator subject to the lien of the two trust deeds before mentioned, and also subject to the dower of the widow and the homestead rights of the widow and children of the deceased. At a sale under the decree the widow bid the sum of \$1,400 for the premises, subject to the said trust deeds, her dower, and the homestead rights of herself and her children, which was the highest and best bid therefor. The sale was reported to and approved by the probate court, and on the 20th day of September, 1895, the administrator executed and delivered to said widow, *Pauline*, an administrator's deed for the said premises.

In May, 1896, the trust deed for \$3,000 having matured, the said widow, *Pauline*, executed a note for that amount, and a trust deed upon the property securing the note, and delivered the said note and trust deed to the said *Charles H. Fleischer*, who was

the payee in the note and the trustee in the trust deed, who thereupon canceled and delivered to her the former note for \$3,000, and released of record the former trust deed given by herself and her husband securing the same. In April, 1899, the note and trust deed given by the widow in 1896 became due, and the widow, said Pauline, together with Lizzie, the older of her children, who had arrived at legal age, in order to procure the money to pay and discharge the same, executed their note for \$3,600, payable to Sophia Seaman, one of the appellees, five years thereafter, and bearing 6 per cent. interest per annum, and to secure the same executed also a trust deed to appellee Samuel Eichberg, as trustee, whereby they mortgaged the premises aforesaid to secure the payment of the said note. This trust deed, both in the body and in the acknowledgment thereof, released and relinquished the homestead interests of the makers.

On the 5th day of February, 1902, the appellees, Sophia Seaman, the holder and owner of the said note, and said Eichberg, the trustee in the trust deed given to secure the same, filed this, their bill in chancery, to foreclose the said trust deed. The appellant and the other children of the said Bernhard Reinhardt were, among others, made parties defendant to the bill. The appellant, Martha, filed a separate answer to the bill for foreclosure, in which she set up that the premises were the homestead of her father, Bernhard Reinhardt, during his lifetime, and upon his death the homestead right, under the statute, inured to her mother, the widow, Pauline, and herself and the other minor children of said Bernhard; and alleged that the widow, Pauline, and the said Stauber, the administrator, fraudulently procured to be entered the decree for the sale of the premises, subject to the dower of the said Pauline and the homestead rights of the said Pauline and said minor children of the deceased, well knowing that, if so sold, no one would bid a fair price at the sale for such an interest in the property. The answer also averred that the administrator "fraudulently made a pretended sale" of the premises to the widow, Pauline, for a grossly inadequate consideration; that said Pauline did not pay, nor did Stauber receive, said \$1,400, or any other sum, therefor; that the sale was therefore without consideration, and void; that the said trust deeds executed by said Pauline after she had received a deed from the administrator for the premises did not create liens upon the premises, but were clouds upon the title of her, the said Martha, and her said brother and sisters. Said Martha also filed a cross-bill in substance the same as her answer, and averred that the probate court was without jurisdiction and power to decree a sale of the premises subject to the homestead of herself and her brother and sisters, and prayed that the trust deed sought to be foreclosed should be declared

of no valid force and effect as a lien, and should be removed and canceled as a cloud on the true title of herself and her brother and sisters to the property.

Replication was filed to the answer, and an answer was filed to the cross-bill, and replication thereto. The cause was heard, and a decree entered fixing the amount due on the note secured by the trust deed in favor of the complainant, and declaring said trust deed to be a valid lien on the premises, subject to the right of defendants Martha, Millie, Emma, and Katie Reinhardt to occupy as a homestead a portion of said premises, including the dwelling house, of the value not exceeding \$1,000, until they shall severally attain 21 years; finding the present value of the homestead interest to be \$387; directing that commissioners be appointed to set off and allot the homestead in the premises of the value of \$1,000, "to be occupied by the defendants Martha, Millie, Emma and Katie Reinhardt until they shall attain the age of twenty-one years," if such allotment could be made without injury to the interests of the parties in the premises, and that, if such allotment should be made, the residue of the premises should be sold by the master, or as much thereof as might be necessary to realize a fund out of which to pay the appellees the principal and interest of the indebtedness secured by the trust deed, and that, if such homestead cannot be specifically set off from said premises without injury to the parties interested, that then said master proceed to sell all of said premises, together with all buildings and improvements thereon, or so much thereof as may be sufficient to realize the amount due complainant, and which may be sold separately without material injury to the parties interested, at public auction, for cash; and, if the entire premises be sold under the provisions of the decree, including homestead rights and interests of the defendants Martha, Millie, Emma, and Katie Reinhardt, then out of the proceeds of said sale said master shall pay into court for the benefit of Martha, Millie, Emma, and Katie Reinhardt the sum of \$387, being the amount heretofore found to be the present value of the homestead interests of said Martha, Millie, Emma, and Katie Reinhardt, said sum of \$387, to be divided among said Martha, Millie, Emma, and Katie Reinhardt in the proportions to which they are legally entitled. Complainant in the cross-bill, Martha Reinhardt, has perfected this appeal to reverse the decree. The appellees have assigned as cross-error that the court erred in not holding that the trust deed executed by the widow, Pauline, and Lizzie Reinhardt, to the appellee Eichberg, subjected the estate of homestead of all the children of said Bernhard Reinhardt, deceased, to the lien of the trust deed.

We think the charges of fraud made against Pauline, the mother of appellant, and the administrator, were not sustained by the

proof. The charges were, in the main, general, and constructive or implied, rather than actual or intended. So far as specific at all, the charge seems to be that Pauline desired to obtain the title to the property, and chose the plan of procuring it to be sold to her by the administrator in payment of her widow's award, and as a part of the scheme procured the decree to be entered ordering the premises sold subject to the homestead of herself and her minor children. The award to which the widow was entitled had been ascertained and fixed by the court. It was not contended that any wrong or fraud entered therein. The widow was entitled to receive that amount from the estate, and to ask that the real estate of the deceased other than the homestead should be sold to pay the amount so legally found due to her. She had the legal right to bid at the sale. There was no evidence that the sale was conducted otherwise than in a fair and lawful manner. The amount bid at the sale cannot be said to have been inadequate. The estimated value of the property is from \$6,000 to \$8,500, from which, in order to obtain its salable value, must be deducted the value of the homestead estate, \$1,000, and the value of the dower of the widow. The total indebtedness contracted by the ancestor and secured by the two trust deeds on the property was \$3,300, besides interest. The amount bid at the sale was \$1,400, which, with the incumbrance assumed by the bidder, amounted to \$4,700 and more for the property, subject to the dower of the widow and the homestead right of herself and her children. The sale could not be avoided on the ground the bid was inadequate.

The report made by the administrator that he had sold the premises for cash was not rendered fraudulent by the fact that he only received the receipt of the widow acknowledging payment of the award to her. The receipt discharged the indebtedness of the estate to the same extent that it could have been paid in money.

The failure to set off the homestead of the widow and children, even if that could have been done without injury to the premises, was but a mere irregularity, which might have been urged on appeal from the decree of the probate court or writ of error to reverse the same, but which does not constitute a valid objection to the decree in a collateral proceeding. *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214. The probate court had jurisdiction of the parties and of the subject-matter of the proceeding, and the decree rendered by it cannot be attacked in a collateral proceeding for mere errors or irregularities not going to the jurisdiction of the court. *Moffitt v. Moffitt*, 69 Ill. 641; *Harris v. Lester*, 80 Ill. 307; *Bradley v. Drone*, *supra*; *Frothingham v. Petty*, 197 Ill. 418, 64 N. E. 270.

The deed from the administrator vested in Pauline, the widow, the title to the property
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subject to the homestead estate and her right of dower. The dower interest became merged in the fee, and Pauline, being the mother of the appellant and the other children of the deceased householder, became vested with the absolute right to dispose of the homestead estate without the concurrence or consent of the children. *Clubb v. Wise*, 64 Ill. 157; *Kingman v. Higgins*, 100 Ill. 319; *Capek v. Kropik*, 129 Ill. 509, 21 N. E. 836; *Hayack v. Will*, 169 Ill. 145, 48 N. E. 292. In the case of *Hayack v. Will*, *supra*, we said: "The husband entitled to a homestead dying and leaving a widow and children, the homestead becomes vested in the widow, who may sell, incumber, or abandon the same. In case of a sale or incumbrance by such widow, with proper acknowledgment, the conveyance or lien is complete as against the children." The trust deed executed to the appellees by the widow released and relinquished the homestead estate in due form of law, and subjected the homestead estate in the property to the lien of the trust deed. The homestead interest of the appellant and the other children of the deceased in the estate are subordinate to the interests of the mother in the homestead estate, and to the lien of the trust deed given by the mother to the appellees. The release of the homestead by the widow in the trust deed was effectual, and the lien of that instrument was complete against the entire fee-simple title to the property.

It follows, then, that so much of the decree as declares the lien of the trust deed of the appellees to be subject to the right of the appellant and her sisters, Millie, Emma, and Katie, to occupy a portion of the premises as a homestead, and fixing the fair present value of such interest at \$387, was erroneous, and must be and is reversed. In all other respects the decree is affirmed.

Decree reversed in part.

(207 Ill. 544)

CHICAGO UNION TRACTION CO. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Feb. 17, 1904.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT—ORDINANCE—VALIDITY—ASSESSMENT OF LOTS IN PARCEL—STATUTES.

1. The caption of an ordinance for a public improvement was, "for the improvement, plastering curb walls, resetting curbstones, constructing a granite concrete combined curb and gutter, grading and paving of the roadway," etc. As to the curb and gutter the ordinance provided that the curb walls then in place should be plastered on their face for a certain space, provided how they should be reset, and that there should be constructed concrete gutter flags of certain dimensions. *Held*, that an objection that there was a variance between the caption and the body of the ordinance was untenable.

2. The constitutional provision requiring that no law shall contain more than one subject,

§ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 233.

which shall be expressed in its title, does not apply to city ordinances.

3. An ordinance providing for the improvement of a street fixed the grade at the intersection of a certain street at 13 feet above datum, and at the intersection of the next street at 12.5 feet above datum, and the specifications required that the surface of finished pavements of all intersecting alleys should be 4 inches below the top of the curb at each side of the alley intersections, and parallel therewith. *Held*, that the ordinance was not invalid for uncertainty, in that the height of the curbs on the two sides of an alley between the intersecting streets would be different, it being presumable that the contractor and engineer would be able to construct a pavement nearly enough in the manner called for so as to meet the purposes of travel.

4. Hurd's Rev. St. 1901, p. 385, c. 24, § 543, provides that on levying special assessments each lot shall be assessed separately, provided that it shall not apply to the property of railroad companies, or the right of way and franchise of a street railway company. *Held*, that the proviso does not apply to lots belonging to a street railway company occupied by buildings used for storage purposes, etc.

5. Hurd's Rev. St. 1901, p. 385, c. 24, § 543, provides that in levying special assessments each lot shall be assessed separately, but section 547 (Act 1901, amending the local improvement act) provides that several lots owned and improved as one parcel may be assessed as one parcel. A street railway company owned lots numbered 12 to 19 and 20 to 29. On lot 12 was a building, and lots 13 to 19 were covered with a car barn. Lot 12 joined lot 13, and the building on 12 and the car barn had a wall in common between them. Lots 20 to 26 were south of the first group, and had on them an old car barn used as a stable. On lot 27 was a small private alley dividing the buildings located on lots 20 to 26 from another building located on the remainder of lot 27. *Held*, that the lots were properly assessed as one parcel.

6. The determination of benefits from a street improvement is to be based on the increase in the market value of the property, and is not limited by the benefit conferred for the particular use to which the property is then put.

7. On proceedings to confirm a special assessment the assessment roll is prima facie evidence that the property was benefited to the extent of the assessment on the correct legal theory—the benefit to the market value.

Appeal from Cook County Court; R. A. Russell, Judge.

Proceedings by the city of Chicago for the confirmation of a special assessment on the property of the Chicago Union Traction Company. From a judgment confirming the assessment, the traction company appeals. Affirmed.

Williston Fish and Louis Boisot (John A. Rose, of counsel), for appellant. Robert Redfield (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

RIKKS, J. This is an appeal prosecuted from the county court of Cook county from a judgment of that court confirming a special assessment levied to defray the cost of curbing, grading, and paving Racine avenue from Clybourn avenue to Center street, in the city of Chicago. The property assessed to and objected for appellant is in Sheffield's Addition, and in the assessment roll is described as sublots 12 to 19 and 20 to 29 in

the subdivision of lot 1 and part of lot 2, block 9, in said addition. Sublots 12 to 19 were assessed \$932.50, and sublots 20 to 29 were assessed \$1,060.05.

Appellant appeared and filed numerous legal objections, which, upon the hearing before the court, were overruled, and by agreement of parties a trial by jury was waived as to the question of benefits, and the cause submitted to the court for trial without a jury. The court, having heard the evidence upon the question of benefits, found that the property was not assessed more than it would be benefited, or more than its proportionate share of the cost of the improvement, and confirmed the assessment. It is now insisted (1) that the ordinance is void; (2) that the assessment was improperly spread upon the lots by placing the same in two groups, instead of assessing them separately; (3) that the court erred in refusing to mark "held" appellant's 10 propositions of law; (4) that the court erred in the exclusion and admission of evidence; and (5) that the finding of the court as to benefits is contrary to the weight of the evidence.

The objections filed at the first hearing before the court were broad enough and sufficient to cover the legal objections here insisted upon. The first objection, as stated by appellant, is: "The ordinance provides for new gutter flags and resetting curbstones, while the caption covers new combined curb and gutter." The caption of the ordinance in question is as follows: "For the improvement plastering curb walls, resetting curbstones, constructing a granite concrete combined curb and gutter, grading and paving of the roadway of Racine avenue from the north line of Center street produced from the east to the northeasterly curb line of Clybourn avenue, and also the roadways of all intersecting streets and alleys extended from the curb line to the street line produced on each side of said Racine avenue between said points (except street railway rights of way thereon between said points), in the city of Chicago, county of Cook, and state of Illinois." Appellant urges that there is a variance between the caption of the ordinance and the details of provisions in the body of the ordinance relating to the curb and gutter. As to the curb and gutter, the provisions of the ordinance are, substantially, that the curb walls now in place on each side of the roadway, and also on each side of the roadways on intersecting streets and alleys, shall be plastered on their face from the top surface down for the space of 5 feet, and shall be reset in such manner that the roadway face of said curbstones shall be parallel with and 19 feet from the center line of said Racine avenue, and that there shall be constructed granite concrete gutter flags 18 inches in width and 5 inches in thickness (giving the details for their construction), so that the upper surface of the gutter flags shall conform to the surface of the finished road-

way. We do not think the objection here made tenable, but think that, in a general way, the caption covers all contained in the ordinance relating to the curb and gutter. *Thompson v. City of Highland Park*, 187 Ill. 265, 58 N. E. 1094. But, if there were a variance, we are of the opinion that it would be immaterial, and insufficient upon which to declare the ordinance void. It is believed that the constitutional provision requiring that no law shall contain more than one subject, which shall be clearly expressed in its title, only applies to state legislation, and not to the ordinances of cities, and that, in the absence of a statute containing a similar requirement to the Constitution in the passage and adoption of ordinances, the constitutional requirement as applicable to acts of the General Assembly need not be observed in the passage of ordinances. 21 Am. & Eng. Ency. of Law (2d Ed.) 975; *Village of Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327; *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751; *People v. Wagner*, 86 Ill. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141; *Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678. The only statutory requirement as applied to ordinances is as to the style or enacting clause, and the requirement is that the style of the ordinance shall be, "Be it ordained by the city council of," etc. *Hurd's Rev. St. 1899*, c. 24, art. 5, § 63. To require of cities and villages the same certainty and care with reference to the titles of ordinances that is required of the General Assembly in the enactment of laws for the state would, we think, be requiring of such city and village authorities greater precision than is contemplated by the law, or ought reasonably to be expected of bodies constituted as they are authorized to be.

The contention of counsel that *Smith v. City of Chicago*, 169 Ill. 257, 48 N. E. 445, sustains the position here contended for by appellant cannot be admitted. The view there expressed was that the provisions of the ordinance in the main body thereof, as found in section 2, authorized a local improvement for the erection of lamp posts only, and that in attempting to give the details of the construction of the lamp posts, in section 6, the provisions of the latter section of the ordinance extended beyond the declared purposes of the ordinance in its main body by declaring the method of connecting cables, switches, and arc lamps with the same, and, while the following language there used, "clearly the description is inconsistent, and cannot be reconciled with the improvement named in the title and provisions of the ordinance authorizing the improvement," would seem to lay some stress upon a variance between the caption or title of the ordinance and the provisions thereof, the holding was based upon the departure of the sixth section, in its specifications, from the provisions of the second section, which

declared what improvement was authorized.

It is further complained of the ordinance that it is uncertain, in that it does not sufficiently fix the height of the curb at a supposed alley between Maud and Clybourn avenues. The objection filed was that the ordinance is uncertain in describing the pavement in the intersecting alleys. Racine avenue runs north and south and crosses Center street, Maud and Clybourn avenues. Appellant argues that as the grade is fixed at 13 feet above datum at Center street, 13 feet above datum at Maud avenue and 12.5 feet above datum at Clybourn avenue, the curbs on the different sides of an alley between Maud and Clybourn avenues would necessarily be of different heights—one lower than the other—and, as the specifications required "the surface of the finished pavement of all intersecting alleys * * * shall be four inches below the top of the curb * * * on each side of said alley intersections and parallel therewith," it would be impossible to comply with that requirement with the height of the curbs varying on the two sides of the alley. There is no evidence that there is an alley between the points discussed, and, if there is, it seems to us the objection here made is too refined and technical to be allowed to prevail in such ordinance. We will presume, in a matter of such small detail, that the contractor and engineer will be able to so construct a pavement of the kind called for in the ordinance, of the material therein designated, and nearly enough in the manner therein called for, that it will meet all purposes of travel, although there may be a slight variation in the height of the curb on the two sides of an alley; and certainly, upon a mere supposititious difficulty, concerning which there is no evidence, oral or otherwise, we are not disposed to declare this ordinance void.

It is next urged that it was improper, in spreading the assessment upon the lots of appellant, to have placed the same in two groups, one consisting of lots 12 to 19 and the other of lots 20 to 29, and assessed them in that manner, instead of assessing each lot separately. Appellant invokes section 40 of the improvement act (*Hurd's Rev. St. 1901*, p. 385, c. 24, § 546), as follows: "In levying any special assessment or special tax, each lot, block, tract or parcel of land shall be assessed separately in the same manner as upon assessment for general taxation: provided, that this requirement shall not apply to the property of railroad companies, or the right of way, and franchise of street railway companies, but the same may be described in any manner sufficient to reasonably identify the property intended to be assessed;" and reliance is placed upon the case of *Howe v. People*, 86 Ill. 288, and several cases from other states. The *Howe Case* we do not regard as any authority upon the proposition here urged. *Howe* was the owner of 80 acres of land in a certain section, and two

tracts of land adjoining it, lying in the same section, but belonging to other persons, were, together with Howe's land, included in a single assessment, and taxes to the amount of over \$1,000 were placed against the combined property. There was no way to determine how much Howe's land was assessed or taxed, and it was held that the assessment, made in that manner, was void. In *Moore v. People*, 106 Ill. 376, which was a special assessment case under the drainage act, and where the provision was quite similar to that in the local improvement act as to assessments, it was held proper to assess 420 acres of land belonging to the objector in a single assessment, although there was no single description that would describe the tract.

Appellee takes the position that this mode of assessment is authorized by the amendment of 1901 of section 41 of the local improvement act (Hurd's Rev. St. 1901, c. 24, § 547), which is as follows: "Several lots, or parts of lands, owned and improved as one parcel, may be assessed as one parcel," and further contends that the proviso to section 40, above quoted, also applies. We do not agree that the proviso to section 40 has any application to the property here objected for. The property in question is not the property of a railroad company, and is no part of the right of way or franchise of a street railway company, and those are the only classes of property affected by the proviso.

From the evidence in this record it is somewhat difficult to get a clear conception of the location and exact situation of the two groups of property of the assessment of which it is complained. In the trial before the court a map was used and referred to by most of the witnesses, but it does not seem to have been put in evidence, and is not in the record. As nearly as we can understand the testimony of the witnesses, lots 12 to 19 are entirely covered with buildings. On lot 12 is a one-story brick building, and lots 13 to 19 are covered with a car barn used for the storage of cars. Lot 12 joins lot 13, and the building on lot 12 and the car barn have a wall in common between them. The building on lot 12 is used for the storing or keeping of waste iron. Lots 20 to 26 lie substantially south of the first group of lots we have mentioned, and lots 20 to 26 have upon them an old car barn that is now used for a stable for horses and the keeping of wagons and such things appertaining to the business of appellant, and on lot 27 is a small private alley of about 12 feet in width, dividing the buildings that are located on lots 20 to 26 from another large building that is located on the remainder of lot 27 after the alley is taken off, and also on lots 28 and 29. These properties all belong to appellant, and, according to the testimony of its foreman, are all used as one plant, and we are clearly of the opinion that it was not error to assess, and that no injustice was done appel-

lant in assessing, the lots in two groups, in the manner they were assessed.

Appellant urges that the law applicable to mechanics' liens is analogous to the rule with reference to assessments of property, and that only those properties that can be said to be under one roof can, under the mechanic's lien law, be treated as one improvement for a single lien, and that by analogy the same rule is applicable for the assessment of property under the local improvement act. We think not, and regard such construction too narrow for the language used in the amendment of 1901 of section 41 of the local improvement act, which authorizes "several lots or parts of land owned and improved as one parcel" to be assessed as one parcel. The private alley between the buildings on the second group of lots, left there for appellant's convenience, or for fire protection, or other cause, cannot be said to be a severance of the properties of such a character as to prevent their being treated as one parcel, when the undisputed evidence shows that they in fact constitute one plant. And so, too, as to the division of the buildings on lots 12 to 19. The simple fact that one of them is a building in which old iron is stored and the other is one in which cars are stored, but all joined together and all constituting substantially one improvement, and used as one parcel, is not sufficient, as we interpret the law, to prevent the lots constituting one parcel and being assessed as one parcel. In *Pfeiffer v. People*, 170 Ill. 347, 48 N. W. 979, it was objected that lots 7 and 8 and lots 1 to 16 in a certain block in the city of Alton were assessed in two separate groups. The county court overruled the objection, and we affirmed its judgment, and regard that case as applicable to and supporting the views expressed here. If the alley separating the buildings in the second group of lots (20 to 29) were a public alley, there would be more reason in the contention here made, and some authority to support it, but the mere leaving of a passageway, upon one's own property, between the buildings, would not seem to us sufficient to require the classification of the property as constituting separate groups or parcels.

Proposition No. 10 offered by appellant and refused by the court was, in substance, that, if the evidence shows that any part of the property objected for is permanently devoted solely to use as a site for a street railway car storage barn, the assessment against such part of said property in this proceeding is limited by the benefit conferred on said property by said improvement for such use, and the fact that the general market value of the property, or its desirability for any other purpose, may be increased by the improvement, is not material in the decision of this case. This holding was properly refused. *Chicago Union Traction Co. v. City of Chicago*, 202 Ill. 576, 67 N. E. 383; *Chicago Union Traction Co. v. City of Chicago*, 204

Ill. 363, 68 N. E. 519. This proposition is so fully discussed and reviewed in the case last cited that it would seem unnecessary to again review it, and, as appellant proceeded upon an erroneous theory in fixing the benefits to the property, the complaint that the court erred in the admission and exclusion of evidence cannot be sustained, as the evidence admitted went upon the theory of the increase in the market value, and the evidence excluded was to the proposition that the property was not benefited for the particular use. The assessment roll was introduced in evidence, and it was prima facie evidence that the property was benefited to the extent of the assessment upon the true legal theory. Appellant's evidence was upon an erroneous theory, and did not rebut or overcome the evidence in the assessment roll; and, besides, there were witnesses who testified that the market value would be increased by the improvement to the extent of or more than the assessment.

The judgment of the county court is affirmed. Judgment affirmed.

(208 Ill. 161)

HOGAN v. CHICAGO & A. R. CO.

(Supreme Court of Illinois. Feb. 17, 1904.)

APPEAL—DECISION—FINDINGS OF FACT BY APPELLATE COURT—CONCLUSIVENESS ON SUPREME COURT—SUFFICIENCY TO SUPPORT JUDGMENT.

1. Where a judgment is reversed by the Appellate Court without remanding, on the ground that it finds the facts differently from the findings of the trial court, the Supreme Court is concluded by the findings of the Appellate Court on the questions of fact, and can only consider whether the facts found support the judgment.

2. In an action by an owner of property abutting on a street to recover the damages sustained by reason of defendant railroad company laying an additional track over its right of way and diagonally across the street adjacent to plaintiff's property, the Appellate Court found that defendant, by reason of a conveyance to it, had the right to construct tracks and operate a railroad over the right of way; that the consideration paid for the conveyance included not only the value of the strip conveyed, but compensation for damages that might arise to adjacent lands; and that plaintiff had acquired no right to the use of the strip as a means of ingress or egress to and from his premises, and suffered no damages by reason of the additional track. *Held*, that the facts supported a judgment for defendant.

Appeal from Appellate Court, Third District.

Action by Thomas D. Hogan against the Chicago & Alton Railroad Company. From a judgment of the Appellate Court (105 Ill. App. 136) reversing a judgment of the trial court, plaintiff appeals. Affirmed.

Albert Salzenstein, for appellant. Patton & Patton (William Brown, of counsel), for appellee.

RICKS, J. The appellant brought his action on the case against the appellee in the

circuit court of Sangamon county to recover damages to his real estate abutting on Fourth street, in the city of Springfield, on account of appellee laying an additional railroad track over its right of way, and diagonally across said street, adjacent to appellant's premises. Appellee pleaded the general issue. The cause was heard by the court without a jury, and a judgment rendered in favor of appellant for \$380 damages. Appellee prayed on appeal to the Appellate Court for the Third District (105 Ill. App. 136), and that court reversed the judgment of the circuit court without remanding the cause. The judgment was not reversed because the Appellate Court differed from the trial court as to the law governing the case, but upon the ground that the Appellate Court found the facts differently from the finding of the trial court. From that judgment an appeal was prosecuted to this court by appellant, and at the April term, 1903, the judgment was reversed, and the cause remanded to the Appellate Court, with directions to that court "to enter such judgment reversing and remanding, reversing without remanding, or affirming the judgment of the circuit court as, in its judgment, may be proper; and if it shall reverse the judgment because it has found the controverted facts different from the circuit court, and shall not remand the cause, it shall recite in its judgment the ultimate facts as found by it." *Hogan v. Chicago & Alton Railroad Co.*, 202 Ill. 206, 68 N. E. 1070. Complying with the remanding order of this court, the Appellate Court further considered said cause, and again entered its judgment reversing, without remanding, the judgment of the trial court, because it found the controverted facts differently from the circuit court. The findings of fact of the Appellate Court were as follows: "Appellant, by virtue of a conveyance made by Lewis Kirsch and wife to the Chicago & Mississippi Railroad Company, dated December 24, 1852, and certain mesne conveyances since then made, is the owner in fee of a certain strip of land sixty feet wide, containing one and two-tenths acres, which it is using for right of way and railroad purposes, and has so used it continually since the date of the conveyance by Kirsch, either by itself or its predecessor in title; that the purpose of the grant was to enable the grantee to construct tracks and operate a railroad over the strip; that the consideration paid Kirsch included not only the value of the strip of the land conveyed, but compensation for all damages that might arise to adjoining lands from the use of the premises so conveyed in operating a railroad with a single or double track; that appellee, who is Kirsch's remote grantee, has acquired no right to the use of said strip of land as a means of egress and ingress to and from his premises, except such portion as is embraced within the boundary limits of Fourth street, in the city of Springfield; that Fourth street was laid out and extended across said

strip of land after the appellant had acquired title thereto and begun to operate its railroad along said strip; that appellant had the right to construct and operate a second track along said strip of land and across said street; that the right of appellee and the right of the public to the use of the street is subordinate to the right of appellant to construct such second track, and that appellee's right of egress and ingress to and from his premises has been in no wise impaired by appellant's laying and operating said track." A certificate of importance having been granted, this appeal is prosecuted from that judgment, and both appellant and appellee have filed extensive briefs and arguments covering the facts as well as the law of the case.

Appellant earnestly urges that the conclusion reached by the Appellate Court upon the facts disclosed by the record and the law applicable thereto is erroneous. His argument begins with the supposed legal effect of a certain deed from one Kirsch to the appellee company for the strip of land occupied by it at the place in controversy, and contends that by that deed appellee did not obtain the property therein described for railroad purposes, and that, as the conveyance was made prior to the Constitution of 1870, although appellant obtained his title from the same source, a right of action still exists in favor of appellant. As we understand and have many times interpreted the statute regulating the practice in cases like this, we are not permitted to consider the matters presented by appellant's brief. Where a judgment is reversed by the Appellate Court without remanding, on the ground that that court finds the facts differently from the finding of the trial court, and the judgment of said Appellate Court contains a sufficient and proper finding of facts, the only question then remaining for the consideration of this court is whether the judgment entered by the Appellate Court is supported by the ultimate facts found by it. In other words, do the findings of fact by the Appellate Court support its judgment? This court is concluded, upon the questions of fact, by the finding of the Appellate Court. *Hawk v. Chicago, Burlington & Northern Railroad Co.*, 147 Ill. 399, 35 N. E. 139; *Borg v. Chicago, Rock Island & Pacific Railway Co.*, 162 Ill. 348, 44 N. E. 722. Although the facts, outside of the simple question of whether appellant suffered damages, and the extent thereof, were covered by a stipulation between the parties, we are not permitted to examine the stipulation and determine for ourselves the facts, but must accept them as found by the Appellate Court. *Irwin v. Northwestern National Life Ins. Co.*, 200 Ill. 577, 66 N. E. 386; *National Linseed Oil Co. v. Heath & Milligan Co.*, 191 Ill. 75, 60 N. E. 834; Practice Act, § 88 (*Hurd's Rev. St.* 1901, c. 110, § 88). The only damages appellant claims there was any evidence in the record tending to support were for the obstruction and interference with

his right of ingress and egress. By reference to the finding of facts by the Appellate Court we observe that it has found that the conveyance from Kirsch to appellee of the strip of land held by it was to enable appellee to construct tracks and operate a railroad over said strip, and that the consideration paid by appellee for said conveyance included not only the value of the strip of land conveyed, but compensation for all damages that might arise to adjacent lands from the use of the premises conveyed in operating a railroad with a single or double track, and that appellant has acquired no right to the use of said strip of land as a means of ingress and egress to and from his premises, except such portion as is in the street; that the street was laid out and extended across said strip of land after appellee had acquired title thereto and begun to operate its railroad over the same; and that appellant's right of egress and ingress from and to his premises has been in no wise impaired by appellee laying said track and operating said railroad. The facts as found by the Appellate Court are not discussed by appellant, but instead thereof the facts as disclosed by the stipulation of the parties to the record. Nor is it claimed that the Appellate Court has not found the proper or ultimate facts contemplated by the statute. That court having expressly found that appellant suffered no damage by interference with his ingress or egress to or from his premises by reason of laying the additional track, this is the one conclusive ultimate fact found adversely to him upon which he bases his right of action, whatever other legal questions may be involved; and under such finding of facts the judgment should be for appellee, and such was the judgment of the Appellate Court; so it cannot be said that the facts as found by the Appellate Court do not sustain the judgment entered by it, and it becomes unnecessary for us to discuss the legal questions arising upon a state of facts which might establish the existence of damages to the appellant, when the facts found show there was no damage, which is the very foundation of the action.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(207 Ill. 312)

CHICAGO, M. & N. R. CO. v. PEOPLE ex rel. ELSESSER, County Collector.

(Supreme Court of Illinois. Feb. 17, 1904.)

TAXATION—DELINQUENT TAXES—APPLICATION FOR JUDGMENT—OBJECTIONS—CONSTRUCTION—RESPONSIVENESS—AMENDMENT.

1. Where a county tax collector's notice of application for judgment for delinquent taxes stated that he would apply for judgment for the "general and special taxes due for the year 1902," and defendant's objections stated, "Now comes [defendant], and defends against the application * * * for judgment and order of sale for delinquent taxes of the year 1903," etc., such objections sufficiently showed that they were to the taxes for which judgment was asked, since, by Revenue Act, § 177 (*Hurd's Rev.*

St. 1901, c. 120, § 177), the taxes levied in 1902, if not paid within the time specified, became the delinquent taxes of 1903.

2. Revenue Act, § 191 (Hurd's Rev. St. 1901, c. 120, § 191), declares that, in all judicial proceedings for the collection of taxes, all amendments may be made which by law could be made in any personal action pending in such court. *Held*, that where, after the beginning of the hearing of objections to an application for judgment for taxes due for the year 1902, the court held that defendant's objections, which were to the application "for judgment * * * for delinquent taxes of the year 1903," were not responsive to the application, it was error for the court to refuse defendant's application to amend such objections to show that they related to the taxes levied in the year 1902, which became delinquent in 1903.

Appeal from Stephenson County Court; A. J. Clarity, Judge.

Application by the people, on the relation of John Elsesser, county collector of Stephenson county, for judgment for delinquent taxes levied against the Chicago, Madison & Northern Railroad Company. From a judgment in favor of relator, the railroad appeals. Reversed.

J. H. Stearns (Wm. Barge, of counsel), for appellant. Louis H. Burrell, State Atty. (Horatio C. Burchard, of counsel), for appellee.

HAND, C. J. At the June term, 1903, the county collector of Stephenson county made application to the county court in said county for judgment and order of sale for the taxes which were then delinquent which had been levied for the year 1902 in said county. The appellant appeared and filed objections to the town taxes for the towns of Buckeye, Ridott, Silver Creek, Harlem, and Oneco; to the school taxes in School District No. 37, town 27; and to the road and bridge taxes in the town of Silver Creek—levied against its property. The objections were overruled, and judgment and order of sale were entered, and the appellant has prosecuted an appeal.

The notice of the application for judgment and order of sale stated that the county collector would apply for judgment for the "general and special taxes due for the year 1902," and the objections filed by appellant stated that "Now comes [the appellant], and defends against the application * * * for judgment and order of sale for delinquent taxes of the year 1903," etc. On the hearing the appellant offered evidence in support of the objections to show that the town taxes above referred to were levied for town purposes, or some other purpose equally indefinite; that the road and bridge taxes in the town of Silver Creek were levied under the cash system, when the town was operating under the labor system; and that the school taxes for District No. 37, town 27, were not levied at a meeting of the school board, and that the certificate of levy was made and signed by the members of the board severally, and while they were sepa-

rate and apart from each other. The court, however, upon the objection of the appellee, refused to admit such evidence, or any evidence offered on behalf of appellant to support its objections, on the ground that the objections filed did not cover the taxes for which judgment and order of sale were sought by the county collector; it being the view of the appellee and the trial court that the "delinquent taxes of the year 1903" were taxes other than the "general and special taxes due for the year 1902." After the court had declined to permit appellant to introduce evidence to sustain its objections, on the ground that the objections filed by it were not objections to the taxes upon which the collector was seeking a judgment and order of sale, the appellant moved the court that it be allowed to amend its objections so they would read, in the particular complained of, "Now comes [the appellant], and defends against the application * * * for judgment and order of sale for taxes levied in the year 1902, and becoming delinquent in the year 1903," etc., but the court declined to permit such amendment.

We think there is much force in the contention that the objections were sufficiently specific to cover the taxes upon which judgment and order of sale were sought to be had. The taxes were levied in 1902, and, if not paid on or before the 10th day of March, 1903, or so soon thereafter as the books should be returned to the county collector, they became delinquent. Revenue Act, § 177 (Hurd's Rev. St. 1901, c. 120, § 177). The taxes levied in 1902, if not paid within the time specified in the statute, became the delinquent taxes of 1903, so that the application and objections referred to the same taxes.

If, however, it be conceded the objections are somewhat indefinite, and if the trial court was in doubt as to whether the objections covered the taxes referred to in the application for judgment and order of sale, we are of the opinion the appellant should have been permitted to amend its objections by incorporating therein apt words to show it was objecting to the taxes levied in the year 1902, and which were delinquent in the year 1903. Section 191 of the revenue act provides: "In all judicial proceedings of any kind, for the collection of taxes and special assessments, all amendments may be made which, by law, could be made in any personal action pending in such court." This language is broad and comprehensive, and under it amendments to objections to judgment and order of sale for delinquent taxes may and should be permitted in so far as may be necessary to permit objectors to fairly present any existing valid objections to the application for judgment and sale against their lands for delinquent taxes, if made in apt time. The appellant here had no notice that the objections filed by it would be held by the court insufficient to admit in evidence

proofs of what it believed to be a valid objection to a judgment and order of sale for the taxes objected to by it, until it had entered upon the trial; and, so soon as it was advised fully of the ruling of the court, it asked leave to amend its objections to meet the view of the court. The amendment sought to be made was as to a matter which could have worked no surprise upon the appellee, as it is apparent the county collector was asking for judgment and order of sale upon the same taxes to which appellant was objecting. When the objections were held insufficient in the particular complained of, the court should have permitted the amendment to be made.

It is claimed the evidence offered does not show the taxes objected to are invalid. The appellant was not given an opportunity to show the invalidity thereof, as the court held that no evidence could be introduced under the objections filed. The evidence offered and rejected, which is incorporated in the record as offered, fairly tends to show that the town taxes in the several towns were levied for town purposes, or for some other purpose equally indefinite, which, it has been held, is not sufficient to sustain a tax levy (*People v. Chicago & Alton Railroad Co.*, 194 Ill. 51, 61 N. E. 1064); that the road and bridge taxes objected to were levied under the statute authorizing a levy under the cash system, when the town was acting under the labor system; and that the school taxes were not levied at a meeting of the school board, but that the certificate of levy was signed by the members of the board acting separately and independently of each other (*Chicago & Northwestern Railway Co. v. People*, 184 Ill. 240, 58 N. E. 367). We, however, express no opinion as to the validity of any of the taxes objected to, but leave those questions open to be determined upon a new trial, when all the evidence with reference thereto is before the court.

The judgment of the county court will be reversed, and the case remanded. Reversed and remanded.

(207 Ill. 562)

PAYNE et al. v. WHITE et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

ACTIONS—DIRECT APPEAL TO SUPREME COURT—FREEHOLDS.

1. Where complainants sued to set aside a contract to convey certain real estate to defendants in consideration of their caring for complainant P. and his wife for their natural life, etc., as a cloud on the title to the real estate embraced in the contract, but no conveyance of the property had ever been made, and defendants did not ask for specific performance thereof, and would not be entitled to a conveyance until they had performed the contract, the suit did not involve a freehold, and was therefore not appealable directly to the Supreme Court.

Appeal from Circuit Court, Stark County; T. N. Green, Judge.

Suit by Charles S. Payne and others against Henry A. White and another. From a decree dismissing the bill, complainants appeal. Dismissed.

Martin Shallenberger, B. F. Thompson, and Frank A. Kerns, for appellants. Frank Thomas and V. G. Fuller, for appellees.

CARTWRIGHT, J. Upon a final hearing of the issues formed by the amended bill of appellants, and the answer of appellees thereto, the circuit court of Stark county entered a decree dismissing the bill for want of equity, and from that decree this appeal was prosecuted.

The appeal was taken to this court on the alleged ground that a freehold was involved in the suit. The complainants in the bill were the appellants, Charles S. Payne and A. G. Hammond, executor of the last will and testament of Elizabeth A. Payne, deceased. The defendants were the appellees, Henry A. White and Nellie T. White, his wife. The purpose of the bill was to cancel an agreement in writing executed by said Charles S. Payne and Elizabeth A. Payne, his wife, as parties of the first part, and said Henry A. White, and Nellie T. White, his wife, as parties of the second part, on February 11, 1890, and to remove the record of the same as a cloud upon the title to the real estate therein mentioned, and for an injunction and accounting. The bill alleged the execution of the agreement and set out the same, whereby said Charles S. Payne and Elizabeth A. Payne agreed to give one-half of all their real estate in the city of Wyoming, Stark county, Ill., except the store and fixtures, and surroundings pertaining to the store, to the said Henry A. White and Nellie T. White, in consideration of the agreement of said Henry A. White and Nellie T. White, on their part, to take care of said Charles S. Payne and Elizabeth A. Payne during their natural lives, and to take care of and keep in repair, in connection with the parties of the first part, the said property in such a manner as would enhance the value thereof, and make it return such profit as to pay all expenses, taxes, and incumbrance, and such claims against the parties of the first part, not to exceed \$400, as might be presented. It was also agreed that the parties of the second part should have the right to move into the house attached to the store, and use the same free of rent, and use such parts of the building as the parties might agree upon, and that both parties should have an equal interest in the management of all the property. It was alleged that the defendants had failed to perform their agreement to take care of the complainant Charles S. Payne, and of his wife, while she lived, and to take care of and keep in repair, in connection with said complainant and his wife, the said property, as agreed, and that the agreement had become burdensome and oppressive, and should be declared null and void. At the date of the

agreement Charles S. Payne was 81 years old, and his wife was 79 years of age, and he was 84 years old when the bill was filed. The defendants moved into the house connected with the store, and boarded. Charles S. Payne and wife, and collected rents from some of the property. Elizabeth A. Payne died May 9, 1902, leaving a last will and testament devising all her property to her husband, the complainant Charles S. Payne. When the agreement was made, she was the owner of three lots, on which the store and fixtures and surroundings were located. The answer of defendants admitted the ownership of the real estate at the date of the agreement by the complainant Charles S. Payne and his wife; admitted the reservation of the store and fixtures and surroundings pertaining to the store, but denied that the three lots mentioned in the bill on which they were located were reserved; admitted the occupation of the house connected with the store, the purchase of household supplies from the store, and the collection of money as rent for the opera house, but denied the other allegations of the bill.

Whether a bill to remove a cloud upon title to real estate involves a freehold, depends upon the nature of the alleged cloud. A bill to remove as a cloud a deed purporting to convey a freehold estate involves the freehold. So, also, a bill for the specific performance of an agreement to convey a freehold estate involves the freehold, but an executory or conditional contract for such a conveyance does not necessarily involve such freehold. *Hutchinson v. Howe*, 100 Ill. 11. In this case the alleged cloud did not purport to convey the fee which was in complainant Payne. He is not seeking to recover a freehold estate, or to set aside an instrument purporting to convey it. No specified time is named in the agreement when the property shall be conveyed, and defendants are not seeking any conveyance or asking any relief, although they insist that they performed their contract up to the time of filing the bill. The contract is a conditional one. If it should be set aside, the freehold would remain where it is; and, on the other hand, if it should be held valid and binding, the defendants would only become entitled to a conveyance upon performance on their part. If they are entitled to a conveyance, they are not seeking a specific performance of the contract, and, in any view, the freehold is not involved in the litigation. *Kesner v. Miesch*, 204 Ill. 320, 68 N. E. 405.

Counsel say the freehold is involved because the answer denied that the lots on which the store, fixtures, and surroundings pertaining thereto were situated were included in the reserved property under the description of "the store, fixtures and surroundings pertaining to the store." That denial only raised a question as to the meaning of the language employed in the contract. If it should be held that the lots were included

in the reservation, they would remain as they are, the property of the complainant Payne; and, if they were not reserved, they would merely be subject to the contract, the same as the other property. The ownership of those lots is not put in issue by the pleadings.

A freehold is not involved in the litigation, and the appeal should have been taken to the Appellate Court. The appeal is dismissed. Appeal dismissed.

(207 Ill. 235)

FORTUNE v. GILBERT.

(Supreme Court of Illinois. Feb. 17, 1904.)

APPEAL—PRAYER FOR APPEAL BY SEVERAL— APPEAL BY ONE.

1. An appeal perfected by one where it was prayed and granted to himself and others jointly is dismissible.

Appeal from Superior Court, Cook County; Jesse Holdom, Judge.

Action by James H. Gilbert, for the use of Kate McGuire, administratrix of the estate of Robert McGuire, deceased, against Peter Fortune and others. From a judgment of the Appellate Court affirming a judgment in favor of plaintiffs, defendant Fortune appeals. Dismissed.

This is an action of debt, brought in the superior court of Cook county by James H. Gilbert, who sues for the use of Kate McGuire, administratrix of the estate of Robert McGuire, deceased, against Catharine McGuire, Patrick O'Toole, Cornelius Hickey, and Peter Fortune, upon a supersedeas bond signed by the defendants below, conditioned that they would prosecute a certain writ of error with effect, and pay the plaintiff mentioned in the bond whatever judgment should be rendered against them should the cause be affirmed. Peter Fortune and Cornelius Hickey demurred to the declaration, and the demurrer was overruled. On November 21, 1899, Peter Fortune and Patrick O'Toole filed their plea, and on November 22d Cornelius Hickey filed his plea, and on November 23d replication was filed to the pleas of Peter Fortune, Patrick O'Toole, and Cornelius Hickey, and on the same day, upon proper affidavit, the cause was placed upon the short-cause calendar, and on January 9, 1900, Catharine McGuire was defaulted. After the cause had been placed upon the short-cause calendar, and upon the same day, plaintiff amended the declaration in the case. Rule 18 of the superior court, as shown by the bill of exceptions, provides that no cause shall be noted for trial on the short-cause calendar until the same is at issue. The cause, however, was at issue when placed upon the short-cause calendar, except as to Catharine McGuire, who had long before that time been served with summons, but had not pleaded, and her default had not been entered. On February 19, 1900, the cause was called for

trial on the short-cause calendar, and the defendants Patrick O'Toole, Cornelius Hickey, and Peter Fortune moved to strike the cause from the short-cause calendar upon the ground that it had been placed there before issue joined. This motion was overruled. Trial was had before a jury, who rendered a verdict for plaintiff below for the sum of \$4,100 debt and \$2,256.60 damages. The cause was appealed by all the defendants below to the Appellate Court for the First District, and on the 20th day of February, 1901, the cause was taken under advisement by the Appellate Court, and on the 4th day of January, 1902, a judgment was entered affirming the judgment below, and an appeal was prayed to this court, but was not perfected. On the 18th day of March the appellant moved to set aside the judgment of affirmance in the Appellate Court, and suggested the death of Patrick O'Toole, one of the defendants, and to continue the cause to the October term, 1902, of said Appellate Court. This motion was allowed, and on the 10th day of March, 1903, appellee moved the court to affirm the judgment of the superior court, but that motion was then denied, and afterwards, on the 28th of April, 1903, the Appellate Court further considered said cause, and affirmed the judgment, from which affirmance the record shows an appeal was prayed by the appellants, the order of the court being: "This day came appellants, by their counsel, and moved the court for an appeal from the order or judgment of this court in said cause to the Supreme Court of Illinois, and the court, being fully advised in the premises, doth order that an appeal be allowed herein to the said Supreme Court on condition that appellants do, within twenty days from this date, execute and file in said cause a good and sufficient appeal bond, conditioned according to law in the penal sum of \$3,000, with surety thereto to be approved by the court." An appeal bond was executed and presented to the court in the proper sum, signed by Peter Fortune alone, with Francis Salter as surety. The bond was approved, and the record brought to this court, and appellee, at the October term of this court, 1903, and before said cause was taken, moved the court to dismiss said appeal upon the ground that the judgment of the Appellate Court was against the three surviving appellants, Catharine McGuire, Cornelius Hickey, and Patrick Fortune, and that, as the prayer of the appeal was by all the living appellants, and the appeal was perfected by only one of them, the appeal was improperly taken, and should be dismissed. This motion was reserved to the final hearing. The only error assigned in the Appellate Court and in this court is the refusal of the court to strike said cause from the short-cause calendar.

M. H. Hoey and Albert H. Meads, for appellant. Moran, Mayer & Meyer, for appellee.

RICKS, J. (after stating the facts). The motion to dismiss the appeal will be allowed. The right of appeal is a statutory right, and can only be availed of when allowed by the court, and must then be in conformity to the prayer for appeal and the order of allowance. Here the appeal was prayed and granted to three of the parties jointly, and perfected by only one of them. It is not in compliance with the prayer or order of appeal. *Carson v. Merle*, 3 Scam. 168; *Hilleman v. Beale*, 115 Ill. 355, 5 N. E. 108; *Ellison v. Hammond*, 189 Ill. 470, 59 N. E. 966; *Tedrick v. Wells*, 152 Ill. 214, 38 N. E. 625; *Town v. Howleson*, 175 Ill. 85, 51 N. E. 712.

Appeal dismissed.

SMITH v. MYERS.

(207 Ill. 126)

(Supreme Court of Illinois. Feb. 17, 1904.)

PROMISSORY NOTE—WHAT CONSTITUTES—STIPULATION TO PAY TAXES.

1. Gen. St. Conn. 1888, § 8323, provides that personal property shall, for the purpose of taxation, include notes: "An instrument was executed in Connecticut in the form of a note, and promising to pay a certain sum 'at the Fourth National Bank. Value received, with interest at six per cent. per annum and taxes.'" Held not a promissory note—the amount being indefinite, on account of the stipulation as to taxes, which could not be rejected as surplusage—and hence a blank indorsement thereof did not create any liability under section 1860, providing that the blank indorsement of a negotiable or nonnegotiable note by a person who is neither its maker nor payee, before or after the indorsement thereof by the payee, shall import a contract of ordinary indorsement of negotiable paper, etc.

Appeal from Appellate Court, First District.

Action by Dwight L. Smith against Johnston Myers. From a judgment of the Appellate Court (107 Ill. App. 410) affirming a judgment for defendant, plaintiff appeals. Affirmed.

Hoyne, O'Connor & Hoyne, for appellant. Blewett Lee, for appellee.

RICKS, J. This is an appeal from the Appellate Court for the First District affirming a judgment of the circuit court of Cook county against appellant for costs in a suit brought by appellant against appellee in an action of assumpsit. The action was upon the following instrument in writing:

"Waterbury, Conn., Aug. 1, 1893. One year after date I promise to pay to the order of Norman D. Grannis thirty-five hundred dollars at the Fourth National Bank. Value received, with interest at six per cent. per annum and taxes. Due August 1, 1894. W. C. Myers."

Indorsed on the back as follows:

"Feb. 8, 1894, rec'd \$532.87 on within note.

"Dec. 8, 1894, rec'd on within note \$49.23.

"Dwight L. Smith, Aug. 3d, 1893.

"Rev. Johnston Myers, Cin., O., July 31, 1893.

"N. D. Grannis."

The declaration contained two special counts and the common counts. The first special count was by appellant as second indorser, and against appellee as first indorser. The second special count was by appellant, as indorser or assignee of the note, against appellee as indorser. The averment in each count was that the indorsement was made before the delivery of the note; that the contract was made and delivered at Waterbury, Conn., and that by the laws of that state the blank indorsement of a negotiable or nonnegotiable note by a person who is neither its maker nor its payee, before or after its indorsement by the payee, shall import the contract of an ordinary indorsement of negotiable paper, as between such indorser and the payee or subsequent holder of such paper.

When the instrument and the indorsements sued on were offered in evidence, objection thereto was made by counsel for appellee, first, on the ground of variance between the instrument and the declaration; second, because a material alteration appears to have been made by adding the words "Aug. 3d, 1893," after the signature "Dwight L. Smith"; third, because it appears from the note that Smith is a prior indorser, and therefore cannot recover from Myers, a subsequent indorser; and, fourth, because the words "and taxes" make the amount due uncertain, and deprive the note of negotiability. A specific objection was made to the words "Aug. 3d, 1893," after the signature of Dwight L. Smith, upon the ground that such words were, in effect, the offering of parol evidence to change or vary the effect of Smith's indorsement. To these objections the court ruled, "For the present, I will admit the note in evidence." Appellant then proved, by depositions, that the payee and maker of the note, as well as appellant, all lived, at the time of the execution and delivery of the instrument, in Waterbury, Conn., and also proved that, after the time of payment arrived, payment was not made by the maker, and protest was had for nonpayment; that the amounts appearing as credits upon the instrument were paid by the trustees of the maker, the latter having become insolvent; and that appellant paid the balance due thereon at the time he received the note. There was no proof of any consideration having been paid appellee for his indorsement.

Appellee introduced in evidence sections 1860 and 3823 of the General Statutes of Connecticut in force January 1, 1888, as follows:

"Sec. 1860. The blank endorsement of a negotiable or non-negotiable note by a person who is neither its maker nor its payee, before or after the endorsement of such note by the payee, shall import the contract of ordinary endorsement of negotiable paper, as between such endorser and the payee or subsequent holders of such paper."

"Sec. 3823. Personal property in this state

or elsewhere, not exempt by its title, shall, for the purpose of taxation, include all notes, bonds and stocks," etc.

Appellant offered to prove a certain conversation between him and the maker of the note at the time he became an indorser, for the alleged purpose of showing that it was a condition of his indorsement that appellee should also indorse, and further offered to prove by certain alleged letters of appellee that appellee had recognized or admitted some liability to appellant by reason of having indorsed the instrument, and had made certain offers of settlement. This evidence was excluded by the court.

The trial was before a jury, and appellant asked the court to instruct the jury to find a verdict for him. This instruction the court refused, and, at the request of appellee, gave an instruction to find the issues for the defendant, which was done, and judgment for defendant for costs was accordingly entered.

Numerous errors are assigned, among which are the refusal of the court to admit the excluded evidence mentioned, and the admission of certain evidence on behalf of appellee, and the refusal of the court to give the instruction asked by appellant, directing a verdict in his behalf, and the giving of the instruction as requested by appellee.

The contention of appellant is that the instrument sued on is a promissory note, carrying with it all the legal effects and incidents of such writing, while the appellee contends that said instrument is only an ordinary contract for the payment of money, and not a promissory note, because of the addition of the words "and taxes," following the provision for interest, and preceding the name of the maker.

If the instrument sued on is a promissory note, we think the clear legal inference from the facts shown by the record is that it was delivered at Waterbury, Conn.; and the rule seems to be that, in an action upon a negotiable instrument, the law of the place where the same is delivered and negotiated is to control in determining the liability, if any, thereon. *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76. And the place where a contract is made depends, not upon the place where it is actually written, but on the place where it is delivered, as consummating a bargain. 1 Daniel on Neg. Inst. 660. Under the statute of Connecticut, as introduced in evidence, if the instrument in question can be held to be a promissory note, the relation between appellant and appellee to the same was that of indorsers, and not of guarantors (*Spencer v. Allerton*, 60 Conn. 410, 22 Atl. 778, 13 L. R. A. 806), as the statute declares that, whether the indorsement be before or after the indorsement by the payee, it shall import the contract of an ordinary indorsement. If the instrument is not a promissory note, then it is clear that appellee bore no such relation to it as would render him liable under the proof disclosed in this record.

Upon a mere contract for the payment of money or the performance of any other covenant, where the instrument is not such as comes within the definition of a negotiable instrument, one by merely signing his name upon the back thereof does not become either a guarantor or an indorser, within the law merchant. There are many instruments that may be transferred by assignment of the holder or payee, and which are sometimes called "negotiable instruments," such as bills of lading, warehouse receipts, and other assignable contracts, for the performance of the terms or covenants of which one may become a guarantor; but the contract of guaranty on such instrument will not arise by the mere signing of the name of a person, not a party thereto, on the back thereof. We take it the only possible relation between the parties here, under the law, if it could be held that the instrument in question is a negotiable instrument, would be that of indorsers; and the relation of indorsers, which appellee and appellant must have borne to the instrument in question, is, in a technical sense, applicable only to a relation touching negotiable paper. While to write one's name on the back of a writing is literally to indorse it, in its technical sense, and in the sense in which it is used when applied to negotiable paper, it means writing one's name thereon with intent to incur the liability of a party who warrants payment of the instrument, provided it is duly presented to the principal at maturity, and is not paid by him, and such fact is duly notified to the indorser. 1 Daniel on Neg. Inst. 667. Such was the rule of the law merchant, which has been modified to some extent in this state, where such instruments are controlled by the laws of this state, by requiring that suit be timely brought, or that it be shown that suit would be unavailing.

A promissory note, as defined by the English bills of exchange act (section 83), is "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a certain sum in money to, or to the order of, a specified person or to bearer"; or as usually defined: "An unconditional promise in writing for the payment of a certain sum of money absolutely and in all events." 4 Am. & Eng. Ency. of Law (2d Ed.) 77. And as defined by Chitty: "A promise or agreement in writing to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer." Chitty on Bills, 516. Many definitions are given, varying only in that in some of them the parties to such instruments are specified more particularly, and the time of payment is stated in different terms; but all agree that, in order to constitute a promissory note, the instrument must be for a specified sum or certain sum of money. *Lowe v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742.

If effect is to be given to the language of this instrument, and no part of it is to be rejected, then it is quite clear that by the addition of the words "and taxes"—which must, if they have any meaning at all, refer to the taxes upon the instrument itself, or the money loaned and represented by it—the amount of which is not fixed by the instrument, nor is there any means found in the instrument by which the amount can be fixed, and resort to extrinsic evidence being necessary to fix the same, it necessarily follows that the sum to be paid is uncertain, and the instrument is not a promissory note. *Lowe v. Bliss*, supra; 4 Am. & Eng. Ency. of Law (2d Ed.) 77; 7 Cyc. 596; *Hill v. Todd*, 29 Ill. 101; *Dorsey v. Wolff*, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99; *Agrey v. Fearnslides*, 4 M. & W. 168; *Howell v. Todd*, Fed. Cas. No. 6,783; *Farquhar v. Fidelity Trust & Safe Deposit Co.* 13 Phila. 473; *Walker v. Thompson*, 108 Mich. 686, 66 N. W. 584; *Carmody v. Crane*, 110 Mich. 508; *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779; *Lockrow v. Cline* (Kan. App.) 46 Pac. 720; *Brooke v. Strothers*, 110 Mich. 562, 68 N. W. 268; *Garnett v. Myers* (Neb.) 91 N. W. 400.

Appellant contends, however, that the word "taxes" is so indefinite and so uncertain, when read in connection with the entire instrument, that it ought to be rejected as surplusage, and, in support of that contention, refers to *Hoyt v. Jaffray*, 29 Ill. 104; *Hill v. Todd*, Id. 101; and *Bilderback v. Burlingame*, 27 Ill. 338. We do not think the cases cited support the contention of appellant. *Lowe v. Bliss*, supra, was an action by the payee against the maker of an instrument in the form of a note for the payment of a certain sum of money at the bank of Kankakee, Ill., "with current rate of exchange on New York." In that case special counts were filed in the declaration upon the note, but there was an omission to state anything in regard to the provision for the New York exchange. Objection was made to the instrument being admitted in evidence on the ground that there was a variance between it and the declaration, and that objection was overruled. On appeal to this court the judgment of the lower court was reversed, and it was held that the instrument was not a promissory note, because of the provision as to current exchange on New York, which made the sum to be paid uncertain, as exchange varied from time to time, and in different banks and localities. In that case the note was executed and delivered in New York. In *Hill v. Todd*, supra, the note was delivered in Chicago, Ill., and payable at the office of the payee "in this city," and was for a certain sum of money, "with current rate of exchange." In that case it was held that, as the note was delivered and payable in Chicago, there could be no exchange when paid at the place where payment was provided for, and that the words "with current rate of exchange" could

be rejected as surplusage. *Hoyt v. Jaffray*, supra, was upon an instrument in the form of a note, payable at Miller's Bank, Aurora, Ill., "with current rate of exchange on New York," and, following the case of *Hill v. Todd*, supra, the provision with reference to exchange was held to be surplusage, and the instrument a promissory note. In *Bilderback v. Burlingame*, supra, the action was upon an instrument reading: "Due W. B. Goddard, \$450.00; to be paid in lumber when called for; in good lumber at \$1.25." That instrument was held to be a promissory note, and it was further held that, as against the maker, it was not necessary to prove the consideration.

By the statute of Connecticut, if the instrument in question had been a promissory note—and, without the provision to pay taxes, it unquestionably would have been—it was subject to taxation. *Howell v. Todd*, supra, was a case in the United States Circuit Court in Connecticut upon a note very similar to this, and the court there said in reference to the same: "The second ground is that the amount to be paid is uncertain, for it provides for the payment not only of interest, which is certain, but also of taxes, the amount of which must necessarily be uncertain until they are assessed or imposed according to law. The instrument in question quite certainly is not a promissory note."

As has well been said by counsel for appellee, from reading the instrument it is quite as certain what subject the word "taxes" relates back to, as the word "interest." The expression is, "with interest at six per cent. per annum and taxes." There is a period after "Fourth National Bank," and the expression following is, "Value received, with interest at six per cent. per annum and taxes." Of course, from long usage and common knowledge no one would hesitate to interpret the instrument as meaning that the interest should be paid upon the debt described in the note; and we see no reason for doubting that the intention of the parties was to contract that the maker of the note should pay the taxes on it, in addition to the principal debt and interest thereon. The provision in the instrument in *Agrey v. Fearnside*, supra, was for a certain sum of money, and "all fines according to rule"; and it was insisted there, as here, that the words in quotation marks should be rejected as insensible, and therefore mere surplusage. *Park, Baron*, delivering the opinion, said: "It is quite possible that they have a meaning, and may import that certain pecuniary fines or forfeitures are to be paid by the defendants; and, if so, this is certainly no promissory note, within the statute, but is a specific agreement to do certain things, the consideration for doing which not being stated, the declaration is clearly bad."

In *Farquhar v. Fidelity Trust & Safe Deposit Co.*, supra, the instrument provided for

the payment of \$5,000, "together with all taxes and charges in the nature thereof that may be levied upon this note, or upon the indenture or mortgage accompanying the same, or the principal or interest moneys thereby secured, immediately upon their assessment." Speaking of this provision, the court said: "Overlooking the clause touching attorney's commission, how can it be said that the notes are either unconditional or certain in amount, in view of the stipulation for the payment of taxes, or charges in the nature thereof, assessed upon the principal or interest? Liable to taxation as the property is in the hands of the holders (and this is the import of the stipulation), in some places they would probably be free from this charge, while in others they may be subjected to indefinite and varying rates of taxation, so that the amount to be paid by the maker, either before or at the maturity of the notes, would fluctuate according to collateral circumstances, and be dependent upon the domicile of the holder. And of these contemplated charges or additions to the nominal consideration, the notes themselves indicate no standard of measurement. They could only be ascertained by reference to extrinsic circumstances, and thus the amount to be paid by the maker is left indeterminate and subject to possible contention. Instruments whose consideration is thus fluctuating and indefinite, and which are laden with such embarrassments to their circulation, could not perform the functions, and therefore do not possess the character, of negotiable paper." And so in the case at bar the instrument sued on provides for the payment of taxes. Whether the taxes shall be paid annually or semiannually, whether before the note becomes due or after, or at the time of its maturity, is uncertain. By the law merchant, and by the statutes of the states in aid thereof, negotiable instruments occupy a highly useful and valuable place in the commerce and business of our people. There is no other form of contract known that in so few words may contain so many well-understood and thoroughly established legal rights and liabilities. Their presence and use are a boon, and to destroy or to materially impair them would be a business calamity. To permit, by strange and unusual provisions, matters in no way relating to or affecting trade or commerce to be incorporated into them, unsettles established rules of construction, and makes that dangerous and uncertain which before was definite and well understood. We are unwilling to assent to the contention that such instruments can or ought to be construed as negotiable instruments or promissory notes.

Under these views, it is unnecessary to discuss other questions urged, as this seems decisive of the case, and the judgment of the Appellate Court will be affirmed. Judgment affirmed.

(207 Ill. 230)

GLOS v. FLANEDY.

(Supreme Court of Illinois. Feb. 17, 1904.)

REFERENCE—COMPENSATION OF MASTER—STENOGRAPHER'S FEES.

1. Under 2 Starr & C. Ann. St. 1896, c. 90, par. 9, § 9, providing that the compensation allowed by law to masters in chancery shall be taxed as costs, a master to whom a cause was referred to take proof of the allegations in the bill, and report, with his opinion, on the law and the evidence, was liable for the fees of a stenographer if he saw fit to employ one, and he could not demand payment of such fees from the parties, and refuse to take their evidence on failure to comply.

Hand, C. J., and Cartwright, J., dissenting.

Appeal from Circuit Court, Cook County; B. S. Tutbill, Judge.

Bill by Ellen Flanedy against Jacob Glos. Decree for plaintiff, and defendant appeals. Reversed.

Enoch J. Price, for appellant. Robert Van Sands, for appellee.

RICKS, J. This was a petition filed by Ellen Flanedy in the circuit court of Cook county on March 28, 1902, to establish and confirm her title to certain property in the city of Chicago under the burnt records act. Appellant, Jacob Glos, was made a party defendant to the petition, and filed an answer denying the petitioner was the owner in fee simple of the property described in the petition, and, on the contrary, alleged that himself and Emma J. Glos are the owners by reason of a certain tax deed, and denied that their deed was void, etc. Replication was filed, and the cause referred to George Mills Rogers, master in chancery, to take proof of all the material allegations in the said bill, and report the same to the court, with his opinion on the law and the evidence. The cause was heard on the report of the master, together with the evidence and exhibits, and the court found that the master had complied with all the provisions of the order of reference, and that the issues are with the petitioner. Objections were filed to the master's report, and exceptions, which were practically the same as the objections, were filed in the circuit court and were overruled. A decree was entered in accordance with the facts set out in the petition, and all costs were adjudged against the petitioner, Flanedy, and an appeal was prayed by Glos and allowed to the Supreme Court.

Of the numerous exceptions filed and overruled by the court none but the second was discussed by appellant, and under our view of the law the overruling of this exception is reversible error and disposes of the case, the same being as follows:

"Second. For that said report is not based on the evidence presented by both parties to said proceeding, as directed by the order of reference herein, but is based on the evidence offered by the petitioner, said master having refused this defendant an opportunity

to present evidence in his behalf before him, excepting as to the examination in chief as to one witness."

During the progress of the taking of testimony the following took place between appellant and the master: "The Master: Let's see; I want some sort of an understanding here. It just occurred to me a little while ago. I want it understood that I am not employing these stenographers; that I am here ready to take the testimony myself, if anybody wants to do it that way. In other words, I am not responsible, personally, for the taking of the testimony by these stenographers, and I expect to charge for my services as master independent of the stenographers' charges. In other words, my position is that unless you gentlemen are willing to employ stenographers for your own convenience in the case I am prepared to take it myself. Mr. Glos: I am satisfied that the master should take it in longhand. This is not my case, and I am simply here as defendant." After taking some testimony on this day, the hearing was adjourned to a subsequent day. The record shows: "Mr. Glos said he was ready to proceed with his testimony. The master told him he had sent him a bill for taking testimony on his behalf (\$2.60), and it had not been paid, and that he would not render further services to Mr. Glos until the bill was paid. Mr. Glos refused to pay the bill, and after discussion the cause was continued until the 13th of November. At that meeting the master demanded of appellant \$5 for the time consumed at the last hearing, which appellant refused to pay, and offered to proceed with the evidence, and asked to cross-examine certain witnesses that had been examined for the petitioner. This the master refused, and refused to hear further evidence without the payment of fees, and continued the hearing until the 20th of November. At that meeting the master stated that he had no technical right to demand the \$5 previously demanded, and would forego the payment of that amount, but would insist upon the payment of the bill that he had rendered for testimony taken before proceeding further with the case or allowing appellant to examine or cross-examine any other witnesses. Counsel for appellant then stated that appellant would not pay the taxed costs, and tendered the appellant as a witness, and asked to be allowed to proceed with the testimony, which the master refused. Witnesses for petitioner, in rebuttal, were then called and testified, but the master refused to permit appellant to cross-examine such witnesses, stating to appellant: 'You have the matter in your own hands. You can have your opportunity at any minute by paying for it. I guess Mr. Glos is able to pay the \$2.60, or whatever it is.'"

The master in chancery, by virtue of his office, has certain powers and duties to perform. Some of these duties are purely ministerial, for the performance of which he de-

gives his authority from the statute, such as administering oaths, acknowledging deeds, and taking depositions, in the discharge of which duties he is allowed by law to charge the fees provided by the statute, and to demand the payment from those for whom and as the services are performed. There are other duties, judicial or semijudicial, performed by him by virtue of the statute, such as hearing applications for writs of ne exeat, injunction, and habeas corpus. In the matters of application for ne exeat and injunction the statute expressly provides that the fee shall be \$5, "to be advanced by the complainant and taxed with the costs." This latter is the only provision in the statute wherein such officers are called upon to perform duties of a judicial or semijudicial character, directly authorizing the master to demand his fees from the litigant. In all matters, when appointed by the chancellor by virtue of his office, such as the taking and reporting of testimony, computing the amount due on which to render a decree and making report thereof, examining questions of law and fact in issue by the pleadings and reporting conclusions, and all other matters where his authority is derived from an order of the court, the master is then a part of the court, and his fees and compensation are constantly subject to the supervision of the court, and we know of no authority, statutory or otherwise, which authorizes him to demand of the parties litigant, as the causes proceed before him under references from the court, the payment of the fees or any part thereof. The law is that such fees shall be taxed as costs (2 Starr & C. Ann. St. 1896, c. 90, par. 9, § 9), and the courts will not suffer their proceedings to be impeded or interfered with by the quibbles of officers and litigants as to the payment or advancement of fees. It was wholly within the discretion of the master whether he would employ or use a stenographer in the taking of the testimony. It is his duty to take it, and the court is not concerned as to the manner in which he does that—whether it be by a stenographer and the notes transcribed under the direction of the master, or whether it be in longhand, in the writing of the master or some other person under his direction. If the master deems it desirable to have the services of a stenographer, he unquestionably has that right; but in such case the stenographer is in the employ and subject to the control of the master, and not of the parties or either of them, and the stenographer must look to the master for his compensation. *Schnadt v. Davis*, 185 Ill. 476, 57 N. E. 652. Under the order of reference it was the duty of the master to take the evidence of the witnesses and reduce it to writing, and it was likewise his duty to not only take the evidence of the witnesses adduced by the petitioner, but also of those adduced by the defendant, and to accord to each party the full right of cross-examination. To do less would be but to

make a pretense of inquiry, and bring upon a court of equity unjust and undeserved reproach; and when the evidence was taken it was the duty of the master to report it to the court with his conclusions, as such was the order of reference, with his costs noted upon his report, so that the same might be subject to the order of the chancellor and taxed to the proper parties.

The decree will be reversed, and the cause remanded for further proceedings in conformity with the views herein expressed. Reversed and remanded.

HAND, C. J., and CARTWRIGHT, J., dissent.

(207 Ill. 328)

KLOSS v. WYLEZALEK et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

HOMESTEAD—ABANDONMENT BY WIDOW—TERMINATION OF CHILDREN'S RIGHTS—PARTITION—DECREES—APPEAL—WHO PREJUDICED.

1. Where, after the death of her husband, the widow remarried and moved to the home of her second husband, some of her children accompanying her, and none of them remaining at the homestead of the first husband, she thereby abandoned and lost her right of homestead in the property of her first husband, and did not regain it on returning to it after living with her second husband for six months; being still in duty bound to return to her second husband, and having an undisputed homestead right in his property.

2. The abandonment of the homestead by the mother on the death of the father will deprive the minor children of their homestead rights.

3. The law favors partition of land among tenants in common, rather than a sale thereof and a division of the proceeds, and it is only when the land itself cannot be partitioned that a sale may be ordered.

4. Where complainants in a partition suit held title in common, a decree adjudging eight-ninths of the property to be subject to a homestead right was prejudicial to the complainant, whose interest was held not to be subject to the homestead, as, under the decree as it was rendered, the interests could only be severed by a sale of the premises, whereas, without the homestead, the tenancy would presumably have been severed by partition.

Error to Circuit Court, Randolph County; B. B. Burroughs, Judge.

Bill for partition by Herman Kloss against John Wylezalek and others. There was a decree ordering the land sold subject to dower and homestead, and complainant brings error. Reversed.

H. Clay Horner, for plaintiff in error. Gordon & Irose, for defendants in error.

WILKIN, J. Emanuel Wylezalek was the owner of the northwest quarter of the southwest quarter and the west fractional half of the northwest quarter of section 24, etc. He, together with his wife, Michalena, mortgaged both tracts to plaintiff in error; releasing, we assume, their right of homestead, which, however, is immaterial in the decision of this case. Afterwards the husband died intestate.

¶ 2. See *Homestead*, vol. 25, Cent. Dig. § 277.

tate, leaving surviving him Michalena, his widow, and six children. The widow gave a second mortgage to plaintiff in error on the same land. She, of course, had no right in the fee at that time which she could mortgage, but thereafter two of the children died intestate and unmarried, and she inherited their undivided interest, being one-ninth thereof, which, by virtue of the last-named mortgage, with its covenants of warranty, inured to the plaintiff in error, and became subject to his second mortgage. Whether the homestead right was released in that mortgage does not appear. After the death of the two children, he filed a bill to foreclose both mortgages in one proceeding, and a decree of sale was rendered in pursuance thereof, under which the first piece of land above described was sold to satisfy the first mortgage, and the one-ninth of the second tract was sold to satisfy the second mortgage. Plaintiff in error obtained a deed for said undivided one-ninth, and then filed this bill to partition the said fractional quarter. By his bill he sets up title to the undivided one-ninth thereof in himself, and to two-ninths in each of the four surviving children; their interest subject to their mother's dower. Decree for partition was rendered, finding all interests as set up in the bill, but decreeing the eight-ninths owned by the children subject to a homestead right in their mother, as well as dower. Commissioners were appointed to set off the dower and homestead and make partition, but they reported that dower and homestead could not be assigned and partition made, appraising the value of the premises at \$300. The court approved their report, and entered a decree ordering the land sold subject to said dower and homestead, and from that decree plaintiff in error has sued out this writ.

There is but one controversy between the parties in this court, and that is whether or not the circuit court committed error in adjudging homestead to the surviving wife of Emanuel Wylezalek in the eight-ninths of said land, and ordering the same sold subject thereto. There was in fact no issue in the court below on that question raised by the bill and answer, but it seems that that question is waived here.

The testimony shows that the widow, after the death of her husband, remarried, and is known in this record as Mrs. Gorzney. She testified as follows: "After marrying said Gorzney, I left my said homestead of my deceased husband, and went to reside on a lot in Chester, Illinois, on which lot said Gorzney resided. Said lot was, and yet is, owned by said Gorzney, and occupied by him as a homestead, and was so owned by him prior to our marriage. I lived with him on said lot in Chester for about six months, when, as we could not agree, I went back to the real estate sought to be partitioned in this suit, and have resided thereon with my children ever since. I am still the wife of

Stanislaus Gorzney, and he still lives on said lot in Chester. My children did not live on the premises sought to be partitioned while I was living with said Gorzney. Some of my children went with me to Chester. Some did not. Some remained in the country. I did not move all my things to Chester, but left some of them on the place. We moved to Chester with the intention of trying it, and to see if we could get along and like it, and, if we did not, we could move back. We could not get along, and moved back."

It was insisted in the court below, and is again urged here by counsel for the plaintiff in error, that, upon this testimony, which was all that was introduced on that subject, the widow had abandoned whatever homestead rights she had in the premises in question, and we think the position well taken. When she married her second husband, and removed with him to his homestead in Chester, she unquestionably intended to, and did, at least for the time being, abandon her home on this land. She does not claim that she did so with a purpose and intention of returning and reoccupying the old home. All that she claims is that she went to Chester with the intention of trying it, and to see if she could get along and like it, and, if not, could move back, and then says, "We could not get along, and moved back." For anything appearing in her testimony, she may at any time again change her mind, and return to her husband's homestead, and continue to live there; and there is nothing whatever in this record to show that it is not her duty, as his wife, to do so. "Where there is a removal from the homestead premises, it will be taken as an abandonment, unless it clearly appears that there is the intention to return and occupy it." *Jackson v. Sackett*, 146 Ill. 646, 35 N. E. 234, and cases cited. An equivocal intention to return is not sufficient. *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247. In other words, a person cannot cease to occupy a homestead, with the intention that he or she may or may not return, depending upon future conditions or circumstances, and still retain the homestead right.

The case of *Buck v. Conlogue*, 49 Ill. 391, is somewhat similar in its facts to the case at bar, with the distinction that it there appeared that, after her second marriage, Mrs. Morse (the party claiming the homestead, and removing with her husband to property owned by him in Sterling) still entertained the intention of returning with her husband to the former home in La Salle; but when that intention was to be executed did not appear, and she had not returned at the time the action was brought in which she attempted to set up her homestead rights. We there announced the uniform holding of this court to be "that where the husband removes from the homestead with his family, and acquires another home, the right is lost"; citing *Titman v. Moore*, 43 Ill. 169, and *Cabeen v. Mul-*

lign, supra. And we further said: "From the evidence in the cause, we are satisfied that there was such an abandonment by the widow as precludes her from asserting the right. Her husband's home is her home, and she cannot insist that she has not acquired a new one, and by its acquisition she lost the right of homestead."

That a party cannot, under our statute, have two rights of homestead at the same time, is too well settled to need the citation of authority, and we are at a loss to perceive how the claim of Mrs. Gorzney to a homestead in this land can be sustained without violating that well-settled principle. The fact that she had returned to the premises before this proceeding was begun is, we think, unimportant. As already said, for anything appearing in this record, she may at any time lawfully and with perfect right return to the home of her husband, and she does not even say that she does not intend to do so. His home being her home, and it being her duty, as his wife, to live with him, every presumption must be that she will perform her duty in that regard. If the husband should die, she could unquestionably, on the facts in this record, claim and maintain her right of homestead in the Chester property. Having an undisputed right of homestead there, she cannot have it here. That her abandonment terminated the right of homestead in her children has also been repeatedly decided. Although infant children have rights in the homestead, they are necessarily under the control of their parents during the joint lives of the latter; and, as the mother becomes the head of a family upon the death of the father, her abandonment of the homestead will deprive such children of their homestead rights. *Shepard v. Brewer*, 65 Ill. 353.

It is insisted, however, by counsel for defendants in error, that, under his bill and the decree of the circuit court, plaintiff in error cannot question the decree below in adjudging homestead. Their position is that inasmuch as he claims by his bill but one-ninth of the property in fee, and the decree gave him that, he has received all he asked for, or that, as the homestead is decreed only against the eight-ninths, he cannot complain. However plausible the contention may at first impression seem to be, we do not regard it as sound. The interests as set up in the bill, though distinct, were held by the parties in common, and as shown by the report of the commissioners, with the homestead upon the undivided eight-ninths, could only be severed by a sale of the premises. Had the court decreed the eight-ninths to the children, subject only to dower, as averred in the bill, the sale might have been, and, presumably, in the absence of proof to the contrary, would have been, void, and the tenancy in common severed by partition. The law favors partition of land among tenants in common, rather than a sale thereof and

a division of the proceeds, and it is only when the land itself cannot be partitioned that a sale may be ordered. In this view of the law, we think the decree of the court below, erroneously adjudging homestead to Mrs. Gorzney was harmful to plaintiff in error, and therefore he has the right to complain.

The power to order a sale subject to the homestead is not involved here. That and other questions which might arise upon the record are waived by counsel, and not here considered.

For the reason stated, the decree of the circuit court will be reversed, and the cause remanded to that court, with directions to proceed in accordance with the views herein expressed. Reversed and remanded.

(207 Ill. 411)

WORMLEY v. WORMLEY et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

CEMETERIES—DEDICATION—WHAT CONSTITUTES—RIGHTS OF PUBLIC—OBLIGATIONS OF FEE OWNER—INJUNCTION—GROUNDS—DESECRATION OF CEMETERIES—EQUITY PRACTICE—APPEAL—ORDERS REVIEWABLE—WAIVER—SEVERANCE—JURATS—DEFECTIVE VERIFICATION—EFFECT.

1. Cemeteries are among the purposes for which land may be dedicated.

2. Equity will enjoin the owner of land dedicated to the public for burial purposes from defacing or meddling with graves thereon, at the suit of any party having deceased relatives or friends buried therein.

3. No particular form of ceremony is necessary to dedicate land for cemetery purposes, but all that need be shown, to constitute dedication, is the assent of the owner, and the fact that the land is used for the purposes intended by the appropriation.

4. A bill alleging that, during the lifetime of the original owner of land dedicated for cemetery purposes, such owner recognized the land as a cemetery for a period of about 51 years, during which time he not only buried his own relatives therein, but permitted others to bury their dead, and erected and maintained a suitable fence inclosing the land, permitting the persons making interments to erect monuments, and to protect and preserve the identity of the remains there buried, there being in all more than 80 persons buried in the cemetery, whose graves had been cared for by their relatives; and further alleging that, since the death of the original owner, his son for more than 10 years thereafter recognized the land as a cemetery, and did nothing to interfere with its use until near the time of the filing of the bill, when he committed acts of depredation, by tearing down the fence, and by pasturing cattle, horses, and swine, and threatening to kill persons who attempted to repair the fence or care for the monuments and graves therein, and also threatened to remove the monuments, and to plow and cultivate the land—stated good grounds for injunctive relief at the instance of one having relatives buried in the cemetery, and who had continued to protect the remains of those buried therein, and to preserve their identity and their memory by monuments.

5. Where the court, on sustaining a demurrer to a bill, also dismissed it for want of equity, the order for dismissal was not an interlocutory order, like the order sustaining the demurrer, but was a final order, reviewable on writ of error, independently of the question whether complainant, by taking leave to amend the bill,

waived his right to complain of the action of the court in sustaining the demurrer.

6. Where a bill for an injunction shows sufficient equity to require an answer, it is not dismissible on general demurrer, although the jurat is so defective as to authorize the dissolution of a temporary injunction.

7. Where several complainants join in a bill which is dismissed for want of equity, one of them alone can sue out and maintain a writ of error where he joins the others as defendants in error, and they appear without assigning errors or cross-errors, as such conduct on his and their part creates a severance.

Error to Circuit Court, Kendall County; Chas. A. Bishop, Judge.

Bill in chancery by George D. Wormley and others against John T. Wormley. There was a decree dismissing the bill for want of equity, and complainant George D. Wormley brings error, joining his co-complainants as defendants in error. Reversed.

This is a bill in chancery filed in the circuit court of Kendall county on June 10, 1899, by the plaintiff in error, George D. Wormley, and all of the defendants in error except John T. Wormley (said defendants in error, except John T. Wormley, being 10 in number), as complainants, against defendant in error John T. Wormley, as defendant. A general demurrer was filed to the bill. On January 4, 1901, the demurrer was sustained. Subsequently, on April 3, 1901, the bill was dismissed for want of equity, and the costs were taxed against the complainants below, and it was ordered that the defendant below have execution therefor. The present writ of error is sued out for the purpose of reviewing the decree so entered, which dismissed the bill for want of equity.

In the bill, the orators therein being plaintiff in error, George D. Wormley and 10 other persons, who are defendants in error herein with the defendant in error John T. Wormley, alleged that in February, 1839, and prior thereto and thereafter, one John H. Wormley was the owner in fee of a certain tract of 80 acres of land in said county, and also was the owner in fee of other lands particularly described in the bill; that such other lands so described constituted in all one-half acre; that said one-half acre of land so described was generally known as the "Wormley Cemetery," and had been so known and recognized ever since the year 1839; that in February and June of 1839 two of John H. Wormley's relatives were buried in said one-half acre of land; that in 1845 a brother-in-law of his was buried on said half acre; that in 1845 John H. Wormley, being the owner of said one-half acre, and of other lands about the same, whereon he resided, dedicated by words and acts said half acre for a burying ground for the uses of the Wormley family and their relatives; that ever since 1839 said half acre has been used by the Wormley family and the neighborhood for the uses of sepulture; that since the year 1845 there have been buried on said dedicated land many persons, the names of about 80 of

whom are mentioned in the bill, being of the Wormley family, and relatives of orators; that monuments have been erected over the graves of many of said decedents, many of them by orators; that orators and other relatives of said decedents have continued to protect the remains of those buried in said cemetery, and to preserve the identity and memory of their said relatives; that orators have not in any manner neglected to preserve the monuments erected to indicate the identity and preserve the memory of their said relatives, or to give and continue to said cemetery the character and name of a burial ground, except so far as they have been prevented by John T. Wormley, the defendant; that there were then, at the time of filing the bill, in said cemetery, more than 80 graves cared for and kept by orators and other relatives of the deceased; that John H. Wormley settled in Oswego, in Kendall county, several years before 1839, and resided on and owned the farm on which said cemetery is located from the time of such settlement until the time of his death, about the year 1890; that during all that time he recognized said cemetery as the burial ground of his relatives and the neighborhood, and assisted in maintaining the same as such; that during his lifetime he, with other relatives of those buried in said cemetery, caused to be erected and maintained a suitable fence inclosing said half acre dedicated by him as a cemetery; that such fence was kept up by orators and other relatives of the deceased until prevented by the defendant in a violent and unlawful manner; that, upon the death of John H. Wormley, the defendant, John T. Wormley, as his son and heir, came into the ownership and possession of the farm on which said cemetery is located, and still owns and possesses the same; that, for many years after his coming into such ownership of said farm, he recognized the said cemetery as the burying ground of and for the Wormley family and neighborhood, and that the same had been dedicated by his father, John H. Wormley, for such purposes; that said cemetery is located on said farm, on the line of the Aurora and Oswego Wagon Road, and ingress and egress in and out of said cemetery can be had without in any way interfering with or trespassing on the lands or premises of the defendant, John T. Wormley; that lately said defendant has torn down the fence surrounding said cemetery, and is pasturing cattle, horses, and swine therein; that he has defaced and is defacing the monuments and desecrating the graves in said cemetery; that he threatens to shoot and kill any persons who attempt to fence said cemetery, or care for the monuments and graves therein; that he threatens to enter and remove the monuments therein, and to plow and cultivate the land therein; that by threats and force he prevents orators and other relatives of the buried from replacing the fence, or

caring for the monuments and graves in said cemetery; that orators fear that he will carry his threats into execution, unless restrained by the order of the court. The bill thereupon prays that John T. Wormley may be restrained by injunction from defacing or in any manner interfering with the monuments and graves in said cemetery, or with orators, or any one of them, in fencing said cemetery, and preserving the monuments and caring for the graves therein, or in any way interfering with the fence or fences of said cemetery now or hereafter erected; that upon a final hearing it may be ordered and decreed that said described one-half acre of land, known as the "Wormley Cemetery," has been dedicated to the Wormley family and their relatives, and neighborhood contiguous thereto, as a burying ground; that said injunction may be made perpetual, and orators may have such other relief as equity may require, etc.

Aldrich & Worcester, for plaintiff in error.
Hopkins, Dolph & Scott, for defendant in error John T. Wormley.

MAGRUDER, J. (after stating the facts).

1. It is well settled in the United States that cemeteries are among the purposes for which land may be dedicated, and it is held that, upon such dedication, the owner is precluded from exercising his former rights over the land. 5 Am. & Eng. Ency. of Law (2d Ed.) p. 784, and cases referred to in notes.

It is also well settled that a court of equity will enjoin the owner of land from defacing or meddling with graves on land dedicated to the public for burial purposes, at the suit of any party having deceased relatives or friends buried therein. *Beatty v. Kurtz*, 2 Pet. 585, 7 L. Ed. 521; *Davidson v. Reed*, 111 Ill. 167, 53 Am. Rep. 613. In the case of *Beatty v. Kurtz*, supra, the Supreme Court of the United States, in speaking of property consecrated to cemetery purposes, held that the removal of the memorials erected by piety or love to the memory of the good are such acts as cannot be "redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living." In *Davidson v. Reed*, supra, two persons, residents in the neighborhood of a public burying ground, having friends buried there, filed a bill to enjoin the party owning the tract of land on which it was located from defacing the graves, and to preserve the ground for the public use for burial purposes; and it was there held that they could maintain the bill in their names, for the benefit of themselves, as well as if all others directly interested had joined.

It is also well settled that no particular form or ceremony is necessary to dedicate land for the purposes of a cemetery. All

that need be shown, to constitute such a dedication, is the assent of the owner, and the fact that the land is used for the public purposes intended by the appropriation. Staking off ground as a cemetery and allowing burials therein amounts to a dedication. An express setting apart of land for such a purpose by the owner may constitute a dedication of the land as a burial ground or cemetery. 5 Am. & Eng. Ency. of Law (2d Ed.) p. 784; 9 Am. & Eng. Ency. of Law (2d Ed.) p. 28; *Hagaman v. Dittmar*, 24 Kan. 42; *Hayes v. Houke*, 45 Kan. 466, 25 Pac. 860. It has been held that the notorious use of property for 20 years for burial purposes with the acquiescence of the owner affords presumptive evidence of its dedication for such purposes. *Boyce v. Kalbaugh*, 47 Md. 334, 28 Am. Rep. 464.

In *Davidson v. Reed*, supra, this court held that a dedication of land to the public for any public use may be shown by grant, by user, or by the acts and declarations of the owner, coupled with evidence of acceptance by the public, and that, where there was evidence of an intent to dedicate, no particular form or ceremony is necessary. In *Davidson v. Reed*, supra, it appeared that the owner of a quarter section of land as early as 1844 buried a child in a corner thereof, since which time the same had always been used by the people of the neighborhood as a public burying place, and the declarations of such owner showed an intent to devote the land to such use, and the subsequent owners of the quarter section of land made no objection to such use, but recognized the same as a public burial place; and it was there held that these facts were sufficient to show a dedication of the land so used to the public for a place for the interment of the dead.

In *Alden Coal Co. v. Challis*, 200 Ill. 222, 65 N. E. 665, we have recently held that the statute of frauds does not apply to dedication of ground to the public, but that the same may be evidenced by acts and declarations without any writing, and that no particular form is necessary to the validity of the dedication, it being properly a question of intention, and that a dedication may be established by parol. See, also, *Cincinnati v. White*, 6 Pet. 440, 8 L. Ed. 452. In *Alden Coal Co. v. Challis*, supra, we also held that the acceptance necessary to complete such dedication may be implied from acts and from user, and that, when the dedication is beneficial or greatly convenient or necessary to the public, an acceptance will be implied from slight circumstances.

By comparing the allegations of the bill in the case at bar, as the same are set forth in the statement preceding this opinion, with the allegations of the bill passed upon by this court in *Davidson v. Reed*, supra, it will be found that the two cases correspond in all essential particulars. It appears from the allegations of the bill in the present case that during the lifetime of John H. Wormley,

the original owner of the land dedicated for the purposes of the Wormley Cemetery, he recognized the half acre of ground here in question as a cemetery for a period of about 51 years, to wit, from 1839 to his death, in 1890. During that time he not only buried his own relatives upon this half acre, and permitted others to bury their dead there, but he indicated his intention to make such dedication, and to continue it, by positive and open acts. He, with others who buried their dead upon the half acre, caused to be erected and maintained a suitable fence inclosing such half acre. He permitted the persons who buried their dead there to erect monuments over them, and to protect and preserve the identity of the remains buried there. The bill alleges that more than 80 persons have been buried in the cemetery, and that their graves have been cared for and kept up by their relatives. John H. Wormley died in 1890, and the defendant, John T. Wormley, his son, for more than 10 years after that date, recognized the half acre as a cemetery, and did nothing to interfere with its use as such until about the time the present bill was filed. The bill also alleges that he has committed acts of depredation upon the cemetery by tearing down the fence surrounding it, and by pasturing his horses and cattle and swine therein, and also that he not only threatens to kill persons who attempt to rebuild the fence around the cemetery, or care for the monuments and graves therein, but also threatens to remove the monuments erected to commemorate the dead, and to plow and cultivate the land therein. The demurrer filed by the defendant admits all these allegations of the bill to be true. When the land descended to John T. Wormley from his father, he inherited it subject to the rights which had been acquired in this half acre as a cemetery. The assent of his father to its use for such purposes is clearly averred in the bill, and it is also alleged therein and shown that it was accepted by the parties using it for the purposes for which it was dedicated by the owner.

Under the facts, and under the authorities applicable thereto, we are of the opinion that the court below erred in sustaining the demurrer to the bill, and that such demurrer should have been overruled.

2. Some points of a technical character are insisted upon by the defendant in error John T. Wormley as justifying the action of the trial court.

When the order was entered on January 4, 1901, sustaining the demurrer to the bill, leave was granted to the complainants below to file an amendment to the bill by January 26, 1901. This order seems to have been entered by mistake in Term No. 18 of the law side, instead of Term No. 18 of the chancery side, of the docket of the October term, 1900, of the circuit court. The amendments were not filed within the time allowed by the

court, to wit, by January 26, 1901, and were not filed until April 1, 1901. On April 3, 1901, they were stricken from the files for noncompliance with the order, which required them to be filed by January 26, 1901.

Defendant in error insists that, by taking leave to amend their bill after the demurrer was sustained, the complainants confessed the demurrer, and waived all right to except to the ruling of the court in sustaining it. In support of this position, counsel cite many cases which apply, as a rule thus insisted upon, to common-law pleadings. It is also said that the decision of the trial court in sustaining the demurrer was merely interlocutory, and that, if complainants were willing to rest their case upon the demurrer, they should have moved the court to dismiss the bill, and should have entered of record their election to abide by it. It is also said that, where a demurrer to a bill in chancery is sustained, and no amendments are made within the time prescribed by the court, the court may dismiss the bill. We do not deem it necessary to pass upon the validity of these contentions, as we do not regard them as being applicable to the present case.

The record does not show that the court dismissed the bill because the amendments which the complainants were given leave to file were not filed within the time specified in the order. The court merely struck the amendments from the files because they were not filed within the time allowed. If, then, the case had been allowed to stand upon the order sustaining the demurrer to the bill, a different question would be presented. The question would then arise whether it was not the duty of the complainants to dismiss their bill, in order to take an appeal to, or sue out a writ of error from, a reviewing court. But the court itself dismissed the bill, entering the following order, to wit: "And the court thereupon orders and decrees that the bill of complaint filed herein be, and the same is hereby, dismissed for want of equity, and that the costs in this cause be, and the same are hereby, taxed against the complainants, and that defendant have execution therefor." The court, having sustained the demurrer, dismissed the bill of its own motion for want of equity. The order so dismissing the bill was not an interlocutory order, like the order sustaining the demurrer, but was a final order. We see no reason why the complainants had not the right to review this final order by writ of error. Independently of the question whether the complainants, by taking leave to amend the bill, waived their right to complain of the action of the court in sustaining the demurrer to the bill, they have the right to show, if they can, that the court erred in dismissing the bill for want of equity upon its face.

It is also said that the jurat attached to the bill was not in proper form, but we regard this as immaterial, for the reason that the insufficiency of the jurat, if it existed

went only to the temporary injunction which was granted. It had no effect upon the bill as a whole. There was sufficient equity in the bill to justify its retention, so as to require the defendant to answer it, even if the defective verification was such as to authorize the court to dissolve the temporary injunction. A bill should not be dismissed for want of equity on general demurrer where it shows any ground for equitable relief. *Gooch v. Green*, 102 Ill. 507; *Wescott v. Wicks*, 72 Ill. 524. In the latter case of *Wescott v. Wicks* it was held that "although a case is so defectively made by a bill in chancery that the court cannot fully comprehend it, and pronounce upon it with confidence, still, if the court can see from what is stated that there is equity in the bill, it is error to sustain a demurrer to the whole bill for want of equity."

3. It is further claimed by the defendants in error that the writ of error should be dismissed for misjoinder of parties. All of the defendants in error, except John T. Wormley, were co-complainants in the court below with the present plaintiff in error, George D. Wormley, and claimed the same rights; and it is said that they should have been joined here as plaintiffs in error with George D. Wormley. The general rule undoubtedly is that all the plaintiffs or defendants against whom a joint judgment is rendered must be joined as plaintiffs in error where a writ of error is sued out by one or more of them. Section 76 of the practice act, provides that, in all cases where a judgment or decree shall be rendered against two or more persons, either one of them may remove such suit to the Appellate Court by appeal or writ of error, and for that purpose shall be permitted to use the names of all such persons, if necessary. 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 3099; *McIntyre v. Sholtz*, 139 Ill. 171, 29 N. E. 43; *Cooke v. Cooke*, 194 Ill. 225, 62 N. E. 536. It is true that the present plaintiff in error, George D. Wormley, could have used the names of all his co-complainants in the court below as coplaintiffs in error with himself in suing out the present writ of error. As was said in *McIntyre v. Sholtz*, 139 Ill. 176, 29 N. E. 44: "All the plaintiffs or defendants in the original suit who are alive must join in the writ of error, and it is competent for one to join the others without their consent. The reasons for this rule are that the writ must agree with the record, and that, if one of a number of plaintiffs, or one of a number of defendants, who have not distinct and several interests, should be permitted to bring a writ of error, every one might do the same, and such a practice would tend to multiply suits. If the parties whose names are thus used by a coplaintiff or codefendant choose to abide an erroneous judgment, and refuse to appear and assign errors, they must be summoned and severed, and then after the severance the writ may be prosecuted in the name of such coplaintiff or codefendant." If

in the present case George D. Wormley had sued out the writ of error in his own name, and also in the names of the other co-complainants with him in the court below, and if they had refused, when their names were so used, to join in the prosecution of the writ, he could have summoned them into court, and obtained a judgment of severance against them, so that then he could have prosecuted the writ alone, and as sole plaintiff in error. 7 Ency. of Pl. & Pr. pp. 860-862. While this was not done in the present case, yet, when George D. Wormley sued out the writ of error alone in his own name, he made all of his co-complainants below defendants in error with the defendant below, John T. Wormley. All of his co-complainants have been served as defendants in error, or have entered their appearance as defendants in error. They are therefore before this court. They might have assigned cross-errors, or they might have asked to be joined with George D. Wormley as coplaintiffs in error for the purpose of prosecuting the writ of error. They have not taken any such steps. But being before the court as defendants in error by entry of appearance, the case stands in the same position as though there had been a summons and a severance. They are in court, and this would be the only effect which could result from a summons. Where there are several defendants in an action, all may plead jointly one and the same defense, or each may plead a separate defense for himself, and in the latter case he is said to sever; and his doing so is termed "severance in pleading." 25 Am. & Eng. Ency. of Law (2d Ed.) p. 631. In the present case there is an actual severance, because the plaintiff in error, George D. Wormley, is prosecuting this writ of error alone, and not jointly with the other complainants in the bill. Their action in declining or neglecting to assign cross-errors, or to unite with him in the prosecution of the writ of error while they are in court by their entry of appearance, operates to create a severance, and justifies him in prosecuting the writ of error alone. For these reasons, the motion to dismiss the writ of error is overruled.

Accordingly the decree of the circuit court dismissing the bill for want of equity is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(208 Ill. 52)

SHANNON v. SWANSON.

(Supreme Court of Illinois. Feb. 17, 1904.)

HUSBAND—ALIENATION OF WIFE'S AFFECTIONS—SEDUCTION—EVIDENCE—SUFFICIENCY—WITNESS—INSTRUCTIONS—DEFENSE—RELEASE TO ANOTHER SEDUCER.

1. There is no rule of law making a seven year old child incompetent as a witness merely because of his age.

2. Evidence, in action for seduction and alienation of the affections of plaintiff's wife, ex-

amined, and held sufficient to support a verdict for plaintiff, apart from anything testified to by plaintiff's seven year old son.

3. The fact that a husband, in an action for seduction of his wife and alienation of her affections, proves no resulting expense or loss of services, does not deprive him of the right to recover substantial damages from one who has committed adultery with her.

4. A charge, in an action by a husband for the seduction of his wife and alienation of her affections, which states that the fact that the husband has forgiven the conduct of the adulterous wife does not relieve the seducer of the wife from liability to answer in damages to the husband, in the concluding portion of which the phrase "if any you find from the evidence" occurs, clearly referring to the words "offenses of the defendant," found immediately preceding such phrase, is not objectionable as assuming that defendant had been guilty of the adultery charged.

5. The fact that a brother of defendant, in an action by a husband for the seduction of his wife and alienation of her affections, had also had intercourse with her, and that plaintiff had instituted an action against him, and in settlement of the suit had received the sum of \$1,000 from the brother of defendant, and had executed a release of the cause of action against the brother, is no bar to the action against defendant.

Error to Appellate Court, Second District.

Action by Axel T. Swanson against Howard Shannon. From a judgment of the Appellate Court affirming a judgment for plaintiff (109 Ill. App. 274), defendant brings error. Affirmed.

William L. Pierce and W. O. Kellum, for plaintiff in error. Cliffe & Cliffe (H. A. Jones, of counsel), for defendant in error.

BOGGS, J. This was an action on the case, brought by the defendant in error against the plaintiff in error for the seduction and alienation of the affections of Louise Swanson, wife of the defendant in error, by the plaintiff in error. On the trial before the court and a jury, judgment was entered in favor of the defendant in error in the sum of \$1,000, and the judgment was affirmed by the Appellate Court for the Second District. The record is before us on a writ of error.

The plaintiff in error contends that the trial court erroneously permitted Harold Swanson, a boy about seven or eight years old, the son of the defendant in error, to give testimony as a witness for the defendant in error; and he insists that, aside from the testimony of such alleged incompetent witness, there was no testimony to support the allegations of the declaration, and urges, therefore, that the court erred in denying the motion, entered at the close of all the evidence, for an instruction directing the jury to return a verdict of not guilty. We find in the record, apart from anything testified to by the said Harold Swanson, abundant evidence tending to show that the plaintiff in error committed adultery with the said Louise; that he came to the home of the defendant in error, in Kirkland, in the nighttime, and that Louise left the bed of the defendant in error, her husband, to meet and

consort with the plaintiff in error in another room of the building; that he induced her to leave the home of her husband, taking with her the boy, Harold, and take up her abode in Rockford; that plaintiff in error caused a portion of the household furniture to be taken from the home of the defendant in error and stored for a short time in a shed on his premises, and that he afterwards hauled the same to Rockford and placed it in rooms which were occupied by said Louise. Moreover, we are unable to agree that it was error to permit the boy, Harold, to testify. Some traces are found of an ancient rule of the common law making the age of a child the arbitrary test of competency to testify, but if it ever was well established it has long since fallen into disuse and become obsolete. Intelligence, ability to comprehend the meaning of an oath and the moral obligation to speak the truth, and not age, are the tests by which the competency of a child to give testimony is determined. *Draper v. Draper*, 68 Ill. 17; 16 Am. & Eng. Ency. of Law (2d Ed.) p. 268; *Bradner on Evidence*, p. 135. Section 10 of division 2 of the Criminal Code (Hurd's Rev. St. 1901, c. 38, § 282) provides that every person who is neither an idiot nor lunatic, nor affected with insanity, and who has arrived at the age of 14 years, shall be considered of sound mind, and that persons who have not reached that age shall be considered of sound mind if they comprehend the distinction between good and evil. In analogy to this rule of the criminal law, a witness who has reached the age of 14 years should be presumed, *prima facie*, competent. If below that age, his competency to testify is to be determined by an inquiry as to the strength of his mental faculties and his power to understand and appreciate the moral duty to speak the truth. This inquiry is to advise the trial judge, whose duty it is to determine whether the person is competent to testify. The decision of this matter may be reviewed, but as the intelligence of the witness is to be ascertained, to some extent, by his appearance and conduct while in the presence of the court, and as the judge is vested with a degree of discretion, it is only when there has been an abuse of discretion, or a manifest misapprehension of some legal principle, that the decision will be reviewed. 16 Am. & Eng. Ency. of Law (2d Ed.) 270, 271. In the case at bar the witness Harold was subjected to an examination. We have consulted the record with reference thereto, and agree with the trial court that the boy had sufficient mental perception and moral understanding to qualify him to speak as a witness, the weight and value of his testimony being matters for the consideration of the jury.

A husband is entitled to recover substantial damages from one who has committed adultery with his wife, although he proves no resulting expense or loss of services (*Yundt v. Hartrunft*, 41 Ill. 9; 8 Am. & Eng.

Ency. of Law [2d Ed.] 266), and this answers the complaints as to instructions Nos. 2 and 6.

It is complained that instruction No. 3 contains an assumption that the plaintiff in error had been guilty of adultery with the wife of the defendant in error, and, as to the fourth instruction, that it assumes the relations between the husband and wife were cordial and affectionate. Both of the instructions are so drawn as that they are likely to provoke the criticism made against them. The purpose of instruction No. 3 was to advise the jury of the general legal principle that the fact that a husband has forgiven the conduct of an adulterous wife does not relieve the seducer of the wife from legal liability to answer in damages to the husband, and the language found in an opinion of the Supreme Court of New Hampshire announcing that doctrine was framed into the instruction. In the concluding portion of the instruction the phrase, "if any you find from the evidence," clearly refers to the words "offenses of the defendant," found immediately preceding such phrase, and would, we think, prevent the jury from being misled to believe the court assumed it to be true, or to have been proven, that defendant had committed the offense of adultery. There is no assumption of fact in the fourth instruction. Whether the relations between the husband and wife were cordial and affectionate was left by it to be determined by the jury from the evidence.

The fact that Parker Shannon, a brother of the plaintiff in error, had also had intercourse with the wife of the defendant in error, and that the defendant in error had instituted an action against him, and in settlement of the suit had received the sum of \$1,000 from Parker, and had executed a release of the cause of action against Parker, did not bar the action against the plaintiff in error, or make it incumbent upon the trial judge to grant the motion for an instruction directing a peremptory verdict for the defendant. The acts of adultery of Parker Shannon and of the plaintiff in error were separate and distinct acts, and not one act or wrong, and no right of action accrued against them jointly. There being no joint liability, the doctrine that satisfaction by one joint tortfeasor bars recovery against all other of such tortfeasors has no application. *Yeazel v. Alexander*, 58 Ill. 254; *Chicago & Northwestern Railway Co. v. Scates*, 90 Ill. 586. The judgment is affirmed.

Judgment affirmed.

(207 Ill. 630)

HARRISON v. NATIONAL BANK OF MONMOUTH.

(Supreme Court of Illinois. Feb. 17, 1904.)
SUPREME COURT—CERTIFICATE OF APPELLATE COURT—FINDINGS.

1. The certificate of the Appellate Court certifying a cause to the Supreme Court does not

present any question for consideration unless the record shows questions of law to be passed on.

2. The findings of fact by the Appellate Court confirmatory of findings below are binding on appeal to the Supreme Court.

3. Under Prac. Act, § 42 (Hurd's Rev. St. 1901, c. 110, § 43), where appellant desires to preserve for the consideration of the Supreme Court a question as to the jurisdiction of the court, he should present to the trial court a proposition to be held or refused by such court.

Appeal from Appellate Court, Second District.

Action by the National Bank of Monmouth against F. O. Harrison. From a judgment of the Appellate Court (108 Ill. App. 493) affirming judgment for defendant, he appeals. Affirmed.

C. H. Layman, for appellant. J. B. Brown and L. L. Legg, for appellee.

RICKS, J. This was an action of assumption, brought to the September term, 1901, of the Warren county circuit court, by the National Bank of Monmouth against F. O. Harrison, Allen Jones, and O. T. Kimmel, Harrison and Jones being the makers of the promissory note sued on, and Kimmel being indorser thereon. Summons was issued directed to the sheriff of Franklin county for Harrison and Jones, and to the sheriff of Warren county for Kimmel. The summons issued to Franklin county was returned to the clerk of the Warren county circuit court, with the indorsement of the sheriff showing service as to appellant, Harrison, and not served as to Jones, and the summons to Warren county was returned showing defendant not found. Appellant, Harrison, filed his plea in abatement to the jurisdiction of the court, to which replication was filed. Kimmel appeared and filed the general issue, and upon the day of trial Kimmel withdrew his plea of general issue and entered his appearance, and allowed a default to be taken as to him. A jury was waived, and both matters of law and fact were submitted to the court, and, after the introduction of evidence as to the place of residence of Kimmel, the court found the issues for the plaintiff, and entered judgment against appellant upon his plea in abatement in the sum of \$288.71, and judgment by default against Kimmel for the same amount. An appeal was prosecuted to the Appellate Court by appellant, Harrison, where the judgment of the circuit court was affirmed, and the case is brought to this court upon a certificate of importance.

The cause was tried before the court without a jury, and no propositions of law were submitted, and there are therefore no questions of law before this court for review. The certificate of the Appellate Court certifying a cause to this court does not present any question for the consideration of this court unless the record shows questions of law to be passed upon. *Commercial Nat. Bank v. Cauniff*, 151 Ill. 329, 37 N. E. 898.

Two questions are presented by the record. The first is as to whether the defendant Kimmel was a resident of Warren county, so as to give the court jurisdiction of a defendant in another county, under section 2 of the practice act (Hurd's Rev. St. 1901, c. 110, § 2), and this being a question of fact, and having been decided adversely to appellant by the Appellate Court, its judgment is final. Under the second, appellant urges that to authorize suit against him, a resident of Franklin county, in a court in Warren county, his liability and that of Kimmel, his co-defendant, must be a joint liability, and that appellant's liability as maker and the liability of Kimmel as indorser is not, under our statute, a joint liability, although the statute authorizes a joint action in such cases. If appellant desired to preserve that question for the consideration of this court, he should have presented to the trial court a proposition to be held or refused by that court under section 42 of the practice act (Hurd's Rev. St. 1901, c. 110, § 43), and the holding of the trial court thereon could have been reviewed by this court. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(207 Ill. 222)

SHEA et al. v. TEUFERT.

(Supreme Court of Illinois. Feb. 17, 1904.)

FRAUD—PROCUREMENT OF CONVEYANCE—EVIDENCE—SUFFICIENCY.

1. Plaintiff claimed that she was 73 years old, that her husband was 69, and that neither understood the English language; that she exchanged her real property on fraudulent representations by defendant that the exchange would be profitable for her; and that she did not understand the contract, and did not know that it was a conveyance. Plaintiff's property was worth \$8,000, for which she received three pieces of property, one incumbered by a mortgage of \$3,000 and worth but little more, and the other two incumbered for about their full value; while, of the \$2,000 which she was to receive in money, she got but \$546. *Held*, that the evidence was sufficient to support a finding of fraud.

2. Findings by the chancellor, on testimony taken in open court, will not be set aside unless clearly against the weight of the evidence.

Appeal from Superior Court, Cook County; Jesse Holdom, Judge.

Bill by Margaretha Teufert against Edward Shea and others. From a decree for plaintiff, defendant Edward Shea appeals. Affirmed.

Elmer H. Adams, for appellant. John Stalk (Albion Cate, of counsel), for appellee. Utt Bros., for John C. Butts.

WILKIN, J. Appellee filed her bill in the superior court of Cook county to set aside a deed of conveyance from her to appellant.

Appellee was the owner of a certain piece of property in Chicago known as No. 585 South Central Park avenue, consisting of a three-story brick flat building with three

apartments, and of the value of about \$8,000. She was 73 years old and in poor health, residing in one of the flats with her husband, who was 69 years of age and also in poor health. They were both Germans, and claimed to be unable to speak or understand the English language. Defendant John C. Butts was a real estate agent, and had the above-described property in his charge for sale or trade. In September, 1902, he took the appellant, Shea, to look at the property as a prospective buyer, and, as a result of that visit, a written agreement was entered into which provided that appellee should transfer to Shea the property in question, and receive in exchange therefor three other pieces of property and \$2,000 in cash. The transfers were subsequently made in pursuance of such agreement, and the appellant mortgaged the property in question to one Olin, as trustee, for the sum of \$4,500, out of the proceeds of which he was to pay \$2,000 to appellee and \$1,500 for one of the pieces of property which had been conveyed to her, and which, at the time of the transfer, belonged to a third party. Some time after the conveyances had been made, appellee discovered that the property which she had received was mortgaged for about all it was worth, and she immediately filed her bill in the superior court of Cook county to set aside her deed of conveyance to appellant, on the ground that such deed and her contract of sale were obtained from her by the appellant and defendant Butts by fraud and misrepresentations. Several others were made parties defendant to the bill, but, as the action was dismissed by the trial court as to them, their rights need not be considered.

Upon a hearing before the court a decree was entered, which found that the material averments of the bill had been proven, and that fraud had been practiced upon the appellee in the procurement of said deed, and that both the defendant John C. Butts and Edward Shea were parties to the fraud, and that the conveyance from appellee to appellant, Shea, should be set aside and vacated. The decree further provided that the defendants should be credited with \$546.80 which they had paid to appellee on the \$2,000 cash which she was to receive; that the trust deed, or mortgage, which appellant had placed on the property conveyed to him by her, amounting to \$4,500, could not equitably be set aside as to the holder thereof, but that the balance of the incumbrance, amounting to \$3,953.20, should be charged against the defendants Butts and Shea, and the cause was referred to the master in chancery to ascertain the proportion of that amount which should be charged against each of them. The court also decreed that the receiver who had previously been appointed should continue in charge of several other pieces of property belonging to appellant, including those for which he had made deeds, until the rents and profits derived therefrom should be suf-

scient to satisfy the money decreed against the defendants. The defendant Edward Shea alone appeals. The only ground of reversal urged by him is, that the decree of the court below is not sustained by the evidence.

In support of her bill, the appellee testified, through an interpreter, that she was 73 years of age and in poor health; that her husband was 69 years of age, and at the time the contract in question was entered into was confined in a hospital with a broken arm; that the property conveyed by her consisted of a three-story brick flat building about six years old, modern in all respects, and heated by a hot-water plant; that it would reasonably rent for \$50 per month; that the defendant Butts came to her and wanted to sell her house; "came in July, 1902, with another man—I think Mr. Shea;" that at his request she permitted him (Butts) to take charge of the said property; that, at the time he brought Shea to see it, he told her that the property for which she was trading was of the value of about \$8,000, and would be worth \$10,000 or \$11,000 in the spring; that it was free from incumbrance, and, if she would permit him to trade, he would treat her as a mother and make money for her. She further testified that she was unable to speak or understand the English language, and that at the time she signed the contract of sale its contents were not explained to her, and she did not know what she was signing, and at the time the deed of conveyance was made she did not understand it was a deed, and did not understand that she was conveying her property. Her husband also testified to the same statement by the defendants as to the relative value of the property. They were both contradicted, in the main, by both of the defendants, and, if the case depended altogether upon the testimony of witnesses we should hesitate to affirm the decree. Other facts and circumstances proved in the case are entitled to serious consideration and weight. At the time the trade was entered into, appellee owned property of the reasonable value of \$8,000, free from incumbrance. After the trade had been entered into she received three pieces of property, all of which were much inferior in value to that which she parted with—one, incumbered by a mortgage of \$3,000, worth, as testified to by defendants' own witnesses, but \$4,630; the other two pieces being incumbered for about their full value. The evidence shows that appellee received practically no real estate in exchange for the property which she transferred to appellant, and that, of the \$2,000 which she was to receive from appellant in cash, she got but \$546, the balance being consumed in commissions charged by the defendant Butts, in the payment of judgments claimed to exist against her, and in the satisfaction of an attachment proceeding which was secured to be issued against her by the defendant Butts.

From all the evidence in the record, it would seem that the transaction as to the complainant below was most unconscionable, and should not be upheld in a court of equity. It is also to be observed that in the trial of the case in the court below the testimony was taken before the chancellor in open court. He saw the witnesses and heard them testify, and, as we have often held, his decree under those circumstances will only be set aside when it is clearly against the weight of the evidence. In this case we think the decree of the superior court was justified by all the facts and circumstances proved.

Decree affirmed.

(207 Ill. 486)

PITTSBURG, C. C. & ST. L. R. CO. v. SMITH.

(Supreme Court of Illinois. Feb. 17, 1904.)

TRIAL—QUESTIONS TO JURY—SUBMISSION TO ADVERSE COUNSEL—SUBMISSION BY COURT—PREJUDICIAL ERROR.

1. Where an instruction is such that an imperfection in it may be cured by others, error in giving or refusing it will not be considered on appeal unless all the instructions are set out in the abstract.
2. Hurd's Rev. St. 1899, c. 110, § 58a, declares that in any case in which the jury render a general verdict they may be required, and must be required on request of any party, to find specially on any material question, which question shall be submitted by the party requesting it to the adverse party before argument to the jury. Held, that the statute is mandatory, and where a party requests a finding he must submit it to the adverse party.
3. The statute is not in violation of the ancient mode of trial by jury.
4. Where an interrogatory is propounded by the court without any request, the court must submit it to the party to whom it is adverse.
5. Where, in an action for injuries sustained by plaintiff owing to the alleged negligence of defendant, the questions whether plaintiff was guilty of contributory negligence and whether defendant was guilty of negligence were material and sharply controverted, it was prejudicial error for the court to submit to the jury, without submitting to counsel for defendant, the question whether plaintiff, by the exercise of ordinary care, could have avoided the accident.

Appeal from Appellate Court, First District.

Action by Louise Smith against the Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Reversed.

Jesse B. Barton (George Willard, of counsel), for appellant. Francis T. Murphy, for appellee.

CARTWRIGHT, J. This is an action on the case brought by appellee, in the superior court of Cook county, against appellant and the Chicago Terminal Transfer Railroad Company, to recover damages for injuries received by appellee on December 8, 1899, by being struck by an engine at the crossing of appellant's track and Thirty-Fifth street, in

the city of Chicago. The suit was begun on April 26, 1900, and the declaration contained a single count, alleging that appellant owned the railroad tracks, and the terminal company operated an engine and train thereon, and it charged negligence, generally, in the management of the engine and train causing the injury. On September 10, 1901, four additional counts were filed, charging negligence, first, in failing to ring an engine bell as required by a city ordinance; second, in failing to ring a bell or blow a whistle as required by statute; third, that the flagman at the crossing did not give reasonable warning or notice of the approach of the train; and, fourth, repeating the charge that the ordinance was not complied with. On September 26, 1901, two more counts were filed, charging negligence, first, in not stationing or maintaining a flagman at the crossing, and not signaling and warning appellee, by its flagman or otherwise, of the approaching engine and cars; and, second, in failing to give warning by bell, whistle, flagman, or otherwise. The plea was the general issue, and there was a trial, at which appellant and the terminal company each asked the court to direct a verdict of not guilty as to it. The court granted the motion of the terminal company, and instructed the jury to find it not guilty, but denied the motion of appellant, and submitted the issue to the jury as to it. The court, of its own motion, directed the jury, in addition to the general verdict, to answer the following special interrogatory: "Do you find, from the evidence, that the plaintiff, by the exercise of ordinary care on her part for her own safety, just before and at the time of the accident in question, could have avoided the same?" The jury returned a general verdict finding appellant guilty, and assessing the damages at \$2,000, and answered "No" to the question propounded by the court. Appellant appealed to the Appellate Court for the First District, and, the judgment being affirmed, prosecuted this appeal.

The following facts were proved on the trial: Thirty-Fifth street runs east and west. Crossing it at right angles there are six steam railroad tracks, the west two of which are owned by appellant—the east one for north-bound trains and the west one for south-bound trains. There are two street car tracks crossing the railroad tracks near the middle of the street. A few feet west of the west track, and just north of the curb line of the street, is a flagman's shanty. The accident occurred about 2:30 p. m. of December 8, 1899—a clear, bright day. Appellee and two other women were walking west on the sidewalk on the south side of Thirty-Fifth street. They crossed the other tracks, and when they came to appellant's tracks a long freight train was going north on the east track. The women stopped and stood talking while the freight train was passing. The train made a great deal of noise, especially in crossing the

street car tracks. As soon as the last car had passed the sidewalk, they started to cross the street. At that time a south-bound train was approaching on the west track, and was about 75 feet north of the street. The brakeman on the rear of the freight train saw the women as the rear of that train approached the crossing, and, his attention being called by the whistle of the train on the south-bound track, he rose up and tried to call their attention, but they did not hear him.

The only charge of negligence in the declaration which the evidence tended to prove was that the flagman stationed at the crossing failed to signal and warn appellee of the approaching danger. That is the ground now relied upon by counsel for appellee, and it is insisted that the flagman was so near the shanty that he could not be seen when the freight train cleared the crossing, and that he failed to give proper warning of the approach of the other train. The bell on the engine was ringing, as required by ordinance and statute. The whistle was blown before reaching the crossing, and was again blown as a danger signal as soon as the women were seen on the track. The only evidence as to the speed of the train was that it was going about 10 miles an hour.

The controverted questions of fact at the trial were whether appellee was in the exercise of proper care, and whether the flagman was negligent in the discharge of his duty. The evidence for the respective parties on those questions was directly contradictory. The first of appellee's companions to start across testified that when the freight train got out of the way she looked to see if there was any flagman to warn them if the track was not clear, but she did not see any flagman, and as they saw no one they started over. She passed over the crossing before the train reached it. The second woman testified that there was no flagman east of the freight train, and she did not see any flagman, and that she did not look, and was not thinking of anything until she heard the noise of the train, when she jumped out of the way. Appellee testified that she looked to see if there was anything to hinder her passing over, and did not see anybody there; that the other women went on, and she looked north just as the freight train got by, and saw no one on the street, and that there was no one there to warn her. She did not succeed in getting across, and was struck by the engine. They all testified that they did not hear any bell or whistle or see or hear any warning. There was a flagman stationed at the crossing, and there was also a police officer of the city detailed and on duty there. They both testified that they were standing over by the shanty when the freight train was passing; that when the other train was coming they went out on the middle of the crossing and called out to the women to look out, and warned them from coming over.

Another witness, apparently disinterested, testified that he saw the flagman and policeman in the middle of the crossing, shouting and throwing up their hands as a warning. The brakeman on the rear of the freight train testified that as he passed the crossing he heard some one yell, and at the same time the women started to cross the track.

It is assigned as error that the court refused to give certain instructions asked by the appellant. The instructions so refused are the only ones contained in the abstract. Where an instruction is of such a nature that an omission or imperfection in it may be cured by others, an alleged error in giving or refusing it will not be considered unless all the instructions are set out in the abstract. In such a case a refused instruction, although stating a correct principle of law, may have been properly refused because the point was covered by other instructions, or an instruction given which might be objectionable when considered alone would not be so regarded when considered with other instructions which were given. *Thompson v. People*, 192 Ill. 79, 61 N. E. 474. The instructions refused are within that rule.

It is also assigned as error that the court submitted the special interrogatory to the jury with respect to the care or want of care of appellee, without submitting it to appellant's counsel before giving it to the jury. The act of 1887 provides that, in any case in which the jury render a general verdict, they may be required by the court, and must be so required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury. *Hurd's Rev. St. 1899*, p. 1291, c. 110, § 58a. The statute is mandatory, and where a party to the suit requests a special finding it must be submitted to the adverse party before the commencement of the argument to the jury. *McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1027. The statute is not in violation of the ancient mode of trial by jury, and should be liberally construed. 20 *Ency. of Pl. & Pr.* 307. The reply of appellee's counsel is that, while the statute is imperative that a party proposing to ask for special interrogatories shall submit them to the adverse party, it does not require the court to do so. It is true that the Legislature did not see fit to command the court; but every reason which could have moved them to require the adverse party to submit an interrogatory applies with equal force where the same interrogatory is propounded by the court without a request, and we would scarcely adopt a rule of practice that a court might be less fair and just to a litigant than the statute requires his adversary to be. There are obvious reasons for the provision of the statute. If an interrogatory is to be

asked concerning one material fact in the case, a party may desire to submit other interrogatories concerning other material facts, and counsel may wish to direct their arguments to the particular point covered by an interrogatory. It was held in *Chicago & Alton Railroad Co. v. Gore*, 202 Ill. 188, 66 N. E. 1063, that it was legitimate for counsel, in argument, to review the evidence in connection with the special interrogatories, and that it was not improper practice to permit counsel to read them in connection with their argument to the jury, in order to convince the jury that they should be answered in the affirmative or negative. If it should be held proper practice for the court, of its own motion, to give an interrogatory without notice to parties, they would be deprived of the opportunities which the statute secures to them, for the mere reason that the court gives the interrogatory. There might be cases where the submission of questions by the court without notice would not be ground for reversal, where it could be seen that there was no injurious effect; but this case cannot be regarded of that character. There were two material and sharply controverted questions of fact: First, whether appellee was in the exercise of ordinary care for her own safety; and, second, whether appellant was guilty of negligence causing the injury. The court, by its interrogatory, submitted only one of these questions, which was a plain intimation that in the mind of the court such question was the one doubtful or controverted question in the case. There being two important questions, the court directed the jury to return a general verdict, and to give an answer to one of the questions. If the interrogatory had been submitted to the counsel for appellant, they might not have been willing to have an answer upon one question in the case without an answer upon the other one. We think that the failure to submit the interrogatory to counsel was prejudicial.

The judgments of the Appellate Court and the superior court are reversed, and the cause is remanded to the superior court. Reversed and remanded.

(207 Ill. 540)

TRADERS' MUT. LIFE INS. CO. v.
HUMPHREY.

(Supreme Court of Illinois. Feb. 17, 1904.)

APPEAL — FINDINGS OF APPELLATE COURT — CONCLUSIVENESS — PROCESS — SERVICE — MOTIONS TO QUASH — TIME OF MAKING — NON-RESIDENCE OF PLAINTIFFS — EVIDENCE.

1. Where the finding of the jury that insured was a member of a beneficial society at the time she received her certificate of membership was affirmed by the Appellate Court, such finding, being one of fact, was final and conclusive on the Supreme Court.

2. A motion to quash the summons and dismiss the suit on the ground that plaintiff was a nonresident was properly denied where it was not made at the earliest moment after defendant discovered the fact of nonresidence, but was delayed until after the jury had been impaneled and sworn.

3. On the issue of nonresidence of plaintiff at the time of suit brought (August 4, 1902), an offer to show that plaintiff resided in Ohio up to January 7, 1903, without any offer to show when he became a resident of that state, or that he was not an actual resident of Illinois at the time the action was brought, was properly refused.

Appeal from Appellate Court, Third District.

Action by Lucius F. Humphrey against the Traders' Mutual Life Insurance Company. From a judgment of the Appellate Court (109 Ill. App. 246) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Hal H. Smith, for appellant. Isaac A. Love and W. R. Jewell, Jr., for appellee.

WILKIN, J. Appellee brought his action of assumpsit in the circuit court of Vermillion county against appellant on a policy of life insurance or certificate of membership issued by appellant on the life of Sarah C. Humphrey, his wife, in the sum of \$1,000, for his benefit. Some time prior to September 12, 1893, the insured, who lived with the plaintiff, her husband, in South Bend, Ind., was solicited by an agent of appellant to become a member of said company. At that time she was not a member of the order of Odd Fellows, but on August 22, 1893, made her application for membership to Schuyler Rebecca Lodge, No. 39, of South Bend, Ind. On September 12, 1893, she was elected to membership in said lodge, but was not initiated, did not sign the by-laws, and was not formally introduced to the lodge as a member until October 10, 1893. Immediately upon receiving the notice of her election, on September 12, 1893, she made written application to appellant for a certificate of insurance, and in her application stated that she was a member of Schuyler Rebecca Lodge, No. 39, located at South Bend, Ind. The certificate of membership upon this application was issued to her on September 21, 1893. She thereafter paid all of the dues and assessments on said certificate of insurance to the time of her death, being more than eight years. On December 13, 1901, the president of the appellant company, in reply to a letter received from her, wrote as follows: "In reply to the same will say that it is not necessary that you belong to any lodge in order to hold your present policy with this company. All that is necessary for you to do is to make payments constantly and on time in the above-named company and your policy will be all right." After the issuing of the certificate on September 21, 1893, and before this letter of December 13, 1901, was written, the charter of appellant company was so changed as not to restrict it to insurance on Odd Fellows, merely, as it had formerly provided, but permitted it to issue insurance to any person. On December 24, 1901, the insured died, having, as before stated, paid all of the premiums due on said certificate up to the date of her death; and

in February, 1902, proof of her death was made to the appellant company, as required by its rules. On March 4, 1902, the company, by its president, notified appellee by letter that the company had recently obtained evidence which showed that at the time the insured made her application and received her certificate of membership she was not an Odd Fellow, and that the certificate was therefore void. Thereupon, on August 4, 1902, appellee brought this suit to recover the amount due upon the certificate, and, upon a trial before a jury, judgment was rendered for \$1,036.62, and the same has been affirmed by the Appellate Court for the Third District.

The first question raised is that by its charter the appellant company was limited to provide life indemnity for acceptable members of the fraternity of Odd Fellows not over 60 years of age, and that the issuing of this certificate was an ultra vires act on the part of the appellant company; also that the insured did not become a member of said lodge or fraternity of Odd Fellows until October 10, 1893, which was after the delivery of the certificate to her. The last question—that is, whether the assured was a member of the order of Odd Fellows at the time she received her certificate of membership—is, upon this record, purely a question of fact. Evidence was offered in the trial court for and against the contention of appellant, and the verdict of the jury found that she was a member at the date of the issuing of the certificate; and that finding, having been affirmed by the Appellate Court, is final and conclusive upon this court. The question as to when she became a member is not raised here on the giving, refusing, or modifying of instructions to the jury; nor is any question made as to the rulings of the trial court on the admission or exclusion of testimony. If the insured was a member of the order of Odd Fellows at the time the certificate was issued to her—that is, if she became a member, as contended by appellee, from the date of her election, under the by-laws and regulations of the company—then the act of issuing to her a certificate was in no sense ultra vires, and that question does not enter into the case. Treated as a mixed question of law and fact, the Appellate Court properly disposed of the point. This disposes of the only question upon the merits of the case raised and argued in this court.

After the jury had been selected and sworn, and the plaintiff's opening statement had been made, counsel for appellant entered a motion to quash the summons and service, and dismiss the suit, on the ground that the plaintiff was a nonresident of the state of Illinois, residing in the state of Ohio; and leave was also asked to introduce evidence to show that plaintiff resided in Ohio up to January 7, 1903. This the court refused to allow, basing his decision upon the fact that the motion was made too late, and that ruling is also assigned for error. We think

the ruling was proper, for the reason that it was not made at the earliest moment after the appellant discovered the alleged fact of the nonresidence of the plaintiff, but delayed its motion until after the jury had been impaneled and sworn. The offered evidence was properly refused because it did not pretend to establish the distinct fact that at the time the suit was brought the plaintiff was a resident of Ohio. The offer was merely that he resided in Ohio up to January 7, 1903, but there was no offer to show when he became a resident of that state, or that he was not an actual resident of this state at the time the action was brought.

We think the judgment of the Appellate Court is right, and it will accordingly be affirmed. Judgment affirmed.

(208 Ill. 57)

CAHILL v. WELCH et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

APPEAL—TEMPORARY INJUNCTION—DISMISSAL OF BILL BY COMPLAINANT.

1. The complainant having procured the dismissal of her bill on the granting of orders dissolving a temporary injunction and awarding damages against her for wrongfully suing out the injunction, no appeal will lie from these interlocutory orders, where the bill sought other relief in addition to the injunction, and the motion to dissolve was heard on the bill and an answer denying the facts stated in the bill.

Appeal from Superior Court, Cook County; Jesse Holdom, Judge.

Bill by Mary Cahill against Elizabeth H. Welch and others. From an order dissolving a temporary injunction, and allowing the defendants to file suggestions of damages, complainant appeals. Dismissed.

This was a bill filed in the superior court of Cook county by the appellant, against the appellee, to restrain appellee from interfering with her possession of certain premises described in the bill, by writ of possession, forcible detainer, or otherwise, and for other relief. The appellee, prior to the time of filing the bill, had foreclosed a mortgage on the premises, executed to her thereon by one Edward T. Cahill, the son of the appellant, and, as purchaser at said foreclosure sale, held a master's deed for the premises. The bill as amended averred that the appellant was in possession of the premises prior to the execution of said mortgage, that she had a homestead therein, and that she was not a party to the foreclosure proceeding; and prayed that as to her the foreclosure proceeding be decreed to be null and void and set aside as a cloud upon her title, that she be decreed to be entitled to the possession of the premises during her natural life, and that the appellee be restrained from interfering with her possession of said premises, and from removing therefrom her household furniture and other personal property situated thereon. A temporary injunction was issued in accordance with the prayer of the bill. The appel-

lee filed an answer denying the allegations of the bill as amended, and entered a motion to dissolve the injunction, which was heard upon bill, answer, and affidavits, and an order was entered dissolving the injunction. The appellant then sought to have the court dismiss the bill, which the court declined to do, and, upon suggestions filed, assessed the damages of the appellee on account of the wrongful suing out of said injunction at \$350, and gave judgment in favor of appellee for that sum, and announced that the bill would be retained for final hearing; whereupon the appellant moved the court to dismiss her bill, which motion was allowed, and the bill was dismissed at her costs. The appellant then prayed an appeal to this court from the order dissolving the injunction and allowing the appellee to file suggestions of damages, and the assessment of damages, which appeal was perfected.

Jay Edwin Reeves, for appellant. William C. Rigby, for appellee Elizabeth H. Welch.

HAND, C. J. (after stating the facts). The appellee has entered a motion in this court to dismiss the appeal on the ground that the suit was voluntarily dismissed by the appellant, which has been reserved. An order dissolving an injunction is interlocutory, and not final, and an appeal does not lie from such order (*Knapp v. Marshall*, 28 Ill. 63; *Weaver v. Poyer*, 70 Ill. 567; *Williams v. Chicago Exhibition Co.*, 188 Ill. 19, 58 N. E. 611); but where the sole object of a bill is to obtain an injunction, and a demurrer is filed or a motion is made to dissolve the injunction upon the face of the bill, and the injunction is dissolved because the facts stated in the bill, when admitted to be true, are not sufficient in law to authorize an injunction to issue, the suit is virtually at an end, and the court, or the complainant, may dismiss the bill, and an appeal or writ of error will lie from such decree. *Titus v. Mabree*, 25 Ill. 257; *Weaver v. Poyer*, supra; *Prout v. Lomer*, 79 Ill. 331; *Williams v. Chicago Exhibition Co.*, supra; *Goddard v. Chicago & Northwestern Railway Co.*, 202 Ill. 362, 66 N. E. 1066. That, however, is not the rule when other relief is sought by the bill, or when an answer has been filed and the court dissolves the injunction upon a consideration of the facts set up in the answer. *Beams v. Denham*, 2 Scam. 58; *Titus v. Mabree*, supra; *Weaver v. Poyer*, supra; *Prout v. Lomer*, supra; *Williams v. Chicago Exhibition Co.*, supra; *Goddard v. Chicago & Northwestern Railway Co.*, supra. In that state of case the court should retain the bill and enter such decree as the law and the facts may require after final hearing. The appellant, by her bill, sought to have the court decree that she was entitled to the possession of the premises during her natural life, and to have the decree foreclosing said mortgage set aside as null and void as to her, as a cloud upon her title. The injunction prayed for in the

bill was incidental only to the principal objects of the bill, and, an answer having been filed by the appellee denying all the facts upon which the relief prayed for was predicated, the court could not determine such facts and dispose of the entire subject-matter except upon final hearing. The order dissolving the injunction was interlocutory, and when the appellant, after that order was entered, dismissed her bill, the suit, by her own act, was terminated, and, she having voluntarily ended the litigation, an appeal by her to review the record made in the progress of the suit will not lie. The appeal will therefore be dismissed.

Appeal dismissed.

(207 Ill. 472)

COOPER v. BOARD OF REVIEW OF MONTGOMERY COUNTY.

(Supreme Court of Illinois. Feb. 17, 1904.)

TAXATION—INSURANCE POLICIES—VALUATION—QUESTION OF FACT—DOUBLE TAXATION.

1. A policy of insurance issued by a fraternal benefit society is, after the death of the insured, and before proofs thereof are made to the society, a credit, within the meaning of 3 Starr & C. Ann. St. 1896 (2d Ed.) pp. 3398-3406, cl. 1, § 1, requiring all credits to be assessed and taxed, and Revenue Act 1898, cl. 6, § 292 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3520), defining credits to be every claim or demand for money due or to become due, and not including money on deposit, though the policy makes the furnishing of proofs of death a condition precedent to liability of the society thereon, and provides that the amount thereof shall not be due until 60 days after proof of death is filed.

2. After the death of insured, and before proofs thereof are made, the value of a policy of insurance issued by a fraternal benefit society is a question of fact for the determination of the taxing officers.

3. Where it appears in a proceeding to subject to taxation the policies of insurance of fraternal benefit societies, payable to a minor child of the insured, who died in March, that the societies pay death claims by assessment levied after the death of members, a contention by the guardian of such minor, appointed in the same month of decedent's death, that an assessment of the policies in his hands as of April 1st would result in double taxation, is without merit; it appearing that he had not made proofs of death of insured on or before April 1st, and the certificates were not paid until May following.

Certified by Auditor of Public Accounts.

In the matter of the assessment of George R. Cooper, guardian, by the board of review of Montgomery county. From the assessment, Cooper appealed. Question submitted by the auditor of public accounts. Question answered.

The board of review of Montgomery county assessed appellant, as guardian, the sum of \$4,330 on a total cash value of personal property, and appellant claims that said property was exempt from taxation for the year 1903. Appellant objecting to the assessment, and, claiming that the property was exempt from taxation, the board by its clerk thereupon certified a statement of the facts concerning said assessment to the auditor of public

accounts. The auditor of public accounts, being satisfied that such property is liable to taxation, submits the question of its exemption from taxation to this court in accordance with the provisions of the fourth clause of section 35 of the revenue law of 1898 (4 Starr & C. Ann. St. 1902, p. 1118).

The facts certified are that Dr. S. H. McLean, the father of Ben O. McLean, died at Lincoln, in Logan county, on or about the 18th day of March, 1903, intestate; that at the time of his death he held a policy of life insurance in the Modern Woodmen of America for the sum of \$3,000, payable to said son, Ben O. McLean; that he also held a policy of life insurance in the Court of Honor, in which the said Ben O. McLean was a beneficiary, to the amount of \$1,833.33; that each of the above insurance companies is a fraternal beneficiary society; that their manner of paying policies is by an assessment levied upon the members of said society; that said Ben O. McLean is a minor of the age of 17 years; that said George R. Cooper filed a petition in the county court of said county, asking to be appointed guardian of said Ben O. McLean, on March 23, 1903; that said petition states "that said minor has due him life insurance to the amount of about \$4,200; that said George R. Cooper was appointed guardian of said Ben O. McLean by the county court of Montgomery county on March 27, 1903, and duly qualified, and from thence hitherto has been acting as such guardian; that each of said policies of insurance required proof of death as a condition precedent to the payment thereof, and allowed 60 days in which to pay said policies; that on the 1st of April, 1903, proofs of death had not been made under either of said policies, nor had any assessments been made on the members of said societies, or either of them, for the payment of either of said policies; that on April 1, 1903, no money had been paid to said guardian under either of said policies, nor had he taken any steps whatever at that time to collect the same further than to be appointed guardian; that on May 9, 1903, said Cooper received, as such guardian, from the Court of Honor the sum of \$1,333.33, and on May 26, 1903, he received, as such guardian, from the Modern Woodmen of America the sum of \$3,000.

Lane & Cooper, for appellant. H. J. Hamlin, Atty. Gen., for appellee.

MAGRUDER, J. (after stating the facts). Upon the certificate of facts set forth in the statement preceding this opinion the board of review predicated the right to make the assessment, and it is contended by George R. Cooper, guardian of Ben O. McLean, that the assessment is illegal and contrary to law.

The value of the two policies of insurance was assessed against the guardian as of the 1st day of April, 1903. "All property subject to taxation shall be listed by the person at the place and in the manner required by law,

and assessed at the place and in the manner required by law with reference to the ownership, amount, kind and value on the first day of April in the year, for which the property is required to be listed, including all property purchased on that day. The owner of property on the first day of April in any year shall be liable for the taxes of that year." 4 Starr & C. Ann. St. 1902, p. 1110; section 8 of Revenue Act of 1898. The father of the minor, Ben O. McLean, had died early in March, 1903, and Cooper was appointed his guardian on March 27, 1903, and qualified on that date. Was the guardian the owner of the policies on the 1st day of April?

By the terms of the second clause of section 1 of the revenue act, all "credits" shall be assessed and taxed; and by the first clause of section 6 of the revenue act, every person of full age and sound mind, being a resident of this state, is required to list all his "credits" and personal property for taxation. 3 Starr & C. Ann. St. 1896 (2d Ed.) pp. 3398-3406. In the sixth clause of section 292 of the revenue act "credits" are defined as follows: "Every claim or demand for money, labor, interest or other valuable thing due or to become due, not including money on deposit." 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 3520. Undoubtedly the claim of the guardian against the fraternal beneficiary societies who issued the policies or certificates to Dr. S. H. McLean in his lifetime comes within the statutory definition of "credits." It therefore follows that the claim was properly listed as the personal property of the guardian on April 1, 1903.

It is contended, however, on the part of the guardian, that a full and perfected claim for the amount due upon the certificates had no existence on April 1, 1903. The certificate of facts shows that each of said policies or certificates of insurance required proof of death as a condition precedent to the payment thereof, and also that each company had 60 days after the making of proof of death in which to pay the amount of the policy. It also appears from the certificate of facts that proofs of death had not been made under either of the policies on the 1st of April, 1903. It is claimed that the companies were not bound to pay the policies until proofs of death were submitted, and then not until 60 days had elapsed. The contention is that no valid claim existed against either of the said companies until proofs of death were submitted, and until the 60 days had passed, and that, therefore, the guardian was not the owner of any claim on the 1st day of April, 1903. The statutory definition of "credits" includes every claim or demand for money "due or to become due." The fact that the claim for the insurance money against the companies was not due until after the lapse of 60 days would make no difference in view of the fact that under the statute a claim for money "to become due" as well as one for money already due is in-

cluded within the definition of "credits." The certificate of facts states that Dr. McLean, to whom the policies were issued, had died, and the submission of proof of his death was an act to be performed by the guardian; and if the claim was one which was "to become due" it was such a claim as well because it had not matured on account of the delay in filing the proofs of death as because the period of 60 days had not yet expired. If the claim had been merely one which would be due in 60 days, it comes within the definition of "credits," which embraces claims "to become due" as well as claims "due," and it would equally come within the definition if it was not yet due because the proofs of death had not been made.

It is urged that the board of review could not determine what the value of the policies was on April 1, 1903, and therefore that their value should not be taxed. The policies were certainly evidence of claims of the beneficiaries, and what their value was was a question to be determined by the assessor or the board of review. The value of the policies was fixed at their face value or the amount due by their terms. This would appear to have been a correct mode of ascertaining their value, as on the 9th and 26th days of May, 1903, the companies paid the full amounts called for by their terms. In such cases the policies will be presumed to be worth their face value. *Wedbury v. Cassell*, 164 Ill. 622, 45 N. E. 978.

It is furthermore contended that the money with which the policies were to be paid was in the hands of the companies, and that therefore they constituted a fund which belonged to the companies and was taxable as the property of the companies. In support of this position the case of *Catholic Knights v. Board of Review*, 198 Ill. 441, 64 N. E. 1104, is referred to and relied upon. In the latter case it was held that a fund in the hands of the treasurer of a benefit society was properly assessed as the property of the society although orders had before April 1st been issued against a portion of the fund to beneficiaries of deceased members; it being there said: "No part of the fund assessed had been paid out prior to April 1st, and it then became liable to the tax in the hands of the treasurer of the institution, who was its lawful custodian." Taking the ground that the amount due upon the policies here in controversy was a fund which belonged to the companies and was taxable on April 1, 1903, as the property of the companies, the objecting guardian contends that, if the claims are assessed against him as his property, there will be a double taxation of the same property. But there is no evidence here that the money was in the hands of the insurance companies on April 1, 1903. It appears from the certificate of facts that the manner of paying their policies by these companies is by an assessment levied upon the

members of the society, and that on April 1, 1903, no assessment had been made upon the members of either of the societies for the payment of either of said policies. As therefore the funds were not in the hands of the societies on April 1, 1903, they could not be taxed as property belonging on that date to the societies or companies. If, therefore, the claims for the moneys due upon these policies are not taxed as the property of the objecting guardian, they will escape taxation altogether for the year 1903.

Counsel for the guardian refers us to no authority supporting the conclusion that because the money in the hands of the insurance companies was taxable the evidences of indebtedness against the insurance companies could not be taxed. A debtor who has money in his possession on April 1st is subject to assessment upon that money, and a creditor who holds a note or other evidence of indebtedness against such debtor at the same time is subject to assessment on that credit according to its value, whether due or not. We are therefore of the opinion that the action of the board of review in assessing these claims against the insurance companies or societies as being the property of the guardian on April 1, 1903, at their face value was correct, and the decision of the board is approved.

Decision approved.

(208 Ill. 100)

ILLINOIS, I. & M. RY. CO. v. HUMISTON et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

EMINENT DOMAIN—RAILROAD RIGHT OF WAY—CONDEMNATION—DAMAGES—DETERMINATION OF JURY—REVIEW—ELEMENTS OF DAMAGE.

1. The damages awarded in condemnation proceedings will not be disturbed on appeal where the evidence is conflicting and the jury views the premises.

2. In condemnation proceedings, the amount for which sales of land in the neighborhood have been made is not the only factor in determining the weight of the testimony of a witness on the question of value, since he may, in forming his opinion, take into consideration his own knowledge of the surroundings, and the use and capabilities of the property.

3. Where, in condemnation proceedings by a railroad for a right of way, the right of way passed diagonally through a farm, leaving a triangular piece separated by the road from the rest of the farm, and the evidence was conflicting as to the damage to the triangular piece, the jury had a right to resort, in determining such damages, to the result of their examination of the premises.

4. Where a condemnation of a right of way by a railroad company through a farm left a triangular piece separated by the road from the rest of the farm, evidence as to how other farms had been affected by such cutting off of a triangular piece was incompetent.

5. Evidence as to what the railroad company had paid for other triangular pieces of land was incompetent.

6. Where, in condemnation proceedings by a railroad company for a right of way through a

piece of land, the part taken is of greater value in connection with the whole than as a separate parcel, the measure of damages for the part taken is the fair cash value of the part taken as a part of the whole.

7. In condemnation proceedings for a portion of a farm by a railroad for a right of way, the value of the land taken, as a part of the farm, should be determined with the improvements on the balance of the farm.

Appeal from Circuit Court, Kane County; H. B. Willis, Judge.

Condemnation proceedings by the Illinois, Iowa & Minnesota Railway Company against Fred J. Humiston and others. From the judgment of condemnation, petitioner appeals. Affirmed.

This is a condemnation proceeding, begun in the circuit court of Kane county on July 1, 1903, by the filing of a petition by the appellant company against appellees, to condemn, under the statute in regard to eminent domain, a strip of land of a uniform width of 100 feet across the farm of appellee, Fred J. Humiston, to be used by the appellant for right of way purposes. The appellee, Fred J. Humiston, filed a cross-petition, setting forth that he was the owner of the strip of land described in the petition, but that said strip was a part of cross-petitioner's farm, consisting of 273.053 acres lying contiguous to the strip described in the petition; and the petition asked that the cross-petitioner be given damages for the injury, loss, and damage caused by the location and construction of the road to the remainder of his farm. There was a stipulation that the petitioner would construct fences along the strip, and maintain the same; that it would construct a farm railway-grade crossing across the strip, when it should lay its rails, and at such point as appellee or his assigns might designate, and would always maintain such crossing; that it would not disturb the fences upon the land, sought to be condemned, during the time of grading the railway, except so far as might be necessary, and would replace said fences after the grading of the railroad, and allow same to remain until it should lay its rails and construct the first above-named fences; and that said stipulation, and the agreements therein, should be made a part of the judgment rendered in the cause, and should be a covenant running with the land.

The cause was tried before the court and a jury. Witnesses were examined, and the jury made a personal inspection of the premises. The jury returned a verdict, finding the sum of \$380 as just compensation for the taking of the strip of land 100 feet wide, and finding the sum of \$1,000 as the damages to the remainder of the land, adjacent to the strip, and described in the cross-petition, resulting from the location, construction, operation, and maintenance of the railroad. Judgment was rendered in accordance with the verdict, and the present appeal is prosecuted from such judgment.

Murphy & Alschuler, for appellant. Raymond & Newhall (Robert S. Egan, of counsel), for appellees.

MAGRUDER, J. (after stating the facts). It is first insisted, on the part of the appellant company, that the amount allowed as compensation for the land taken was excessive. The quantity of land taken from appellees' farm for appellant's right of way was 3.8 acres. In allowing \$380 for the land thus taken, the jury fixed the value of the land at \$100 per acre. We are unable to see why the amount thus allowed was not fair and just to the appellant company, and authorized by the clear preponderance of the evidence.

The main question as to the value of the land taken was a question of fact to be determined by the jury upon the evidence. The appellant company introduced six witnesses as to the value per acre of the land taken for the right of way; one of these witnesses fixed the value of the land without the improvements at \$75 per acre, and the five other witnesses fixed the value of the land with the improvements at \$100 per acre. Appellees also introduced six witnesses, who fixed the value of the land, including improvements, at from \$120 to \$130 per acre. The jury appear to have adopted the valuation given by the great majority of the witnesses introduced by the appellant, and, if the verdict is to be set aside because the amount allowed as compensation for the land taken is excessive, the testimony of appellant's own witnesses upon the value of the land would have to be disregarded.

It is true that the valuation as fixed by the witnesses of appellees was higher than the valuation fixed by the witnesses of appellant, and if, notwithstanding the fact that the jury adopted the valuation fixed by appellant's witnesses, the testimony upon the subject of valuation is to be regarded as conflicting, still there would be no just ground for disturbing the judgment. This is so for the reason that the jury made a personal examination of the premises, and we have held that the damage awarded by a jury in a condemnation proceeding will not be disturbed where the evidence is conflicting and the jury view the premises. *Rock Island & Peoria Railway Co. v. Lelsy Brewing Co.*, 174 Ill. 547, 51 N. E. 572, and cases cited; *Sexton v. Union Stock Yards Co.*, 200 Ill. 244, 65 N. E. 638; *Guyer v. Davenport, Rock Island & Northwestern Railway Co.*, 196 Ill. 370, 63 N. E. 732.

Counsel for appellant claim that the evidence showed sales of property in the neighborhood of the land in controversy at much less sums per acre than \$100, and that the value of the property taken should have been fixed with reference to the amounts of such sales. If this were so, the testimony of appellees showed that there were at least two sales, within a recent period, of property sim-

ilarly situated in the same neighborhood, at \$125 and \$127.50 per acre. But while it is true that a witness may base his opinion as to value upon the fact that sales have been made at a certain figure in the neighborhood of the property in controversy, yet such fact is only one of the grounds upon which a witness may base his opinion of value. The fact of sales is not always the only factor in determining the weight of the testimony of a witness as to value. A witness may, in forming his opinion, consider the uses and capabilities of the property, as well as the prices at which like property in the neighborhood has been sold. He may also base his opinion of value upon his knowledge or observation of the growth and development of towns and cities, a general knowledge of trade and business, rental value, the interest which the land would pay upon an investment, its productiveness, ease of cultivation, its situation in a particular community, and other elements. *St. Louis, Vandalla & Terre Haute Railroad Co. v. Haller*, 82 Ill. 209; *Chicago & Evanston Railroad Co. v. Blake*, 118 Ill. 163, 4 N. E. 488; *Chicago, Burlington & Northern Railroad Co. v. Bowman*, 122 Ill. 595, 13 N. E. 814.

It is also claimed by counsel for appellant that the award of \$1,000 as damages to the balance of the farm not taken was excessive. Upon this branch of the case there was more conflict among the witnesses than there was as to the value of the land actually taken. Most of the witnesses introduced by the appellant stated that there was very little, if any, damage done to the land not taken, while the witnesses for the appellees fixed the damages to the balance of the farm not taken at figures all the way from \$300 to \$1,500. The proof showed that the right of way passed diagonally through the southwest corner of appellees' farm, leaving south of the right of way a long, triangular-shaped piece of ground, containing about 7 acres, separated entirely from the balance of the farm. Witnesses of appellant testified that the triangular piece of land thus cut off was damaged, by reason of its being cut off from the balance of the farm, at from \$25 to \$40 per acre, while witnesses for the appellees testified that such triangular piece would be damaged to the amount of from \$700 to \$900, and that the balance of the farm would be damaged from \$300 to \$1,500. Many of the witnesses based their opinion as to the damage thus done upon the inconvenience of access to the triangular piece, the inability to cultivate it, and the difficulty of carrying on a farm with such a triangular piece separated from the rest of the farm. But the damage done to the triangular piece thus cut off was merely a part of what was shown to be the damage to the whole of the balance of the farm, and was included in the latter. In fixing the amount of damage to the balance of the farm not taken at \$1,000, the jury fol-

lowed the average amount fixed for such damage by the appellees' witnesses, and did not follow the testimony of the appellant's witnesses to the effect that there was no damage to the land not taken, but we see nothing to indicate that the jury were governed by passion or prejudice. They saw the witnesses, and heard them testify, and examined the premises; and, the evidence having been conflicting upon this branch of the case, they had a right to resort to the results of their examination or inspection of the premises in determining the weight to be given to the various statements of the witnesses.

Counsel for appellant complain because the court refused to allow them to introduce proof to show generally how the value of other farms was affected where three-cornered pieces thereof were cut off by the running of highways or railways through the farms. How other farms than the one in controversy were thus affected was immaterial in determining the amount of damages done to the farm of appellees. Such testimony was improper, because there was nothing to show that these other three-cornered pieces were similarly situated to the farm in question, nor did it appear whether they had a value in connection with some other farm. *Chicago Terminal Railroad Co. v. Bugbee*, 184 Ill. 358, 56 N. E. 386. As was said in the *Bugbee* Case, *supra*, the substance of such evidence is remote and speculative, as affecting the issues involved. So far as appellant proposed to prove the price which it paid for other three-cornered pieces of land along the right of way, or for damages to the same, such testimony was incompetent, and there was no error in denying its admission. *Peoria Gaslight Co. v. Peoria Terminal Railway Co.*, 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; *Lanquist v. City of Chicago*, 200 Ill. 69, 65 N. E. 681; *Kiernan v. Chicago, Santa Fé & California Railway Co.*, 123 Ill. 188, 14 N. E. 18.

Counsel for appellant complain of the fifth instruction, given for appellees by the trial court, which told the jury that they would have a right to award, as the measure of damages, the fair cash value of the part taken as a part of the whole farm. It was the duty of the jury to award appellees compensation in dollars and cents for the fair market value of the land proposed to be taken, having regard to location and advantages as to situation, and the purposes for which it was designed and used; and we have held that, where but a part is taken, and the part taken is of greater value in connection with the whole than as a separate parcel, the measure of damages will be the fair cash value of the part taken as a part of the whole. *Chicago & Evanston Railroad Co. v. Blake*, 116 Ill. 163, 4 N. E. 488; *Chicago, Burlington & Northern Railroad Co. v. Bowman*, 122 Ill. 595, 13 N. E. 814; *Conness v. Indiana, Illinois & Iowa Railroad Co.*, 193 Ill. 464, 62

N. E. 221. That is to say, if the 3.8 acres of land which were taken would be more valuable as a part of the farm than simply as 3.8 acres of land, the jury would be authorized to give the appellees the benefit of the greater value. As we understand the position of counsel, they do not deny that such is the law under the decisions of this court, nor do they claim that the fifth instruction given for the appellees is erroneous so far as it announces the law upon this question. But counsel complain that proof which they sought to introduce showing the value of the farm without the improvements upon it was refused admission by the court. The witnesses for appellant testified that the improvements upon the farm were worth from \$3,000 to \$3,500, while appellees' witnesses testified that the improvements were worth from \$1,000 to \$1,500. It is said that, while the jury had a right to award, as compensation, the value of the land taken as a part of the farm to which it belonged, yet its value was thus to be determined as a part of the farm without the improvements, and not as a part of the farm with the improvements. We see no reason for this distinction. The improvements upon the farm consisted of the farmhouse, the stables and outhouses, the fences, etc. Where the vacant land embraced in the farm was necessarily used and occupied in conjunction with the improvements thereon, and, by reason of so being used and occupied, had a value as an entirety over and above the value of the bare land, the owner of the land would have the right to the value of the part, sought to be taken, as used and occupied in connection with the whole farm. In other words, the strip of land sought to be taken for a right of way has a special value to the owner in connection with the whole of the farm with the improvements upon it, which is greater than the mere value of the bare land without the improvements. If, however, this were not so, the value of the land, as fixed by appellees' witnesses, after deducting the value of the improvements, would not have been greater than the valuation fixed by the jury, and by the majority of appellant's witnesses, that is to say, \$100 per acre.

We find no error in the record which would justify us in reversing this judgment. Accordingly, the judgment of the circuit court of Kane county is affirmed. Judgment affirmed.

(207 Ill. 478)

CHICAGO CITY RY. CO. v. O'DONNELL. (Supreme Court of Illinois. Feb. 17, 1904.)

STREET RAILROADS—TRESPASSERS ON CARS—WILLFUL INJURY—ACTS OF CONDUCTOR—PLEADING—SEPARATE CAUSES OF ACTION—JOINDER—EFFECT—PROOF—QUESTION FOR JURY—CONFLICTING EVIDENCE—INTERMEDIATE APPEAL.

1. Deceased, a newsboy, boarded a street car on the side next to the opposite tracks, without intending to pay fare, and was concealed by a

passenger standing on the platform. The car was going at a high rate of speed, and the passenger testified that when the conductor discovered deceased he told him to get off, and raised his arm in a threatening attitude and moved toward him, when deceased let go and jumped off. He fell on the opposite track, and, while lying thereon in a helpless condition, was run over by a car coming in the opposite direction. The conductor testified, however, that he did not want deceased to get off, and told him to hold on, because he was afraid, if the boy jumped off, he would be injured by reason of the rate of speed of the car. *Held*, that whether deceased came to his death by the willful act of the conductor was a question for the jury.

2. Where, in an action for willful injuries, the only evidence consisted of two witnesses—one for plaintiff, and the other for defendant—whose testimony was directly contradictory, a verdict in favor of plaintiff, affirmed by the Appellate Court, could not be set aside on appeal to the Supreme Court on the ground that the testimony of defendant's witness was the more probable, and that the circumstances of the case should have convinced the trial court and jury of its truth.

3. A count of a declaration alleged that plaintiff's decedent was riding on one of defendant's street cars, not as a passenger, which was running at such a speed as to make it dangerous to alight therefrom; that the conductor, willfully, wantonly, and recklessly, by ordering deceased to get off the car, and by a threatening attitude, and by attempting to strike him, compelled him to jump therefrom, and in doing so he was thrown onto the opposite track and rendered helpless, and, while so lying in such condition, defendant ran a car on such opposite track so wantonly, recklessly, and negligently as to run over and kill deceased, though he could have been discovered, by ordinary care, in time to have prevented the injury. *Held* that, though such declaration was defective in joining two causes of action in a single count, in the absence of a special demurrer on such ground plaintiff was entitled to recover on proof of one of such causes of action.

Appeal from Appellate Court, First District.

Action by P. H. O'Donnell, as administrator of the estate of Michael B. Rowen, deceased, against the Chicago City Railway Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court (109 Ill. App. 616), defendant appeals. Affirmed.

Wm. J. Hynes, Samuel S. Page, and Watson J. Ferry (Mason B. Starring, of counsel), for appellant. James C. McShane, for appellee.

CARTWRIGHT, J. This is an action on the case instituted by appellee, as administrator of the estate of Michael B. Rowen, deceased, in the superior court of Cook county, to recover damages for the death of said Michael B. Rowen, who was run over and killed by one of appellant's cars. The declaration alleged that his death was caused by willful and wanton conduct on the part of servants of appellant. The plea was the general issue, and a trial resulted in a verdict of \$5,000 for appellee. Upon the argument of a motion for a new trial, appellee remitted \$1,500, and the court overruled the

motion and entered judgment for \$3,500 and costs. The Appellate Court for the First District affirmed the judgment.

At the conclusion of the evidence in the case, defendant entered a motion to instruct the jury to find it not guilty, and the motion was denied. The declaration contained three counts, but a demurrer was sustained to the first count, and the case went to trial on the second and third. The second count alleged that Michael B. Rowen was a minor, aged nine years, and was lying in a helpless condition on the defendant's track in the city of Chicago; that, by the exercise of ordinary care on the part of defendant's servants in charge of one of its cars, his presence could have been discovered and the car could have been stopped before running over him, but that defendant's servants recklessly, negligently, and improperly ran the car over him and killed him. The third count alleged that defendant operated double tracks running east and west on Root street, in said city; that Michael B. Rowen was riding, but not as a passenger, on one of defendant's cars, which was running east at such a high rate of speed as to make it dangerous for a person to alight therefrom; that the conductor in charge of said car willfully, wantonly, and recklessly, by ordering Rowen to get off the car, and by a threatening and menacing attitude toward him, and by attempting to strike and grab him, compelled him to jump from the car, and, in doing so, he was thrown and fell with great force on the track for west-bound cars, so as to render him helpless; that, while so lying in a helpless condition, defendant was running another car west, and the servants of defendant in charge of the same, by the exercise of ordinary care, could have discovered him lying on the track, but that they wantonly, recklessly, and negligently ran the car over him and killed him.

There was no evidence tending to sustain the second count. The accident occurred in the evening of January 5, 1900, after dark; and the evidence showed, without contradiction, that the motorman in charge of the west-bound car had no knowledge that any one was lying upon the track, nor any reason to suspect that such was the case, until he received a warning, and that he made every possible effort to stop the car and prevent the accident. There was an entire failure to prove either willful, wanton, or negligent conduct on the part of any one in charge of that car. The only evidence tending to sustain a cause of action related to the alleged actions of the conductor of the east-bound car, under the charge made in the third count. There were double tracks in Root street; the east-bound cars using the south track, and the west-bound the north track. Passengers were not allowed to get on or off the cars from the side next to the adjoining track, and the cars were equip-

ped with iron gates on that side to keep passengers from getting on or off. When the east-bound car reached the Ft. Wayne tracks, the conductor got off, and preceded the car across the railroad tracks, and then got on at the front end of the car, coming through and collecting fares. As the car was so crossing the Ft. Wayne tracks, Michael B. Rowen, who was a newsboy, nine years old, got on the lower step next to the track for west-bound cars, outside of the iron gate. He had some newspapers under his arm, and held onto the irons by his hands. A young man named Garfield Andrews stood inside the gate in front of Rowen to conceal him from the sight of the conductor. The conductor, having passed through the car to the rear, came out on the middle of the platform; and Rowen either whistled, or Andrews spoke to him, which attracted the attention of the conductor, and he asked Andrews who was behind him. Andrews stepped to one side, and the conductor saw the boy. The liability of the defendant depends upon what the conductor then did, and that, with the speed of the car, is the only disputed fact in the case. There were but two persons who knew anything about it—one being Garfield Andrews, and the other John Nelson, the conductor—and they contradicted each other. Andrews testified that the conductor told the boy to get off, and raised his arm in a threatening attitude and moved toward him; that the witness told the conductor the car was going too fast; and that, when the conductor told the boy to get off, and moved toward him in a threatening manner, the boy let go and jumped off. The conductor testified that when Andrews moved aside, and he saw the boy hanging on the hand rail next the gate, the witness said, "What are you doing there?" that Andrews said, "Oh, let him ride;" that the boy leaned forward as though he were going to let go or fall off, and the witness said, "Hold on there;" and that at the same moment the boy swung aside and jumped off. The evidence for the plaintiff tended to show that the car was going 18 or 20 miles an hour, and the evidence for the defendant was that it was going 7 or 8 miles an hour. The conductor testified that he did not want the boy to get off at that time; that he did not know him, or attempt to make him get off; and that he would not want the boy to jump off, going at the rate of speed the car was moving, because he would be likely to fall and be hurt. When the boy swung off, his feet went out from under him, and he tripped or fell across the other track. A car was coming from the other way, and Andrews jumped off and ran toward the other car, holding up his hand and shouting. The conductor rang his bell for an emergency stop, and then jumped off too. As the cars approached each other, the gongs of both were sounded. Andrews and the conductor both shouted to the

motorman of the west-bound car, and did everything they could to stop it; and, when the motorman saw and heard the warnings, he did everything he could to stop.

The boy was not a passenger, and had no intention of paying fare, but was trying to get a ride by standing on the lower step and hanging onto the iron outside of the gate, where passengers were not received or allowed to enter the car. The defendant was not bound to exercise toward him the care owing to a passenger, but it was bound to not wantonly or willfully inflict injury upon him. The testimony of Andrews tended to prove a willful and wanton injury, and required the submission of the issue to the jury. It seems to be conceded that his testimony did tend to prove such an injury, but it is insisted that the testimony of the conductor was the more probable, and that the circumstances of the case should have convinced the court and jury of its truth. That was a question for the Appellate Court, which is no longer open to inquiry. Cars were passing very frequently on the adjoining track, and the tracks were so close together that passengers were not allowed to enter or leave the car on the side next the other track, doubtless because of the danger. If the testimony of Andrews concerning the action of the conductor was believed, the circumstances tended to show that the accident was a natural and probable consequence of the wrongful act, and such as a person of ordinary prudence ought to have foreseen would be likely to result.

It is also assigned as error that the court gave, at the request of plaintiff, the following instruction: "The court instructs the jury that if you believe from the evidence that defendant's east-bound car, at the time and place in question, was running at such a high rate of speed as to be dangerous for deceased, or any ordinary person so situated, to jump from said car, and that said conductor, while acting within the scope of his authority as such conductor, if he was so acting, willfully and wantonly compelled deceased to jump from said car in manner and form as charged in the declaration, if he did do so, and while it was running at such rate of speed, and that said conductor's conduct in this regard showed a reckless disregard of deceased's safety, and that deceased was thereby thrown down on the adjoining track and rendered helpless, and while so lying upon said track was run over and killed by the west-bound car before it could be stopped, then you should find the defendant guilty, even though you should find from the evidence that there was no fault upon the part of the motorman of the west-bound car." The rule of law stated in the instruction is correct. If the conductor of the east-bound car was guilty of a willful and wanton act which was the efficient cause of the deceased falling upon the track and lying there

in a helpless condition, where he would naturally be in danger of being run over and killed by west-bound cars, the plaintiff could recover, although the injury actually resulted without fault of those in charge of the west-bound car. Cooley on Torts, 70. The objection to the instruction is based on the form of the pleadings. The instruction could only apply to the third count, which charged wanton and willful conduct on the part of both the conductor of the east-bound car and the motorman of the west-bound car; and it is contended that, in order to justify a recovery, it is necessary to prove both charges; that the count stated but one cause of action, based upon two acts conjointly committed by the conductor of one car and the motorman of another, from which the injury resulted; that the proximate cause of the injury was alleged to be the reckless and wanton negligence of the motorman of the west-bound car, and not the act of the conductor in driving the deceased from the east-bound car; and that the instruction was bad in permitting a recovery where the evidence showed that there was no fault on the part of the motorman of the west-bound car. It is a settled rule that a plaintiff must recover, if at all, on the case stated in his declaration. He cannot make one case by allegation, and recover on another case made by the proof; but in this case there was an attempt to state in the declaration two independent wrongful acts, either of which would justify a recovery, and the question is whether the plaintiff was bound to prove both. If the deceased was lying in a helpless condition on the track, and the motorman of the west-bound car, by the exercise of ordinary care, could have discovered him, but wantonly, recklessly, and negligently ran the car over him and killed him, the plaintiff could recover, regardless of the question how the deceased came to be on the track. On the other hand, if the deceased was on the track in a helpless condition through the willful and wanton act of the conductor of the east-bound car, plaintiff could recover, regardless of the question whether the act of the motorman was wrongful or innocent. No objection was made to the count, and, if there was a fault in it, it consisted in the violation of the rule that each count must state a single cause of action, and must not state different facts or sets of facts, any one of which would justify a recovery. That objection is to be raised and pointed out by special demurrer. The alleged acts of the conductor and motorman were not joint or concurrent. Neither was the nature of the act of the motorman, as willful or otherwise, a matter of essential description of the injury, which must be proved as laid. We think that the charges were divisible, and the rule is that, in actions for torts, plaintiff may prove a part of his charge, if there be enough proved to sustain his charge. *Chicago & Grand Trunk Railway Co. v. Spur-*

ney, 197 Ill. 471, 64 N. E. 802. There was therefore no error in giving the instruction.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(207 Ill. 430)

HAWTHORN et al. v. ULRICH et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

WILLS—CONSTRUCTION—INTEREST OF REMAINDERMEN—POWER OF APPOINTMENT—SCOPE—EXECUTION—VALIDITY.

1. Testator gave his estate to his wife for life, except a specified sum to her niece. At the death of his wife one-half of the property then in her possession was to be divided equally between his heirs, and one-half between her heirs "in the manner in which she may decide," his wife's niece to "share equally with the heirs in the whole estate" in addition to the bequest before mentioned. The wife was allowed to dispose of the property to satisfy demands on her, and whatever was left was to be divided as stated above. *Held*, that the wife's heirs as a class took a vested remainder in the part of the estate which was eventually to go to them, subject to the exercise of her power of appointment as to the portion each should take.

2. The doctrine of illusory appointment will not be adopted to invalidate the execution of a power of appointment under which merely nominal shares were given to several of the objects of the power, which left what each should take to the donee's discretion.

3. In the execution of a power of appointment pursuant to a will by which the wife was given a life estate with power to distribute one-half of the remainder among her heirs as she should decide, it is no objection to the execution of the power by her will that no person was specifically required to pay nominal sums appointed to some of the remaindermen, she having directed that they should be paid out of the one-half of the remainder which passed to her heirs.

Appeal from Circuit Court, McLean County; C. D. Myers, Judge.

Suit by William Hawthorn and another against Grace A. Ulrich and others for partition. From the decree therein, complainants appeal. Affirmed.

Tipton & Tipton, for appellants. Barry & Morrissey, for appellees.

SCOTT, J. Orin C. McCord died in McLean county, Ill., testate, on the 2d day of June, 1899, leaving a widow, Mary A. McCord, but leaving no descendants. By his will he provided for the payment of his debts and funeral expenses, and then:

"Second—I give and bequeath to Mary A. McCord, my wife, all of my personal and real property for her use during her natural life, except five thousand dollars, (\$5,000,) which is to go to Grace A. Perkins at such time as my wife may deem wise. At the death of my wife one-half of the property then in her possession is to be divided equally between my heirs, and one-half to be divided between her heirs in the manner in which she may decide. Grace A. Perkins is also to share equally with the heirs in the whole estate at the disposition of the property at my wife's death, in addition to the five thousand (\$5,000) already mentioned in this will.

"If at any time my wife deems it necessary to dispose of the property to satisfy

demands on her, she is at liberty to do so, and whatever of the estate is left at her death is to be divided as stated above."

The will nominated Mary A. McCord to be executrix without bond. At the time of his death, in addition to his personal property, testator was seised of 65 acres of land in McLean county, 14 acres of land in Putnam county, and 2 lots, upon which he resided, in Normal, McLean county, Ill. On the 26th day of December, 1902, Mary A. McCord conveyed by deed the land in McLean county to Grace A. Perkins. The deed recites that it is made in payment of the \$5,000 legacy, and also "for the purpose of remunerating the said Grace A. Perkins for services rendered the said Mary A. McCord since the death of the said Orin C. McCord," and purports to be a conveyance by Mary A. McCord in her own right and as executrix. At the same time she executed her last will and testament, which was duly admitted to probate after her death. After the death of her husband Mrs. McCord also sold and conveyed the 14-acre tract in Putnam county. She departed this life in March, 1903, leaving no descendants. By her will she bequeathed \$200 to Susan E. McCord out of her individual estate and the residue of her individual estate to Grace A. Perkins, and provided that the land theretofore deeded to Grace A. Perkins should vest in her in fee, for the purposes stated in the deed; and the will then proceeds:

"By the last will of my husband I was vested with discretion to appoint the distribution of his residuary estate left at my death as therein provided, and in exercise of such discretion and power of appointment, so far as conferred upon me in and by said will, I declare my will and intention as follows: As to the one-half of said residuary property devised and bequeathed to the heirs of my said husband I desire said will carried out strictly in accordance with my husband's wishes. As to the remaining one-half of said residuary estate of my husband in my possession at the time of my death and by him directed to be divided between my heirs in the manner I should decide, it is my will, and I so desire and decide and appoint, that my said niece, Grace A. Perkins, shall take and receive as her share all of said one-half, except that each one of my heirs-at-law other than said Grace A. Perkins shall be given and paid out of said one-half the sum of five dollars (\$5.00), hereby explicitly declaring it to be my desire and decision that said Grace A. Perkins shall receive from my husband's residuary estate all that a proper and legal construction of said will of my husband will entitle her to and all of said estate which I have any right or power to appoint or award to her, except that each of my remaining heirs shall receive said sum of five dollars (\$5.00) therefrom."

Grace A. Perkins was a daughter of a de-

ceased sister of Mary A. McCord. She had been raised in the family of Orin C. McCord and his wife, and had reached womanhood prior to the death of the widow. She has since married, and, as Grace A. Ulrich, is one of the appellees herein.

On July 3, 1903, William Hawthorn and Amanda McKnight, the appellants, who are heirs of Mary A. McCord, filed their bill for partition in the circuit court of McLean county. This bill was amended several times, and as finally considered stated all the foregoing facts; made the other heirs of Mary A. McCord and all the heirs of Orin C. McCord defendants; charged that one half of the real estate of which Orin C. McCord died seised, excepting the 14 acres in Putnam county, is vested in the heirs at law of Orin C. McCord and the other half in the heirs at law of Mary A. McCord, all subject to the payment of the \$5,000 legacy to Grace A. Perkins; that the deed made by Mary A. McCord for the land in McLean county, which is averred to be of the value of \$9,750, was fraudulently and by undue influence obtained by the grantee therein, and is a cloud upon the title of the owners of said real estate; prays that the deed to Grace A. Perkins be set aside, that she be charged with rent for the premises described therein, and that partition be had of all the real estate of which Orin C. McCord died seised, which is located in McLean county, among the owners thereof as such ownership is stated in the bill, charged with the payment of the \$5,000 legacy to Grace A. Perkins, now Ulrich. To this bill the circuit court sustained a general and special demurrer interposed by Grace A. Ulrich. The bill was thereupon dismissed for want of equity, and the complainants appeal to this court.

It is first urged that Mary A. McCord took only a life estate under the will of her husband, and that the rule is that, where a power of disposal accompanies a bequest or devise of a life estate, the power of disposal is only coextensive with the estate which the devisee takes under the will, and must be such a disposal as a tenant for life could make, unless there are other words clearly indicating that a larger power was intended, and that by the terms of the will of Orin C. McCord the only power given to dispose of the fee was a power to be exercised for the purpose of meeting necessary demands upon Mary A. McCord, and that, subject to the exercise of that power for that purpose and the payment of debts and specific legacies, and subject to the life estate of Mary A. McCord, the heirs of Orin C. McCord, as a class, and the heirs of Mary A. McCord, as a class, each took a vested remainder in his estate. The cardinal rule for the construction of wills requires the ascertainment of the testator's intention as he has expressed it by the language used, and when so ascertained it must be effectuated, unless it be in some instance where he uses terms which have a settled

and definite meaning in the law, when such terms must be given such meaning, even though the result is to defeat the manifest intention of the testator, as some times unfortunately occurs in enforcing the rule in Shelley's Case.

No question arises in this controversy in reference to the portion of the estate of Orin C. McCord which has reached his heirs under his will and under the will of his widow. They do not attack either of the deeds made by Mary A. McCord. The only question that arises is in reference to that portion of the property which the testator intended should pass eventually to the heirs of his wife, and the first position of appellants is that Mary A. McCord had no power of appointment as to the remainder in the one-half of the estate which was to pass to her heirs, but that such heirs are entitled to take it, share and share alike, and that her appointment is entirely void because beyond the power conferred upon her. The remainder in one-half of the property is "to be divided between her heirs in the manner in which she may decide." To put upon this will the construction which appellants ask is to disregard entirely the words italicized. The testator meant them to apply to something. They could not have been intended to apply to the life interest, because his purpose was that she should retain that herself, and as every word and every clause of the will should be given meaning, this power of appointment must be held to apply to that portion of the remainder which was to pass to the heirs of Mary A. McCord.

In considering the portion of the will that confers the power of appointment, counsel for appellants place great stress upon the sentence which immediately follows, and which is: "Grace A. Perkins is also to share equally with the heirs in the whole estate at the disposition of the property at my wife's death, in addition to the five thousand (\$5,000) already mentioned in this will;" the argument being that, if she is to share equally with the heirs of the wife, then they must each take an equal amount, or her share cannot be equal to the share of each of the others. It must be remembered that the property passing to testator's heirs is to be divided among them share and share alike; and when the language last quoted is considered in the light of that fact it plainly shows his intention to be that she should share equally with his heirs in one-half of the remainder. In effect, she is by this sentence made one of his heirs, and her right to share as one of the heirs of his wife is not prejudiced, or lessened, or taken away by the \$5,000 legacy. So far as his will is concerned, it simply means that she has an equal right to share with the other heirs of his wife; the right of all, so far as the portion each will take, being equally subject to the power of appointment. Under this power each heir of the wife must take something.

The portion which each will take is left to her discretion.

Orin C. McCord, after providing for the payment of legal charges against his estate, and the legacy of \$5,000 to the woman who had grown from childhood in his family, and for the maintenance of his wife during her remaining years, was undoubtedly, from the language of his will, animated by a desire to divide the remainder of his property equally between his wife and himself, ultimately vesting the one-half thereof in his own heirs and Grace A. Perkins and the remaining one-half in the heirs of his wife; and, knowing his own right to distribute this property among his own heirs in such shares as he saw fit, his purpose was to confer the same right upon his wife in reference to the property that was to pass to her family. At the death of Orin C. McCord, her heirs, as a class, took a vested remainder in the portion of his estate which was eventually to pass into their possession, subject to the exercise of this power of appointment. If this be true, however, it is said that her will is a fraud upon the power she possessed, and we are asked to apply the doctrine of illusory appointment, and hold the execution of the power void, and direct an equal distribution of the property which by the will of Orin C. McCord was to pass to the heirs of Mary A. McCord, among all such heirs. Where, by the terms of an instrument, a power is given to appoint property to or among certain persons, the amount that each is to receive being left to the discretion of the donee of the power, and where none of the beneficiaries can be excluded, and where a mere nominal share is appointed to one or more of them, such an appointment is termed "illusory." 2 Am. & Eng. Ency. of Law (2d Ed.) p. 475; 1 Bouvier's Law Dic. p. 769. Formerly, in England, while it was held in a suit at law that the appointment of any sum, however small, to one of the beneficiaries, would satisfy the power, in equity the rule was different; and, while a court of chancery would not require an equal distribution of the property among all the persons to whom it was to be appointed, still it was held that some substantial amount must be given to each, and where the amount given to any one was merely nominal the appointment would be set aside, and the property distributed in such manner as would seem just to the court. A very interesting discussion of this doctrine is found at page 431 of volume 1 of White & Tudor's Leading Cases in Equity, where it is said: "Much litigation arose in consequence of the great difficulty of deciding what was a substantial, and not merely an illusory, share, and great dissatisfaction with the doctrine was expressed by the most eminent judges, who endeavored, in many cases, to narrow it. * * * In the celebrated case of Butcher v. Butcher, 9 Ves. 382, the objects of the power were nine in number, and the fund to

be appointed amongst them about £17,000. To some of the objects of the power shares of £200 three per cents, only, were given. Sir W. Grant, M. R., held the appointment not to be illusory, but, like Lord Alvanley, strongly disapproved of this doctrine of equity. "To say," he observed, "that under such a power an illusory share must not be given, or that a substantial share must be given, is rather to raise a question than to establish a rule. What is an illusory share and what is a substantial share? Is it to be judged of upon a mere statement of the sum given, without reference to the amount of the fortune which is the subject of the power? If so, what is the sum that must be given to exclude the inference of the court? What is the limit of the amount at which it ceases to be illusory and begins to be substantial? If it is to be considered with reference to the amount of the fortune, what is the proportion, either of the whole or of the share, that would belong to each upon an equal division? In terms, the power, though limited as to objects, is discretionary as to shares. A court of law says no object can be excluded; but there it stops. It does not attempt to correct any—the extremest—inequality in the distribution. * * * As no case has been found in which a sum of this amount has been declared illusory, there is no ground upon which I think myself justified in determining that this is an invalid appointment.' Later, in another case, the same master said: 'I adhere to the rule I laid down in *Butcher v. Butcher* that I will go as far as I am bound by an authority, but no farther. Show me a case in which a specific sum or an equal proportion of what would be the share of each object of the appointment upon an equal division has been held to be illusory, and I will, in the same case, make the same decision. But where I am deprived of the guidance or freed from the compulsion of authority I will not hold any appointment to be invalid upon that ground of objection.'" Lord Eldon affirmed this holding of the Master of the Rolls (16 Ves. 15), but expressed the view that it, in effect, destroyed all the authorities, because no two cases would ever be the same, and that, if an amount could not be held illusory except by showing that the same amount or the same proportion of an estate had been held illusory in some earlier case, then the doctrine could no longer be applied. The editors of the work from which we have been quoting state that "the interference of courts of equity in cases of illusory appointments was so unsatisfactory in its results that the Legislature at length interfered, and by statute 1 Wm. IV, c. 46, passed June 16, 1830, it was enacted that no appointment * * * should be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share" only should be appointed to one or more of the objects of the power.

Appellants cite four cases to show that the doctrine has been adopted by some of the states of the Union. In *Hatchett v. Hatchett*, 103 Ala. 556, 16 South. 550, in a suit at law, a plaintiff sought relief for the reason that in the execution of a power he had received merely an illusory appointment. The court said that the doctrine had no standing in a court of law, and that plaintiff's remedy, "if, indeed, he has any upon this aspect, would be in a court of equity." In *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. 232, a power was to be executed for the benefit of two. The donee of the power executed it by a will devising all the property to one. In discussing the law of appointment, in meeting the argument of counsel who sought to uphold the execution of the power, it was said that the donee of the power could not give one child substantially all the estate and give the other only a nominal amount, for the reason that this would be an illusory appointment; but the holding was that the power of appointment in that case remained unexecuted because no property at all was given to one of the objects of the power. In *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523, a power of appointment existed in the widow of the testator to divide the property among his children as she might think best, at the expiration of her life estate therein. She attempted to execute the power by deed, and conveyed a much greater portion of the property to one of the children than to either of the others, for the purpose of providing for the support of herself and her second husband during their respective lives. These deeds were set aside for the reason that the power of appointment must be exercised for the benefit of the parties entitled to the property, and not with a view of benefiting the donee of the power, and for the reason that an appointment for such purpose is fraudulent and void; and it is also said that each of the beneficiaries was entitled to a substantial portion of the estate. The decision, however, could not have been based on the latter ground, because the least amount of property received by either of the children under the deeds was sixty-one acres of land. In *Clay v. Smallwood*, 100 Ky. 212, 38 S. W. 7, testator's daughter was given a power of appointment, to be exercised at her death, for the purpose of distributing a certain share of his estate "to my other children as she may direct." She attempted to execute the power by devising this property to two of her sisters and their children and to the daughter of another sister, excluding entirely other children of the testator. The court held that the attempted execution of the power passed no title whatever, and that all of the children of the testator living at the time of his death took an interest in this property. This was on the theory that the exercise of the power was void, for the reason that some of the beneficiaries were excluded entirely; but in passing upon the

question the court refers to *Kemp v. Kemp*, 5 Ves. 848, *Alexander v. Alexander*, 2 Ves. Sr. 639, and *Degman v. Degman*, *supra*, as authorities for the proposition that each of those entitled must receive a substantial share of the estate.

We think it fair to conclude from these authorities that, if the question was properly presented, in Kentucky, at least, the rule of the earlier English authorities would be followed. We have, however, been referred to no case, and we have been unable to discover any case, where the doctrine of illusory appointment has been actually applied in any of the American states. In none of the American cases relied upon by appellants has the execution of the power been set aside or held null and void for the reason that the portion received by some one or more of the beneficiaries was nominal or illusory. In the cases where the doctrine has been discussed with favor, and where the holding has been that the power was improperly executed, it has not been on the basis that one or more of the shares was merely nominal. Pomeroy states the rule to be: "When the trust power is of such a nature that the donee trustee is authorized to dispose of the property among a class, and is clothed with a discretion, a court of equity will not interfere to control that discretion, or interfere with the mode of exercising it, if he does, in fact, make an appointment." 2 Pomeroy's Eq. Jur. § 1002. In a number of American cases, where the question has been properly presented, it has been held that, where the power of appointment is to be exercised according to the discretion of the person to whom it is committed, no appointment will be defeated, no matter how unjust or unreasonable it may seem, and no matter how nominal or illusory the portion received by some of the beneficiaries may be, provided, only, that some portion of the estate passes to each of the objects of the power. *Graeff v. De Turk*, 44 Pa. 527; *Ingraham v. Meade*, 8 Wall. Jr. 32, Fed. Cas. No. 7,045; *Fronty v. Fronty*, *Bailey*, Eq. 527; *Lines v. Darden*, 5 Fla. 51; *Van Syckel's Estate*, 9 Pa. Dist. R. 387; *Cowles v. Brown*, 4 Call (Va.) 477. In *Graeff v. De Turk*, *supra*, a devisee was authorized to appoint among the heirs of his body, and he exercised the power by giving one of his children 130 acres and giving to the three children of another 3 acres among them. The court, in holding this to be a valid exercise of the power, said the English equity rule that, where there is a power of appointment among several distributees, it cannot be legally exercised except by giving to each appointee a beneficial interest in the fund fairly proportioned to the amount for distribution, and that the appointment of a nominal share to a beneficiary is illusory and void, has never been adopted in Pennsylvania.

Certain difficulties in the way of the practical enforcement of this doctrine would

cause us to hesitate about adopting it, even if it had received the unquestioning approval of courts of last resort in other states. The only basis upon which a court of equity could interfere would be that the power had not been executed as the testator intended, for the reason that he intended each of the beneficiaries to receive a substantial portion of his bounty. Manifestly, he did not intend that they must receive equal portions, or the power to decide what portion each should receive would not have been given another. If, now, a court of chancery determines that the appointment made is a fraud upon the power, and shall be set aside for the reason that the donor's purpose has been thwarted, what, then, shall be done with the property? Shall it be distributed equally? That, too, in the absence of a direction to that effect from the donee of the power, would be as manifestly a perversion of his will, and it would seem to be impossible, by any investigation, to determine just what portion each must receive to make the final distribution conform to the desires of the testator. Equity cannot do better than to leave the power of distribution where the testator left it, and refuse to interfere where the power has been executed by conveying to each intended beneficiary some portion, however small, of the testator's property.

In view of the fact that this doctrine was long discredited and reluctantly enforced by the English courts of equity until the steadily increasing dissatisfaction was recognized by a statute entirely forbidding its application, and in view of the further fact that no case, as it seems, can be found in which it has ever been applied by an American court, we are of the opinion that in the light of the authorities above cited from Pennsylvania and other states, and in consideration of the reasons which make against the rule and its enforcement, we would not be warranted in ingrafting this doctrine of illusory appointment upon the laws of Illinois.

The execution of the power is also questioned because no person is specifically required to make the payment of the \$5 legacy to each of the heirs of Mary A. McCord, other than Grace A. Ulrich. It is to be observed that the will directs that these \$5 legacies are to be paid out of the one-half of the remainder which passes to the heirs of the testatrix. If in that one-half there be personal property sufficient, these legacies will be payable by her executor in due course. If there be not personal property sufficient, we regard the language of the will as sufficient to charge them upon the real estate, and they would then be payable by the principal devisee.

What we have said makes it unnecessary to dispose of the error assigned which questions the conveyance of the 65 acres. No one complains of that except the heirs of Mary A. McCord; and as they would, in any event, have no interest in the property be-

yond the amounts fixed in her will, the error in sustaining that conveyance, if any there be, is one of which they cannot complain.

The decree of the circuit court will be affirmed. Decree affirmed.

(207 Ill. 215)

FIRST NAT. BANK OF METROPOLIS v. LEECH et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

CONSTRUCTIVE TRUST — EVIDENCE — SUFFICIENCY — ADMISSIBILITY — BILL IN EQUITY — FAILURE OF PROOF — FORECLOSURE OF MORTGAGE — RES ADJUDICATA — CROSS-EXAMINATION.

1. The fact that a guardian acquired a certificate of purchase of real estate with funds that he held as guardian, an assignment of which was taken by a bank, with knowledge thereof, as security for money loaned to the guardian, makes the bank the trustee of the wards, no matter what legal advice the bank had to the contrary, and no matter what the bank officers believed about the question of their liability.

2. Where sufficient material averments of a bill to enforce a constructive trust to sustain a decree in favor of complainant are established by the evidence, the fact that other allegations in the bill are not supported by the evidence is not cause for reversal.

3. An adjudication on the foreclosure of a real estate mortgage that a certain person was the holder of the legal title is not evidence of an adjudication of the question whether he held the legal title for another, or upon a trust arising by implication in favor of another.

4. Where, in an action to enforce a constructive trust, one of the defendants testifies on behalf of complainant, the fact that the court sustained objections to cross-interrogatories by which it was sought to show that no conspiracy existed to defraud complainant is not cause for reversal; it appearing that the witness was afterwards permitted to testify during the same cross-examination that it was not his purpose, nor the purpose of the officers of the cross-examining defendant, to damage complainant in the transaction.

Appeal from Circuit Court, Massac County; O. H. Harker, Judge.

Action by James H. Leech and others against the First National Bank of Metropolis and another. From a decree for plaintiffs, the bank appeals. Affirmed.

Appellees on June 12, 1902, filed their bill of complaint in the circuit court of Massac county against appellant. The bill alleges that on January 10, 1896, one Frank Adams was appointed guardian of complainants, who were then minors, and, as such guardian, received from his predecessor \$7,037.12; that on January 20, 1896, Adams purchased a note for \$4,000, secured by a mortgage upon certain real estate, paying for the same out of said wards' funds, and that the note and mortgage were duly assigned to him as guardian of complainants; that this mortgage was afterwards foreclosed, and on March 19, 1898, the master offered for sale the real estate therein described, under the decree of foreclosure; that the same was sold to complainant in the foreclosure suit—Adams, as their guardian, bidding the sum of \$4,969.79, being the amount of the debt,

interest, and costs; that, at the time of bidding, Adams was personally insolvent; that he owed the First National Bank of Metropolis over \$1,000, evidenced by overdue promissory notes, and owed other creditors, in the aggregate, \$1,000, a large portion of which was held by said bank for collection; that the bank and its officers knew of the insolvent condition of Adams; that the master refused to issue a certificate of sale to Adams, as guardian, until the costs of the proceedings, amounting to \$162.50, were paid; that Adams did not have the money to pay these costs, and applied to said bank for a loan of that amount, offering to deposit with the bank, as collateral security for this loan, the certificate of sale, when issued; that the bank refused to loan the money in this way, but offered, if Adams, as such guardian, would receipt the master for the full amount due under the decree, and would have the master issue to him individually the certificate of sale, and would execute to the bank a new note for \$2,254, and assign to the bank, as security for such new note, the certificate of sale, the bank would pay said costs, would surrender all evidences of private indebtedness due it from Adams, and would let him have sufficient money to pay his other creditors; that Adams accepted this offer, receipted the master, as guardian, without receiving any money from said master, received a certificate of sale to himself, individually, executed the note for \$2,254 to said bank, and assigned and turned over to the bank the certificate of sale; that the bank surrendered the private notes to Adams, and placed to his credit in the bank almost \$1,000 in addition, which was soon checked out and paid by the bank to other creditors of said Adams; that on November 9, 1900, the time for redemption having expired, the master executed a deed to the bank, as assignee of Adams; that Adams obtained possession of the property, but on May 20, 1902, surrendered possession to the bank, recognized it as a landlord, and agreed to thenceforth pay rent to it. The bill further charges that the bank had full knowledge when said note and mortgage were purchased by Adams that they were purchased with money held by him as guardian; that it had full knowledge when he bid in the property at the sale that he bid as guardian, and that he was personally insolvent; that it knew he received no money from the master, and knew that the master had received no money from him, except \$162.50, which had been furnished by the bank to pay the costs; that it knew when it took the new note and the certificate that Adams was insolvent, and that the note represented his private indebtedness, and that the certificate was held by him in the capacity of trustee or guardian of complainants, and that the assignment of the certificate by Adams to the bank was therefore fraudulent and void; that the bank took the title burdened with a resulting trust in favor

of complainants; that, at the time of the above transactions, complainants were minors, and knew nothing of what had been done; that Frank Adams has recently filed his report as guardian, and that therein the complainants are charged with said premises at the valuation of \$4,000; alleges willingness to accept the property at that valuation, but states that appellant now claims the absolute title to said premises. The prayer is that the assignment be declared fraudulent and void as against complainants; that the bank be decreed to hold the premises in trust for complainants, and be ordered to convey the legal title to them; that an accounting for the rents and profits be had; and for general relief. The appellant and Frank Adams are made parties defendant.

A default was taken against Adams, but the bank answered, admitting the purchase of the note and mortgage by Adams, and the foreclosure proceedings, but denying that Adams purchased the property as guardian, and specifically denying all other material allegations in the bill. The complainants filed a replication to this answer.

The cause was heard without other pleading. The evidence was taken in open court, and a decree rendered finding the allegations of the bill to be true, finding the equities to be with the complainants, and awarding the relief sought by the bill. The bank appeals.

Courtney & Helm, for appellant. C. L. V. Mulkey, for appellees.

SCOTT, J. (after stating the facts). The principal insistence of appellant is that the decree is not sustained by the evidence, and that the case made by the evidence, if any, does not conform to the allegations of the bill. The finding of the decree is that the allegations of the bill are true, as therein stated. The bill alleges that Adams acquired the certificate of purchase with funds belonging to his wards, the appellees, and alleges that the bank took the assignment of the certificate with knowledge of that fact. No question is made as to the first of these charges, but it is insisted that the bank did not have notice. We have carefully examined the evidence contained in the record. It is somewhat conflicting. A discussion thereof would be profitless here, however, as we are satisfied that the judge of the circuit court, who saw and heard the witnesses testify, reached a correct conclusion on this question of fact.

The appellant sought to show, and did show, that before taking the assignment it sought the advice of counsel for the complainant in the foreclosure suit, and was by him assured, in substance, that the bank could lawfully take and hold the certificate as security for the money it was about to loan to Adams. This is not enough. The fact that Adams purchased this certificate with funds that he held as guardian, and

that the bank accepted the certificate with knowledge of that fact, makes the bank a trustee for appellees, no matter what an attorney advised it, and no matter what the bank officers believed about the question of their liability. It is the existence of these facts that makes the bank liable, not the views of its officers or attorney in regard to whether it is liable.

Where a guardian invests the money of his ward in the purchase of land, taking the title to himself, a trust arises, by implication, in favor of the beneficiary, who may follow the money into the land, and hold the land as trust estate; and the motives by which the guardian was animated in taking the title to himself are wholly immaterial. *Rice v. Rice*, 108 Ill. 199; *Cookson v. Richardson*, 69 Ill. 137; *Reese v. Wallace*, 113 Ill. 589; 2 *Pomeroy's Eq. Jur.* § 1049. And further: "The doctrine is that a purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect of the property, and is bound in the same manner as the original trustee from whom he purchased; and this even though he is a purchaser for a valuable consideration. 2 *Pomeroy's Eq. Jur.* § 688; 27 *Am. & Eng. Ency. of Law*, pp. 251, 265; *School Trustees v. Kirwin*, 25 Ill. 73; *Fast v. McPherson*, 98 Ill. 496; *Cushman v. Bonfield*, 139 Ill. 219, 28 N. E. 937; *Union Mutual Life Ins. Co. v. Slee*, 123 Ill. 57, 12 N. E. 543; *Phillips v. South Park Com'rs*, 119 Ill. 628 [10 N. E. 230]." *Indiana, Illinois & Iowa Railroad Co. v. Swannell*, 157 Ill. 616, 41 N. E. 989, 80 L. R. A. 290.

The bill contains certain charges of actual fraud or fraud in fact, as distinguished from constructive fraud or fraud in law, and certain charges of conspiracy on the part of the bank and others to wrong these wards, which we do not think are sustained by the evidence; but material averments of the bill, which we have above held to have been established by the evidence, are sufficient to sustain the decree. The fact that other allegations contained in the bill are not established by the evidence does not warrant a reversal. *Booth v. Wiley*, 102 Ill. 84; *Chicago West Division Railway Co. v. Mills*, 105 Ill. 63.

Appellant takes the position that the decree of confirmation in the foreclosure suit is an adjudication that Adams purchased the land in his individual capacity, and that, consequently, when the certificate ripened into a deed, the grantee therein would necessarily take both the legal and equitable title; and reliance is placed on the case of *Hunter v. Stoneburner*, 92 Ill. 75, which is said to be identical in principle with the case at bar. That is a case in which the complainant, *Stoneburner*, filed a bill to set aside a sale and conveyance in partition of property in which he had owned an interest, and also to set aside a deed conveying the same property from the purchaser at the partition sale to *Hunter*. In the suit to partition the land he

had been made a defendant while a minor. The principal ground upon which he based his claim for relief was the charge that his co-tenant fraudulently procured the commissioners in partition to report that the land was not susceptible of division. The land was sold under a decree in partition, and purchased by the co-tenant at a grossly inadequate price, and by him conveyed to Hunter, who was the owner thereof at the time the bill to set aside the sale was filed. The court held that, even if there was fraud, Hunter could not be affected thereby, unless he had actual or constructive notice thereof. It will be perceived at once that the notice which was proven in the case at bar was wholly lacking in the Stoneburner Case. The court properly held in that case that, in the absence of either actual or constructive notice to Hunter of the fraud, he had the right to rely upon the decree of sale and the approval by the court of the report of sale as *res judicata*. One distinction between the two cases is that, in the case before us, notice to the purchaser was proved; in the Stoneburner Case, it was not. The decree of confirmation here was an adjudication, binding upon all the parties to the foreclosure suit, that Frank Adams held the legal title. On the question whether he held the legal title for another, or upon a trust arising by implication in favor of another, the decree of confirmation was no evidence whatever.

Adams testified on the part of appellees. On cross-examination appellant sought to show by him that no conspiracy existed to wrong or defraud the appellees. Complaint is made of the action of the court in sustaining objections to cross-interrogatories on this subject. This was not proper cross-examination. Moreover, the witness afterwards testified, during the same cross-examination, that it was not his purpose, nor the purpose of the officers of the bank, to defraud appellees by the transaction under investigation, so that appellant had the benefit of the witness' views on that subject.

We are of opinion the decree of the circuit court does equity between the parties, and it will accordingly be affirmed. Decree affirmed.

(207 Ill. 104)

WILENOU v. HANDLON et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

DEEDS—DELIVERY—TESTAMENTARY DISPOSITION—EVIDENCE.

1. A landowner executed a deed to his daughters, who lived with him, and after having the deed recorded delivered it to one of his daughters, telling her to place it among his papers, that being the first that the daughters had known of the deed. Thereafter the property was assessed to the daughters, and insurance written on it in their names, but it was not shown that the father knew of such facts. He and the daughters continued to live on the land, dividing the profits between them as before. At the time the deed was executed the father was ill and believed he would not live long. and

he had talked with the daughters about the land, and stated that on his death he wished it divided between them. It was shown that he had stated to several parties that he had deeded the land to the girls. *Held*, that the evidence showed that the deed was intended as a testamentary disposition of the property, and not as a present conveyance.

2. The fact that a grantor, after causing his deed to be recorded, gave it to one of the grantees with instructions that she should place it among his papers with a view that it might be found in case of his death, rebutted any presumption of delivery.

3. The fact that a grantor remained in possession of land after the execution of a deed is an important fact in determining whether the deed was delivered.

4. On an issue as to whether a deed by a landowner to his daughters was intended to operate as a testamentary disposition or as a present conveyance, the fact that the land was assessed to the daughters and insurance written on the buildings in their names was not binding on him, in the absence of any evidence that he knew of such facts.

5. The burden of proof was on one claiming a present conveyance to show that the grantor knew of facts relative to the insurance and assessment.

6. On an issue as to whether a deed by a landowner to his daughters was intended to operate as a testamentary disposition or as a present conveyance, the fact that the landowner stated to various persons that he had made a deed of the farm to his daughters was not inconsistent with the view that he intended the deed to take effect after his death.

Appeal from Circuit Court, Grundy County; S. C. Stough, Judge.

Suit by John Fred Wilenou against Anna Handlon and others. From a decree of dismissal, complainant appeals. Reversed, and cause remanded, with directions.

This is a bill in chancery filed by appellant in the circuit court of Grundy county against his three daughters, Elizabeth Wilenou, Paulina Wilenou, and Anna Handlon, and William Handlon, husband of Anna, to cancel and set aside as a cloud upon his title the record of a deed bearing date February 18, 1899, executed by the appellant to his said daughters, and purporting to convey to them his farm, containing 440 acres, located in said county, which deed was recorded in the office of the recorder of deeds of Grundy county on the 20th day of February, 1899. Elizabeth and Paulina disclaimed any interest in the farm, and Anna and her husband filed an answer denying the allegations of the bill, and averring that Anna was the owner of an undivided one-third part thereof. A replication was filed, and the case was referred to the master to take proofs and report his conclusions as to the facts and the law. A report was filed by the master, in which it was found that Anna was the owner of the undivided one-third part of the farm in fee, and, objections and exceptions having been filed thereto and overruled, a decree was entered finding that Elizabeth and Paulina, by reason of their disclaimer, had no interest in the farm, and decreeing Anna to be the owner of the undivided one-third part

¶ 2. See Deeds, vol. 16, Cent. Dig. §§ 126, 576.

thereof in fee, and as to her dismissed the bill for want of equity, from which decree appellant has prosecuted an appeal to this court, and has assigned as error the finding of the court that Anna was the owner of the undivided one-third part of said farm in fee, and in entering a decree dismissing the bill for want of equity as to her.

It appears from the pleadings, proofs, and master's report that appellant is a German, was a widower, and was about 70 years of age at the time of the execution of the deed sought to be canceled; that he came to America when a young man; that many years ago he purchased the farm in question, which was not the best quality of soil, but was adapted to the raising of stock, and upon which he and his family made their home; that by industry and economy, with the assistance of his wife, he improved and paid for the same and raised his family, which consisted of five girls—the defendants; a married daughter who died several years prior to the execution of the deed, leaving five small children, who had had a home, since their mother's death, with the appellant; and another married daughter, who married a man by the name of Allen Spellman, and who resides in Coal City, not far from said farm; that subsequent to the time of the death of appellant's wife, which occurred some 10 years prior to the date of the deed, the defendants were the housekeepers of the appellant; that the appellant disliked his son-in-law, Spellman, and said he should have none of his property; that appellant had been in poor health, and a short time prior to the execution of the deed he seems to have been impressed with the fact that he might soon die, and on one or two occasions talked with his three daughters about making a disposition of his property in view of that fact. He testified he told his three daughters that he wanted the farm, upon his death, divided equally between them, and that they should take care of the children of his deceased daughter, and if any one of said daughters married she was to have \$1,000 in cash at the time of his death, and have no interest in the farm; that some six weeks prior to the execution of the deed the appellant met Patrick Howard, whom he had known for 30 years, on the street in Coal City. Howard testified: "I met him and shook hands with him, and I says, 'Fred, how are you getting along now?' and he says, 'I am not getting along good; I am filling up here, and can hardly breathe.' He seemed to be laboring for his breath, and he says, 'I think I would be all right on account I get my property settled before I die,' and I says, 'Why don't you make a will?' and he says, 'I don't like wills; afraid of trouble afterwards.' 'Well,' I says, 'Fred, now my father is gone and our property was willed, and it has gone through the probate courts and has cost considerable money, but if I had property I should deed it as I wanted it to be;' and I do not know just

what answer he made, but in a very short time after that the very first thing I saw in the paper was this transfer."

On the day the deed was executed the appellant was in Coal City. While passing a saloon he says he heard his son-in-law, Spellman, say, "I saw my old father-in-law, and he looks bad, and I think he will kick the bucket soon." He immediately went to the office of Joseph Campbell, a notary public in Coal City, and Campbell drew the deed in question, and appellant executed it. Campbell testified: "My impression was that he was pretty sick at the time he came to my office. I do not think I knew the nature of his ailment. I do not know as I remember exactly what was said. My impression was that he wanted to have a deed to take the place of a will. He didn't expect to live long at that time, and after his death he wanted the property to go to the grantees therein. Neither of the grantees was there—just himself. I think I have heard him say that Mr. Spellman, his son-in-law, should not participate in the disposition of his estate. About the time he made the conveyance was when I heard him make such a remark." After the deed was executed it was sent by Campbell to the county seat and recorded, and then returned to Campbell, when the appellant called and it was delivered by Campbell to him. He said nothing to either of his daughters about having made the deed until after it had been recorded and returned to him by Campbell. When he reached home with the deed he gave the deed to one of his daughters and told her to put it with his papers, and she put the deed in the bureau drawer with the other papers of the appellant, where it remained until this suit was commenced.

Elizabeth testified: "I had a conversation with father about the disposition of his property in case of his death. He said he was going to make a deed to us children. He said he was going to make a deed over to his children. We were to have it when he died. I know he did make a deed to the three girls, Elizabeth, Anna, and Paulina. I remember him bringing it home. Q. What was done with the deed at that time? A. Gave it to me and told me to put it among his papers. Q. And what did you do with the paper? A. I put it away. Q. Did you ever see the deed after that? A. No, sir. Q. Does he have a certain place where he keeps all his papers? A. Yes, sir. Q. Referring back to the time he mentioned about making this deed, can you recall anything else that was said at that time about who was to have the property? A. He said his children would have the property. Q. When were they to have it? A. After death. Q. Was anything further said about their leaving the home? A. He said that the one who would leave home was to have \$1,000 after he was dead. Q. And what was to become of the property? A. We were to have it and keep the grandchildren together—his grand-

children. Q. You may state whether or not, if anything was ever said as to when you were to have the property. A. We wasn't to have it until after father died."

Paulina testified: "In the fall father's health was pretty good, but later in the winter he had poor health, and the latter part of the winter was under the doctor's care, and he thought he wouldn't last very long. He talked this over at home before sister Anna and myself. I think it was in January that he first talked about making the deed. He said he would give the property to us three. We were to take care of the grandchildren, and if one of us left home before he died we were only to get \$1,000. All three were present. Father afterwards made a deed. I do not know the date of it. Q. Do you know what he did with it? A. He brought it home, and we three were in here, and he said: 'Here is the deed, and I have fixed it so you three will have the property. Put it among my papers, so you will know where it is if I should die suddenly.' Q. To whom did he hand the deed? A. He handed it to my sister Elizabeth. Q. Do you know what she did with the deed? A. Put it in a drawer among his papers. Q. Did he ever give the deed, to your knowledge, to your sister Anna? A. No, sir; he never did. Q. Did you or your sister Elizabeth or Anna ever have possession of the deed? A. No, sir."

The appellant testified: "Q. How did you come to have the deed recorded? A. Campbell was thinking it was better. Q. Did anybody tell you to have it recorded? A. Campbell told me it would be better; that the way I was I might die in a day or two. Q. When you took the deed home, to which one of the girls did you hand it to? A. I think I handed it to two of them. I wanted to take my coat off and lay right down. They took it and put it among my papers, and I afterwards found it there. I have had it all the time since. They could get to it, for I never had anything locked up. Q. At the time you had the deed made and the same placed upon record, did you intend to pass the present estate to the children? A. Not as long as I lived. Q. When you took the deed home, did you deliver it to either or any of the girls with the intention of giving them the farm at that time? A. No, sir. Q. Did you at that time deliver the deed to either of them? A. No, I just handed it to them and told them to throw it in my papers, and I took my coat off and lay down. Q. Since the 18th of February, 1899, have you been in possession of this farm? A. Yes, sir. Q. Did you ever deliver the possession of the farm over to the girls? A. No, sir."

At the time the testimony was taken before the master, Elizabeth was 42, Anna 39, and Paulina 30 years of age. They all had worked in and about the home, at times doing the work of men upon the farm, and after the mother's death shared in a part of the profits of the farm with the father. An-

na had received superior educational advantages to those of her sisters, and taught in the public schools of Grundy county for 10 years. There was no apparent change in the possession of the farm after the deed was executed, and no change in the manner of conducting the same. In the year 1901 Anna married Handlon, very much against the wishes of her father. Her marriage displeased him greatly. Prior to her marriage he said to her if she married Handlon she would get nothing from the farm. She replied all she wanted was what she had earned teaching school, and she took with her from \$1,800 to \$2,000 in money when she left home. Shortly after her marriage the appellant asked her to release to him any apparent interest which she might have in the farm by reason of the deed having been made a matter of record, which she declined to do, and the bill was then filed.

The appellant, after the deed had been made, told different persons he had deeded the farm to the girls, and after the deed was recorded the land was assessed in the names of the girls, and at least one tax receipt was taken in their names. The insurance was renewed upon the buildings after the deed was executed, and a new insurance policy was taken in the names of the girls. It does not appear, however, that the land was assessed and the insurance renewed in the names of the girls by the direction of the appellant.

E. L. Clover, for appellant. Cornelius Rear-don, for appellees.

HAND, J. (after stating the facts). The main question presented here for determination is, did the appellant deliver the deed executed by him on February 18, 1899, to his three daughters, or to one of them for the benefit of all, with the intention that it should then take effect and the title to said farm immediately vest in them, or was the deed in the nature of a testamentary disposition of the farm? That is, did the appellant intend the deed should not take effect and the title to the farm vest in his daughters until after his death? The deed was recorded by him, but that is not conclusive evidence that he then delivered it absolutely, or that he intended it to at once take effect. When the deed was executed the grantees were not present. Neither did they have any knowledge of the fact that it had been executed until after it had been recorded. The first time they received notice that the deed had been executed was when the appellant brought it home with him. He then gave it to one of his daughters and told her to place it among his papers, where it could be found in case of his death. Anna testified, when her father brought the deed home with him he gave it to her and Elizabeth, and said: "Here is the deed; now you take care of it." We think the weight of the evi-

dence strongly preponderates in favor of the appellant's contention that he did not deliver the deed to his daughters with the intention that it should then vest in them the title to the farm.

In the case of *Brown v. Brown*, 167 Ill. 631, 47 N. E. 1046, a bill was filed by the father to cancel, as a cloud upon his title, a deed which he had executed to his son and caused to be recorded. On page 638, 167 Ill., and page 1047, 47 N. E., it was said: "It is true the deed was placed upon record, but that fact of itself does not establish a delivery of the instrument. If a grantor, without the knowledge or assent of the grantee, place a deed on record, that will not constitute a delivery, for the reason the grantee has not assented to receive the deed, and it is well settled that it is essential to the legal operation of the deed that the grantee assents to receive it. Without acceptance on behalf of the grantee there can be no delivery. *Herbert v. Herbert*, Breese, 354 [12 Am. Dec. 192]; *Kingsbury v. Burnside*, 58 Ill. 310 [11 Am. Rep. 67]; *Maynard v. Maynard*, 10 Mass. 458 [6 Am. Dec. 146]; *Sullivan v. Eddy*, 154 Ill. 199 [40 N. E. 482]. Here, from all the evidence, it is apparent that the grantor himself placed the deed on record, and after it was recorded he retained the possession and control of the instrument, and if at any time the deed passed out of his possession the act was without his consent, and hence did not affect his rights. *Wormley v. Wormley*, 98 Ill. 544."

If the deed was intended by the appellant to operate as a will, and not as a deed, it was not delivered. In *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. 1041, 33 Am. St. Rep. 326, Patrick Boylan executed a deed to a piece of real estate to his three sons. He handed it to one of them with instructions, "Take this deed and put it in the box in the bank." He further said, "The boys need not know anything about this till after my death." The circuit court held the deed was delivered, but this court reversed its decree, and on page 406, 141 Ill., page 1042, 30 N. E., 33 Am. St. Rep. 326, said: "It is plain that the intention of Patrick Boylan was to have the deed to take effect only after his death. On its face the deed purported to operate presently, but he intended to, and did, retain the possession of the land, and received and enjoyed its rents during his life. He did not deliver the deed in escrow to a third party, with direction to him to deliver it to the grantees therein named after his death, but he retained its possession himself until his death, intending that it should become operative only after that event; in other words, he intended it should operate precisely as a will, without having it executed and witnessed as a will."

It has been held, if a parent execute a deed to an infant child which is beneficial to the child, and manifests by his words and

acts that he intends the deed shall operate at once, a delivery will be presumed, and proof of actual delivery is unnecessary. This is because the infant is incapable of doing any act in regard to the deed which he may not avoid on reaching his majority, and it is the duty of a parent, as his natural guardian, to accept and preserve the deed for him. *Hayes v. Boylan*, supra. The grantees here were all of age, and the presumption of delivery in their favor does not obtain—at least, to the extent it would if they were minors; and, if such presumption did obtain, the circumstances under which this deed was executed and recorded, and the fact that it was retained by the grantor and placed by one of the grantees, by his direction, among his papers, with the view that it might be readily found in case of his death, rebuts the presumption of delivery.

In *Cline v. Jones*, 111 Ill. 563, Cline went alone before a justice of the peace and had drawn up, and signed and acknowledged, a warranty deed of the land in controversy to Mrs. Jones, his daughter, the deed reciting it was made in consideration of love and affection and one dollar. He told the justice he had given all his other children land, but none to Mrs. Jones, and he felt he ought to give her said land. After he had executed the deed he told many persons that he had made the deed; that he had made his children equal; that Mrs. Jones would have the land upon his death. He also said to Mrs. Jones and her husband he had fixed it so that the land would be hers at his death, but if she would move on the land it should be hers immediately. That she did not do. He retained the possession of the deed until his death; also the possession of the land. It was held the deed was not delivered, and for that reason it did not convey the title. It was there said (page 569): "The deed by its purport was absolute, conveying the grantor's entire interest, to operate immediately. But the evidence shows the deed was not intended to be absolute, but to be qualified in its effect; that it was not intended to convey the grantor's whole interest, but that he meant to have a life estate unless the grantee should move upon the land, which she never did; that the deed was not intended to operate presently, but only upon the grantor's death, or going upon the land to reside. The evidence shows the distinct intention not to create a present estate in the grantee. As, then, there was never any actual delivery of the deed, but the grantor ever kept it in his own possession, and as it never was his intention that the deed should presently take effect and become operative according to its terms, there was no delivery of the instrument as the deed of the grantor, and it was not valid as a deed."

Mr. Lewin, in his work on Trusts, on page 124, quotes from the case of *Habergham v. Vincent*, 2 Ves. Jr. 203, as follows: "A deed

must take place upon its execution, or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing the interest to be conveyed at the execution; but a will is quite the reverse, and can only operate after death." The author then proceeds: "We may therefore safely assume, as an established rule, that if the intended disposition be of a testamentary character and not to take effect in the testator's lifetime, but ambulatory until his death, such disposition is inoperative unless it be declared in writing, in strict conformity with the statute enactments regulating devises and bequests."

The evidence in this case also shows that the appellant remained in the possession and was in the possession of the land at the time he commenced this suit. The fact that the grantor remains in possession of the land after the deed is made is considered and commented upon in all the decided cases as an important fact in determining whether a deed for land made to a party out of possession has been delivered. The facts of this case are peculiar. The grantor was old and infirm, and his daughters resided with him. They often did the work upon the farm usually performed by men. He advised with them as to whom the land should be rented to when rented, and divided with them the income of the farm—that is, the profits arising from the grain and hay raised on the farm, and stock raised and sold from the farm—before and after the execution of the deed. The fact that the land was assessed in the names of the girls and an insurance policy was written upon the buildings in their names, if the assessment was made and the policy written without the knowledge or assent of the appellant, would not blind him. If the appellant was to be bound by such facts, the burden of proof was upon Anna to show that he knew of such facts and assented thereto. This she failed to do. The fact that the appellant stated to different persons that he had made a deed of the farm to the girls is not inconsistent with the view that he intended the deed to take effect only upon his death.

We have examined this record, which is voluminous, with care, and are fully convinced that the appellant did not intend to transfer by said deed to his three daughters, absolutely, said farm, which represents the accumulations of a lifetime, and which transfer would have left him almost penniless, as it is conceded the farm was substantially all he had and the deed was without any valuable consideration; but are confident, in view of what appellant supposed was approaching death, he sought by said deed to make a disposition of his property which would place the title in his three daughters after his death.

The decree of the circuit court will be reversed, and the cause remanded to that court with directions to enter a decree in favor

of the complainant and against all the defendants, in accordance with the prayer of the bill of complaint. Reversed and remanded, with directions.

(207 Ill. 172)

GOULD v. MAGNOLIA METAL CO.

(Supreme Court of Illinois. Feb. 17, 1904.)

MASTER AND SERVANT—SALESMAN—ADULTEROUS CONDUCT—DISCHARGE—CONTRACT OF EMPLOYMENT—CONTEMPORANEOUS WRITING—ADMISSIBILITY OF EVIDENCE—INSTRUCTIONS.

1. Under Practice Act, § 34 (Hurd's Rev. St. 1901, p. 1341, c. 110), dispensing with proof of the execution of a written instrument declared on unless the execution is denied by a verified plea, such a plea is not necessary in order to render admissible a contemporaneous letter explanatory of the terms of the written contract.

2. A written contract of employment as a salesman provided that the employer might end the contract at any time for any conduct on the salesman's part reflecting discredit on the employer, or injurious to his business. In the salesman's action for wrongful discharge, the employer offered the salesman's letter, saying that, inasmuch as certain matters of a private nature to him had been brought to the employer's attention, and knowing that the employer considered them to be detrimental to him, the salesman wished to say that on a renewal of the contract for employment he reiterated in full a certain conversation, and that, as far as concerned him, the employer would not have in the future to refer to the matter. There was evidence that the salesman had been associated with a woman of bad character, and that the employer proposed to have an agreement for the breaking off of such connection inserted in the contract, but that the salesman objected on account of its offensive nature, and said he would write a letter to that effect. *Held*, that the letter was not objectionable in evidence as varying the written contract.

3. The conversation referred to in the letter was admissible in evidence.

4. Where a conversation is admissible, the statement of the witness testifying thereto that it was the same as one previously had is not ground for reversal.

5. A salesman was employed on condition that the employer might discharge him at any time for conduct reflecting discredit on the employer, or injurious to his business, etc. This provision was made in view of the salesman's previous association with a woman of bad reputation, and contemporaneously with the contract the salesman wrote to the employer saying that certain matters of a private nature had been brought to the latter's attention which were detrimental to him, and that the salesman wished to say that on renewal of the contract he reiterated in full a conversation with the employer, who would not in the future have any occasion to refer to the matter. In the salesman's action for wrongful discharge, the employer offered evidence that the salesman had renewed relations with the woman, had taken her to a hotel, procured treatment for her for a disease of a private nature, and paid her bills; that her general reputation was bad; that the reputation of her sister, whom the salesman had also met, was bad; that the salesman understood the sister's relations with another man were improper; and that the salesman had received a letter signed "Emma," which was the name of a woman in a resort whom he knew, which was full of vile language, etc. *Held*, that the evidence was admissible.

6. A party cannot complain of the submission of an issue to the jury which his own instructions have submitted.

7. Under a provision in a contract of employment as salesman, empowering the employer to discharge the salesman, a married man, for conduct reflecting discredit on the employer, or injurious to his business, or reflecting discredit on his method of conducting business, the salesman may be discharged for association with persons of bad repute, and particularly a woman of bad character with whom the salesman sustained an adulterous relation.

8. In a salesman's action for wrongful discharge, the plaintiff, when testifying, identified the letter discharging him, which stated the reasons therefor. He then identified the letter written by himself denying defendant's right to discharge him, in which the reasons given in the former letter were declared false. *Held*, that a cross-examination as to such grounds of discharge was not improper.

9. The agreement not to resume the improper association was not an independent contract, a breach of which would not furnish ground for discharge, but was a condition of the employment.

10. While the practice of emphasizing an instruction by repetition is not proper, the restatement of an instruction, correct in itself, is not ground for reversal.

11. A contract for the employment of a married man as a salesman of babbitt metal, conditioned for its continuance on the salesman's not associating with a woman of bad repute, does not contravene public policy.

Appeal from Appellate Court, First District.

Action by Frank E. Gould against the Magnolia Metal Company. From a judgment of the Appellate Court, First District (108 Ill. App. 203), affirming a judgment for defendant, plaintiff appeals. Affirmed.

Ira W. & C. C. Buell and P. H. Bishop, for appellant. Wing & Wing, for appellee.

CARTWRIGHT, J. This is a suit in assumpsit, brought by appellant in the circuit court of Cook county, for damages resulting from an alleged breach of a contract hiring appellant as salesman and representative of appellee for one year from December 1, 1899, at \$5,000 per annum. The contract was in writing, and contained the following paragraph:

"Seventh—It is further understood and agreed that the party of the first part shall have the right to end this agreement at any time for neglect of duty, willful disobedience of instructions, or for any conduct on the part of the party of the second part that would reflect discredit on the party of the first part or be injurious to their business interests or reflect discredit upon their methods of conducting business."

Appellee is the party of the first part to the contract, and discharged appellant April 21, 1900, by means of a letter written from New York. The letter stated that appellant was discharged in accordance with said provision of the contract, and assigned as reasons for the discharge that he had neglected the business of appellee while at Boston; that he had given offense to customers; that he had passed much time in company with disreputable women, and had renewed and maintained relations with a certain woman

with whom he had formerly associated in Pittsburg; that he had brought her to Boston and introduced friends of appellee to her, and had taken her to Portland and elsewhere, maintaining the same relations with her as he formerly did at Pittsburg; and that such conduct was injurious to appellee's business interests, and reflected much discredit upon it. Appellant was paid to the time of the discharge. The trial resulted in a judgment for appellee, which was affirmed by the Appellate Court for the First District.

The first alleged error presented in argument is the admission in evidence of the following letter written by the plaintiff to the defendant in connection with the execution of the contract:

"New York, Dec. 2, 1899.

"Mr. E. C. Miller, Vice-Pres't Magnolia Metal Co., New York—My Dear Sir: Inasmuch as certain matters of a private nature to me have been brought to your attention, and knowing that you consider same to be, if continued, detrimental, not only to myself but to the company, I wish to say that upon conditions of our renewing contract for my services I reiterate in full my conversation to you of yesterday. That as far as concerns me you will not in future have any occasion to refer to the matter again.

"Yours very truly, F. E. Gould."

Plaintiff had previously been in the employment of defendant. He had a wife and child, and had publicly and intimately associated in Pittsburg, during such employment, with a woman named Bessie Van Hansen. There was evidence tending to prove that defendant refused to renew the contract of employment unless he agreed specifically to cut his acquaintance with that woman and have nothing more to do with her; that Mr. Miller, the vice president and general manager of defendant, told plaintiff that defendant regarded the association as bad for its business; that such association had been the cause of his removal from Pittsburg at the request of defendant's agents; and that defendant proposed to have this agreement incorporated in the contract, but that plaintiff said it was of such an offensive nature he would not do it that way, but would write a letter to that effect. Plaintiff testified that the conversation with Miller and the condition of renewal related to his marital relations, but it was not denied that he wrote the letter and delivered it. It was a part of the same transaction with the execution of the contract, and was understood by both parties to be a part of the agreement or in explanation of its meaning.

The first objection to the letter is that it was not admissible under the pleadings, because the contract was set out in *hæc verba* in the declaration, and its execution was not denied under oath, as provided by section 34 of the practice act (Hurd's Rev. St. 1901, p. 1341, c. 110). It is argued that, by failing to deny the execution of the contract as set

out, defendant admitted that it constituted the whole contract and agreement between the parties, and that if defendant claimed it was not the whole contract it should deny its execution. That section of the practice act establishes a rule of evidence, and dispenses with proof of the execution of a written instrument declared upon unless the execution is denied by a verified plea. The execution of the contract as set out in the declaration was not, and could not truthfully be, denied by the defendant, and the letter did not tend to make a new or different contract or substitute another one. The only effect of failing to deny the execution of the contract was to make it admissible in evidence without proof of its execution. A verified plea was not necessary to permit the introduction of evidence explanatory of its meaning.

A second ground of objection is that the letter tended to vary a contract which was complete in itself. It is the rule that testimony is inadmissible to contradict or vary the terms of a contract which purports to contain the whole agreement of the parties and shows no uncertainty as to the object or extent of such agreement. In such a case it is conclusively presumed that all previous and contemporaneous engagements by which the parties intend to be bound are contained in the writing. On the other hand, it is equally well established that, where the agreement is evidenced by more than one writing, all of them are to be read together and construed as one contract, and all the writings executed at the same time and relating to the same subject-matter are admissible in evidence. *Stacey v. Randall*, 17 Ill. 467; *Gardt v. Brown*, 113 Ill. 475, 55 Am. Rep. 434; *Crandall v. Sorg*, 198 Ill. 48, 64 N. E. 769; 1 Greenleaf on Evidence, § 283. In this case the writings were executed as different parts of the same agreement, and related to the same subject-matter. Together they were understood and intended by the parties to constitute the agreement. If, as the evidence tended to prove, the language employed in the seventh paragraph was not made more explicit on account of the offensive nature of the matter referred to, and plaintiff preferred to write the letter, it did not involve any variance from the contract, but only enabled the court to definitely ascertain and carry out the meaning and intention of the parties. The letter did not vary, contradict, or add to the contract set out in the declaration in any material respect. It is clear from the evidence that the seventh paragraph related either to the marital relations of the plaintiff, as claimed by him, or to his association with the other person, as claimed by the defendant, and the letter operated both as a part of the contract and as an explanation of the meaning of its terms.

The court admitted, over the objection of the plaintiff, evidence of the conversation between plaintiff and Miller which the letter stated was reiterated in full upon condition

of renewing the contract. The substance of this conversation is given above. It is manifest the letter was incomplete and meaningless without the conversation which was thereby reiterated. The conversation was not copied into the letter, but, in effect, was incorporated by reference to it, and proof of the conversation was admissible. Counsel say that, in detailing the conversation referred to in the letter, the witness Miller was allowed to state a previous conversation. The court did not admit evidence of a prior conversation, but refused to strike out an answer in which the witness said that the conversation detailed was the same as plaintiff had previously said to him at Pittsburg in relation to his wife and the Van Hansen woman. It was merely a statement that what was said had been said before, and was not harmful to the plaintiff.

It is next insisted that the court erred in admitting evidence "(1) concerning the marital relations of appellant; (2) concerning the relation between plaintiff and Bessie Van Hansen; (3) concerning the general reputation for chastity of Bessie Van Hansen; (4) concerning the disease for which Dr. Pudor treated Bessie Van Hansen; (5) concerning the relations of Bessie Van Hansen's sister and a man named Whitelsey; (6) concerning the general reputation for chastity of Bessie Van Hansen's sister; (7) concerning a letter signed 'Emma,' received by appellant." The evidence so admitted related to the conduct and habits of plaintiff and the reputation and character of his associates. It showed that, after the making of the contract, plaintiff, when located in Boston in the service of defendant, renewed his relations with Bessie Van Hansen; that she came to Boston, and he took her to Portland, Me., to a hotel, where she remained for some time; that he took her at that place to a blood-disorder specialist, and placed her under treatment for a disease of a private nature; that he paid the doctor's bills, running at least a year; that he paid her hotel bills while there, and associated with her, leaving Boston weekly to go and visit her at Portland; that her general reputation was bad; that the reputation of her sister, whom he had met in Pittsburg, was bad, and he understood her relations with the man Whitelsey to be improper; that plaintiff received the letter signed "Emma" from Boston, and that he knew a woman of that name at a house which he had visited, and the persons named in the letter were his acquaintances. The letter was full of vile language and filthy statements concerning plaintiff's acquaintances named in it, and could not have emanated from any but the lowest possible source. We think it was entirely competent to make this proof, under the contract set out in the declaration, regardless of the letter, and for still stronger reasons in view of the letter.

Counsel, in commenting on instructions given to the jury, insist that the question

what would constitute an adequate cause or legal ground for the discharge of the plaintiff under the contract was a question of law for the court. That is undoubtedly true, although the plaintiff could not complain of that question being submitted to the jury, for the reason that by his own instructions he caused the same question to be submitted for decision. What facts would constitute a legal ground for discharge is not to be determined by the judgment of the jury, but is a question for the court, and there is no controversy as to the existence of the facts relied upon as a ground for discharge. We have no hesitancy in saying that such facts constituted ample legal ground for plaintiff's discharge, and that the disgraceful conduct of plaintiff would naturally reflect discredit on his employer and be injurious to its business interests. For a business concern to select, as a matter of choice, a person of such habits and associates, would tend to discredit the employer in the estimation of decent people with whom it was doing business, and to say that such people would be as willing to do business through such a representative as with a reputable person would be equally an affront to decency and common sense.

A further ground of objection to some of this evidence is that the defendant was permitted to cross-examine the plaintiff upon matters which had not been inquired into on his direct examination. Plaintiff, when testifying, identified the letter discharging him, which stated at length the reasons for his discharge, and the letter was offered in evidence. He then identified a letter written by him to the defendant denying the right to discharge him, in which he said that the statements of the letter to him that his conduct had been injurious to defendant's business interests or reflected discredit upon it, or that any act of his had been a sufficient excuse for dispensing with his services, were false. He was then cross-examined as to such facts, and, while considerable latitude was allowed, we think the court did not abuse its discretion.

There are some objections to instructions, one of which has already been noticed, and some others relating to the question of damages have become immaterial in view of the verdict and judgment. It is objected to the third instruction, given at the request of defendant, that it did not limit the jury to the contract signed by the parties and introduced in evidence. The instruction stated that if the jury believed that at the time of entering into the contract plaintiff promised, as a condition thereof, he would refrain, during such employment, from publicly associating with Bessie Van Hansen, but during the employment did openly and publicly associate with her, the verdict should be for the defendant. It will be seen that we do not regard this instruction as erroneous from what we have said as to the admissibility of the

letter and conversation. But it is further urged that the agreement to not publicly associate with Bessie Van Hansen was an independent contract, not constituting a breach of the contract of employment, but for which defendant might sue plaintiff for damages, if it sustained any. The parties had a right to make it a condition of the employment, or a continuance of it, that plaintiff should refrain from publicly associating with Bessie Van Hansen, and the evidence showed that it was a condition of the employment, and not an independent covenant.

An objection is made to the fifth instruction on practically the same ground as to the third. It was a repetition of the third, and the practice of emphasizing instructions by repetition is not proper, but there was no error in the statement of the law, and the giving of it is not ground for reversal.

The sixth instruction stated that it was proper for a party employing a married man as a salesman to make it a condition of employment that he should not associate with a certain woman to whom he owed no legal duty, and application of that rule was made to the facts of the case. It is objected to as suggesting a distinction between the rights and liabilities of a married and a single man employed to sell habbit metal, and it is said that any tendency to make such a distinction should be frowned upon as against public policy. We do not know of any rule of public policy that would prevent the parties making such a contract.

We find no error in the record. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(207 Ill. 410)

FRIER v. LOWE et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

APPEAL—JURISDICTION—ACTION INVOLVING FREEHOLD.

1. An ordinary petition to sell real estate of a decedent to pay debts does not involve a freehold, and hence the order therein is not appealable directly to the Supreme Court.

Appeal from Gallatin County Court.

Petition by N. A. Frier, as administrator of the estate of Charles Kopf, deceased, to sell real estate. From a judgment sustaining a demurrer to the petition, the administrator appeals. Appeal dismissed.

Jesse E. Bartley and W. R. McKernon, for appellant. D. M. Kinsall and Carl Roedel, for appellees.

WILKIN, J. This was a petition by the appellant, as administrator de bonis non of the estate of Charles Kopf, deceased, in the county court of Gallatin county, to sell real estate which it was alleged the deceased died seised of to pay debts probated and allowed against his estate. A demurrer was sustained to the petition on the single ground that

¶ 1. See Courts, vol. 12, Cent. Dig. § 560.

the administrator was appointed administrator de bonis non, whereas he should have been appointed administrator de bonis non with the will annexed, the deceased having died testate. Without entering upon a consideration of the merits of the case, the appeal must be dismissed for want of jurisdiction in this court. It is difficult to perceive why an appeal should have been taken directly to this court from the county court, in view of our former decisions holding that in an ordinary petition to sell real estate to pay debts no freehold is involved (*Fields v. Coker*, 161 Ill. 186, 43 N. E. 616), and that it is only in cases where, upon such a petition, the title to real estate is put in issue that this court can entertain jurisdiction on a direct appeal (*Lynn v. Lynn*, 160 Ill. 307, 43 N. E. 482; *Richie v. Cox*, 188 Ill. 276, 58 N. E. 952). The appeal in this case should have been taken to the Appellate Court for the Fourth District.

Appeal dismissed.

(208 Ill. 60)

KOHTZ et al. v. ELDRED et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

WILLS—CONSTRUCTION—FEE OR LIFE ESTATE—DEATH OF DEVISEE—DURATION OF TRUST.

1. A residuary clause gave the remainder of testator's property to the executor, in trust for testator's two children, to be divided equally between them, with a provision that if either of them die leaving no issue his share should go to the survivor, and if both should die leaving no issue the testator's estate should be divided among others, and a further provision that if any of the latter should die before testator the share of such deceased should be divided among the survivors. *Held*, that there was a gift in fee to testator's children, they surviving him, which was not cut down to a life estate, the gift over being only in case of their dying before testator.

2. Under a will making several bequests, and then giving the residue to the executor in trust for testator's children, to be divided equally between them, with direction that the executor and trustee shall manage the estate and sell any or all the real or personal property, the trust ceases when the estate has been reduced to possession by the executor, and the debts and specific legacies paid, and the balance divided between the children.

Appeal from Superior Court, Cook County; Axel Chytraus, Judge.

Bill by Louis O. Kohtz, executor of Theodore Harz, against Bertha M. Eldred and others. From the decree the executor and Oscar H. Harz and another appeal. Reversed.

This was a bill in chancery filed in the superior court of Cook county by Louis O. Kohtz, the executor and trustee therein named, to obtain a construction of the will of Theodore Harz, deceased. The will was admitted to probate on May 19, 1903, and reads as follows:

"I, Theodore Harz, of Chicago, Cook county, in the State of Illinois, being of sound, disposing mind and memory, do hereby make, publish and declare the following to be my last will and testament:

"First—I order and direct that my executor hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

"Second—I give, devise and bequeath to my son, Oscar H. Harz, my library, jewelry and collection of coins and relics.

"Third—I give, devise and bequeath to my daughter, Alma Harz, all the jewelry formerly owned by my late wife, all the family pictures and the piano.

"Fourth—I give, devise and bequeath to my sister, Bertha Eldred, the sum of two thousand (2000) dollars.

"Fifth—I give, devise and bequeath to my present house-keeper, Ogda Palmquist, for her good, faithful and truthful service, the sum of one thousand (1000) dollars.

"Sixth—All the rest, residue and remainder of my estate, both real and personal, together with my life insurance, I give, devise and bequeath to my executor hereinafter named, in trust for my two children, Oscar H. Harz and Alma Harz, to be divided equally between both of my children, share and share alike. Should either of my above named children die leaving no issue surviving them, then the share of such deceased child shall go to the survivor of them, and if both my children should die leaving no issue surviving them or either of them, then I direct that my estate shall be divided as follows: (a) To my house-keeper, Ogda Palmquist, in lieu of the legacy of \$1000 mentioned in clause fifth of this my last will and testament, I give, devise and bequeath the sum of three thousand (3000) dollars; (b) all the rest, residue and remainder of my estate, of every name and nature whatsoever, shall be divided into two equal shares, one share thereof I give, devise and bequeath to my sister, Bertha Eldred, and the other share I give, devise and bequeath to my nephews and nieces, to-wit, Elsie Friedlander, Hubert Harz, George Harz, Roland Harz and Hazel Harz, meaning and intending hereby to give each of said nephews and nieces an undivided one-fifth ($\frac{1}{5}$) of an undivided one-half ($\frac{1}{2}$) of said estate. Should any of my aforementioned nephews or nieces die prior to my decease, then the share of such deceased one shall be divided amongst the survivors of any of them.

"Lastly—I make, constitute and appoint Louis O. Kohtz executor and trustee of this my last will and testament, and it is my wish and I hereby direct that he may not be required to give any bond or security as such executor or trustee, and that he shall manage my estate, sell any or all of the real or personal property, at public or private sale, to such persons and on such terms as he thinks best, it being unnecessary for the purchasers at such sales to look to the application of the purchase money.

"I do hereby revoke all and every former will by me made.

"In witness whereof, I have hereunto set

my hand and seal this 4th day of February, A. D. 1902. Theodore Harz. [Seal.]

"This instrument, consisting of two and one-quarter (2¼) typewritten pages, was on the date thereof signed, sealed, published and declared by Theodore Harz as and for his last will and testament in the presence of us, who in his presence and in the presence of each other, and at his request, have subscribed our names as witnesses thereto.

"Charles H. Fleischer,
"21 LeMoyne St.
"Edwin Stewart,
"352 Claremont Ave.
"Ludmil Kandlik,
"1701 N. Rockwell St."

Theodore Harz, a widower, died on April 22, 1903. His son, Oscar H. Harz, aged 30 years, and his daughter, Alma Harz, aged 20 years, who were both unmarried, were his children and only heirs. Oscar H. Harz, Alma Harz, and the other beneficiaries named in the will were made parties defendant. Oscar H. and Alma Harz and Ogda Palmquist filed answers admitting the allegations of the bill. Hubert, George, Roland, and Hazel Harz, who were minors, answered by their guardian ad litem. John F. Eldred, Elsie Friedlander, and Samuel Friedlander were defaulted, and Bertha Eldred answered. Replications were filed, and the case was tried upon the bill, answers, and replications. The decree finds the testator died possessed of personal property worth \$24,760, and real estate of the value of \$22,000; that paragraphs 1 to 5 of the will are clear, and need no construction, but that the meaning of paragraph 6 is uncertain, and it was held under that provision the legal title to the estate disposed of thereby vested in fee in Louis O. Kohtz, as trustee; that Oscar H. and Alma Harz were entitled to the net income thereof during life or during the life of the survivor; that, in case they both die leaving a child or children them surviving, the child or children of each would take the fee to one-half the estate; if only one died leaving a child or children him surviving, upon the death of the other said child or children would take the entire estate, and in case they both died childless the estate would go to the other beneficiaries named in said will. Louis O. Kohtz and Oscar H. and Alma Harz have prosecuted an appeal to this court.

Goldzier, Rodgers & Froehlich, for appellant Louis O. Kohtz. Henry Hiestand, for appellants Oscar H. Harz and Alma Harz. Ayers, Rinaker & Ayers, for appellee Bertha M. Eldred.

HAND, C. J. (after stating the facts). The language, "all the rest, residue and remainder of my estate, both real and personal, together with my life insurance, I give, devise and bequeath to my executor hereinafter named, in trust for my two children, Oscar H. Harz and Alma Harz, to be divided equal-

ly between both my children, share and share alike," found in the sixth paragraph of the will, is ample to carry the equitable fee in the property covered by that paragraph to Oscar H. and Alma Harz, share and share alike, and the estate thus given to the children of the testator can only be cut down to a life estate by other subsequent provisions found in the will which express the intention so to do in clear and unambiguous language. In *Roberts v. Roberts*, 140 Ill. 345, 29 N. E. 886, on page 349, 140 Ill., and page 887, 29 N. E., it is said: "The rule of construction is that where an estate is given by one clause or part of a will it cannot be cut down or taken away by a subsequent clause except by clear and unambiguous terms, and it is sometimes said that in order to give the latter clause that effect its language must be as clear as that of the clause giving the estate."

It is said, however, the following language, "should either of my above named children die leaving no issue surviving them, then the share of such deceased child shall go to the survivor of them, and if both my children should die leaving no issue surviving them or either of them, then I direct that my estate shall be divided as follows," immediately following the language which, standing alone, would invest the children of the testator with an equitable fee, does clearly show the testator intended his children should take only the net income for life in the property remaining after the payment of his debts and the specific bequests provided to be paid by the will. The soundness of this contention depends upon whether the words, "die leaving no issue surviving them," found in said paragraph, refer to the death of said children, or either of them, before the death of the testator, or refer to their death at a time subsequent to the death of the testator. If the former is the true meaning of said language, the gift over to the other beneficiaries named in the will was substitutionary merely, depending upon the contingency of the death of the primary devisees in the lifetime of the testator and designed to prevent a lapse, and, both of said children having survived the testator, the contingency upon which the other beneficiaries named in the will were to take could never happen, and the equitable fee immediately became vested in said children, share and share alike, upon the death of the testator. From an examination of the entire will we are of the opinion that the language, "die leaving no issue surviving them," used in the sixth paragraph of the will, refers to the death of said children, or either of them, during the lifetime of the testator.

Mr. Jarman (2 Jarman on Wills, 752) says the rule is well established that where property is given by will to one person, and in case of his death to another, if the primary devisee survive the testator he takes the estate devised absolutely. In *Vanderzee v. Slingerland*, 103 N. Y. 47, 8 N. E. 247, 57 Am.

Rep. 701, the court held the rule thus announced by Mr. Jarman applies with equal force to real and personal property, and said on page 53, 103 N. Y., page 248, 8 N. E., 57 Am. Rep. 701: "The authorities in this country uniformly sustain the construction that where there is a devise or bequest simpliciter to one person, and in case of his death to another, the words refer to a death in the lifetime of the testator." And again, on page 55, 103 N. Y., page 249, 8 N. E., 57 Am. Rep. 701: "Where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, followed by a devise over in case of his death without issue, it has, I think, been uniformly held in England, and it is the rule supported by the preponderance of judicial authority in this country, that the words refer to a death without issue in the lifetime of the testator, and that the primary devisee surviving the testator takes an absolute estate in fee simple."

In *Wright v. Charley*, 129 Ind. 257, 28 N. E. 706, the testator devised his real estate not specially devised to five of his children equally, and provided by a subsequent paragraph of his will that "in case of the death of either of my children except William M., and they leave no children, the property bequeathed to them by this my last will and testament be divided between my children, except William M." The five children all survived the testator. The lands devised were divided in accordance with the terms of the will, and, one of the daughters having subsequently died childless, a contest arose over the land allotted to said daughter between her surviving husband, who claimed as heir, and her brothers and sisters, who claimed under their father's will. The court held that the words, "in case of the death of either of my children," referred to their death prior to the death of the testator, and that the husband took, as heir, under the statute. The court said: "It is the well-settled doctrine that the courts of this country will so construe a will, when not inconsistent with the intention of the testator, as to prevent the title to real estate from remaining contingent, and, unless there are plain indications of a contrary intent, will consider the entire title as vested in those claiming under the will rather than in abeyance. *Wills v. Wills* (Ky.) 3 S. W. 900; *Hellman v. Hellman* [Ind.] 28 N. E. 310. In accord with this rule, it is said by Mr. Jarman to be an established rule that where a bequest is simply to one person, and in case of his death to another, the primary devisee surviving the testator takes absolutely. This rule applies to both personal and real estate, and the authorities in this country uniformly sustain the construction that in a devise or bequest simpliciter to one person, and in case of his death to another, the words refer to a death in the lifetime of the testator. 2 Jarman on Wills, 752. This rule is fully sustained by

the authorities. *Moore v. Lyons*, 25 Wend. 119; *Kelly v. Kelly*, 61 N. Y. 47; *Briggs v. Shaw*, 9 Allen, 516; *Whitney v. Whitney*, 45 N. H. 311; *Vanderzee v. Haswell* (N. Y. App.) 8 N. E. 247 [57 Am. Rep. 701]; *Reams v. Spann* (S. C.) 2 S. E. 412; *Wills v. Wills* (Ky.) 3 S. W. 900; *Hoover v. Hoover*, 118 Ind. 498, 19 N. E. 468; *Harris v. Carpenter*, 109 Ind. 540, 10 N. E. 422. So, too, another well-established rule is that where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over in case of his death without issue, the words refer to a death without issue during the lifetime of the testator, and that the primary devisee surviving the testator takes an absolute estate in fee simple. *Clayton v. Lowe*, 5 Barn. & Ald. 636; *Gee v. Mayor*, etc., of Manchester, 17 Adol. & E. (N. S.) 735; *Woodburne v. Woodburne*, 23 L. J. Ch. 336; *Doe v. Sparrow*, 13 East, 359; *Quackenbos v. Kingsland* (N. Y. App.) 6 N. E. 121 [55 Am. Rep. 771]; *Livingston v. Greene*, 52 N. Y. 118; *Embury v. Sheldon*, 68 N. Y. 227; *Mickley's Appeal*, 92 Pa. 514; *Hellman v. Hellman* [Ind.] 28 N. E. 310."

In *Fishback v. Joesting*, 183 Ill. 463, 56 N. E. 62, the testator gave the residue of his estate to his widow and child or children, and provided: "If it shall happen that myself, my wife, my child or children shall depart this life without my child or children have no heirs, in such a case all of my property shall be disposed of as follows." The widow and one child, a girl, survived the testator. The widow remarried, and died leaving a son her surviving, and the daughter, having married, died childless, leaving her husband her surviving. The beneficiaries named in the will, other than the wife and daughter, claimed the property. It was held the property went to the son of the deceased widow and the husband of the deceased daughter. The court, on page 466, 183 Ill., and page 63, 56 N. E., said: "The first gift is absolute, with no indication of an intention to limit the estate in any way; but the testator made provision that if the wife and child or children should be dead, and there should be no grandchildren, the estate should go to others. He coupled his own death with that of his wife and child or children, showing that he had in mind that event as the time when there might be a failure of the first provision to take effect. The contingency provided for was the death of the testator's wife and daughter in his lifetime with no issue of the daughter; and this accords with the general rule of construction, even where the testator does not fix the event at his own death. *Arnold v. Alden*, 173 Ill. 229 [50 N. E. 704]; *Estate of Biddle*, 28 Pa. 59; *Austin v. Bristol*, 40 Conn. 120 [16 Am. Rep. 23]. At the death of Anthony L. Hoppe, his wife, Louise A., and his daughter, Ottilia H., were living, and the will gave them the absolute estate. The contingency upon

which the devise to them might fall never occurred."

If the words, "die leaving no issue surviving them," be held to refer to the death of the testator's children, or either of them, prior to the death of the testator, the first clause of the sixth paragraph of the will would read: "All the rest, residue and remainder of my estate, both real and personal, together with my life insurance, I give, devise and bequeath to my executor herein-after named, in trust for my two children, Oscar H. Harz and Alma Harz, to be divided equally between both of my children, share and share alike. Should either of my above named children die prior to my death leaving no issue surviving them, then the share of such deceased child shall go to the survivor of them, and if both my children should die prior to my death leaving no issue surviving them or either of them, then I direct that my estate shall be divided as follows," etc.; which would transfer the legal title to Louis O. Kohtz, as trustee, and the equitable title to Oscar H. and Alma Harz, share and share alike, immediately upon the death of Theodore Harz, deceased.

The view that the testator intended the balance of his estate, after the payment of debts and specific legacies, should go to Oscar H. and Alma Harz absolutely, share and share alike, in case they should survive him, is strengthened by the fact that the courts always favor a construction which gives estates of inheritance to the first devisee in fee. In *Becker v. Becker*, 206 Ill. 53, 69 N. E. 49, on page 55, 206 Ill., and page 49, 69 N. E., it is said: "The growing tendency of courts has become a settled policy to adopt the construction of a will that will give an estate of inheritance to the first devisee, unless other limiting or qualifying clauses in the will disclose, clearly and unequivocally, that it was the intention of the testator to limit or qualify the estate granted." And a construction is uniformly adopted which will favor the heir. "In the construction of wills it is a well-established rule that the law favors the heir. Thus, heirs at law are not to be disinherited by conjecture, but only by express words or necessary implication. Nor will mere negative words suffice; there must be an actual disposition of the estate to some other person." 29 Am. & Eng. Ency. of Law (1st Ed.) p. 352. They also so construe a will that the estate will become vested, and so that the title thereto will not remain in abeyance. In *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351, on page 374, 120 Ill., and page 354, 11 N. E., it was said: "It has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent on a future event." And the fact that the legal title is placed in a trustee, and the equitable title

only given to the legatee or devisee, does not affect the application of the rule that the law favors the vesting of estates rather than that the title remain in abeyance. Nor will it have the effect to cut down an estate of inheritance, when clearly given by the will to the first taker, to a life estate and transfer the fee to another. *Flanner v. Fellows*, 206 Ill. 186, 68 N. E. 1057.

The only question remaining is, how long will the trust created in Louis O. Kohtz endure? The property belonging to the estate of Theodore Harz, deceased, consisted of real and personal estate, out of which the debts and specific legacies are ordered paid, and the balance is to be distributed, share and share alike, between Oscar H. and Alma Harz. The powers conferred upon Louis O. Kohtz, who is named executor and trustee, are to manage the estate, sell the real and personal estate, and to divide what shall remain after the debts and specific legacies have been paid between Oscar H. and Alma Harz, share and share alike. The testator doubtless thought until his estate was divided between his children it would be necessary that some one should loan the funds, rent the real estate, pay taxes and insurance, and make repairs. He therefore gave his executor and trustee power to manage the estate. He, however, did not fix the time when his power to manage the estate should end, and that time must be determined from a consideration of the entire will. Where a testator by his will creates a trust and fixes the duration thereof, his direction will, if not in violation of the rule against perpetuities, be given effect and the trust will continue for the time indicated; but where a testator does not specifically indicate the time for which the trust is to continue, his intention must, if possible, be determined from the entire will. Where the evident purpose of a trust is the accomplishment of a particular object, the trust will terminate so soon as that object has been accomplished, and the fact that a fee is given to the trustee does not show the testator's intention that the trust estate shall continue after the active duties connected with the trust have been accomplished. Page on Wills, § 618. The active duties of the trustee under this will are to reduce the personal and real estate to cash unless the owners of the equitable fee elect to take it in specie, and to divide the amount remaining after payment of debts and specific legacies equally between the son and daughter of the testator, and to care for, manage, and control the estate until the same is divided between its equitable owners. When the estate has been reduced to possession by the executor, and the debts and specific legacies paid, and the balance divided between Oscar H. and Alma Harz, the objects of the trusteeship will be accomplished, and the trust created in Louis O. Kohtz will be at an end.

The decree of the superior court will be reversed, and the cause remanded to that

court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(207 Ill. 405)

PEOPLE ex rel. **JEFFRIES**, County Collector, v. **CASH** et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

SPECIAL ASSESSMENTS—VALIDITY—SIDEWALKS—FILING OF COSTS.

1. Under 1 Starr & C. Ann. St. 1896, p. 858, relating to special assessments for sidewalks, and under an ordinance passed in conformity therewith, requiring that a bill of the cost of the sidewalk, showing in separate items the cost of grading, materials, laying down, and supervision, be filed in the office of the clerk of the town, certified to by the officers or board designated by the ordinance, together with a list of the abutting property, names of owners, and the frontage, and superficial or real or assessed value, according as the ordinance might provide for the levy of costs, a paper reciting that the committee had constructed a walk, and had directed collection as follows against a certain owner: "Cost of material, \$73.92; cost of laying down, \$73.92; total cost, \$147.84;" and that "the foregoing is a true statement of the cost of material and of laying down of" the sidewalk—was not a sufficient compliance with the statute.

2. It is essential to the right of a city to recover a judgment for a special tax for building a sidewalk that it should prove affirmatively that the ordinance was complied with.

Appeal from Coles County Court; T. N. Cofer, Judge.

Proceedings by the people, on the relation of Ralph Jeffries, for a special assessment for a sidewalk, to which Adeline Cash and others file objections. From a judgment refusing to subject the property to the tax, said Jeffries appeals. Affirmed.

Frank C. Winkler, City Atty., and John F. Voigt, Jr., State's Atty., for appellant. H. A. Neal, for appellees.

MAGRUDER, J. This is an appeal from a judgment of the county court of Coles county refusing to give judgment against the property of appellees for a sidewalk tax. The trial was held in a summary way, without a jury, before the court, on objections to application for judgment. The property involved was lots 1, 7, and 8 in block 7 in the original town of Independence (now city of Oakland), in Coles county, which lots were situated on Pike street, in Oakland. The appellees filed objections to the rendition of judgment for the sidewalk tax against their lots. The court heard the testimony of witnesses, and received documentary evidence, and sustained the objections to the application for judgment against the lots in question. Appellant, the county collector, excepted. The present appeal is prosecuted from such judgment.

The objections filed by the appellees in the court below, and which were sustained, were, first, that the ordinance for the construction of the sidewalk in question did not fix the grade of the walk; second, that there

was never filed with the clerk of the city of Oakland, or with the county clerk of said Coles county, a certified bill of the cost of said sidewalk, as provided by the statute, and that objectors had no notice, and no means of knowing, what the cost of the sidewalk was; and, third, that the sidewalk tax is wholly without authority of law, and illegal and void.

The main objection, relied upon, is the second objection, above mentioned. Section 5 of the ordinance for the construction of the sidewalk on the west side of Pike street, between Montgomery and Moore streets, in Oakland, provides that, when any such sidewalk is constructed by the city, the street and alley committee, or a majority thereof, of said city, shall, within 15 days after its completion, file in the office of the city clerk a certified bill of the cost of said sidewalk, showing in separate items the cost of grading, materials, laying down, and supervision, setting the same opposite the owner or owners, and shall give a description of the land or lots or parcels of ground touching upon or contiguous to the line of said sidewalk, according to the frontage thereof, stating the measurement of such frontage. Section 3 of the sidewalk act of 1875, under which the sidewalk was constructed, provides that "such ordinance may provide that a bill of the cost of such sidewalk, showing in separate items the cost of grading, materials, laying down and supervision, shall be filed in the office of the clerk of such city, town or village, certified to by the officer or board designated by said ordinance to take charge of the construction of such sidewalk, together with a list of the lots or parcels of land touching upon the line of said sidewalk, the names of the owners thereof, and the frontage, superficial area or assessed value as aforesaid, according as said ordinance may provide for the levy of said costs by frontage, superficial area, or assessed value." 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 858.

The street and alley committee of the city of Oakland consisted of three aldermen, to wit, E. N. Carter, A. E. Thomas, and J. W. Newman. Carter and Thomas (Newman being sick), who were a majority of the street and alley committee, prepared and signed the following paper, to wit: "We, the undersigned, a majority of the street and alley committee of said city, would most respectfully make report that the city did, pursuant to ordinance of said city, construct a concrete sidewalk on the west side of Pike street, and that the owners of the lot, lots or parts of lots hereinafter described have not paid the cost of the same, and you are hereby directed to collect the same according to law. Adeline Cash, lots 1, 7 and 8 in block 7 of the original town of Independence (now city of Oakland), Illinois, frontage 231 feet. Cost of material, \$73.92; cost of laying down, \$73.92; total cost, \$147.84. We, the undersigned, a majority of the street and alley

committee of the city of Oakland, in Coles county, Illinois, do hereby certify that the foregoing is a true statement of the cost of material and of laying down of a concrete sidewalk in front of the respective lots above mentioned." The document above set forth is the only bill of the cost of the sidewalk which was ever filed by said committee, or a majority of the same, in the office of the clerk of the city; and it needs only a casual examination of the same to show that it is not such a bill of cost as is required by the statute, or by the ordinance passed by the city council. It does not show "in separate items the cost of grading, materials, laying down and supervision." It simply divides the entire cost by two, and states that the cost of material is \$73.92, and the cost of laying down is \$73.92, without any statement at all as to the cost of grading or supervision. This paper, purporting to be a bill of the cost of the sidewalk, gives no information, except as to the total cost in front of the three lots owned by appellees. The city clerk states in his evidence that the paper in question was presented to him a few days before he sent it to the county treasurer and ex officio county collector of the county, between the 1st day of March and the 10th day of March, 1903. He also states that, after he so sent the paper to the county collector, there was no such paper as that on file in his office. The county collector states that the paper was filed with him on March 9th, and that it was the authority under which he put the delinquent sidewalk tax upon the delinquent list for judgment.

Section 2 of the ordinance provided that the cost of the sidewalk and all expenses connected therewith, should be paid for by special taxation of the lots parts of lots, and parcels of land touching upon the line of said sidewalk, according to its frontage upon said street. We have held that the provisions of the statute of 1875 are for the protection of the property owner, and that no valid special tax can be allowed thereunder without a substantial compliance therewith. *Hoover v. People*, 171 Ill. 182, 49 N. E. 367; *Vennum v. People*, 188 Ill. 158, 58 N. E. 979; *Holland v. People*, 189 Ill. 348, 59 N. E. 753; *Biggins' Estate v. People*, 193 Ill. 601, 61 N. E. 1124. In the case of *Holland v. People*, supra, we said: "The next step required by the statute, in order to charge the property with the tax, was that a bill of the cost of the sidewalk, showing in separate items the cost of grading, materials, laying down, and supervision, should be filed in the office of the clerk of the village, certified to by the officer or board designated by the ordinance to take charge of the construction of the sidewalk, together with a list of the lots or parcels of land touching upon the line of the sidewalk, the names of the owners thereof, and the frontage. This certified bill of cost is the basis for a special tax list to be prepared by the clerk."

The city clerk further testified that there was no itemized statement of the costs filed in his office, except a statement of the contract; that is to say, that nothing more was filed than the bill of the amount of the contract. It cannot be said that this statement of the amount of the contract was the itemized statement of the bill of cost required to be filed by the statute, and to be signed by the street and alley committee, or a majority thereof. Indeed, counsel for appellant admit in their brief that this statement cannot take the place of the bill of cost of the sidewalk.

It also appears that no special tax list was prepared by the clerk and filed in his office. It is not clear that a warrant for the collection of the tax was issued by the city clerk to the city collector. No return seems to have been made by the city collector to the city clerk, showing the special tax, or the portion remaining unpaid. In his testimony the city clerk says: "I wouldn't say whether I issued any warrants for the collection of this tax to the city marshal or not. * * * I think I did issue warrants to the city marshal for this tax, but I would not swear to it. It is my impression that I did issue the warrants." It is essential to the right of the city to recover a judgment for the special tax for building a sidewalk that the city should affirmatively prove that the ordinance has been complied with. *Hoover v. People*, 171 Ill. 182, 49 N. E. 367.

We are of the opinion that the court below decided correctly in sustaining the second objection made by the appellees to the entry of judgment for the sidewalk tax against their lots. Accordingly the judgment of the county court is affirmed. Judgment affirmed.

(207 Ill. 180)

In re MOIR'S ESTATE.

(Supreme Court of Illinois. Feb. 17, 1904.)

INHERITANCE TAX—DOMICILE—REMOVAL—INTENTION—EVIDENCE—SUFFICIENCY.

1. Evidence examined, and held to show that decedent's removal from his home in Illinois to another state was for the temporary purpose of securing medical aid, not with intention to change his domicile, and hence, on his death in the other state, his property was subject to the Illinois inheritance tax.

2. To bring about a change of residence it is necessary that there be not only an intention to change the residence, but the change must actually be made by abandoning the old and permanently locating in the new place of residence.

3. Decedent conveyed his real property to his sons. On the same day he gave each son a certain sum of money, which they put into a partnership formed by themselves and father, of which he was to receive one-half the profits. Though the sons testified that the real estate was not partnership property, the income therefrom was carried into the partnership, and decedent received one-half thereof. Held that, as to one-half the real estate, the conveyance was equivalent to one to take effect on the grantor's death, and was subject to the inheritance tax.

¶ 2. See *Domicile*, vol. 17, Cent. Dig. § 8.

Appeal from Henderson County Court; W. T. Church, Judge.

Proceedings for the assessment of an inheritance tax on the estate of Robert Moir, deceased. From a judgment sustaining objections filed by the children, the people appeal. Reversed.

This is an appeal from a judgment of the county court of Henderson county adjudging that the estate of Robert Moir, deceased, was not subject to an inheritance tax.

The deceased had resided in Oquawka, in Henderson county, for many years, where he owned his residence, and was engaged in the business of banking, merchandising, loaning money, and farming, and where he had accumulated a large fortune. His wife died in September, 1901. For some time prior to her death he had contemplated leaving Oquawka. He talked of going to California, and finally determined to go to Burlington, Iowa, where a married daughter, the wife of George Tracy, an attorney of that city, resided, and with whom he expected to make his home. On Saturday, December 7, 1901, said daughter was at her father's home in Oquawka. That afternoon Mr. Tracy came to Oquawka with the intention of remaining over Sunday. In the afternoon of that day Dr. Fleming, of Burlington, was called by telephone to Oquawka to see Mr. Moir, who was somewhat indisposed. On his arrival he held a consultation at the residence of Mr. Moir with Dr. Hanson, Mr. Moir's family physician, who resided at Oquawka. It was found that the deceased was suffering from an ulcerated tooth, and it was suggested that he go to Burlington, where the same could be satisfactorily treated. That evening Mr. and Mrs. Tracy and Dr. Fleming returned to Burlington, accompanied by Mr. Moir. On their arrival at the Tracy home a dentist, Dr. Cochran, was called. Dr. Fleming, in company with Dr. J. W. Holiday, treated Mr. Moir until December 19, 1901, when he died at the home of Mr. Tracy. The remains were taken to Oquawka for interment. The funeral was held at and the burial took place from the Moir residence, in which no change had been made during the 12 days intervening between the time Mr. Moir went to Burlington and his death.

On June 1, 1898, Robert Moir executed a deed, for the consideration of \$100 and other good and valuable considerations, to his three sons, Alexander, James, and Robert, purporting to convey to them all his real estate situated in Warren and Henderson counties, Ill., except his homestead in Oquawka, which deed was acknowledged February 26, 1899, and recorded in Henderson county March 25, and in Warren county March 27, 1902. On the same day that the deed bears date Mr. Moir gave to each of his three sons \$200,000 in personal property, and articles of copartnership were executed between said Robert Moir and his said sons whereby the members of the firm were each to put into

the business \$200,000, and were to succeed to the banking business carried on before that time by Robert Moir. Robert Moir was to receive one half of the profits of the business, and the other half was to be divided equally among the three sons. The farms owned in Warren and Henderson counties, purporting to be conveyed by said deed, had been rented by Robert Moir prior to the execution of said deed, and were occupied by tenants, a number of whom testified they knew of no change in the ownership of the farms occupied by them, respectively, prior to the date of the death of Robert Moir, and that they transacted the business connected with the renting of said farms and in payment of rent with Robert Moir after the date of the deed, the same as they had done before that date. The sons testified the land was not a partnership estate, but that the income thereof, as it accrued, was carried into the partnership account, and that Robert Moir received one-half thereof, as a member of said firm, up to the time of his death.

It was stipulated on the trial that Robert Moir died possessed of personal property of the value of \$826,107.22, and that the real estate conveyed on June 1, 1898, to the three sons, was of the value of \$105,200.

Propositions of law were submitted to the court wherein the court was asked to hold, as a matter of law, upon the facts disclosed by the evidence, that Robert Moir, at the time of his death, was a resident of Henderson county, and that the personal property of which he died possessed was subject to the payment of an inheritance tax; also that said real estate was conveyed to said grantees with the intention that said conveyance should not take effect in possession or enjoyment until after the death of the grantor, and that said real estate was subject to the payment of an inheritance tax. The court refused to hold said propositions of law, and the action of the court in holding that the estate of Robert Moir, deceased, was not subject to an inheritance tax under the statute of this state is assigned as error in the manner following, that is to say: First. The court erred in holding that Robert Moir was not a resident of Illinois at the time of his death, and that his personal estate was not subject to an inheritance tax. Second. That the court erred in holding that the real estate in Warren and Henderson counties conveyed by the deed of June 1, 1898, was not subject to an inheritance tax. Third. The court erred in refusing to mark "held," and to hold as the law, the seven propositions of law, and each of them, submitted for the people.

H. J. Hamlin, Atty. Gen., and J. W. Gordon, State's Atty., for the People. H. B. Safford and R. J. Grier, for appellees.

HAND, C. J. (after stating the facts). The controlling questions of law and fact arising

on this record lie within a very narrow compass.

1. Was Robert Moir a resident of Henderson county at the time of his death? Mr. Moir had lived in that county for many years, and when a residence is once established the presumption is that it continues, and the burden of proof is upon the party to show a change who claims a residence once established has been changed. 10 Am. & Eng. Ency. of Law (2d Ed.) p. 6. In this case the evidence relied upon to show a change of residence of Mr. Moir from Oquawka to Burlington consisted wholly of the proven declarations of the deceased. While such declarations are admissible in evidence they are not considered a high class of evidence, and when the acts of the party are inconsistent with his declarations the declarations are entitled to but little weight. *Kreitz v. Behrensmeier*, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349. The record is voluminous, and to set out in this opinion the declarations of Mr. Moir testified to by the numerous witnesses who testified upon that subject would serve no useful purpose. Suffice it to say, it is clear therefrom that the deceased had made up his mind to go to Burlington and make his home with his daughter at that place at some time in the future not far remote from the time when he actually went to Burlington. The evidence of all the witnesses on that point, with one or two exceptions, agrees, however, that at the several times upon which he spoke upon the subject he said he would go to Burlington when the business with which he was then connected was closed up. The business of himself and sons at Oquawka, during the fall of 1901, was in process of settlement preparatory to the contemplated change. No new goods were being bought for the store which they were carrying on at that place, and the depositors in the bank were being paid off preparatory to transferring the assets of the bank to a national bank which was being organized at Oquawka to take on its business. The business was not, however, closed up at the time the deceased went to Burlington, and it is admitted that the various enterprises in which Mr. Moir was engaged continued to be carried on by his sons until some weeks after the death of Mr. Moir. The time, therefore, when the deceased had determined to change his residence had not arrived at the time he went to Burlington. To bring about a change of residence it is necessary that there be not only an intention to change the residence, but the change must actually be made, which can only be effected by abandoning the old and permanently locating in the new place of residence. We are strongly impressed that the deceased intended to make the change so soon as his business was closed up, but are equally clear that such intention was never executed by a permanent abandonment of the old and the selection of a new place of residence by Mr. Moir. It appears

that he was at his home in Oquawka on the 7th of December, 1901; that he was indisposed; that his daughter was with him; that Mr. Tracy came from Burlington, on the afternoon of that day, to Oquawka, expecting to spend the following day, Sunday, at the home of the deceased; that during the afternoon Dr. Fleming was telephoned to come to Oquawka; that he did so, and met Dr. Hanson at the residence of the deceased; that after consultation they determined that Mr. Moir was mainly suffering from an ulcerated tooth, and that it was desirable he should see his dentist at once, who resided in Burlington; that thereupon Mr. and Mrs. Tracy returned home, the deceased going with them; that the dentist was sent for, and met him at the house of his daughter; and that other complications arising, and Mr. Moir growing worse, he remained at the Tracy home until his death, which occurred December 19, 1901. It is plain that Mr. Tracy and wife did not return to Burlington in company with Mr. Moir, by reason of the fact that after Dr. Fleming and Dr. Hanson arrived at the home of the deceased it was then agreed the time had come when the contemplated change of residence should be made, but that they returned to their home and took the deceased with them in order that the deceased might readily receive the medical attention which it was thought he needed. To have effected a change of residence at that time it was necessary that Mr. Moir should have gone to Burlington with the fixed intention of changing his residence, that is, with the intention of abandoning his old residence and taking up a new residence in Burlington. The clear inference to be drawn from the evidence is that the deceased went to Burlington for the purpose of receiving medical treatment, and not with the intention of effecting a change of residence. His business not having been closed up, he left his home, and all that was in it, as it had existed for years, his unmarried daughter, who was his housekeeper, and his servants, remaining. After his death his remains were taken back to the old home, and a funeral was there held. All the facts show that he went to Burlington for a temporary purpose, and not with the intention of making said city his permanent future residence.

The terms "residence," "abode," "domicile," and kindred terms, differ somewhat in meaning, but, when used in statutes similar to the one in force in this state providing for an inheritance tax, have frequently been held to be synonymous. 10 Am. & Eng. Ency. of Law (2d Ed.) p. 9; *Cooley on Taxation* (2d Ed.) p. 369; *Thorndike v. City of Boston*, 1 Metc. (Mass.) 242. In *Hayes v. Hayes*, 74 Ill. 312, on page 316, it is said: "To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction,

coupled with the intention of making the last-acquired residence a permanent home." In *Du Puy v. Wurtz*, 53 N. Y. 556, on page 561, the court say: "To effect a change of domicile for the purpose of succession, there must be not only a change of residence, but an intention to abandon the former domicile and acquire another as the sole domicile. There must be both residence in the alleged adopted domicile and intention to adopt such place of residence as the sole domicile. Residence alone has no effect per se, though it may be most important as a ground from which to infer intention. Length of residence will not alone effect the change; intention alone will not do it; but the two taken together do constitute a change of domicile." In *Thorndike v. City of Boston*, supra, which was an action to try the question whether the plaintiff, who had left the country with his family, was liable afterwards to be taxed as an inhabitant of the place of his former residence, the court, speaking through Chief Justice Shaw, said (page 245): "The questions of residence, inhabitancy, or domicile—for, although not in all respects precisely the same, they are nearly so, and depend upon much the same evidence—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of 'domicile.' It depends upon no one fact or combination of circumstances, but from the whole, taken together, it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. Of course, it follows that his existing domicile continues until he acquires another; and, vice versa, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places, and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character which fix it beyond question in another. So, on the contrary, very slight circumstances may fix one's domicile, if not controlled by more conclusive facts fixing it in another place." We are of the opinion the county court erred in holding that Robert Moir was a resident of the state of Iowa at the time of his death.

2. Was the real estate conveyed by the deed on June 1, 1898, subject to an inheritance tax? The solution of that question depends upon whether said conveyance was intended to take effect in possession or enjoyment after the death of Robert Moir. If it was, the lands transferred by said deed are subject to an inheritance tax; otherwise not. The evidence shows that the deed and

the copartnership agreement were executed simultaneously; that the real estate was not a partnership asset, but that the profits from the real estate were carried into the copartnership account; and that Robert Moir, as a member of said firm, received, from the time of the execution of the deed to the time of his death, one-half of the rents of said lands. If the rents from the lands had been reserved by Robert Moir, during his life, in the deed or by other writing, it would be plain that the deed was not intended to take effect in possession or enjoyment during the life of the grantor. If that was the intention of the parties to the deed, can an inheritance tax on said lands be defeated by reason of the fact that the intention to postpone the possession or enjoyment of the lands until after the death of the grantor is not evidenced in writing? We think not. If the failure to evidence such intention in writing would defeat the inheritance tax, such tax could be defeated in every case by the parent executing a deed to his children and prospective heirs, relying upon their parol promises to account to him for the rents of the lands conveyed during the life of the grantor. In this case the grantor, by virtue of the partnership with his sons, who were the grantees in the deed, did not postpone the possession or enjoyment of all the lands until after the death of the grantor, but only the one-half part thereof. As to one-half of said lands, the possession and enjoyment thereof were postponed during the life of Robert Moir; and we think, by reason of that fact, said one-half was subject to the payment of an inheritance tax. In *Reish v. Commonwealth*, 106 Pa. 521, a deed in fee simple was executed and a bond taken for the payment to the grantor, during his life, of one-half of the net income; and it was held the deed was intended to take effect in possession or enjoyment after the death of the grantor, and the estate was subject to an inheritance tax. In *Appeal of Seibert*, 110 Pa. 329, 1 Atl. 346, a will was made devising real estate, and the testator then made a deed conveying his lands to persons named, to be disposed of as directed in his will. The land was held subject to an inheritance tax. In volume 24 of the first edition of the *American & English Encyclopedia of Law* (page 464), it is announced that the policy of the law will not permit the owner of an estate to defeat the plain provisions of an inheritance law by any device which secures to him, for life, the income, profits, and enjoyment of the estate. It must be by such a conveyance as parts with the possession, the title, and the enjoyment in the grantor's lifetime.

The judgment of the county court is reversed, and the cause remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(307 Ill. 385)

STRONG v. DIGNAN.

(Supreme Court of Illinois. Feb. 17, 1904.)

ADMINISTRATORS — APPOINTMENT — NOMINATION—NONRESIDENT NEXT OF KIN—RIGHT TO NOMINATE—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.

1. 4 Starr & C. Ann. St. 1902, c. 3, par. 6, providing that where an intestate is a nonresident, and where the intestate is without a widow, next of kin, or creditors in Illinois, but leaves property within the state, administration shall be granted to the public administrator of the proper county when such county contains a population of 200,000 inhabitants or over, is unconstitutional as special legislation, since it can only apply to one county of the state, and rests on no reasonable or just basis of classification.

2. 4 Starr & C. Ann. St. 1902, c. 3, par. 6, provides that administration shall be granted to the surviving husband or wife, or to next of kin or some of them, or the court may grant letters to some competent person who may be nominated to the court by either of them, etc. The section also declares that no person who is not a resident of the state can be appointed administrator, etc. *Held*, that where a resident intestate died without a widow, next of kin, or creditors in Illinois, but was possessed of personal property in such state, his nonresident sister was entitled to nominate a resident to act as administrator, and to have the person so nominated appointed by the probate court in the place of the public administrator.

Wilkin, J., dissenting.

Appeal from Probate Court, Cook County—C. S. Cutting, Judge.

Petition by Mary Lavis for the revocation of letters of administration issued to Joseph H. Strong, public administrator of Cook county, on the estate of Jeremiah Ahearn, deceased, and for the appointment of Peter A. Dignan as administrator de bonis non. From a judgment granting the petition affirmed by the county court, the public administrator appeals. Affirmed.

This is an appeal from an order entered by the probate court of Cook county on May 26, 1903, revoking the letters of administration issued to Joseph H. Strong of Cook county upon the estate of Jeremiah Ahearn, deceased, and granting letters of administration de bonis non to Peter A. Dignan, on the petition of Mary Lavis, a resident of Massachusetts.

Jeremiah Ahearn died intestate in Chicago on March 15, 1903, without a widow, next of kin, or creditors in this state, possessed of no real estate, but of certain personal property, the amount of which is in dispute. He left him surviving, as his only heirs at law, Mary Lavis, a sister, and Morris Ahearn, a brother, both residing in the state of Massachusetts. On March 17, 1903, letters of administration were issued by the probate court of Cook county to Joseph H. Strong, public administrator of that county, on his petition therefor on his official bond, and in his official capacity.

On May 13, 1903, within 60 days after the death of the decedent, Jeremiah Ahearn, Mary Lavis filed her petition in said court, asking that the letters of administration theretofore issued to Joseph H. Strong be

revoked, and that Peter A. Dignan, a resident of Chicago, in Cook county, be appointed administrator de bonis non by said court. An order was entered in accordance with the prayer of the petition on May 26, 1903, as above stated, in which order, removing appellant, the public administrator, and appointing appellee as administrator, the court found that no claims had been filed against the estate; that no order of adjudication had been entered; that Mary Lavis was entitled to select a suitable person to act as administrator; that appellee was a suitable person duly qualified under the laws of Illinois to so act; and in said order it is expressly found by the probate court, as a reason for its action, that that portion of section 18 of chapter 3 of the Revised Statutes of the state of Illinois (Starr & C. Ann. St. 1902, par. 6), relating to the administration of estates hereinafter set forth, was unconstitutional and void, to wit: "In all cases where the intestate is a non-resident, and in all cases where the intestate is without a widow, next of kin or creditors in this state, but leaves property within the state, administration shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over."

Burras & McKenzie, for appellant. John S. Huey, for appellee.

MAGRUDER, J. (after stating the facts). Two questions are presented by this record: First, is that portion of section 18 of the administration act of this state (Starr & C. Ann. St. 1902, c. 3, par. 6), which is set forth in the statement preceding this opinion, constitutional? And, second, did Mary Lavis, sister of the deceased intestate, being a resident of Massachusetts, have the right, under the provisions of said section, to nominate a competent person to act as administrator of the estate?

Section 18 of chapter 3 of the Revised Statutes, entitled "An act in regard to the administration of estates," as amended in 1897 (Starr & C. Ann. St. 1902, par. 6), is as follows: "Administration shall be granted upon the goods and chattels of decedent to the surviving husband or wife, or to next of kin to the intestate, or some of them, if they will accept the same, or the court may grant letters of administration to some competent person who may be nominated to the court by either of them, but in all cases the surviving husband or wife or the persons so nominated by him or her, respectively, shall have the preference, and if none of the persons hereinbefore mentioned applies within sixty days from the death of the intestate, the county court may grant administration to the public administrator of the proper county, or to any creditor who shall apply for the same. If no creditor applies within fifteen days next after the lapse of sixty days as aforesaid, administration may be granted

to any person whom the county court may think will best manage the estate: provided, that in all counties having a population of two hundred thousand inhabitants or over, it shall be the duty of the county court to commit the administration of such estate to the public administrator of the proper county. In all cases where the intestate is a non-resident, and in all cases where the intestate is without a widow, next of kin or creditors in this state, but leaves property within the state, administration shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over. And in all cases where any contest shall arise between the widow, heirs-at-law, next of kin, or creditors of the intestate, in relation to the grant of letters of administration, and it shall appear to the court that the estate of said intestate is liable to waste, loss or embezzlement, administration to collect shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over: provided, that no administration shall, in any case, be granted until satisfactory proof be made before the county court to whom application for that purpose is made, that the person in whose estate letters of administration are requested is dead, and died intestate: and provided further, that when the heirs are resident of this state, and the estate is solvent and without minor heirs, and it is desired by the parties in interest to settle the estate without administration, this law shall not apply: and provided further, that no non-resident of this state shall be appointed administrator, and no non-resident shall be appointed or act as executor." 4 Starr & C. Ann. St. 1902, p. 32.

1. The third sentence of section 18, as above quoted, is claimed to be unconstitutional, as being local or special legislation. The provisions of the Constitution which it is said to contravene are section 22 of article 4 and section 29 of article 6 of the Constitution. 1 Starr & C. Ann. St. (2d Ed.) pp. 134, 158. Section 22, so far as it is necessary to quote the same in the present case, provides that "the General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For * * * regulating the practice in courts of justice. * * * In all other cases where a general law can be made applicable, no special law shall be enacted." The portion of said section 29 which is applicable here is as follows: "All laws relating to courts shall be general and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." The sentence in question, in providing that "in all cases where the intestate is a non-resident, and in all cases where

the intestate is without a widow, next of kin or creditors in this state, but leaves property within the state, administration shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over," is certainly special legislation, because it can only apply to Cook county, inasmuch as Cook county is the only county in the state which has a population of 200,000 inhabitants. We have held that a designation of counties as a class according to a minimum population, "which makes it absolutely certain but one county in the state can avail of the benefits of the law applicable to such class, cannot but be regarded as a mere device to evade the constitutional provision forbidding special legislation." *Devine v. Commissioners of Cook County*, 84 Ill. 594; *Cummings v. City of Chicago*, 144 Ill. 563, 83 N. E. 854. The third sentence of said section 18, being the one here under consideration and quoted in the statement preceding this opinion, in excepting Cook county from its operation, rests upon no just or reasonable basis of classification. There is no reason why administration should be granted to the public administrator in Cook county, and not to the public administrator in any other county, where the intestate is a nonresident, or dies without a widow, next of kin, or creditors in Illinois, and leaves property within Illinois. If in such case it is proper to select the public administrator as the person to administer upon the estate in Cook county, it would be equally proper to select the public administrator to administer upon such an estate in any other county.

The appointment of an administrator, and the mode of selecting an administrator, certainly constitute a part of the practice in probate courts, which are courts of justice. A law which provides a different mode of appointment or selection for a county having a population of 200,000 inhabitants or over from that which provides for such appointment or selection in counties having a less number of inhabitants is a special law regulating the practice in courts of justice. It makes the practice as to the mode of appointing and selecting administrators different in one county from what it is in other counties, without resting such difference upon any reasonable basis of classification. Under section 29 of article 6 of the Constitution above quoted, the "proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." This provision of the Constitution is violated where one mode of appointing and selecting administrators prevails in the probate court of one county, and a different mode prevails in the probate courts or county courts having probate jurisdiction of the other counties. While it is true that a classification of the counties of the state by population as a basis

for legislation is valid, yet all legislation on that subject must be by uniform and general laws. There must also be some reasonable relation between the situation of counties classified and the purposes and objects to be attained. In other words, as has been said, "there must be something in the nature of things which in some reasonable degree accounts for the division into classes." *People v. Martin*, 178 Ill. 611, 53 N. E. 309; *Knopf v. People*, 185 Ill. 20, 57 N. E. 22, 76 Am. St. Rep. 17; *People v. Board of Supervisors*, 185 Ill. 288, 56 N. E. 1044; *People v. Knopf*, 183 Ill. 410, 56 N. E. 155. It is difficult to conceive of anything in the nature of things which in any reasonable degree accounts for the division of counties into classes having populations exceeding 200,000 inhabitants and having populations less than 200,000 inhabitants, so as to make it proper to appoint the public administrator in counties of the former class and some other person in counties of the latter class, where the intestate dying is a nonresident, or has no widow or next of kin or creditors in this state. We are therefore of the opinion that the probate court of Cook county decided correctly in holding that the clause of section 18 here under consideration is unconstitutional, as being special legislation. A general law, applicable to all the counties in the state, could as well have been passed as the special law here attacked as unconstitutional.

2. The next question is whether or not the nonresident sister of the deceased intestate, Jeremiah Ahearn, had the right to nominate to the probate court a competent person to act as administrator. Mary Lavis, the sister, did nominate the appellee to the probate court to be so appointed, and the probate court appointed appellee in accordance with her nomination. Section 18 provides that "administration shall be granted upon the goods and chattels of decedent to the surviving husband or wife, or to next of kin to the intestate, or some of them, if they will accept the same, or the court may grant letters of administration to some competent person, who may be nominated to the court by either of them," etc. The nomination of appellee was made within 60 days after the death of decedent, such being the time required by the statute. The words, "who may be nominated to the court by either of them," refer back "to the surviving husband or wife or to next of kin of the intestate." The next of kin to the intestate can nominate a competent person to the probate court to act as administrator. Here, Mary Lavis, the decedent's sister, was one of the next of kin to the intestate. It is true that she was a resident of the state of Massachusetts, and not of Illinois, but the language of the first sentence of section 18 is broad enough to include a person occupying the position of next of kin who is a nonresident as well as a person who is a resident. It is true, also, that in a subsequent part of the section no

person who is not a resident of the state can be appointed administrator; but there is no statement anywhere in the section that a nonresident next of kin may not nominate a person to act as administrator, provided such person is a resident of Illinois. The reasons which would militate against the appointment of a nonresident as administrator would not apply to the selection of a resident administrator by a nonresident kinsman. The court could not call a nonresident administrator to account as could be done in the case of a resident administrator, nor could the court exercise over a foreign administrator the same degree of control in the management of the estate as it could exercise in the case of a resident administrator. But whatever advantage would be secured to the estate by the selection of a resident administrator would be gained as well when such resident administrator, if otherwise competent, was nominated by a nonresident kinsman of the deceased as when he was nominated by a resident kinsman. In other words, it could make no difference in the character of the administration whether the person nominating the administrator was a resident of the state or not, provided the administrator was a resident of this state and a competent person to act.

In *Branch v. Rankin*, 108 Ill. 444, this court had under consideration the construction of section 46 of the administration act (Starr & C. Ann. St. 1896, c. 8, par. 46), which provides that "whenever any person dies seized or possessed of any real estate within this state, or having any right or interest therein, has no relative or creditor within this state, who will administer upon such deceased person's estate, it shall be the duty of the county court, upon application of any person interested therein, to commit the administration of such estate to the public administrator of the proper county"; and it was there held that the words, "any person interested," were not limited to a person residing in this state, but were general and applicable to a nonresident creditor, it being there said: "This section, in its language, fully covers the present case. It is said 'any person interested' means such a person residing in this state; but there is no such restriction to be found in the language of the section—the words are general, with no limitation in this respect."

In *Estate of Cotter*, 54 Cal. 215, it was held that the surviving husband or wife of a deceased person, though incompetent to serve on account of nonresidence, nevertheless was entitled to nominate a suitable person for administrator.

It has been held in North Carolina that where the next of kin reside abroad the court will grant administration to the nominee of such next of kin. *Smith v. Munroe*, 23 N. C. 345; *Little v. Berry*, 94 N. C. 433.

It is true that the third sentence of section 18 provides that in all cases where the

Intestate is without a widow, next of kin, or creditors in this state, but leaves property within this state, administration shall be granted to the public administrator only when such county contains a population of 200,000 or over. But the third sentence of the section makes no reference to the nomination to the probate court of any competent person to act as administrator. Although the provision is that when an intestate dies without a widow, next of kin, or creditors in this state, leaving property here, administration shall be granted to the public administrator, yet there is no provision that if the intestate dies without a widow, next of kin, or creditors in this state, and no competent person is nominated by the next of kin, the public administrator is to act. In other words, the provision that a competent person may be nominated to the court by a nonresident next of kin would remain and be applicable to all the counties of the state, including Cook county, even though the third sentence of the section were eliminated. As the third sentence now stands, and if it were permitted to remain as a part of the section, it would involve and imply an exception, so far as the nomination of an administrator to the court by a nonresident next of kin is concerned. If the third sentence had provided that in all cases where the intestate is without a widow, next of kin, or creditors in this state, and where no next of kin, either resident or nonresident, nominates a person to act as administrator to the probate court, then a different question would arise; but such is not the language of the section.

We are therefore of the opinion that, notwithstanding the elimination of the third sentence as being unconstitutional, the clause which authorizes a next of kin, whether resident or nonresident, to nominate an administrator to the probate court, remains and is valid.

Taking this view—that is, that the nonresident sister had a right to nominate the administrator—the probate court of Cook county revoked the letters issued to the public administrator and appointed the appellee. We think that this action of the probate court was correct and authorized by the language of the section.

Accordingly the judgment or order of the probate court is affirmed. Judgment affirmed.

WILKIN, J., dissenting.

(207 Ill. 245)

BAUMGARTNER et al. v. BRADT et al.
(Supreme Court of Illinois. Feb. 17, 1904.)

WATERS AND WATER COURSES—ESTABLISHMENT—MAINTENANCE—OBSTRUCTION—LAND-OWNERS—RIGHTS—MANDATORY INJUNCTION—EQUITY—BILL—MULTIFARIOUSNESS—PARTIES—JOINDER—ANSWER—DEMURRER—WAIVER.

1. One who was entitled to the maintenance of a ditch, and to the unobstructed flow of water

through the same, is entitled to a mandatory injunction compelling the removal of an obstruction placed in the ditch by another, and to compel the restoration of the water to its natural channel, from which it had been wrongfully diverted, without regard to whether the channel was a natural water course or an artificial ditch.

2. Defendant, by answering a bill after the overruling of his demurrer thereto, waives the demurrer, except so far as he may have the same advantage on final hearing.

3. Where several complainants joined in a bill for a mandatory injunction to compel the removal of obstructions to a water course were all injured in the same manner by such obstructions, the fact that their titles to lands damaged by the obstruction were different did not render the bill multifarious, in that it joined different causes of action on behalf of each of the complainants.

4. Where, in a suit to restrain the obstruction of a water course, defendants admitted that there was a natural water course through the land owned by them, and that the waters from a highway and lands owned by some of the complainants found their outlet through such water course, and witnesses testified that an open water ditch had been in existence as long as they could remember, and for 20 or 30 years, it was immaterial that defendant's father dug the channel and created the ditch in the beginning.

5. Where, in a suit to restrain the obstruction of a water course, the evidence was conflicting, a finding of the chancellor thereon could not be set aside on appeal, where not manifestly against the preponderance of the evidence.

Appeal from Circuit Court, De Kalb County; Chas. A. Blishop, Judge.

Action by S. E. Bradt and others against Joseph Baumgartner and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Jones & Rogers, for appellants. A. G. Kennedy and Carnes, Dunton & Faissler, for appellees.

MAGRUDER, J. This is a bill, filed by the appellees against the appellants to enjoin the obstruction of a channel or stream alleged to be a natural outlet for water from the premises of appellees, and the highway running along the south side thereof. After answer filed by the defendants below, a decree was entered in accordance with the prayer of the bill. The present appeal is from the decree so entered.

Three of the appellees who filed the bill are commissioners of highways of the township of De Kalb, in the county of De Kalb, and the other appellees are the owners and occupants of the south half of section 8, and of the southwest quarter of section 9, in said township. The defendant below, Joseph Baumgartner, is the owner of the northwest quarter of section 16 in said township, subject to the life estate of another party therein, and wherein the other of the defendants below have some interest. The decree found that there was, and had been for more than 20 years last past, a public highway extending along the south side of the south half of said section 8, and the southwest quarter of

¶ 2. See Equity, vol. 19, Cent. Dig. § 493.

said section 9, and along the north side of said northwest quarter of said section 16; that there was a stream of water which flowed northerly across the said road in the south half of section 8, near the west side thereof, thence easterly through said south half to the east line thereof, thence southerly across the southwest corner of the southwest quarter of section 9, and which again crossed in a southerly direction said highway, and ran across, in a southerly direction, the northwest quarter of said section 16; that the water in said stream flowed in the course above specified, and had done so for a time whereof the memory of man runneth not to the contrary; that the course of the water, as above specified, is a natural water course, and that the stream of water, running in a southerly direction, as above set forth, through the northwest quarter of said section 16, had cut a channel about five feet deep through said northwest quarter; that said channel was a natural outlet for the water from said road, and from the south half of section 8 and the southwest quarter of section 9; that the defendants below (appellants here), or some person acting for them and under their direction, in September or October, 1901, unlawfully filled up and obstructed said channel upon the northwest quarter of said section 16, and thereby obstructed the flow of the water in the channel so as to throw the water back upon the highway, and upon the premises belonging to appellees, thereby overflowing the highway and said premises; that appellants have neglected and refused to remove said obstruction and open said channel; that the obstruction of the channel has caused great and serious injury to said highway, and to the lands of appellees, and the crops growing thereon, and that the appellants have threatened to further fill up and obstruct said channel or stream; that, if appellants are permitted to continue the obstruction of said channel and the flow of said water, it will result in irreparable damage to the highway and to the property of appellees; and that appellees are entitled to the use of the channel upon the northwest quarter of section 16 as an outlet for the water on the highway and on the lands of appellees, free from any and all obstruction by appellants. The decree made the preliminary injunction issued in the cause perpetual, and ordered that appellants be enjoined from continuing the obstruction of the channel upon the northwest quarter of section 16, and from permitting the channel to remain filled up or obstructed. The decree furthermore ordered that appellants should proceed forthwith to remove said filling and obstruction, so as to restore the channel to its former depth, and so as to restore to appellees the right to the free flow of the water through the portion of the channel so obstructed.

One whose right to the maintenance of a ditch, and to the unobstructed flow of water through it, constitutes a perpetual case-

ment, is entitled to a mandatory injunction directing the removal of an obstruction. *Hunt v. Sain*, 181 Ill. 372, 54 N. E. 970. A mandatory injunction may be granted to compel the restoration of water to its natural channel, which has been wrongfully diverted therefrom; and in such case it makes no difference whether the channel dammed up, or from which the water is diverted, is a natural water course or an artificial ditch. *Hunt v. Sain*, supra; *High on Injunctions*, § 804; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395.

1. The appellants urge as the first reason for a reversal of the decree that the bill is multifarious. It is said that the interests of the appellees named Cheasbro, owners of the south half of section 8, are separate from the interests of the commissioners of highways, and that the interests of the appellee named Twombly, the owner of the southwest quarter of section 9, are separate and distinct from the interests of the Cheasbros, and also separate and distinct from that of the commissioners of highways. The appellants, in the court below, filed a general demurrer to the bill, which was overruled, and they claim that the demurrer should have been sustained, upon the ground that the bill was multifarious. But the rule is that a defendant, by answering a bill in chancery after the overruling of his demurrer thereto, waives the demurrer, except so far as he may have the same advantage on final hearing, and he cannot assign for error the ruling upon the demurrer. *Gordon v. Reynolds*, 114 Ill. 118, 28 N. E. 455; *Bauerle v. Long*, 165 Ill. 340, 41 N. E. 227; *Stirlen v. Jewett*, 165 Ill. 410, 46 N. E. 259; *Gleason & Bailey Mfg. Co. v. Hoffman*, 168 Ill. 25, 48 N. E. 143. In the present case, after the demurrer filed by the appellants was overruled, they answered the bill; and we said in *Gleason & Bailey Mfg. Co. v. Hoffman*, supra, "By answering, after a general demurrer is overruled, the right to assign error in overruling the demurrer is waived."

But, independently of the question as to the waiver of the right to assign for error the overruling of the demurrer, the rule is well settled in this state that, if several property owners seek relief against the same injury upon the same ground, a bill in which they join as complainants will not be regarded as multifarious. A bill is generally understood to be multifarious when distinct and independent matters are improperly joined in one bill, and thereby confounded—as, for example, where several perfectly distinct and unconnected matters against one defendant are united in one bill. It has been held that, where a tax is sought to be levied without authority, several property owners, having a common interest in the subject, and asking relief against the same injury on the same ground, may join in a bill to restrain its collection, as a common object, in which all the complainants are interested, is sought,

and against parties who are doing the alleged wrong. *Mt. Carbon Coal & Railroad Co. v. Blanchard*, 54 Ill. 240; *Hickey v. Chicago & Western Indiana Railroad Co.*, 6 Ill. App. 172. "If the act complained of affects a common right of several persons, whose interests are, in a legal point of view, substantially the same, proceedings for an injunction may be instituted by one or more of them in behalf of the others." *High on Injunctions*, § 1549. "Upon the question of the joinder of parties in proceedings to restrain a private nuisance, it is held that, where the grievance is common to several different property owners, they may unite in one action for an injunction." *High on Injunctions*, § 757. In the case at bar, although some of the appellees owned one piece of land, and others of the appellees owned another piece of land, and the highway commissioners are interested in the highway running along the south side of the land, yet the obstruction of the channel, carrying off the water from the highway and from the lands of the appellees, is one and the same injury, suffered by them all. All the appellees have a common interest in the matter of removing the obstruction which closes the outlet of the water from the lands in question, and from the highway. In other words, owners here occupy the same position as owners in severalty of different tracts or premises upon a mill stream, who are operating mills thereon; and it has been held that, in such case the owners may maintain an action to restrain the improper diversion of water to the injury of their mills. "In such case, although the titles are different, yet the injury, being a common one, creates such a community of interest as to entitle them to join in the action." *High on Injunctions*, § 880.

2. Appellants claim that the ditch or channel constructed upon the northwest quarter of section 16, owned by appellants, was an artificial ditch, and that therefore appellants might fill it up without being liable to appellees. It appears that the father of appellant Joseph Baumgartner dug a ditch upon the northwest quarter of section 16 as far up as the highway. But it is admitted by the appellants in their answer that there was a natural water course through the land owned by them, and that the waters from the highway and from the lands owned by appellees, Cheasbros and Twombly, found their outlet through that water course. If it be true that the father of appellant Joseph Baumgartner dug a channel as is claimed, the proof shows that it was done at a time far back in the past, and that appellants had acquiesced in the running of the waters through their lands for such a length of time that the court was justified in finding that the channel through the land of appellants was a natural water course, and was the outlet for the water from the highway and from the premises of appellees. In support of their contention upon this branch of the

case, appellants refer to the case of *Weidakin v. Snelson*, 17 Ill. App. 461, but in that case there was no prescriptive right to the flow of water from the lands of the complainants over the lands of the defendants, nor any right by contract, and for this reason the case referred to is not in point. The appellant Joseph Baumgartner, in his testimony, says that the open ditch was there as long as he can remember, and that he is 40 years old. At least four other witnesses swear that they have been acquainted in the neighborhood 20 or 30 years, and that the open water ditch has been in existence as long as they remember.

3. It is claimed on the part of appellants that there was an agreement between appellees, on the one side, and the appellants, on the other, that a tile ditch should be constructed for the purpose of draining their respective lands. There is some evidence tending to show that tile was laid across the highway and across a part of the lands in question. But the weight of the evidence is not in favor of the contention of the appellants that the tile thus laid was to be a substitute for the open water course or channel which had existed for so long a time. At any rate, the evidence is conflicting upon the question whether the open water course was to be filled up, and the title was to be substituted for it. It is not claimed that there was any written agreement on this subject, and whether or not there was any oral agreement to the effect that the open ditch or water course should be filled up is a question upon which the witnesses of the appellees and those of the appellants differ. This being so, we are not inclined to disturb the finding of the chancellor. The trial court has an opportunity of seeing the witnesses, and of hearing their testimony as it is delivered orally; and, when such is the case, the findings of the trial court upon mere questions of fact, where the testimony is conflicting, will not ordinarily be disturbed on appeal, unless such findings are clearly and manifestly against the preponderance of the evidence. *Burgett v. Osborne*, 172 Ill. 227, 50 N. E. 206. Here we are unable to say that the findings of the lower court are clearly and manifestly against the preponderance of the evidence upon this subject.

After a careful examination of the record, we find no good reason for holding that the decree entered by the trial court is not correct and justified by the testimony. Accordingly the decree of the circuit court is affirmed. Decree affirmed.

(207 Ill. 116)

PFAELZER v. KAU.

(Supreme Court of Illinois. Feb. 17, 1904.)

NOTES—GUARANTOR OF PAYMENT—NOTICE OF NONPAYMENT—EFFECT OF FAILURE TO GIVE.

1. Where on the issues whether defendant's signature on the back of the note was made at

the time of its execution or after its delivery, and whether defendant was a guarantor or an indorser, the evidence was conflicting, and it was conceded that, if he was an indorser, he was not liable, an instruction defining guaranty, and stating that, if defendant was not a guarantor, he was not liable, and, if his signature was not placed on the note until after the delivery of the note, he was not liable, was correct, and a judgment of the Appellate Court affirming a judgment for plaintiff is a finding conclusive on the Supreme Court that he was a guarantor.

2. A guarantor of a note at its maturity by writing his name across the back thereof is not entitled to notice of nonpayment, and failure of the payee to give notice of nonpayment until the maker, who was solvent at the maturity of the note, became insolvent, did not discharge the guarantor, though he was obliged to pay the debt, and was unable to enforce payment thereof against his principal.

Appeal from Appellate Court, First District.

Action by Henry Kau against Bernhard Pfaelzer and others. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant Bernhard Pfaelzer appeals. Affirmed.

Binswanger & Jackson, for appellant. R. P. Langworthy, for appellee.

SCOTT, J. This was a suit in assumpsit, begun in the superior court of Cook county on March 14, 1901, by appellee, on a promissory note, payable to himself, for the sum of \$1,500, dated July 27, 1900, due six months after date, with interest at 6 per cent. from date, signed by Leopold Pfaelzer, across the back of which, in blank, appeared the signatures of Bernhard Pfaelzer, the appellant, and Hattie Pfaelzer. All three were made defendants. Appellant alone defended. He interposed the general issue, and a stipulation was made that he should have the right to make any defense under that plea that he could make under any special plea properly pleaded. A trial by a jury resulted in a verdict and judgment for the full amount of the note and interest. Appellant prosecuted an appeal to the Appellate Court for the First District, where the judgment was affirmed, and he now presents the record to this court for review.

Appellee sought to charge appellant and Hattie Pfaelzer as guarantors. Two defenses were interposed, which were submitted to the jury: First, that the signature of appellant was not placed upon the back of the note until several days after the note had been delivered and the consideration therefor passed to the maker, and there was no consideration for the contract of appellant; and that, in any event, the contract of appellant was that of an indorser, and not that of a guarantor. On these two questions the evidence was sharply conflicting. It is conceded that the facts would not warrant a recovery against appellant if he were an indorser rather than a guarantor. There was no evidence at all to show any consideration for the contract of appellant, evi-

denced by his signature, except the original consideration for which the note was given.

It is urged that the jury was not properly instructed in reference to the law distinguishing a guarantor from an indorser. The instructions accurately stated the elements necessary to constitute a contract of guaranty between the parties, and the jury were emphatically advised that, if Bernhard Pfaelzer was not liable as a guarantor, he was not liable at all; that, if his signature was placed upon the back of the note in accordance with any contract except a contract of guaranty, he was not liable; and that, if his signature was not placed upon the note until after the note was delivered, he was not liable. We think the instructions correct. The judgment of the Appellate Court is therefore final so far as the defenses to which we have alluded are concerned, and in this court appellant must be considered a guarantor.

Appellant sought to interpose another defense, which did not reach the jury, as the court, on objection, refused to admit the evidence which was offered for the purpose of showing that the maker of the note was solvent at the time of the maturity of the note, and remained solvent for a considerable period thereafter, but became wholly insolvent before any demand was made upon him for the payment of the note, before any notice to appellant of such default in payment, and before this suit was brought. The proposition urged upon us is that, while it is not necessary, in order to charge the guarantor in the first instance, to show diligence on the part of the plaintiff, or a demand upon the maker, or notice of default to the guarantor, still the guarantor may establish an affirmative defense by showing the facts which appellant offered to prove in this case; while the position of appellee is that it is the duty of the guarantor to pay the note on the day it matures if the maker defaults, and that no laches or delay of the payee will affect or alter the liability of the defendant, unless, indeed, the bar of the statute of limitations shall have intervened.

The authorities are conflicting on this proposition. This is explained to some extent by the varying terms of the contracts of guaranty with which the courts have dealt. The blank on the back of the note in this case has never been filled up. Appellee presented instructions to the jury on the theory that it was a contract of guaranty, and in view of the subsequent history of the case we necessarily treat it as a contract reading substantially as follows: "For value received, I hereby guaranty the payment of the within note at maturity." Upon such a guaranty it has been held in Massachusetts that the guarantor will be discharged by neglect of the holder to demand payment of the maker and to give the guarantor notice of nonpayment, provided the maker was solvent when the note fell due, but has since become in-

solvent. *Oxford Bank v. Haynes*, 8 Pick. 423, 19 Am. Dec. 834. In New York, on the other hand, it is held that the guarantor will not be discharged by neglect of the holder to demand payment of the maker and to give the guarantor notice of nonpayment, where the maker was solvent when the note fell due, and has since become insolvent. *Brown v. Curtiss*, 2 N. Y. 225. In our own state there is some apparent lack of harmony. The principal case relied upon by appellant is that of *Heaton v. Hulbert*, 3 Scam. 489, where this language was used: "The result of my investigation of this subject is that it was not necessary for the plaintiff to institute legal proceedings against the maker or indorser of the note, nor to show their insolvency, nor to prove demand and notice of nonpayment, in order to establish the liability of the guarantor; but that the defendant might have discharged himself from such liability by showing laches on the part of the plaintiff in the collection of his debt, and a resulting injury to the defendant, such as an omission to make demand and give notice within a reasonable time, and a loss to the guarantor in consequence of such omission. The doctrine of demand and notice, as applicable to commercial paper, has but this qualified application to guaranties: Laches, and a consequent injury, must be shown, and the onus probandi rests upon the defendant. It is to be observed, however, that a distinction has been taken between the absolute guaranty of a promissory note, or a sum ascertained and certain, and a letter of credit with a guaranty which requires acceptance and notice, and what is here said is to be restricted to that class of cases to which the one before the court properly belongs." The only case that has followed the view there expressed is *Voltz v. Harris*, 40 Ill. 155, where it is said: "He entered into the contract of guaranty with his eyes open, and must perform all its stipulations, unless he can show the appellees have been guilty of some laches by which he has been injured." It will be observed that in neither of these cases was the point now before us squarely presented. In neither of them was there any evidence that the guarantor had been injured or damaged by delay in bringing the action against the principal debtor, and what was said in reference to the effect of laches and delay was unnecessary to the decision of either case. In both cases it was objected that the creditor had not given notice of nonpayment to the maker, and in each it was held that the payee was not required to give such notice, and in neither case was there any offer to show insolvency of the principal debtor. In *Parkhurst v. Vall*, 73 Ill. 343, while the statement of the case does not show that the original maker had become insolvent after the maturity of the note, the case seems to have been tried on that theory, and the court, in discussing a refused instruction, used this language: "It is the doc-

trine of this court, as that of others, that the liability of a guarantor depends not upon, nor is it in any manner affected by, the solvency or insolvency of the makers of the note, and the question of due diligence is not an element in the case. It is an original undertaking by the guarantor that he will pay at all events. This is the life of the doctrine, and therein is it distinguishable from the liability of a mere indorser."

This court has had contracts similar to the one now before us under consideration on several other occasions. "No legal proceedings are necessary to fix the liability of a guarantor, or to show the insolvency of the maker, or to prove demand or notice of nonpayment, or to use diligence against the maker." *Stowell v. Raymond*, 83 Ill. 120. "The creditor, on this paper, was not in any sense the curator of the interests of the security or guarantor. By accepting this paper he assumed no such position. He owed to him no affirmative duty in this regard. He made no implied or express contract to assume any such duty. The holder of this paper was not under any obligation to the guarantor to make prompt demand of payment and give notice of nonpayment." *Hooker v. Gooding*, 86 Ill. 60. "The definition of a guaranty by text-writers is an undertaking by one person that another shall perform his contract or fulfill his obligation, or that, if he does not, the guarantor will do it for him. A guarantor of a bill or note is said to be one who engages that the note shall be paid, but is not an indorser or surety. 2 Parsons on Bills and Notes, 117. If this be so, then he must be regarded as an original promisor, and this, we believe, is the doctrine of adjudged cases." *Gridley v. Capen*, 72 Ill. 11. Where the maker (Cramer) had left the state, and suit was brought against the guarantor, it was said: "By the terms of this guaranty no terms were imposed upon appellee that he should sue the maker, or do any other act. He could remain passive, and the guarantor should have looked to it, before Cramer left the state, that he had paid this note." *Worden v. Salter*, 90 Ill. 160. "Any person, whether a party to the note or not, may guaranty its payment by the maker within any time specified, or may impose any terms or conditions to his guaranty which he may choose, and he will only be liable to the holder according to the terms of his agreement. If he guaranty payment at maturity to the holder without imposing other conditions, he need not protest, or give notice of nonpayment, or institute legal proceedings to hold the guarantor. If such steps are necessary, it is only because they have been imposed by the terms of the contract of guaranty. When the money is not paid according to the terms of the guaranty, the person holding the guaranty has a right to sue upon it and recover of the guarantor." *Hance v. Miller*, 21 Ill. 636. "It is also insisted that notice should have

been given to appellant that Kimball had failed to pay the money, before he could be held liable as guarantor. There can be no question that, where the guaranty is absolute, it is the duty of the guarantor to see to the payment of the money. In such a case no demand or notice of nonpayment is required, but the holder may institute suit at maturity of the debt without taking any other steps. In *Hance v. Miller*, 21 Ill. 636, this rule was recognized. When, however, the guaranty depends upon the happening of a contingent event, it is necessary, when the event has occurred, that notice should be given to the guarantor within a reasonable time. This is manifestly proper, to enable the guarantor to secure himself against loss. 2 *Parsons on Contracts*, 174. But what is a reasonable time depends upon the circumstances of the case. If, however, it is given before loss could occur, or the situation of the parties become changed so as to endanger loss, it is believed to be sufficient. If delayed so long as to deprive the guarantor of the means of rendering himself secure, it would not be in time, and the guarantor would be released." *Dickerson v. Derrickson*, 39 Ill. 574. "Where the payee of a promissory note or third parties execute a contract written on the back of an unconditional promissory note for the payment of money at a specified time, in which they guaranty the payment of the promissory note at maturity, the holder of the note is under no obligation to demand payment of the maker, and on default of payment notify the guarantors. The reason is obvious. The contract of the guarantors is absolute and unconditional, and it requires payment by the guarantors upon maturity of the note. This rule is clearly laid down in *Gage v. Mechanics' Nat. Bank of Chicago*, 79 Ill. 62, and is well sustained by authority. The principle upon which this doctrine rests is that the contract is absolute, and not conditional or collateral." *Taussig v. Reid*, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504.

It is true, as suggested by appellant, that in none of these cases, with the exception, perhaps, of the *Parkhurst Case*, where, after maturity, the principal debtor seems to have become insolvent, and the *Worden Case*, where he had evidently gone out of the state after the debt came due, so that process could not be served upon him, does it appear that the guarantor had been in any wise damnified by the failure to give him notice of nonpayment, but the reasoning of these cases is like that of the *New York Court of Appeals*, and is to the effect that the guaranty here under consideration is an absolute agreement by the guarantor that the maker will pay the debt at maturity. The moment the principal debtor is in default, that moment the guarantor is in default, and an action could be immediately brought against him. It is his duty to pay, and to pay right then. If it be argued that the payee is negligent for a failure to immediately seek

the satisfaction of the obligation which he holds, the guarantor is likewise negligent in failing to meet that obligation; and, as he has become responsible for the default of the principal, it seems just, if he does not desire to incur the risk of the principal thereafter becoming insolvent, that he should be diligent himself to meet his obligation and enforce the cause of action against his principal. *Dickerson v. Derrickson*, supra, leads to the conclusion that in this state the rule contended for by appellant applies only where the guaranty is a conditional or collateral one.

The question before us is one in reference to which courts and text-writers of the most eminent respectability differ, but, in view of the absolute and unconditional character which this court has determined such an undertaking as we here consider bears, we feel ourselves committed to the doctrine that he who guaranties the payment of a promissory note at its maturity by writing his name across the back thereof is not entitled to notice of nonpayment, and that, if the payee does not give notice of nonpayment until the maker, who was solvent at the maturity of the note, becomes absolutely insolvent, the guarantor is not thereby discharged, even though he is obliged to pay the debt, and, as a consequence of the delay, is unable to enforce payment thereof against the principal.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(208 Ill. 81)

CHICAGO CITY RY. CO. v. HANDY.

(Supreme Court of Illinois. Feb. 17, 1904.)

TRIAL—EXAMINATION OF EXPERT—INTEREST—ARGUMENT OF COUNSEL—FAILURE TO OBJECT.

1. In a personal injury action a physician, called as an expert by defendant street railway, testified, on cross-examination, that he charged it \$50 a day for his services, and had frequently rendered services for it in other cases. The court sustained an objection to a question as to how many times he had testified for the company in the last four or five years. The witness then testified further as to his connection with the company, and was asked how much money he had received from it within four or five years, to which objection was sustained. The plaintiff's attorney then stated that he proposed to show that the physician was virtually an employé of the company. The company's counsel said he would not object to that, and the court said that plaintiff was only entitled to find out how often the physician was employed and how long. Plaintiff's attorney said that he thought he had covered that, and the colloquy ended. *Held*, that there was no error of which the company could complain.

2. An objection to an alleged improper argument of counsel cannot be taken for the first time on appeal.

Appeal from Appellate Court, First District.

Action by Vina Ross Handy against the Chicago City Railway Company. From a judgment of the Appellate Court, affirming a

judgment for plaintiff, defendant appeals. Affirmed.

William J. Hynes and Edward C. Higgins (Mason B. Starring, of counsel), for appellant. Theodore G. Case and John T. Murray, for appellee.

BOGGS, J. The judgment in the sum of \$1,000, entered in the superior court of Cook county in favor of the appellee against the appellant company as damages for personal injuries sustained by the appellee in consequence of the alleged negligence of one of the appellant's conductors, was, on appeal, affirmed by the Appellate Court for the First District. By a further appeal the record has been brought into this court for review.

The grounds urged for reversal are: "First, because of alleged improper remarks and comments made by counsel for appellee in the cross-examination of witnesses and in his argument to the jury; second, for the refusal to give instructions Nos. 15 and 16, requested by the appellant."

In the brief of counsel for the appellant it is urged that in the trial court counsel for the appellee made improper remarks and comments in the cross-examination of Mrs. Lilly Bond and Dr. Leeming, two witnesses introduced in behalf of the appellant company. It does not appear from the record that any objection was made to the trial judge as to the alleged misconduct of counsel during the cross-examination of Mrs. Bond, or that the attention of the court was in any way called thereto or any ruling asked or obtained. In the cross-examination of Dr. Leeming, after the witness had testified that he charged the appellant company \$50 per day for his services as an expert witness, and that he had frequently rendered services for the company in other cases, he was asked, "How many times have you testified for the Chicago Union Traction Company in the last four or five years?" This was objected to "as incompetent and irrelevant in this case." The court sustained the objection, and after the witness had further stated that he had testified in six other cases in the last six months for the appellant company, and that he had rendered other services for the appellant company than giving testimony, and had made other statements relative to his connection with the appellant company, he was asked: "Have you any idea how much money you have received from the Chicago City Railway Company within the last four or five years?" This was objected to by counsel for the defendant as immaterial in this case, and the following colloquy occurred between Mr. Case, attorney for appellee, and Mr. Brady, attorney for the appellant company, and the court:

"Mr. Case: I propose to show—I don't mean to cast any reflections—that he is vir-

tually an employé of this company. Mr. Brady: Well, why don't you ask him the direct question? Mr. Case: Because you objected to it. Mr. Brady: Well, I don't object to this, your honor. The Court: He stated how frequently he is there. Mr. Brady: Yes. The Court: And what his charges are per day. Mr. Brady: Yes. The Court: You can find out how often he is employed, and how long. I think that is the only material part here, Mr. Case. Mr. Case: I think I have about covered that. That is my impression." The examination of the witness was concluded without further objection.

It is competent to show that a witness has charged or expects to receive greater compensation than the fees allowed by the statute, and that he is in the employ of one of the litigants regularly or frequently as an expert witness, or to prove facts and circumstances which would naturally create a bias in the mind of the witness for or against the cause of either of the litigants. Expert witnesses are often found to be necessary, and while there is no good reason that any one who has the requisite special knowledge should not give testimony as an expert witness and receive greater compensation therefor than the fee allowed a witness by the statute, if the party calling him voluntarily consents to pay such greater compensation, still the fact that he receives such additional compensation may be very properly shown to the jury for their consideration when determining the weight and value of his testimony, and any fact which tends to show that he has the feelings of a partisan for the cause of one of the litigants or a bias against that of the other may be shown for the like reason. We are unable to see that the appellant company has any just cause of complaint of any ruling made by the court during the cross-examination of Dr. Leeming.

No objection was entered or any ruling of the court asked with reference to the alleged improper remarks of counsel for appellee during the course of his argument to the jury. We have frequently decided such complaints cannot be made for the first time in this court.

Twenty instructions were given in behalf of the appellant company, and the refusal to give instructions Nos. 15 and 16 might well be sustained on the ground that all contained in them proper to be given was but a repetition of that contained in other given instructions. The two instructions were not presented to the court within the time limited by the rules of the court for the presentation of instructions. Nor do we think the suggestion well advanced that the occasion for these instructions arose during the argument of counsel for the appellee.

The judgment must be and is affirmed. Judgment affirmed.

(207 Ill. 466)

CHICAGO CITY RY. CO. v. CREECH.

(Supreme Court of Illinois. Feb. 17, 1904.)

**TRIAL—CROSS-EXAMINATION OF WITNESSES—
ARGUMENTS OF COUNSEL—DISCRETION OF
COURT—ABSENCE OF JUDGE FROM COURT-
ROOM—REVIEW—REFUSAL OF INSTRUCTIONS.**

1. The scope of a cross-examination of a witness is largely within the discretion of the trial court.

2. A witness may be cross-examined as to his direct testimony in all its bearings, and as to whatever goes to explain or modify or discredit what he stated in his examination in chief.

3. Counsel must be allowed to make reasonable comments on the evidence and conduct of witnesses, and should not be subjected to any unreasonable restraint in this respect.

4. The comments of counsel on the evidence and conduct of witnesses is a matter for the sound discretion of the presiding judge.

5. During the argument to the jury the presiding judge retired to his chambers, to look over requested instructions, leaving an open door between him and the courtroom, through which he could hear and see what was going on. *Held*, that this being only a technical violation of the rule requiring his presence in the courtroom, and, it not appearing that the parties were prejudiced thereby, it did not constitute reversible error.

Appeal from Appellate Court, First District.

Action by William B. Creech against the Chicago City Railway Company. A judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. *Affirmed.*

William J. Hynes and Watson J. Ferry (Mason B. Starring, of counsel), for appellant. Wing & Wing and Ela, Grover & Graves, for appellee.

WILKIN, J. This action on the case was brought by appellee against appellant in the circuit court of Cook county to recover damages for personal injuries alleged to have been sustained through the negligent management of one of its cars by its employes.

Between 5 and 6 o'clock on the afternoon of July 6, 1897, the plaintiff, who was an iron and brass molder employed in the city, boarded a car of the appellant company on South Halsted street to go to his home. The car was so crowded with passengers that he was compelled to ride upon the footboard, which he did, on the west side of the car, near the front. It was southbound, and the injury occurred about 150 feet south of Thirty-Fourth court, at which place there is a double track, the distance from the west rail to the curb on Halsted street being about 15½ feet. In front of a coal office stood an express wagon, with the horse facing south. A large coal or ice wagon came into Halsted street from Thirty-Fourth court, and turned south on the west side of the street, and as it came near the express wagon the driver turned his team to the east, for the purpose of passing around that wagon. As he was passing the express wagon the car came from the north, and struck the wagon in such a manner as to injure the plaintiff by pressing

him between the coal wagon and one of the posts of the car, fracturing his ribs, collar bone, and otherwise severely injuring him. Upon a trial by jury, verdict and judgment were rendered in his favor for \$4,500, which have been affirmed by the Appellate Court, and hence this appeal.

But three grounds of reversal are here urged: First, that the trial court erred in excluding and in admitting evidence; second, appellant was deprived of a fair and impartial trial because of improper remarks and conduct of counsel for appellee; and, third, the trial court erred in the refusal of instructions asked on behalf of appellant.

Under the first head it is contended that the court erred in restricting cross-examination of appellee and his witnesses, and in permitting appellee's counsel to cross-examine appellant's witnesses upon matters not covered by their examination in chief. We have examined the record for the purpose of ascertaining whether or not improper evidence was admitted on behalf of the plaintiff or proper evidence excluded on behalf of the defendant, and, without attempting to discuss the question here, it is sufficient to say that no reversible error was committed in that regard.

The principal complaint of counsel for appellant is as to the ruling of the court on the cross-examination of witnesses. Many of the objections were simply that the questions were not proper cross-examination. The scope of a cross-examination is necessarily largely within the discretion of the trial court, being governed by the direct testimony of the witness and other circumstances attending the giving of his evidence, and it has been held to be erroneous for the trial court to restrict the cross-examination to the extent of preventing the party from going only into the matters connected with the examination in chief, it being his right to elicit suppressed facts which weaken or qualify the case of the party introducing the witness or supporting the case of the party cross-examining. A witness may be cross-examined as to his direct testimony in all of its bearings, and as to whatever goes to explain or modify or discredit what he has stated in his first examination. 1 Thompson on Trials, § 405, p. 367. This rule has been often recognized and approved by this and other courts. We think the cross-examination in this case on either side was substantially in compliance with correct rules of evidence, and that no error was committed by the trial court in his rulings in that regard. Nor do we find any substantial fault with the conduct of counsel for plaintiff in his manner of examining the witnesses, as objected by counsel for appellant. Doubtless on either side there was some objectionable conduct by counsel, but not such as calls for any criticism here.

Under the second point it is insisted that in the argument to the jury counsel for ap-

pellee went outside the record, and commented on matters upon which there was no evidence, and made unwarranted appeals to class prejudice for the purpose of prejudicing the jury. We have held that, in the argument of cases to juries, attorneys must be allowed to make reasonable comment upon the evidence and upon the conduct of witnesses giving their testimony; that the interest of public justice requires that counsel should not be subjected to any unreasonable restraint in this regard; that the matter is one which must be left largely to the sound discretion of the presiding judge, it being for him to say, under all the circumstances of the case and in view of the remarks preceding the argument objected to and the temper and character of the jury, whether or not a new trial should be granted for the misconduct of counsel by way of improper argument to the jury. *North Chicago Street Railroad Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Illinois Central Railroad Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 68 Am. St. Rep. 253; *West Chicago Street Railroad Co. v. Annis*, 165 Ill. 475, 46 N. E. 264; *North Chicago Street Railroad Co. v. Anderson*, 176 Ill. 635, 52 N. E. 21. We have read the argument of counsel so far as it appears in the abstract of the record, and are of the opinion that no substantial error was committed by the court in refusing a new trial on that ground.

Under this same head it is further contended that the presiding judge was absent from the courtroom during the argument to the jury, and therefore failed to pass upon all the objections interposed by the appellant. It appears from the record that at the beginning of the argument a large number of instructions were handed by counsel for appellant to the judge to be given to the jury, and he retired to his chambers to look them over, leaving the door between him and the courtroom open, through which he could see and hear what was going on in the courtroom. We do not wish to be understood as approving the practice, but think, as we have frequently held, that the presiding judge should be present in the courtroom during the entire trial, unless it should become necessary for him to be absent, in which case he should suspend the trial until his return. The record, however, here shows that the violation of this rule was but technical, and that no rights of the parties were prejudiced thereby. We do not think that reversible error is shown by the absence of the trial judge.

The third ground of reversal urged, as above stated, is the ruling of the court upon instructions. The record shows that no instructions whatever were asked or given on behalf of plaintiff, and that 26 were offered by counsel for the defendant. Those given at its instance covered, we think, every substantial feature of the case. The complaint of the modification of the two instructions pointed out in the opinion of the Appellate

Court by Adams, J., and the refusal of a third, is fully and fairly considered and disposed of by that opinion, and we fully concur therein.

There are no reversible errors of law in this record, and the judgment of the Appellate Court is affirmed. Judgment affirmed.

(207 Ill. 632)

COAL BELT ELECTRIC RY. CO. v. KAYS.

(Supreme Court of Illinois. Feb. 17, 1904.)

APPEAL—TIME TO FILE RECORD—STATUTORY PROVISIONS.

1. Practice Act, § 72 (Hurd's Rev. St. 1899, p. 1294), requires authenticated copies of records of judgments appealed from to be filed in the Appellate Court on or before the second day of the term succeeding the appeal, if 20 days shall have intervened between the last day of the term at which the judgment was entered and the sitting of the Appellate Court. Defendant appealed from a judgment entered at a term of the circuit court which ended more than 20 days before the sitting of the Appellate Court. *Held*, that the order of the trial court giving defendant 30 days in which to file his appeal bond under the authority of section 67 (Hurd's Rev. St. 1899, p. 1293), providing that the party appealing shall file an appeal bond within the time, not less than 20 days, fixed by the court, did not extend the time for the filing of the transcript in the Appellate Court.

Appeal from Appellate Court, Fourth District.

Action by George W. Kays against the Coal Belt Electric Railway Company. From a judgment of the Appellate Court dismissing an appeal from a judgment for plaintiff, defendant appeals. *Affirmed*.

William H. Warder, for appellant. W. A. Schwartz (Spiller & White, of counsel), for appellee.

CARTWRIGHT, J. On August 3, 1903, the circuit court of Williamson county entered a judgment in favor of appellee against appellant for \$3,000 and costs. The appellant prayed an appeal to the Appellate Court for the Fourth District, which was allowed, and 30 days were given to file an appeal bond, and the time for filing a bill of exceptions was extended 60 days. The day on which the judgment was entered was the last day of the May term, and on that day the court adjourned for the term. The next term of the Appellate Court for the Fourth District was fixed by statute to begin on the fourth Tuesday in August, 1903, which was August 25th, and on that day the Appellate Court convened for that term. Twenty-two days intervened between the last day of the term, at which the judgment appealed from was entered, and the sitting of the Appellate Court. On August 23, 1903, appellant filed its appeal bond, duly approved, with the clerk of the circuit court. It did not file with the clerk of the Appellate Court any transcript of the record, nor obtain an extension of time to file the same. On September 10,

1908, the appellee filed in said Appellate Court a transcript of the record of the circuit court, showing the judgment and allowance of the appeal, the adjournment for the term, and the filing of the appeal bond, and moved the court to dismiss the appeal on the ground that no transcript of the record was filed in said court as required by law. Appellant thereupon entered its cross-motion for an extension of time in which to file such transcript, assigning as reasons in support of its motion that the circuit court allowed 30 days for filing an appeal bond; that the appeal bond was filed within the time so allowed, 2 days after the second day of the August term of the Appellate Court; that 60 days were allowed for filing a bill of exceptions; and that appellant had been unable to secure a copy of the evidence, so as to make a bill of exceptions and secure a transcript in time to file it at the August term. The motion was supported by an affidavit that the appeal bond was filed as soon as possible, and that the appellant had been unable to secure a copy of the evidence, and therefore could not file a bill of exceptions or secure a copy of the record in time for the August term. The Appellate Court denied the cross-motion of appellant, allowed the motion of appellee, and dismissed the appeal, with 5 per cent. damages on the amount of the judgment. From the judgment dismissing the appeal and assessing damages against it, appellant prosecuted this appeal.

The right of appeal is conferred by statute, and can only be exercised by complying with the statutory conditions. By section 72 of the practice act, it is provided that authenticated copies of records, orders, and decrees appealed from shall be filed in the office of the clerk of the Appellate Court on or before the second day of the succeeding term of said court, if 20 days shall have intervened between the last day of the term at which the judgment, order, or decree appealed from shall have been entered, and the sitting of the court to which the appeal shall be taken; otherwise the said appeal shall be dismissed, unless further time to file the same shall have been granted by the court to which said appeal shall have been taken, upon good cause shown. Section 73 provides that, when appeals are dismissed by the Appellate Court for failing to file authenticated copies of records as required by law, the court shall enter judgment against the appellant for not less than 5 nor more than 10 per cent. damages on the amount recovered in the inferior court. Hurd's Rev. St. 1899, p. 1294.

Appellant contends that these provisions are modified or controlled by section 67 (Hurd's Rev. St. 1899, p. 1293) of the same act for the allowance of an appeal, which provides that the party praying for such appeal shall file an appeal bond within such time, not less than 20 days, as shall be limited by the court. Its position is that, if the time so limited extends beyond the second day of

the succeeding term of the Appellate Court, it is not necessary to file the transcript by that time. It is true that the circuit court had power to fix 30 days as the time within which appellant should file its appeal bond, that the appeal was not perfected until the bond was filed, and that the Appellate Court could not take jurisdiction of the case, or hear a motion to extend the time for filing a transcript, until the appeal was perfected by filing the bond; but the circuit court could not defeat the plain provision of the statute for filing the transcript by extending the time for filing the bond or bill of exceptions. A trial court cannot fix a less time than 20 days for filing an appeal bond, and may grant a longer time; but, if 20 days intervene between the last day of the term of that court and the sitting of the Appellate Court, the provisions of section 72 as to filing the transcript must control. In every such case the transcript must be filed as required by that section, unless further time has been granted by the court for good cause shown. *Swafford v. Rosenbloom*, 189 Ill. 892, 59 N. E. 790; *Fonda v. Jackson*, 203 Ill. 113, 67 N. E. 741. The extension of time can only avail the appellant so far as it will not conflict with the requirement for filing the transcript.

The statute requires the Appellate Court to assess damages upon dismissing an appeal for failure to file the transcript as required by law, and, as there was such a failure in this case, it was not error for the Appellate Court to assess the damages. *Swafford v. Rosenbloom*, supra.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(207 Ill. 395)

RIVERTON COAL CO. v. SHEPHERD (two cases).

(Supreme Court of Illinois. Feb. 17, 1904.)

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY—CONTRIBUTORY NEGLIGENCE—HYPOTHETICAL QUESTIONS—OBJECTIONS.

1. An objection to a hypothetical question, based on the fact that it does not contain all the elements necessary to a proper answer, in order to be available on appeal, must specifically point out the elements alleged to have been omitted.

2. Evidence, in an action for personal injuries sustained by an employé in a mine by reason of an explosion therein, examined, and held to support plaintiff's claim that defendant negligently permitted gas and air charged with dust to accumulate in the mine.

3. Where the state mine examiner ordered a mining company's fire boss and mine manager to remove the dust from the entryways of the mine, to sprinkle the roads therein, and to put up a canvass sheet at a crosscut, the company was chargeable with knowledge of the defective condition of the mine, making it liable for the damages sustained to an employé by reason of an explosion arising from such defects.

4. Contributory negligence of a mining employé will not defeat a recovery for injuries sustained by reason of the mining company's willful violation of the statute regulating mines.

5. Where there is nothing to show that the danger which a mining employé encountered was so imminent that any reasonably prudent man would have abandoned the work, the employé, in continuing to work, is not guilty of such contributory negligence as will bar his right to recover for injuries sustained.

Appeal from Appellate Court, Third District.

Consolidated actions by John E. Shepherd and Charles L. Shepherd against the Riverton Coal Company. From judgments of the Appellate Court, affirming judgments in favor of the plaintiffs, defendant appeals. Affirmed.

Conkling & Irwin and J. C. McBride, for appellant. Robert H. Patton and James E. Dowling, for appellees.

WILKIN, J. This appeal is from a judgment of the Appellate Court for the Third District affirming two judgments rendered in the circuit court of Sangamon county, one in favor of the appellee John E. Shepherd for \$5,000, and another in favor of his son, Charles L. Shepherd, for \$1,500, both against the appellant, the Riverton Coal Company. The suits were for personal injuries growing out of the same accident, and are similar in all respects. By agreement of the parties they were tried in the circuit court as one case, and are submitted here, as they were in the Appellate Court, upon one set of abstracts, briefs, and arguments.

There are four counts in the declaration. The first alleges that on March 18, 1902, the appellant negligently permitted gas to accumulate in the mine, and on account of the lack of air and presence of dust the explosion resulted. The second count alleges that appellant willfully failed and neglected to have the galleries, roadways, and entries in said mine thoroughly sprinkled or cleaned, and that by reason of such failure said galleries, entries, and roadways were so dry that the air became charged with dust, and this, together with the gases accumulated, caused said explosion. The third count alleges five violations of the statute, as follows: First, that appellant did not always maintain sufficient currents of fresh air; second, that appellant did not force currents of fresh air into every working place, thus permitting the accumulation of standing smoke and impure air; third, that appellant did not split or subdivide the main current so as to give a separate current of pure air to every 100 men; fourth, that appellant did not have a certain permanent door so hung as to close automatically, and that at the junction of a certain crosscut and the southeast entry, west, the door was made of cloth, and on the day of the accident, and some time prior thereto, this cloth had been so torn that it did not perform its functions as a door; fifth, that appellant did not have an attendant at certain principal doorways, and that because of the condition of the air and gases

in said entry the explosion occurred. The fourth count alleges that appellant willfully failed and neglected to thoroughly examine said mine as to air currents, gases, etc. The plea was not guilty, and the trial by jury. The circuit court refused proper requests to instruct the jury to find for the defendant as to each count of the declaration. That refusal, with other errors assigned, is urged as ground of reversal.

Briefly, the circumstances attending the injury were as follows: Plaintiffs below were mining coal in defendant's mine, working in a certain room, and on the 18th day of March, 1902, placed two shots, as it is termed, in that room, one west of the center and in the face of the room, and the other in the northwest corner. When they lighted the shots they ran out of the room to a point in the center of the entry about 18 feet west of the center of the mouth of the room. One of the shots, as it went off, threw out a large flame, which ran into the entry where they were, and burned them. That shot also threw out a large amount of gas which was not consumed, and, as it was followed almost immediately by the second shot, that gas, being hot, was ignited, and they were again burned by the flames, both being severely burned upon their hands and faces. The evidence tends to show that in the preparation of the shots, firing them, and running into the entry they exercised reasonable care and skill.

It is first claimed that the trial court erred in permitting Otto Wenneborg to answer a hypothetical question put to him. This question is quite lengthy, and includes the elements upon which appellees base their case, and from these elements the witness was asked his opinion as to the cause of the explosion. It is claimed that this question assumes that there was coal dust circulating in the air, and does not contain all of the elements necessary to a proper answer to the question. An examination of the record shows that the objection as made was not specific, and did not point out the elements alleged to have been omitted. It was certainly not the duty of the trial court to go through the record to ascertain whether all of the elements were included in the question, and it was the duty of the appellant to call the specific attention of the court to the admission, and, failing to do so, it certainly has no cause of complaint in this court. An examination of the evidence, however, shows that the question as asked was in substantial accord with the evidence. If counsel for the defendant claimed that other material facts should have been included in the hypothesis, they had a right, on cross-examination, to take the opinion of the witness upon their version of the testimony. On the objection made, the court did not err in its ruling upon the question.

We are also of the opinion that the court properly refused to instruct the jury to find

for the defendant, there being at least some competent evidence fairly tending to support the several counts of plaintiffs' declaration. Witnesses testified that the curtain across the crosscut, mentioned in the declaration, had been torn for three or four weeks, and was in that condition on the date of the accident; that the mine manager and fire boss had been notified of that fact, and also that the air was bad in the mine by reason of that condition, and were asked to remedy it; that the manager replied that he would do so as soon as he could get the hole in the curtain fixed, or words to that effect, and the fire boss replied that he had done all he could, and that he had reported it. One of the witnesses asked the fire boss if he had made this report in the book, to which he replied that he had not, but that he had reported it to the manager, Marsh. Several witnesses testified that the air was bad in the rooms, and that the lamps burned very low during the day and charred the wicks, which was an indication of the presence of gas called "black damp." Others testified that every time the drivers came in with a car the mules would kick up a dust, and it would rise very thick; that the dust in the back entry was at least one inch or more thick, and was composed of fire clay and coal, which dust had accumulated from the tramping of the mules' feet and the travel in the entry. Witnesses also testified that they had notified the fireboss and the mine manager of this condition, and asked them to sprinkle the entry, and that it was not done because, as was claimed, the water tank was too high for the entry, and they could not go down the entry with the tank. This testimony certainly tended to show that the mine was rendered unsafe through the negligence of defendant's employees, and, while much of it was contradicted by witnesses for the defendant, it cannot be said that there is a want of evidence to support the plaintiffs' cause of action.

But it is said that notice to the mine manager and fire boss does not constitute notice to the defendant, and that, having employed a competent mine examiner, who was not shown to have been guilty of willfully violating the statute, it cannot be held liable, and that the appellees, who knew of the condition, were guilty of such contributory negligence as should preclude their right of recovery. With this position we cannot agree. The state mine examiner testified that he visited the mine on January 16, 1902, and then ordered the company's officials to remove the dust from the entryways, to sprinkle the roads, and put up the canvas sheet. We are unable to see what further evidence of notice to the company could have been given than through this mine manager and other officials. As to the plaintiffs below being themselves guilty of negligence, it need only be said that even if it were true that they did not exercise due care for their own safety, still, if the evidence fairly tends to

prove, as we think it does, a willful violation of the statute, their right of action would not be defeated. Even under the first count the rule is that "an employé does not assume all the risks incident to his employment, but only such as are usual, ordinary, and remain so incident after the master has taken reasonable care to prevent or remove them, or, if extraordinary, such as are so obvious, and expose him to danger so imminent, that an ordinarily prudent and careful man would anticipate injury as so probable that in view of it he would not enter upon or remain in the employment." *Chicago & Alton Railroad Co. v. House*, 172 Ill. 601, 50 N. E. 151. There is no evidence in this record to show that the danger which the plaintiffs encountered was so imminent that any reasonably prudent man would have abandoned the work, and therefore in no view of the case can it be said that they were guilty of such contributory negligence as will bar their right of recovery.

We think the Appellate Court properly disposed of the case, and its judgment will therefore be affirmed. Judgment affirmed.

(207 Ill. 604)

ERNST v. SCHMITZ.

(Supreme Court of Illinois. Feb. 17, 1904.)

PARTNERSHIP—ACTION FOR DISSOLUTION—REFERENCE TO MASTER—STATEMENT OF ACCOUNT—APPEAL—RECORD—ABSTRACT—FAILURE TO INDEX—EVIDENCE—SUFFICIENCY—PRESUMPTION.

1. Where the record on appeal in an equity case shows that not all of the evidence is incorporated therein, it must be presumed that there was sufficient to warrant the findings of fact which justified the decree.

2. In a suit for dissolution of a partnership, it appeared that monthly settlements were customary between the partners, when the net profits due to each on account of the business done during the preceding month were ascertained, and that thereupon two of the partners drew in cash what was coming to them, while the third permitted his share to remain in the business, and the master, to whom the case was referred, after giving credit to the former for the amounts which the books showed the firm to be owing to each of them at the time of dissolution, found that the balance of the assets of the concern should be credited to the latter, and stated the account on that basis. *Held*, that there was no error in so doing.

3. A failure to index the abstract of the record on appeal, as required by Supreme Court Rule No. 14 (47 N. E. vi), would justify a refusal to consider a case on its merits.

Appeal from Appellate Court, First District.

Suit by Mathias Schmits against Joseph H. Ernst and another. Plaintiff and defendant Joseph H. Ernst having died, their executors, Nicholas J. Schmitz and Katharina S. Ernst, were substituted as complainant and defendant respectively, and from a decree in favor of complainant, defendant Katharina S. Ernst appeals. Affirmed.

This is an appeal from the judgment of the Appellate Court for the First District affirming the decree of the circuit court of Cook

county rendered upon a bill filed in that court by Mathias Schmitz against Joseph H. Ernst and Andrew J. Ernst, administrator of the estate of Adolph C. Ernst, deceased, for the dissolution of the partnership, which had existed for many years prior to the filing of the bill, between said Mathias Schmitz and Joseph H. and Adolph C. Ernst in the real estate and loan business in the city of Chicago, and for an accounting. Answers and replications were filed, and Joseph H. Ernst filed a cross-bill. The case was referred to a master in chancery to take proofs and report his conclusions as to the law and the facts. Subsequent to the filing of the bill Mathias Schmitz died, and his executor, Nicholas J. Schmitz, was substituted as complainant. Joseph H. Ernst has also died, and his executrix, Katharina S. Ernst, has been substituted as defendant. The firm was organized in the year 1872. Adolph C. Ernst became a member thereof in 1890, and it continued in active business until 1899. The master reported that Joseph H. Ernst was indebted to Mathias Schmitz in the sum of \$2,685.08, and Andrew J. Ernst was indebted to Mathias Schmitz in the sum of \$1,556.94, and it was decreed that said sums be paid to Nicholas J. Schmitz, as executor of Mathias Schmitz, deceased, by their respective personal representatives in the due course of administration. Katharina S. Ernst, as executrix, alone prosecuted an appeal.

Ernest Saunders, for appellant. Arnold Tripp, for appellee.

HAND, C. J. (after stating the facts). The findings of the master and chancellor are challenged on the ground that they find no support in the evidence. On looking into the record we find that all the evidence upon which the master and chancellor based their findings of fact has not been incorporated into the record by certificate of evidence or otherwise. The findings of fact contained in the master's report and the decree justified the court in entering the decree which it did, and, all the evidence upon which such findings were based not being before this court, it will be presumed the evidence heard below was ample to sustain the findings. *Allen v. Henn*, 197 Ill. 486, 64 N. E. 250.

The Appellate Court, when the case was there, filed an opinion, which, in part, is as follows: "The principal ground of contention is that the master adopted and the court approved a wrong method of accounting. * * * It appears that both before and after A. C. Ernst joined the firm there were monthly settlements between the partners, and the net profits due to each on account of the business done during the preceding month was then ascertained; whereupon the two Ernsts usually drew in cash what was coming to them, but Schmitz permitted his share of the net profits to remain in the business. The master, after giving credit to the two

Ernsts for the amounts which the books showed the firm to be owing to each of them at the time of the dissolution, found that the balance of the assets of the concern should be credited to Schmitz, and stated the account upon that basis. Under the circumstances we think the master was right in so doing. It is also claimed, first, that an account was stated between the partners October 14, 1896, which was improperly disregarded by the master; second, that there were undivided profits for which no credit was given to the defendants; and, third, that the cross-bill of J. H. Ernst should not have been dismissed. After a careful consideration of the record and the briefs of counsel, we are of opinion that there is no error in either of these regards."

The record in this case contains in the neighborhood of 1,000 and the abstract 140 pages. On the first page of the abstract is printed what purports upon its face to be a meager index of the record. The abstract, however, is not indexed. Rule 14 of this court provides: "The abstract shall contain a complete index, alphabetically arranged, giving the page where each paper or exhibit may be found, with the names of the witnesses and the pages of the direct, cross and re-direct examination." 47 N. E. vi. A compliance with this rule requires that the court be furnished with an abstract of the record, properly indexed. To require this court to search back and forth through a pamphlet of 140 pages to find each paper or exhibit or the testimony of the various witnesses, as it becomes necessary to examine the same, while the case is being considered or the opinion prepared, is a useless waste of the court's time, and it was held in *Chadwick v. People*, 206 Ill. 122, 68 N. E. 1106, the court would refuse to consider a case upon its merits when thus presented. In the shape this appeal comes to us it might well have been dismissed for a failure to comply with rule 14. We have, however, read the briefs and examined the abstract and record, and have found no reversible error therein. The opinion of the Appellate Court, in our judgment, properly disposed of the case.

The judgment of the Appellate Court will therefore be affirmed. Judgment affirmed.

(207 Ill. 237)

FIREBAUGH v. DIVAN.

(Supreme Court of Illinois. Feb. 17, 1904.)
VENDOR AND PURCHASER—RIGHTS TO CROPS.
1. As between the grantor and grantee of land, crops standing on the land, whether ripe or unripe, pass to the grantee, unless reserved in the deed or by other writing simultaneously executed.

Appeal from Appellate Court, Third District.

Action by Thomas Firebaugh against Isaac Divan. From a judgment of the Appellate

¶ 1. See *Crops*, vol. 15, Cent. Dig. § 2.

Court affirming a judgment for defendant, plaintiff appeals. Affirmed.

This is an action of assumpsit, begun in the circuit court of Champaign county by the appellant against the appellee. The declaration contained one count, and alleged that on the 21st day of October, 1902, the plaintiff sold and delivered to the defendant a certain piece of real estate, and conveyed the same to him by warranty deed containing general covenants of warranty; that at the time of said sale the plaintiff had standing upon said land the corn that was grown thereon that year; that, while said corn was still undetached from the soil, it was, nevertheless, fully matured, and ready for gathering and cribbing, at the time of said sale; that said corn was not reserved or mentioned in said deed; that a few days after said deed was delivered plaintiff sought to remove the corn, but was prevented from so doing by the defendant; that the defendant gathered the corn and converted the same to his own use to the damage of the plaintiff of the sum of \$300. A general demurrer was filed to the declaration, which was sustained. The plaintiff elected to stand by his declaration, and judgment was rendered in favor of the defendant in bar of the action and for costs. The plaintiff prosecuted an appeal to the Appellate Court for the Third District, where the judgment was affirmed, and, a certificate of importance having been granted by the Appellate Court, a further appeal has been prosecuted to this court.

Johr J. Rea, for appellant. F. M. Green & Son, for appellee.

HAND, C. J. (after stating the facts). The law in this state is well settled that, as between vendor and vendee, growing crops produced by annual planting and cultivation are real estate, and pass to the vendee, unless they are reserved in the deed or by other writing executed simultaneously with the deed. This is conceded by the appellant to be the general rule, but it is contended, where the crops are fully matured at the time of the execution of the deed, and are ready to be severed from the soil, they do not pass to the vendee, but that the title thereto remains in the vendor, and he may afterwards enter upon the land and remove the same, and, if they are gathered by the vendee and converted to his use, he is liable to the vendor for their value. We do not agree with such contention, but are of the opinion, upon principle and authority, that there is no distinction in this particular between crops, whether mature or immature, standing upon the land at the time of the conveyance. A deed, when delivered, transfers to the grantee all the interest of the grantor in the land not reserved, and entitles the grantee to possession. The title to the crops then standing upon the land, not severed from the soil, whether ripe or

unripe, passes to the vendee as a part of the land. By the delivery of the deed the vendor loses all dominion over the land. In *Tripp v. Hasceig*, 20 Mich. 254, 4 Am. Rep. 388 (a well-considered case), it was held that ripe crops, although no longer drawing nutriment from the ground, will, if still unsevered, pass by a conveyance of the land. In 4 Kent's Commentaries, on page 468, it is said: "If the land be sold without any reservation of the crops in the ground, the law is strict as between vendor and vendee; and I apprehend the weight of authority to be in favor of the existence of the rule that the conveyance of the fee carries with it whatever is attached to the soil, be it grain growing or anything else, and that it leaves exceptions to the rule to rest upon reservations to be made by the vendor." While cases may be found holding to the contrary, we feel convinced the rule above stated is the true doctrine. It is said the contrary rule is announced in *Powell v. Rich*, 41 Ill. 406. The court in that case held the crops, which at the time of the conveyance were immature, passed to the grantee, and the question here presented was not then before the court. What was there said in regard to the rule when the crops have matured was unnecessary to be said, and is not considered by us as an authority in support of the contention of the appellant.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(207 Ill. 226)

SPRING VALLEY COAL CO. v. ROBIZAS.

(Supreme Court of Illinois. Feb. 17, 1904.)

MASTER-INJURY TO SERVANT-NEGLIGENCE-PERSONAL INJURIES-FELLOW SERVANT-QUESTION FOR JURY-INSTRUCTION-ERROR-ESTOPPEL.

1. Evidence, in an action by a miner against his employer for personal injuries, examined, and held insufficient to show that the injury resulted from a failure on the part of defendant to furnish plaintiff a reasonably safe place to work.

2. Where the evidence in an action by a miner against his employer for personal injuries, due to loaded cars in a coal mine striking an empty car and throwing it against plaintiff, was conflicting, the question whether the empty cars had been negligently left in that position by a mule driver, also in the employ of defendant, is for the jury.

3. Where there was testimony in an action by a miner against his employer for personal injuries, alleged to have been caused by the negligent act of a mule driver, also in the employ of defendant, that the duties of plaintiff and the mule driver were wholly independent of each other, the question whether they are fellow servants is for the jury.

4. An instruction applicable neither to the issue nor the evidence is erroneous.

5. Error in directing a verdict on proof of the hypothesis of facts contained in an instruction applicable neither to the issue nor the evidence cannot be cured by another instruction.

6. Where an action by a miner against his employer, founded on negligence at common law, independently of statute, was tried by both parties on the incorrect theory that the action was predicated on a statute, the defendant, having obtained from the court an instruction ap-

plying the statute to the case, cannot be heard to complain that it was also applied to another instruction given at the request of the plaintiff.

Appeal from Appellate Court, Second District.

Action by Joseph Robizas against the Spring Valley Coal Company. From a judgment of the Appellate Court affirming judgment for plaintiff, defendant appeals. Affirmed.

Alfred R. Greenwood, for appellant. O. H. Porter, Wood & Elmer, and Daniel Belasco, for appellee.

CARTWRIGHT, J. In this case appellee obtained a judgment in the circuit court of Bureau county for \$1,750 on account of personal injuries sustained by him while in the employ of appellant as a miner in its coal mine No. 3, in the city of Spring Valley. Appellant appealed to the Appellate Court for the Second District, and from the judgment of that court affirming said judgment prosecuted this appeal.

The trial was by jury, and at the close of the evidence the defendant asked the court to instruct the jury to return a verdict of not guilty. The motion was denied, and the instruction refused, and the ruling is assigned as error.

The declaration contained three counts. The charge against the defendant in the first count was that it failed to provide plaintiff with a reasonably safe place to work, but permitted the same to remain in an unsafe and dangerous condition. The second count charged that the defendant delivered empty cars for the use of plaintiff in a careless, negligent manner by leaving them in such a position that a portion of one of them protruded into the main entry near the track on which loaded cars were hauled, by reason of which such loaded cars struck the protruding car, and, hurling it against plaintiff, injured him. The third count charged negligence in the mule driver in driving the mule drawing the loaded cars so negligently and carelessly that the collision occurred.

There was no evidence tending to sustain the charge in the first count. The injury to plaintiff did not result from any failure to furnish him with a reasonably same place to work. The accident happened in this way: Plaintiff was paid by the ton for mining coal and loading it on cars, and was assisted by his son, a boy about 14 years old. Defendant furnished him with empty cars, which it was usual to leave for him in the entry to a room adjoining the room where he worked, and about 50 feet distant. When he needed an empty car, he was accustomed to go there and get one, and push it along the main entry into his room, and up to the face of the coal, where it was loaded, and afterward hauled out by a mule. In the main entry there was a track along which the cars were hauled, and four empty cars had been left in the entry of the adjoining room by one of the

mule drivers. At the time of the accident plaintiff sent his boy to the adjoining room to get an empty car. One of these cars had some props in it, and for that or some other reason the boy was unable to move the car. The plaintiff came out of his room, and went along the main entry toward the place where the empty cars were standing, and when about 20 feet distant he saw a driver approaching along the main track with a mule and two loaded cars. He hastened to the place where the cars were, and stepped into the side entry, where they stood. The mule was trotting or running, and when he neared the place the driver saw that the first standing car was very close to the main track. The first loaded car struck it, and the second one knocked it off the track against the plaintiff, crushing him against the side of the entry. The accident was caused by the loaded cars striking the empty car and throwing it against the plaintiff, and was not due, in any sense, to any defect or imperfection in the place where plaintiff was required to work, or to any fault or negligence of defendant concerning the same. He was in a place of entire safety if the car had not been too near the main track so as to be struck by the passing loaded cars. The place was dangerous only in the sense that a negligent act causing an injury is always connected with some place. The evidence for the plaintiff tended to show that the empty cars had been negligently left in that position by the mule driver. There was a slight descent to the main track, and the driver testified that he placed the cars at a safe distance, and blocked them with a stone, and that the boy and two men who were there at the time must have moved them afterwards. The evidence was conflicting, and it was proper to submit that question to the jury.

It is also contended that the court ought to have directed a verdict, because plaintiff and the mule driver were fellow servants. On the other hand, it is insisted that the duty to furnish a safe place to work was one owing by the defendant to the plaintiff, and that, therefore, it would make no difference whether the mule driver was a fellow servant of the plaintiff or not. There being no evidence tending to show that the character of the place was such as to render it dangerous, the rule invoked does not apply. The only cause of the injury was the alleged negligent act of the mule driver, and it was a material question whether the parties were fellow servants. The testimony was that their duties were wholly independent of each other, and under the evidence the question was one of fact. It was not error to refuse to direct a verdict for the defendant.

An instruction was given at the request of the plaintiff requiring the jury to find the defendant guilty if the plaintiff was in the exercise of ordinary care, and was struck and injured by one of defendant's cars because of a failure on defendant's part to ex-

ercise ordinary care to supply reasonably safe places of refuge along the hauling road, not more than 60 feet apart, as required by law. There are several objections to this instruction. It was erroneous because there was no evidence whatever that the accident occurred because of the want of a place of refuge along the main track. Furthermore, the instruction was based on a statute which provides that such places shall not be required in entries from which rooms are driven at regular intervals, not exceeding 20 yards; and the undisputed evidence was that the rooms were so driven from the entry in question. It was also erroneous because the declaration was not founded upon any violation of the statute, but on negligence at common law, independently of the statute. The instruction was neither applicable to the issue nor the evidence, and it could not be cured by any other instruction because it directed a verdict upon proof of the hypothesis of fact contained in it. While that is true, the record shows that both parties tried the case upon the same theory in that respect. The defendant asked and the court gave an instruction stating the exception, that the statute did not require the defendant to have a place of refuge cut in the side wall of the hauling road, where the plaintiff was injured, if rooms were divided from the said roadway at regular intervals, not exceeding 20 yards apart. If the case was tried upon an incorrect theory concerning the application of the statute to the case, both parties adopted the theory. The defendant, having obtained from the court an instruction applying the statute to the case, cannot be heard to complain that it was also applied in another instruction given at the request of the plaintiff.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(207 Ill. 624)

KELLYVILLE COAL CO. v. HARRIER.

(Supreme Court of Illinois. Feb. 17, 1904.)

CONSTITUTIONAL LAW — DEDUCTION FROM WAGES—EQUAL PROTECTION OF THE LAWS—INTERFERENCE WITH RIGHT TO CONTRACT.

1. Act May 28, 1891, §§ 3, 4 (Laws 1891, p. 212), declare that it shall be unlawful for any person, company, corporation, or association, employing workmen in this state, to make deductions from their wages, except for lawful money, checks, or drafts, and except as may be agreed for hospital or relief fund for sick or injured employes, and authorize the recovery of deductions by an action in which set-offs or counterclaims are forbidden. *Held*, that the exemption, by section 6, of farmers, farm laborers and servants, from the provisions of the act, rendered such sections invalid, as depriving miners and manufacturers of the equal protection of the laws guaranteed by the federal Constitution.

2. They are also void as an unauthorized interference with the privilege of contracting.

Appeal from Circuit Court, Vermillion County; M. W. Thompson, Judge.

Action by A. J. Harrier against the Kellyville Coal Company in justice court. From a

judgment for plaintiff on appeal to the circuit court, defendant appeals. Reversed.

H. M. Steely, for appellant. W. T. Gunn, for appellee.

CARTWRIGHT, J. Appellee brought this suit before a justice of the peace of Vermillion county, against appellant, to recover for wages due him as a miner. On appeal to the circuit court a jury was waived, and the cause was submitted to the court for trial. There were no disputed facts. Defendant owed plaintiff for wages, and plaintiff was indebted to defendant for groceries and household supplies purchased by him. The only controversy was as to the right of defendant to set off the amount due from plaintiff against his demand for wages; defendant claiming that right, and admitting that it owed plaintiff the balance. Plaintiff claimed the right to recover the whole amount of wages earned, and disputed the right to set off against the same the amount due from him to defendant.

Plaintiff's claim was based on sections 3 and 4 of an act entitled "An act to provide for the payment of wages in lawful money, and to prohibit the truck system, and to prevent deductions from wages except for lawful money actually advanced," in force July 1, 1891. Laws 1891, p. 212. The first and second sections of said act were declared in the case of *Fraser v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492, to be repugnant to the Constitution of the state and void. Those sections prohibit an employer engaged in mining or manufacturing from keeping or being interested in a store for furnishing supplies, tools, clothing, provisions, or groceries to his employes, and declare every person, company, corporation, or association violating that prohibition to be guilty of a misdemeanor and liable to a fine. Sections 3 and 4 are as follows:

"Sec. 3. It shall be unlawful for any person, company, corporation or association, employing workmen in this state, to make deductions from the wages of his, its or their workmen, except for lawful money, checks or drafts actually advanced without discount, and except such sums as may be agreed upon between employer and employee, which may be deducted for hospital or relief fund for sick or injured employees.

"Sec. 4. Any deductions made from the wages of any workman in this state, except as provided in section three (3) of this act, may be recovered in any appropriate action before any court of competent jurisdiction, together with such reasonable attorney's fee as the court in its discretion shall think proper, and no offset or counter-claim of any kind shall be allowed in such action or proceeding."

On the trial of this case defendant submitted to the court a number of propositions of law asking the court to hold that defend-

ant, under the law and its charter, has a legal right to keep a store and furnish and sell to its employes supplies, tools, clothing, provisions, groceries, and such other articles as its employes saw fit to purchase from it, and that so far as the act in question attempts to deprive defendant of the right to set off, against the demand of plaintiff for wages, any demand owing by plaintiff to defendant for groceries, merchandise, or other articles purchased at its stores, when it allows such right of set-off to farmers as against their employes, is repugnant to the Constitution of the United States and the Constitution of the state of Illinois. The court held the first proposition to be the law, to the effect that the defendant had the right to keep the store and sell such goods to its employes as they choose to purchase, but refused to hold that the third and fourth sections were in violation of the Constitution, or that the act was rendered unconstitutional by the provision that nothing contained in it should be construed to include the business of farmers or farm laborers or servants. The court held that an employer may sell goods to an employe, but if he is a miner or manufacturer he cannot lawfully secure payment by way of set-off. Accordingly the court found the issues for the plaintiff, and entered judgment in his favor for the whole amount of his demand, which was \$21.27, and costs of suit, together with \$20 attorney's fees, as provided by said section 4.

It is, of course, conceded that sections 1 and 2 of the act are in violation of the Constitution, but it is insisted that sections 3 and 4 should be upheld. We do not see how that can be done, and must hold that the whole act is void. Section 6 of the act is as follows: "Nothing in this act shall be so construed as to include the business of farmers, or farm laborers, or servants." A large proportion of the employers of labor in the state are farmers, and the valuable right of set-off is allowed to them, while it is denied to the miner or manufacturer. A farmer whose employe is indebted to him, if sued by the employe, may set off the amount of such indebtedness against the demand of the employe for wages, and the recovery can only be for the balance due. The employe of a miner or manufacturer is not limited to the recovery of the balance due him, but may have a judgment for the whole amount of his wages, and the employer is relegated to a separate action at law to collect what is justly due him, if he can. By this discrimination the miner and manufacturer are deprived of the equal protection of the laws guaranteed to them by the federal Constitution. It is too plain for argument that the exemption of farmers, farm laborers and servants was a material consideration with the Legislature in the passage of the act, and that it would not have been enacted if they had not been excluded in its operation and protected from its provisions. The whole

act is therefore void. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Mathews v. People*, 202 Ill. 389, 67 N. E. 28.

Furthermore, it is not within the power of the Legislature to provide that one who is possessed of property may not sell it to another, and agree with the purchaser to work for him in payment for it. The privilege of contracting is both a liberty and a property right. *Fraser v. People*, supra. The laborer has a right to contract with respect to his labor, and to make such terms and agreements as may be mutually agreeable to him and his employer. They may agree that the labor of one shall be paid for with the property of the other, or the laborer may agree to work in payment of a pre-existing debt, and in either case the rights of the parties are free from interference by the Legislature. *Harding v. People*, 160 Ill. 459, 43 N. E. 624, 32 L. R. A. 445, 52 Am. St. Rep. 344.

The judgment of the circuit court is reversed, and the cause is remanded to that court for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

(207 Ill. 192)

GLOS v. CARLIN et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

PARTITION—TAX DEEDS—CLOUD ON TITLE—REMOVAL—ACTIONS—TITLES REVIEWABLE—STATUTES—CONSTRUCTION—BURDEN OF PROOF—FINDINGS.

1. Under Partition Act, § 39 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 2925), providing that in all suits for partition the court may investigate and determine all questions of conflicting or controverted titles, and remove clouds on the titles to any of the premises sought to be partitioned, the court is not limited to an examination of the line of title in which the tenants in common claim, but may also consider other claims of title derived from other sources, alleged to constitute clouds on the title of the tenants in common.

2. Where, in a suit for partition, complainant also asked for a decree setting aside a tax deed as a cloud on the title sought to be partitioned, as authorized by Partition Act, § 39, and alleged specific reasons for the invalidity of such tax deed, the burden of proof was on complainant to establish that the deed was void.

3. Where, in a suit for partition and to set aside a tax deed as a cloud on title, the court found that claimant had no right, title, or interest in the land, such finding was equivalent to a finding that the tax deed was a cloud on complainant's title.

Appeal from Superior Court, Cook County; Axel Chytraus, Judge.

Bill by Nellie Carlin and others against Jessie O. Darrow and others. From a judgment in favor of complainants, defendant Jacob Glos appeals. Reversed.

This is a bill, filed on December 13, 1901, in the superior court of Cook county, by the appellee, Nellie Carlin, against Jessie O. Darrow, Catherine Schilling, Jacob Glos, and Henry L. Glos for the partition of two lots, known as lots 22 and 24 in block 2 of Doug-

las Park Addition to Chicago, and also for the removal of two tax deeds as clouds upon the title to the lots sought to be partitioned. A decree, such as is hereinafter set forth, was entered in favor of the present appellees and against the appellant Jacob Glos. The present appeal is prosecuted from such decree.

The bill alleges that the complainant below, Nellie Carlin, and two of the defendants, Jessie O. Darrow and Catherine Schilling, are the owners in fee simple, as tenants in common, of said lots 22 and 24; that the appellee Nellie Carlin is the owner in fee of an undivided one-half of said lots; that Jessie O. Darrow owns an undivided one-half of lot 22, and Catherine Schilling an undivided one-half of lot 24. The bill also alleges that the appellant, Jacob Glos, claims an interest in lot 24 by virtue of a tax deed dated June 21, 1901, and recorded July 19, 1901; that said tax deed was issued to Jacob Glos upon application No. 6209K upon a tax sale of lot 24 to Jacob Glos on October 5, 1898, for the 1897 general taxes thereon for \$11.88. The bill also makes allegations as to two certain tax deeds issued to Henry L. Glos conveying to him said lot 22; but the controversy with Henry L. Glos was settled after the beginning of this suit, and by the final decree entered the cause was dismissed, without costs, as to Henry L. Glos, and as to the tax deed described in the bill as having been issued to him, so that there is here now no controversy as to Henry L. Glos.

The bill sets up that the tax deeds described therein, including the tax deed of lot 24 to Jacob Glos, are void for certain reasons appearing in the proceedings for said tax sales and in the applications filed for the issuance of said deeds; and the bill sets forth some 10 or 11 specific reasons why said tax deeds are void. Among the reasons alleged are that the precept and judgment for each of said tax sales were void, because the court had no jurisdiction, and because the judgment recites that it is for both taxes and assessments. The bill also alleges "that said tax deeds exist of record uncanceled, are clouds upon the title to said real estate, and tend to depreciate its value and prevent a sale thereof." The bill avers that complainant is ready and willing and offers to repay to the holders of the tax deeds the several amounts paid by them at the tax sales, with lawful interest thereon, and all subsequent taxes, with interest, and such further sums as equity may require as conditions precedent to the setting aside of said deeds. The bill prays for partition, and that, in case it cannot be made, the real estate be sold, and the proceeds be divided. It also prays "that said tax deeds be removed as clouds upon the title to said real estate; that defendants Jacob Glos, Henry L. Glos, and those claiming under them, be restrained from asserting any right, title, or interest in said real estate."

Jacob Glos filed an answer, denying that Nellie Carlin, Jessie O. Darrow, and Catherine Schilling were the owners in fee simple, as tenants in common, of the premises in question, and claiming that he and Emma J. Glos and D. Arnold are the owners of said premises; that at the time of the filing of the bill all interest, if any, which the complainant and Jessie O. Darrow and Catherine Schilling had, had been lost through the tax deeds. Defendant Jacob Glos denies that the tax deeds mentioned in the bill, or either of them, are illegal for any of the reasons stated in the bill, and denies that the reasons stated are sufficient to render said tax deeds, or any of them, invalid, but avers that each one of said tax deeds is a valid and legal conveyance, etc.

The answers of Jessie O. Darrow and Catherine Schilling admit the ownership of the property as alleged in the bill, and join with complainant in alleging the invalidity of the tax deeds therein described for the reasons therein set forth, and ask that the same may be removed.

In its final decree, rendered on September 21, 1903, the court below found that it had jurisdiction of the subject-matter and of the parties; "that equities are with the complainant; that the material allegations of the bill are true"; that the parties own undivided interests, as alleged in the bill; that Jacob Glos claims some title or interest in lot 24 by virtue of the tax deed dated June 21, 1901, "but the court finds that said Jacob Glos has failed to show or establish and has no right, title, or interest whatever in or to said lot 24 under or by virtue of said tax deeds, or in any manner whatsoever"; that "Jacob Glos has no right, title, or interest in or to said lots under the said tax deed issued to him, or in any manner whatsoever." The decree then orders that partition be made, and appoints commissioners, etc.

Jacob Glos (John R. O'Connor, of counsel), pro se. Oliver & McCartney, for appellees.

MAGRUDER, J. (after stating the facts). This is a bill for partition and for the removal of certain tax deeds as clouds upon the title. The final decree found that the parties alleged in the bill to be the owners in fee of the lots as tenants in common did own the interests claimed by them; and, substantially, there is no controversy upon the question of such ownership and the right of the tenants in common to partition. The real controversy is between the tenants in common, owning undivided interests in the property, and Jacob Glos, as to the tax deed of lot 24 held by him.

Section 39 of the partition act provides that "In all suits for the partition of real estate, whether by bill in chancery or by petition, under this act, the court may investigate and determine all questions of conflicting or controverted titles, and remove clouds

upon the titles to any of the premises sought to be partitioned," etc. 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 2925. In construing this statute we have held that in a bill for partition filed thereunder the examination of title is not limited to the line of title in which the tenants in common claim, but that separate titles, derived from other sources, and claimed in other chains of title, can be brought before the court and investigated in such a proceeding, and that clouds upon titles may be removed in the partition suit. In such cases the court, having jurisdiction for the purpose of making partition, is authorized to proceed to settle questions of controverted titles between the parties. The partition act thus allows two kinds of relief in relation to two different subjects to be sought in the same proceeding, to wit, partition, and the removal of clouds upon the title sought to be partitioned. *Gage v. Reid*, 104 Ill. 509; *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927; *Hughes v. Carne*, 135 Ill. 519, 28 N. E. 517. Where a bill is filed for the purpose of removing a tax deed as a cloud upon the title, the burden of proof is upon the complainant to show that the tax deed is invalid, and not upon the holder of the tax deed to show that his deed is valid. Such has been the holding of this court in a number of cases. In *Hyde v. Heath*, 75 Ill. 381, it was held that upon bill filed to impeach and set aside a tax deed as a cloud upon the complainant's title the burden of proof is upon the complainant, and he must prove the allegations of his bill, and show the invalidity of the deed. See, also, *Gage v. Reid*, supra; *Gage v. Bissell*, 119 Ill. 302, 10 N. E. 238; *Gage v. Stokes*, 125 Ill. 40, 16 N. E. 925; *Gage v. McLaughlin*, 101 Ill. 155.

In the case at bar the bill alleges that the tax deed of lot 24, held by appellant, was invalid for certain specific reasons, and it was necessary for the complainant, in order to remove such deed as a cloud upon the title to prove that the deed was invalid for some one or more of the reasons alleged. It is well settled that the proofs and allegations must agree. "It is a familiar rule in equity that a complainant is not permitted to state his case one way in his bill, and make another and a different case by the evidence. He must recover, if at all, on the grounds stated in the bill. The allegata and probata must correspond." *Terre Haute & Indianapolis Railroad Co. v. Peoria & Pekin Union Railway Co.*, 167 Ill. 296, 47 N. E. 513; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Winn v. Owen*, 58 Ill. 111. Here no proof whatever was admitted establishing the invalidity of the tax deed. The complainant below, the present appellee Nellie Carlin, introduced in evidence the tax deed itself. The court below excluded all the evidence offered by appellee, and admitted simply the tax deed. The decree, however, finds that all the material allegations of the bill are true, but this finding is without support in

the evidence as to the most material allegation made in regard to the tax deed of lot 24. No proof whatever was admitted as to the invalidity of that deed.

The theory of the chancellor below seems to have been that, because this was a partition proceeding, all the parties were required affirmatively to establish their respective titles, and that it was incumbent upon the appellant, Jacob Glos, to prove the validity of his tax deed, and not incumbent upon the complainant below to establish its invalidity; and the final decree was rendered upon this theory. We are not aware of any rule which requires the proof as to the removal of a cloud upon title to be different in a partition suit from what it is in a suit where the only relief sought is the removal of the cloud. If this were a bill merely for the removal of a tax deed as a cloud, and not for partition, it would not be contended that the burden of proof was not upon the complainant to show that the tax deed was invalid, because only in that way could he prove that the tax deed was a cloud upon his title, as alleged in the bill. Where the proceeding is for partition, and also for the removal of a tax deed as a cloud upon the title sought to be partitioned, the same rule is applicable; that is to say, the burden of proof is upon the complainant to establish the invalidity of the tax title. There is no reason why the rule should be any different in the one case from what it is in the other. *Hyde v. Heath*, supra; *Gage v. Reid*, supra; *Gage v. Curtis*, 122 Ill. 520, 14 N. E. 30.

It is said by counsel for appellees that there was here no finding by the court that the tax deed was a cloud, and no decree that it should be removed as a cloud. The court, however, finds in its decree that "Jacob Glos has no right, title, or interest in or to said lots under the said tax deed issued to him, or in any manner whatsoever." This finding is substantially equivalent to a finding that the tax deed was a cloud upon the title, and should be removed, because the latter finding would have given no further or greater relief than the finding actually made. If Jacob Glos had no right, title, or interest in lot 24 under the tax deed issued to him, and the court made a decree to that effect, then appellees obtained the relief for which they prayed without the admission in evidence of any proof whatever as to the invalidity of the tax deed. The decree also finds that "Jacob Glos has failed to show or establish" any title. It made no difference whether he failed to establish or show any title or not, inasmuch as under the allegations of the bill, and in order to obtain the relief asked for, it was necessary for the appellees to prove that the tax deed was invalid. We are of the opinion that the theory upon which the trial court proceeded in holding that the appellant, Glos, was obliged to establish the validity of his tax title, and that the appellees were not obliged

to show its invalidity, was erroneous, and opposed to the current of authority in this state.

For the error above indicated, the decree of the superior court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(207 Ill. 340)

HOGUE et al. v. STEEL et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

HUSBAND AND WIFE — RESULTING TRUSTS — DEED TO WIFE CONVEYING HOMESTEAD—EFFECT.

1. A deed, executed by a husband alone, purporting to convey his homestead to his wife, passes no estate, where he continued in possession thereof until his death, and a deed, executed by the wife after the husband's death, purporting to convey such property, passes no fee to the grantees.

2. Evidence that a husband, on removing with his wife from Ohio to Illinois, purchased land in Illinois with money obtained from his wife while they resided in Ohio, does not establish a resulting trust in the wife; it being assumed, in the absence of any evidence to the contrary, that the common law prevailed in Ohio during the period they resided there.

Appeal from Circuit Court, Clay County; S. S. Dwight, Judge.

Suit by Silas Steel and others against Harriet Hogue and another. From a decree for plaintiffs, defendants appeal. Affirmed.

Thomason & Boyles, for appellants. Rose & McCollum, for appellees.

BOGGS, J. This was a bill in chancery for a decree partitioning and allotting the east half of the southeast quarter of section 27, town 5 north, range 6 east of the third principal meridian, in Clay county, among the heirs at law of one William Steel, deceased. In the proceeding a cross-bill was filed, asking that the title to the southeast quarter of the southeast quarter of the said tract be declared to be in one Harriet Hogue, and that the title to the northeast quarter of the southeast quarter of said tract be established in one Emma Cook.

Said William Steel, deceased, received a deed purporting to convey said tract of land to him on the 4th day of October, 1872. At once thereafter he made his home on said tract of land, and resided there with his family until the time of his death, which occurred on the 11th day of January, 1901. He was a householder and the head of a family, and the tract of land was his homestead, and did not at any time exceed \$1,000 in value. On the 26th day of March, 1891, said William Steel signed and acknowledged a deed purporting to convey the tract of land to his wife, Catherine Steel, but the wife did not join as a grantor in such deed, and the husband and the wife remained in possession of

the homestead estate after the conveyance, during the remainder of his lifetime. The lands described in this deed being the homestead of the grantor and said Catherine, his wife, and, being of value not exceeding \$1,000, and the possession remaining with the grantor, the deed to Catherine was without any legal efficacy to invest her with any interest or title in the land. *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306; *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129. The title therefore remained in said William Steel. Catherine, the wife, after the death of William, her husband, executed a deed purporting to convey the south 40-acre tract of the land to one Harriet Hogue, her daughter by a former husband; and at the same time the said Catherine executed a deed purporting to convey the north 40-acre tract to Emma Cook, a daughter by said William Steel, deceased. As Catherine had no interest in the fee of these lands, her grantees took no interest in fee by reason of these deeds. Catherine, the widow of said William Steel, deceased, died March 13, 1902; and on the 10th day of May, 1902, the appellee Silas Steel, a son of said William Steel, deceased, filed this bill in chancery against the other heirs at law of said Catherine Steel for a decree declaring the title to the land to be in the heirs at law of said William Steel, deceased, and for a decree partitioning the same among the heirs at law of said William Steel. Emma Cook and Harriet Hogue filed a cross-bill, in which they alleged said William Steel, deceased, purchased the said lands with money which belonged to his said wife, Catherine Steel, and, without the knowledge or consent of the wife, and in violation of her rights, procured the title to the land to be conveyed to himself. The contention of the complainants in this cross-bill was that a trust arose by operation of law in favor of Catherine Steel, and that said William Steel held the title to the land in trust for said Catherine; that he executed the deed to her in order to carry the trust into legal execution; that said Catherine thereupon became vested with the legal title to the lands, and conveyed good title to one tract thereof to one of the complainants in the cross-bill, and good title to the other tract to the other of said cross-complainants. Upon a hearing a decree was entered dismissing the cross-bill and granting the prayer of the original bill.

We think the chancellor correctly decided that the evidence did not disclose facts requisite to create a resulting trust in favor of Catherine Steel. The burden of proof is on the party who asserts the existence of an implied trust. It may be established by parol proof, but the long-established rule is that the proof of the facts necessary to create the trust must be clear and convincing. *Francis v. Roades*, 146 Ill. 635, 35 N. E. 232; *Koster v. Miller*, 149 Ill. 195, 37 N. E. 46; 15 *Am. & Eng. Ency. of Law* (2d Ed.) 1174.

¶ 1. See *Homestead*, vol. 26, Cent. Dig. § 122.

William Steel and wife moved to Illinois from Ohio in 1872, and he purchased the land in October of that year. We find in the record proof of statements made by him to several witnesses, in substance, that "the money that bought the land was his wife's money." To Mr. Chesley he said he came out West (from Ohio) with his wife's money; that he invested it in this land, and took the title in his own name. It was, however, proven by witnesses who had knowledge of the transaction which resulted in the purchase of the land that the purchase price thereof was \$500, and that Steel, in payment of that sum, gave a team of horses and their harness, and a wagon, and \$250 in money. The same witnesses testified Steel procured the money by selling wheat which he raised and marketed before leaving the state of Ohio. Steel and his wife were married in Ohio in 1851, 1852, 1853, or 1854; the testimony as to such date being uncertain. She was a widow, and acquired some property from the estate of her former husband, and there is some testimony that she owned some land in her own right. Steel had little or no property. The property of the wife was used in buying a home in Westchester, Ohio. This property was sold and other property bought in Monroe Mills, Ohio. The last-named premises were sold, and property purchased near Mt. Vernon, Ohio. The dates of the sales and purchases of these different properties are not shown; nor is it disclosed in whose name the titles thereto, or any of them, were taken. In 1872 the Mt. Vernon property was disposed of, but for what price or how the same was paid for is not shown. Nearly or quite 20 years elapsed after their marriage before they moved to Illinois. There is no proof to show that the wife during that period kept separate control or ownership of the proceeds of the sale of the real estate. Indeed, the theory of the cross-bill is that the husband had possession of the moneys of the wife. The income of the wife's real estate and the money belonging to the wife, according to the common law, became the property of the husband; and so, also, did the choses in action belonging to her, if reduced to possession by the husband. There being no proof to the contrary, we are to assume the common law prevailed in the state of Ohio during the period from 1851 to 1872. *Crouch v. Hall*, 15 Ill. 263; *Tinkler v. Cox*, 68 Ill. 119; *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302. It cannot be said the evidence discloses that this rule of the common law had not operated to invest the husband with the title to the proceeds of the sale of the real estate interests of the wife. The statute adopted in this state, authorizing a married woman to hold and retain the title to her property, has no effect to divest the title which has vested in the husband during their residence in a sister state where the common-law rule obtained. *Tinkler v. Cox*, *supra*. The proof was therefore insuffi-

cient to show that Catherine Steel had legal ownership or title to any money or property which could have been applied by her husband in the purchase of the land. *Keith v. Miller*, 174 Ill. 64, 51 N. E. 151; *Erringdale v. Riggs*, 148 Ill. 403, 36 N. E. 93; *Cisana v. Walters*, 100 Ill. 623. That William Steel paid in part for the land in a team of horses, the harness for them, and a wagon, was well proven. There is no proof the wife had any interest therein.

The statements proven to have been made by William Steel as to the ownership of the money used in the purchase of the land may be fairly understood to mean no more than that, as he had come into the possession of an equal or greater amount in money or property through his wife, she, as a mere matter of abstract right, ought to be regarded to be the owner of any money or property used in the purchase of land for their home.

The evidence, when carefully considered, was properly considered by the chancellor to be insufficient to show that Mrs. Steel was the owner of the money and property which were used in paying for the land.

The decree is affirmed. Decree affirmed.

(207 Ill. 517)

HERSCHBACH v. COHEN.

(Supreme Court of Illinois. Feb. 17, 1904.)

EJECTMENT — TRESPASS QUARE CLAUSUM
FREGIT—JUDGMENTS—RES JUDICATA
—ISSUES—PROOF.

1. Where in an action for trespass quare clausum a plea of liberum tenementum is filed, in a subsequent ejectment suit between the same parties to recover the same land parol evidence is admissible to support a plea of *res judicata* to show that the main issue tried in the trespass suit was the ownership of the property.

2. Where in an action of trespass quare clausum for cutting timber from plaintiff's land the defense consisted of a plea of liberum tenementum, and the main issue tried was the ownership of the property, which was determined in defendant's favor, the judgment in such action was *res judicata* in a subsequent action of ejectment between the same parties to recover the same land.

Appeal from Circuit Court, Randolph County; R. D. W. Holder, Judge.

Action by Henry Herschbach against William L. Cohen. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is an action of ejectment, begun on August 24, 1903, in the circuit court of Randolph county by the appellant against the appellee. The trial, which was before the court without a jury, resulted in a judgment entered on September 24, 1903, in favor of the defendant below, appellee here, and against plaintiff below, appellant here, for costs of suit. The present appeal is prosecuted from the judgment so entered.

The property, which appellant claims in fee, is described as follows, to wit: "Surveys 222 and 223, claims 1,287 and 1,288, in

¶ 1. See Judgment, vol. 20, Cent. Dig. § 182A.

the common fields of Kaskaskia, in township 7 south, ranges 7 and 8 west, in the county of Randolph."

Plaintiff below introduced in evidence a deed dated October 14, 1893, executed to him by a special master in chancery of Randolph county, which deed was issued in pursuance of a decree entered at the September term, 1893, of the circuit court of that county, in a partition suit, and which deed recites that the premises therein described, to wit, surveys 222 and 223, above set forth, were sold to Henry Herschbach for the sum of \$2,755. Plaintiff below also introduced a certain plat of said surveys, drawn by the county surveyor, showing total length of the south line of survey 222 to be 186 chains, and showing both surveys to contain 164.80 acres, which survey was made July 3, 1902; also copy of the government field notes of Randolph county, showing copy of plats and original government field notes of said surveys, showing metes and bounds description, and showing the Mississippi river as the western boundary of the surveys; and also a copy of the government field notes of said county, showing said surveys, the common fields of Kaskaskia, and the accretions, known as "Burch's Island," and showing the south line of survey 222 to be 186 chains, etc. Upon the trial below, the plaintiff introduced two witnesses, who were examined orally.

The defendant below, appellee here, introduced in evidence the declaration, pleas, instructions, verdict, judgment, and other proceedings in a certain trespass suit, brought to the September term, 1902, of said court by the present appellant, Herschbach, against the present appellee, Cohen. In the trespass suit the declaration charged that the defendant, Cohen, cut and destroyed the timber of the plaintiff of the value of \$500 "then growing and being in and upon certain lands of the plaintiff there situate, being part of surveys 222 and 223, * * * and took and carried away the said * * * timber, and converted and disposed of the same to his own use," etc. To the declaration in the trespass suit two pleas were filed, one a plea of not guilty, and the other a plea of liberum tenementum. In the latter plea it was set up "that the close in the said declaration mentioned, and in which," etc., "now is, and at the time when," etc., "was, the close, soil, and freehold of the defendant." The instructions in the trespass suit instructed the jury as to the boundary line between adjoining owners on the island and mainland, and as to the location of the slough, claimed to be the boundary line between the two tracts, and as to its change of position by reason of the change in the bed or current of the river. The trial in the trespass suit was before a jury, and the jury therein returned a verdict on September 15, 1902, finding the defendant therein, the present appellee, not guilty. Motion for a new trial in the trespass suit was over-

ruled, and judgment was rendered in favor of defendant on the verdict and against the plaintiff therein, the present appellant, for costs of suit.

Upon the trial below of the present ejectment suit the following stipulation was made between the parties: "It is admitted that the land sued for in this case is the same land that was involved in an action in trespass commenced by Mr. Herschbach, the plaintiff, against Cohen, the defendant, which was finally disposed of at the September term, 1902, of this court. It is agreed that when all the evidence is in on this question of former adjudication, if the court holds that the plea of former adjudication is not a defense in this suit, then judgment shall pass for the plaintiff, with right to a new trial according to the statute, or appeal, if desired." It is not denied on the part of the appellee that the appellant herein is the owner of the said surveys numbered 222 and 223, and it is not denied on the part of the appellant that the appellee is the owner of said island lying west of the western boundary of said surveys.

It was proven that upon the trial of the trespass suit "both plaintiff and defendant introduced evidence to locate the boundaries of the two claims and surveys numbered 222 and 223, and to locate the slough as it was at the time the government surveyed these surveys and to locate it as it was at the time of the trial of that suit; and that the object of the evidence was to ascertain whether the timber cut was cut on the land of the plaintiff or of the defendant in that case; that the plaintiff and defendant in that suit were respectively the plaintiff and defendant in this suit; that the plaintiff made preliminary proof of the fact that the timber was cut, and that it was cut on the land between the two sloughs shown on Exhibit A introduced in this case, which is the same plat used in that case; that the defendant did not deny the cutting of the timber, but that there was some little evidence as to the value of the timber cut; that the great bulk of the evidence of numerous witnesses was as to where that slough was at the time of the government survey and where it was at the time of the trial of the case, plaintiff contending that it never had moved, and defendant contending that it had moved to the point 'A' on Exhibits 1 and 2."

The land here in controversy is 18.24 acres lying between two sloughs or arms of the Mississippi river, appellant contending that his land extended as far as the westernmost slough, called in the evidence the "original slough," and appellee claiming that appellant's land only extended as far as the easternmost of the two sloughs, marked "1-2," the land between the two being 18.24 acres.

R. E. Sprigg and A. E. Crisler, for appellant. H. Clay Horner, for appellee.

MAGRUDER, J. (after stating the facts). The defense made by the appellee upon the trial below was that the judgment in the trespass suit between the same parties was *res judicata* as to the title involved in this suit. The trial court sustained the defense so made by appellee, and entered judgment accordingly. The question of law presented by the record is this: If, in an action of trespass *quare clausum fregit*, the defense pleaded is *liberum tenementum*, can the judgment therein rendered be set up as *res judicata* when an attempt is afterwards made to establish title in another proceeding between the same parties, the close described in the second action being the same as that described in the first? It appears from the statement of facts preceding this opinion that in the trespass suit the plea of *liberum tenementum* was filed. It also appears from the testimony that upon the trial of the trespass suit—which was brought to recover damages for the cutting of timber upon the land claimed by the appellant—the defendant therein, the present appellee, did not deny the cutting of the timber, but that the object of the evidence in the trespass suit was to ascertain whether the timber cut was cut on the land of the plaintiff in that suit, the present appellant, or upon the land of the defendant in that suit, the present appellee. It appears, therefore, that the main issue tried in the trespass suit was as to the ownership of the same portion of the surveys as is here in controversy, or perhaps as to the location of the western boundary line of the two surveys owned by the present appellant.

It is not necessary to say, nor do we so hold, that the judgment rendered in the trespass suit is necessarily conclusive as to what appears from the record, but it may be shown by parol, and it has been here shown by parol, what was involved in the issues made by the pleadings in the trespass suit, and what actually came in question upon the trial of that suit. This being so, we see no reason why the plea of *res judicata* was not a good defense, and why the action of the trial court in sustaining it was not correct.

We have held that the plea of *liberum tenementum* is a proper plea in an action of trespass *quare clausum fregit*, and that it is error to instruct the jury to disregard the same when pleaded; that the plea, as one of confession and avoidance, in legal effect admits such a possession in the plaintiff as would entitle him to maintain an action against a wrongdoer, and asserts a freehold in the defendant, with a right to immediate possession as against the plaintiff. *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133. In *Dean v. Comstock*, 32 Ill. 173, this court, speaking through Mr. Justice Breese, said (page 179): "Trespass being a possessory action, it is not at all necessary that the right should come in question. But if it does come in question, as it did in this case, by the plea of *liberum*

tenementum, and the defendant has shown, as he did show, that he owned the premises in fee, he cannot, on any principle of law with which we are acquainted, be rendered responsible to a person having neither a right to the property nor to the possession." We have held that where, in an action of trespass *quare clausum fregit*, the defense pleaded is *liberum tenementum*, the judgment rendered upon the issue thereby made will not be regarded as conclusive, yet it may be shown by parol evidence or otherwise that the question of title was actually tried and passed upon in the action of trespass; and that such a judgment is necessarily conclusive as to what appears from the record, or is shown by parol to have been involved in the issues made by the pleadings in the suit, and to have actually come in question on the trial. *Elson v. Comstock*, 150 Ill. 303, 37 N. E. 207; *Rhoads v. City of Metropolis*, 144 Ill. 580, 33 N. E. 1092, 36 Am. St. Rep. 468. If, in an action of trespass *quare clausum fregit* to recover damages for the cutting of timber upon the plaintiff's land, the plea is the general issue, or not guilty, and the defendant denies that he cut the timber, then the issue is one of fact, presented to the jury, as to whether or not the defendant did cut the timber, and as to how much the defendant should pay as damages for the timber so cut. In the case of such an issue in the action of trespass the judgment of course decides nothing as to title. If, however, the defendant in the action of trespass so brought admits that he cut the timber, but claims that he had the right to do so because the land was his own land, then an issue is made as to the ownership of the land. The ownership of the land must be determined, in order to decide whether the defendant had the right to cut the timber or not. In the case of such an issue being made, the question of ownership or title is directly involved; and where the testimony shows that it was so involved we see no reason why the judgment rendered cannot be pleaded as *res judicata* in any subsequent proceeding between the same parties involving the title to the same land. In *Hawley v. Simons*, 102 Ill. 115, we said (page 118): "A judgment at law, whether in an ejectment suit or in some other form of action, is conclusive on the parties upon all questions, titles, and rights involved in the litigation and passed upon by the court, which the court had power and jurisdiction to hear and determine, and nothing more; and whenever the same questions or the same rights or titles are again drawn in issue, whether in a court of equity or court of law, between the same parties or their privies, the previous adjudication must be regarded as conclusive upon them." In the case at bar the parties in the trespass suit were exactly the same parties as the parties in this ejectment suit, and the issue, as has already been shown, in the trespass suit, was the same as the issue here,

to wit, the ownership of the 18.24 acres of ground between the two sloughs mentioned in the statement preceding this opinion. The appellant (plaintiff below) "admitted that the land sued for in this case is the same land that was involved in an action of trespass commenced by Mr. Herschbach, the plaintiff, against Mr. Cohen, the defendant." This disposes of the contention made by the appellant that a judgment in trespass *quare clausum fregit*, where the issue relates only to a particular spot of the premises described in the declaration, without evidence as to the exact locality of the trespass, cannot conclude either party as to the question of title. 2 Waterman on Trespass, § 1119. In the case at bar the evidence does show the exact locality of the trespass, not only by virtue of the admission above set forth, but by reason of the oral testimony, which shows that the timber was cut on the land between the two sloughs; that is to say, the 18.24 acres. It follows that the trespass is exactly located as having occurred upon the 18.24 acres here involved.

Even if the question involved in the trespass suit was merely a question of the true boundary between the land of the appellant and the land of the appellee, yet the evidence shows that that question was decided in the trespass suit in favor of the present appellee; and the judgment in the trespass suit must be regarded as *res judicata* as to the question of boundary. In *Mueller v. Henning*, 102 Ill. 646, where a decree on a bill to correct a mistake in the description of land in a deed found that the place at which the survey was commenced was not the correct one, but that the survey should have commenced at another point, it was held that in an action of ejectment between the parties the question of boundary was *res judicata*, and the decree was conclusive upon them as to its correctness. A judgment, in an action brought solely to determine a boundary line, although brought in the form of an action of trespass to try title, is *res judicata*. 24 Am. & Eng. Ency. of Law (2d Ed.) p. 825, and cases recited in note. "Where, in an action of trespass, the title is actually in issue, and that is a part of that upon which the judgment is based, and the plaintiff prevails, it is conclusive as against an action of ejectment." 21 Am. & Eng. Ency. of Law, pp. 244, 245, and cases in notes. Freeman, in his work on Judgments (vol. 1 [4th Ed.] § 311), after referring to the conflict among the decisions in the various states upon this subject, says: "The title cannot, in some of the states, be regarded as in issue except upon a special plea of soil or freehold, or some other equivalent pleading. But when such plea is interposed, or when, without any special plea, the rules of practice in the state permit the title to be received in evidence and to be considered by the court or jury, and it is in fact received, considered, and made the basis of a verdict and judgment,

then that is as conclusively settled as if it had been drawn in question and decided in some other action." This language applies exactly to the course of decision in this state, and to the facts in the case at bar. Here a special plea of soil or freehold, to wit, the plea of *liberum tenementum*, was filed in the action of trespass, and the proof shows that the title was received in evidence in the action of trespass, and considered, and made the basis of the verdict and judgment therein. Waterman, in his work on Trespass (vol. 2, § 1119), speaking of the action of trespass *quare clausum fregit*, says: "Yet the title may be litigated as a matter directly involved in the issue; and when that question is adjudicated, and a judgment rendered in this form of action by a court of competent jurisdiction, the judgment will conclude the parties, and operate as an estoppel, if the matter appears on the face of the record, or as evidence conclusive in relation to the title, in any subsequent litigation of the matter between them. But when the defendant in ejectment seeks to show title in himself to the premises in dispute by means of the estoppel, created by the recovery in the former action, he is bound to show affirmatively that the title to those premises was passed upon in that action. When it has been apparently necessary to pass upon that question before the judgment could have been given, the record will be *prima facie* evidence for the defendant, and will be conclusive as an estoppel against the plaintiff, unless evidence has been given on his part to contradict and overcome this presumption." Wells, in his work on *Res Adjudicata* and *Stare Decisis* (section 287), says: "Where a plaintiff brings an action of trespass *quare clausum fregit*, and the defendant under the general issue litigates the question of title, and the verdict on that issue is rendered against him, and afterward the plaintiff brings a direct action to try the title, the former judgment will be conclusive, and the defendant will not be allowed to dispute the title."

Counsel for appellant lay great stress upon the case of *Keyser v. Sutherland*, 59 Mich. 455, 26 N. W. 865, where it was held by the Supreme Court of Michigan that a judgment in trespass cannot be a bar to a subsequent ejectment suit for the same premises, even though the parties in both suits are the same, upon the ground that a party is entitled to but one trial, as a matter of right, in Michigan, in an action of trespass, while in ejectment, upon the payment of costs of the first trial, he has an absolute right to another trial; and it is said that the statute allowing a second trial in an action of ejectment upon the payment of costs is substantially the same in Illinois as in Michigan. What is said upon this subject in *Keyser v. Sutherland*, *supra*, is mere dictum, as it appeared that the title was not passed upon in the action of trespass. But, independently of this

consideration, we are not disposed to accept the reasoning of the Michigan court upon this subject as sound. The statute of Illinois provides that at any time within one year after a judgment, either upon default or verdict, in the action of ejectment, the party against whom it is rendered, his heirs or assigns, upon the payment of all costs recovered therein, shall be entitled to have the judgment vacated, and a new trial granted in the cause. 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 1621, c. 45, par. 35. This is so no matter what the defense may have been upon the first trial of the cause. In the Michigan decision referred to the court says that it will not allow the right to two trials in ejectment to be taken away by allowing one trial in trespass to be used as a former adjudication. We see no reason why the result here deplored should necessarily follow. The fact that upon the first trial of the ejectment suit the judgment in the trespass suit is pleaded as *res judicata* does not deprive the defeated party of a second trial in the ejectment suit. There might be other defenses upon the first trial of the ejectment suit, equally as good as the defense of *res judicata*, and yet, if the defeated party chooses to pay up the costs within the time specified, and take his chances upon a new trial, he has a right to do so. The character of the defense made on the first trial does not deprive him of his right to a new trial. Any defense made upon the first trial, if good and valid and supported by the evidence, whether the defense of *res judicata* or something else, would lessen the probability of the defeated party's success upon a second trial if the same defense is set up in the second trial, but in no way interferes with his right to such second trial.

It is said by counsel for appellant that the declaration in the action of trespass does not aver that the plaintiff therein was the owner of the premises. The declaration in the trespass suit avers that the defendant destroyed the timber of the plaintiff then growing "upon certain lands of the plaintiff." This averment is the usual one which is made in declarations in trespass *quare clausum fregit*. The cases in Illinois referred to by counsel for appellant, which require the plaintiff in actions brought to recover damages for cutting timber to aver that he is the owner of the land upon which the timber is cut, were cases arising under a special statute imposing a penalty for cutting timber. This statute, which was entitled "An act to prevent trespassing by cutting timber," provided that any person who cuts trees growing upon land belonging to another person without first having obtained permission so to do from the owner of such land should forfeit and pay for each tree a certain penalty therein named; and it was held in the cases referred to by counsel that in an action of debt brought by the owner to recover the penalty given by the statute

he must aver in the declaration that he was the owner. *Wright v. Bennett*, 3 Scam. 258; *Whiteside v. Divers*, 4 Scam. 336; *Jarrot v. Vaughn*, 2 Gilman, 132. These decisions, being founded upon a special statute, have no application in the present case.

For the reasons above stated, the judgment of the circuit court is affirmed. Judgment affirmed.

(208 Ill. 15)

WEINBERG v. PEOPLE.

(Supreme Court of Illinois. Feb. 17, 1904.)

RECEIVING STOLEN GOODS—GUILTY KNOWLEDGE—EVIDENCE—VENUE—PROOF.

1. Certain jewelry and other articles of the value of \$700 were stolen by a burglar from prosecutrix's room. The police were thereafter notified that the thief, who was then in jail charged with another crime, had sold the articles to defendant for \$50, and that at the time the sale was made defendant asked the thief where he got the jewelry, and was satisfied by a reply, "Oh, they are all right; I got them down there." When he was charged with having the articles, defendant denied buying them, but during the progress of a search admitted that he had bought them, and stated that he had sold the articles to another, but would produce them if given time, which, though he was afforded an opportunity, he failed to do. *Held*, that there was sufficient evidence of guilty knowledge to sustain a conviction of receiving and concealing stolen property.

2. Where the only rational conclusion from the evidence is that the offense was committed in the county alleged in the indictment, the venue is sufficiently proved, though it did not appear from an express statement of any witness that it was committed within the county alleged.

Error to Criminal Court, Cook County; Jos. E. Gary, Judge.

Abe Weinberg was convicted of receiving and concealing stolen property, and he brings error. Affirmed.

Moritz Rosenthal and Benjamin O. Bachrach, for plaintiff in error. H. J. Hamlin, C. S. Deneen, and F. L. Fake, Jr., for the People.

HAND, C. J. This was an indictment returned to the criminal court of Cook county against the plaintiff in error, charging him with receiving and concealing stolen property. The indictment alleges the property to have been that of Mary H. Sparrow, and consisted of the following articles: eight rings, one neck chain, one charm, two earrings, and one satchel. Upon the trial it appeared that Miss Sparrow was staying at No. 232 Michigan avenue, in the city of Chicago, and that on the night of the 29th of July, 1903, her room was entered by a colored man by the name of Jackson, and a small satchel or handbag stolen from under the pillow upon which she was sleeping, which bag contained the articles above enumerated; that Miss Sparrow at once reported her loss to the police department, and two officers were detailed upon the case; that, after search had progressed for several weeks, a colored man

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1279.

by the name of Stokes informed the officers that Jackson, who was then confined in the county jail of Cook county charged with the commission of another crime, had committed the burglary, and had sold the jewelry to plaintiff in error. A search warrant was procured, and the two officers, Stokes, and Miss Sparrow went to the place of business of the plaintiff in error, who denied the purchase of the jewelry, or that he had ever seen or heard of Stokes or Jackson before that day. Search was commenced under the warrant, and before it had progressed far the plaintiff in error admitted that he had purchased the jewelry stolen from Miss Sparrow, but claimed to have sold it to a person residing on the west side, and offered, if given three hours, to go to the west side, and produce the articles purchased by him of Jackson. He was arrested, and taken before the inspector at the Harrison street station, where he again admitted having had the jewelry in his possession. He was later given an opportunity to produce the jewelry, but never did so. No evidence was introduced on behalf of plaintiff in error, and the jury returned a verdict finding him guilty as charged in the indictment, and fixing the value of the goods purchased by him of Jackson at \$100. It is urged as ground for a reversal, first, that the evidence is insufficient to support a conviction; second, that the venue was not proved as laid in the indictment; and, third, error in giving instruction No. 3 on behalf of the people.

1. It appears from the testimony of Miss Sparrow that she was robbed at 232 Michigan avenue, in Chicago, Cook county, Ill., during the night of July 29, 1903; that as soon as she discovered her loss she reported the same to the police department; that the officers assigned to duty called upon her, and at their request she accompanied them to the place of business of plaintiff in error, and that while there he admitted to her and the two officers that he had purchased her jewelry from Jackson. The witness Stokes testified that between 5 and 6 o'clock on the morning of July 30th Jackson called at his room and showed him jewelry answering the description of that described as having been stolen from Miss Sparrow; that Jackson requested him to help sell it; that they went together to 1807 State street, the place of business of plaintiff in error, and that Jackson sold seven rings and the chain and charm to plaintiff in error for \$50; that plaintiff in error at this time asked Jackson where he got this jewelry, and that he answered, "O, they are all right; I got them down there;" that plaintiff in error then asked who Stokes was, and that he replied, "O, he is all right; I just brought him with me; he is all right;" that plaintiff in error then requested Stokes to step to one side, and told his wife to show him some penknives, and that while she was showing him the knives the plaintiff in error purchased the

jewelry of Jackson. Jackson, while on the stand, admitted the burglary, and testified that he sold the seven rings and the chain and charm taken from Miss Sparrow to plaintiff in error for \$50, substantially corroborating the testimony of Stokes. The officers testified that they were connected with the Harrison street station; that they were assigned to this case, and that Stokes informed them that Jackson, who was then in jail, had stolen the jewelry, and what disposition he had made of it; that they went to the place of business of the plaintiff in error, and charged him with having the property, which he denied; that they examined the book in which the plaintiff in error told them all property purchased by him was listed, and failed to find this property described therein; that they started to make search under the search warrant, and that after it had progressed for about 10 minutes the plaintiff in error stated that they need search no further, that he had purchased the jewelry and had sold it again, but, if given three hours in which to go to the west side, he would produce it; that they arrested him, took him to the Harrison street station, and that he was afterwards released on bail, and made engagements at several times to meet them for the purpose of returning Miss Sparrow's property; that he finally told them the settings had been destroyed, and new ones would have to be made; and later said the person to whom he had sold the property refused to turn it back to him except in full payment, and that he could not comply with this condition.

Miss Sparrow testified that the value of the property taken, which Jackson states he sold plaintiff in error, was about \$700. The fact that the articles stolen were of the value stated by Miss Sparrow is not controverted. The fact that Jackson had so large a number of articles of women's jewelry in his possession, which he offered for sale at much less than their value, should have put an honest man upon his guard; and the ease with which Jackson succeeded in satisfying plaintiff in error's quest for information, together with the fact that he did not list the jewelry upon his book, and denied buying it when charged with having it in his possession, was evidence of guilt, and was sufficient evidence of guilty knowledge to justify the court in refusing to take the case from the jury, and warranted the jury in returning a verdict of guilty against the defendant. In *Huggins v. People*, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357, which was a case where the facts were very similar to the facts in this case, it was said (page 247, 135 Ill., page 1003, 25 N. E., 25 Am. St. Rep. 357): "The knowledge of the prisoner, in this sense, is the gist of the offense, and must be found by the jury as a fact. In determining whether the fact existed, the jury will be justified in presuming that the prisoner acted rationally, and that whatever

would convey knowledge or induce belief in the mind of a reasonable person would, in the absence of countervailing evidence, be sufficient to apprise the prisoner of the like fact, or induce in his mind the like impression and belief."

2. While it does not appear from any express statement of any witness that the goods were sold in the county of Cook and state of Illinois, it was expressly stated by Miss Sparrow that the burglary took place in said county, and this, considered with the testimony of the six witnesses as a whole, we think proved the venue as laid with sufficient clearness. It is not necessary that some one testify in so many words to the place where the offense was committed, but it is sufficient if the evidence, as a whole, leaves no reasonable doubt as to the act upon which the indictment is based having been committed at the place laid in the indictment. *Porter v. People*, 158 Ill. 370, 41 N. E. 886. "The venue of an offense may be proven like any other fact in a criminal case. It need not be established by positive testimony nor in the words of the information; but if, from the facts appearing in evidence, the only rational conclusion which can be drawn is that the offense was committed in the county alleged, it is sufficient." *Weinecke v. State*, 34 Neb. 14, 51 N. W. 307.

3. It is said instruction No. 3 given on behalf of the people is meaningless and misleading. While the instruction was bunglingly drawn, we do not think the jury were misled thereby.

The judgment of the criminal court of Cook county is affirmed. Judgment affirmed.

(207 Ill. 566)

CINCINNATI, I. & W. RY. CO. v. PEOPLE
ex rel. RANDOLPH, County Collector.

(Supreme Court of Illinois. Feb. 17, 1904.)

TAXATION—TOWNSHIP TAXES—CERTIFICATE—SUFFICIENCY—HIGHWAY TAXES—LEVY BY COMMISSIONERS—SUFFICIENCY OF CERTIFICATE—MINUTES OF MEETING—PAROL EVIDENCE—VILLAGE TAX—LEVY ORDINANCE—SUFFICIENCY.

1. The levy of a town tax for "town purposes," without specifying the purposes so as to show that the tax was levied for purposes for which the town was authorized to levy a tax, is invalid.

2. The levy of a town tax to pay an indebtedness "and other town expenses," without reciting that the indebtedness and expenses are legal claims against the town, or without showing that the board of town auditors ever took action on or audited the claims, if they were in fact legal claims, is invalid.

3. Under Road and Bridge Act, § 119 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3596, c. 121, par. 119), requiring the highway commissioners of each town annually to ascertain, as near as practicable, how much money must be raised by taxes for the making and repairing bridges, the payment of damages for the opening, altering and laying out new roads, the purchase of tools and materials for repairing roads and bridges, and the payment of the overseer of

highways, and to levy a tax not exceeding 40 cents on the \$100 valuation, and to give a statement of the amount necessary to be raised, and the rate of taxation, signed by the commissioners, a certificate signed by the commissioners and filed, showing that they proceeded to ascertain the amount necessary to be raised by taxation, and determined the amount "as follows"—specifying the purposes as fixed in the act, and the amount for each purpose, together with the total amount and the rate of taxation—was sufficient.

4. Where the highway commissioners of a town levied a valid tax at the rate of 40 cents on the \$100 valuation, as authorized by Road and Bridge Act, § 119 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3596, c. 121, par. 119), and then proceeded, under section 14 of the act, to make another levy of 20 cents on the \$100 for specified purposes, and it was held that the second was invalid, the case stood as a levy of 40 cents on the \$100 valuation only.

5. Under Revenue Act, § 191 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3470, c. 120, par. 193), providing that, in all judicial proceedings for the collection of taxes, any irregularity in the assessment may, in the discretion of the court, be corrected, parol evidence is admissible to show that the minutes of the highway commissioners, reciting that the commissioners met on September 1st, is erroneous, and that they met September 2d—the day designated by law, and the date given in the certificate of the taxes levied by them.

6. The certificate of the levy of a tax by highway commissioners, which fails to give the amount to be raised for the various purposes mentioned in the certificate, or the total amount, renders the tax invalid, under Road and Bridge Act, § 119 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3596, c. 121, par. 119), requiring not only that the total amount to be raised shall be stated in the certificate, but that the specific amount for each of the objects named must be stated.

7. The appropriation ordinance for a village for a certain year showed an appropriation of a certain sum for streets, another sum for salaries, \$200 for "miscellaneous," and another sum for elections. The levy ordinance provided that there should be levied and collected on the property within the limits of the village for that year a tax of \$175 for "general, contingent, and miscellaneous purposes." Held, that the tax levy was invalid.

Appeal from Jasper County Court; F. D. Shamhart, Judge.

Proceedings by the people, on the relation of Taylor Randolph, county collector of Jasper county, against the Cincinnati, Indianapolis & Western Railway Company. From a judgment ordering a sale of the railroad company's property for delinquent taxes, it appeals. Modified.

The appellant company owns and operates its railway through the townships of Hunt City, Willow Hill, St. Marie, Fox, and the village of Hunt City, in Jasper county, which property was duly assessed for taxation for the year 1902 by the state board of equalization, and taxes were extended thereon by the county clerk of Jasper county according to the several certificates of levy for taxes filed with him for the year 1902. Appellant paid a portion of these taxes, but refused to pay the remainder. The county collector made application to the June term of the county court for judgment and order of sale of this property for such unpaid taxes, together with interest and costs. The appellant appeared

by its counsel, and filed objections in writing to the rendition of judgment for such taxes, interest, and costs. The cause was heard by the court at the June term, 1903, and judgment was rendered sustaining the appellant's objections as to certain taxes not here in controversy, and the court overruled its objections and rendered judgment against the property of appellant for the following taxes, to wit: Hunt City township town tax, \$27.96; Willow Hill township town tax, \$45.90; St. Marie township town tax, \$20.91; Willow Hill township road and bridge tax (as to 40-cent levy), \$36.73; Fox township road and bridge tax, \$16.12; Hunt City village tax, \$39.22. The present appeal is prosecuted from the judgment of the county court as to each of the taxes above set forth.

George W. Fisher and Davidson & Isley, for appellant.

MAGRUDER, J. (after stating the facts).

1. As to the three town taxes: The town tax for the town of Hunt City was levied upon the certificate of the town clerk that the board of town auditors, in regular annual meeting, held September 2, 1902, ordered that the amount of \$400 be levied for "town purposes." The record of Hunt City township, containing the minutes of the annual town meeting held on April 1, 1902, shows that, on motion, and by vote of the electors, a levy of \$400 was made for "town purposes." But it does not appear what the purposes were for which the tax was levied or voted. It does not appear that the purpose was to pay claims audited against the town, nor does it appear that the action of the electors at the town meeting was certified by the town clerk in the manner required by law. Consequently the objection made by the appellant upon the trial below, to the effect that the purpose for which the tax was levied did not appear, and it did not appear that the tax was levied for any purpose for which such town was authorized to levy a town tax, should have been sustained. *People v. Chicago & Alton Railroad Co.*, 194 Ill. 51, 61 N. E. 1064; *People v. Chicago & Alton Railroad Co.*, 193 Ill. 364, 61 N. E. 1063; *Indiana, Decatur & Western Railway Co. v. People*, 201 Ill. 351, 66 N. E. 293. In the case of *People v. Chicago & Alton Railroad Co.*, first above cited, we held that the third subdivision of clause 3 of section 3, article 4, of the township organization act (Starr & C. Ann. St. 1896, c. 139, par. 40), authorizing electors at a town meeting to raise money by taxation "for any other purpose required by law," is not authority for sustaining a tax levied by vote of a town meeting "for town purposes," there being nothing to show the nature of such purposes. It was said in that case that it must always appear that the purpose for which the money is to be raised is one for which the town has authority to raise money by taxation. Such purpose does not here appear.

The same is true as to the certificate of

levy for the town tax of the town of St. Marie for 1902, upon which certificate that tax was extended. The certificate shows that at the annual town meeting held on the 1st day of April, 1902, a motion was made that a levy of \$200 be made for "town purposes," and the motion was carried. The town records, containing the minutes of the annual town meeting of April 1, 1902, show that a levy of \$200 was made for "town purposes." As it does not appear what the purposes were, or that the purpose for which the tax was levied was one required or authorized by law to be carried into execution by the town, the objection presenting this point in the trial court should have been sustained, upon the authority of *People v. Chicago & Alton Railroad Co.*, supra.

As to the town tax of the town or township of Willow Hill, the certificate of the town clerk shows that at the annual town meeting held on the 1st day of April, 1902, a motion was made and seconded, and carried, that a tax of \$700 be levied for "all town expenses." The town record of Willow Hill, containing the minutes of the annual meeting held on the 1st day of April, 1902, shows that a motion was made, seconded, and carried to make a tax levy of \$700 to pay the township indebtedness to Hunt City township on the apportionment of the appraisement, "and other town expenses." There is nothing to show how much of the tax is for the township indebtedness to Hunt City, and how much for "other town expenses." It does not appear that the indebtedness and expenses are legal claims against the town, to which the appellant company should contribute. Nor does it appear that the board of town auditors ever took action on or audited these claims, if they were in fact legal claims against the town. We have held that the duty of passing upon claims and demands against the town is imposed upon the board of town auditors, and their certificate is made the foundation for the levy of taxes to pay such claims and demands. The attempt by the town meeting to exercise the power of the board of auditors is illegal, and makes the tax void. *People v. Chicago & Alton Railroad Co.*, 193 Ill. 364, 61 N. E. 1063; *People v. Chicago & Alton Railroad Co.*, 194 Ill. 51, 61 N. E. 1064.

2. As to the two road and bridge taxes: The commissioners of highways of Willow Hill township met, as hereafter stated, and made their levies for road and bridge taxes for the year commencing September 2, 1902—one levy for 40 cents on the \$100 in manner and form as is prescribed for the tax under section 119 of the road and bridge act (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3596, c. 121, par. 119), and one levy of 20 cents on the \$100 valuation on all real, personal, and railroad property, to meet the payment of outstanding orders, which was approved by the town auditing board and the assessor. The certificate of levy of the Willow Hill road and bridge tax, showing the levy of a tax

of 40 cents on the \$100, was signed by the three highway commissioners, and filed with the county clerk; and it appears from the face of the certificate that the commissioners of highways of the town of Willow Hill proceeded to ascertain, as near as practicable, how much money must be raised in said town by tax on real and personal property for the purposes following during the ensuing year, as required by law, and ascertained and determined the same to be as follows, to wit: "(1) For the making and repairing of bridges, \$300.00; (2) for the payment of damages by reason of the opening, altering and laying out new roads, \$50.00; (3) for the purchase of the necessary tools, implements and machinery for working roads, \$50.00; (4) purchasing necessary material for building and repairing roads and bridges, \$50.00; (5) for the pay of overseers of highways for the ensuing year, \$150.00; commencing on Tuesday next preceding the annual town meeting; the total amount for the purposes aforesaid being \$600.00; for raising which amount a tax is levied on all the real and personal property in said town, of forty cents on the \$100.00; witness our hands this second day of September, 1902." We are unable to see why this certificate does not comply with the requirements of section 119 of the road and bridge act.

Complaint is made by counsel that the commissioners made one levy of 40 cents, as shown by their certificate, and then proceeded, under section 14 of the road and bridge act (3 Starr & O. Ann. St. 1896 [2d Ed.] p. 3552, c. 121, par. 14), to make another levy of 20 cents for specified purposes, which was granted by the town auditing board and the assessor, and that the tax was extended at the rate of 60 cents, to get which the commissioners did not proceed according to either system (that is to say, there being towns adopting the labor system, and towns not adopting such system), but according to both systems; and it is also contended that there were two distinct and separate levies in one year, which, as it is claimed, are not authorized by the statutes. *St. Louis Nat. Stockyards v. People*, 127 Ill. 22, 20 N. E. 84. Without passing upon the validity of this contention, it is sufficient to say that the court held the 20-cent levy bad, but the 40-cent levy good, and apportioned the taxes accordingly. If, therefore, the tax was improperly extended at the rate of 60 cents, the court held the levy of 20 cents on the \$100 valuation, in addition to that of 40 cents on the \$100 valuation, to be invalid. The case therefore stands as a levy of 40 cents, only, and not of 60 cents. As a levy of 40 cents, it is in compliance with the statute, and is valid.

But counsel say that the record of the commissioners of highways of Willow Hill township, containing the minutes of the meeting of the commissioners at which the levy was

made for road and bridge taxes for the year 1902, shows that such meeting was held on the 1st day of September, 1902, at the townhouse in Willow Hill. It is conceded that the 1st day of September, 1902, was Monday, and that the 2d day of September, 1902, was Tuesday; and it is claimed that therefore the meeting was held upon the wrong day, as the meeting could only legally be held on the first Tuesday in September, 1902, which was the 2d day of the month, and not upon Monday, the 1st day of September, 1902. It may be admitted that the proper day for the holding of the meeting was Tuesday, the 2d day of September, 1902. The record of the commissioners of highways of Willow Hill township was written up by the town clerk of the township, whose name was H. J. Foltz. Foltz testified upon the hearing that the record was not correct, and that he made a mistake in stating that the meeting was held on the 1st day of September, and that, as matter of fact, it was held on Tuesday, the 2d day of September, 1902. It is contended that the court erred in admitting the oral testimony of the town clerk for the purpose of correcting or amending the record. The action of the trial court in thus permitting the record to be amended is justified by the terms of section 191 of the revenue law of this state (3 Starr & O. Ann. St. 1896 [2d Ed.] p. 3470, c. 120, par. 198). That section makes liberal provision for the correction of irregularities and omissions in proceedings of officers, connected with the assessment and levying of taxes, which do not affect the substantial justice of the tax itself, and those provisions are broad enough to justify the admission of the parol testimony introduced in this case. Whether the admission of such testimony would have been proper if there had been nothing in the record to amend by is a question which does not here arise, and need not be passed upon. Section 119 of the road and bridge act provides that the tax-levy certificate or statement to be made by the commissioners of highways shall be signed by the commissioners, or a majority of them. Here the tax-levy certificate or statement made by the commissioners was signed by three commissioners, and witnessed under their hands, as of the date of September 2, 1902, which day was Tuesday. Inasmuch as the commissioners themselves, under their own hands, certified that their action in ascertaining how much money was to be raised for the required purposes was taken on September 2d, and so certified in writing, the record, as written by the town clerk, could be amended in accordance with such written certificate of the commissioners. In other words, the amendment of the record by changing the date from September 1st to September 2d was justifiable, because there was the written certificate of the commissioners to amend by.

We are therefore of the opinion that the

Willow Hill township road and bridge tax, being based upon a 40-cent levy only, is valid.

The road and bridge tax of the town of Fox was properly objected to, and the objection should have been sustained. The certificate of levy, as to the town of Fox road and bridge tax, shows that the levy was made under section 119 of the road and bridge law, and was made at a meeting of the commissioners held on March 25, 1902. By that certificate, the commissioners of highways of said town of Fox state that, "having proceeded to ascertain, as near as practicable, how much money must be raised in said town by tax on real and personal property for the purposes following, during the ensuing year, as required by law, have ascertained and determined the same to be as follows, to wit: (1) For the making and repairing of bridges, \$—; (2) for payment of damages by reason of the opening, altering and laying out of new roads, \$—; (3) for the purchase of the necessary tools, implements and machinery for working roads, \$—; (4) for the purchase of necessary material for building and repairing roads and bridges, \$—; (5) for the pay of overseers of highways for the ensuing year, \$—; commencing on Tuesday next preceding the annual town meeting; the total amount for the purposes aforesaid being — dollars; for the raising of which amount a tax is levied on all the real and personal property in said town of forty cents on the \$100.00; witness our hands this 25th day of March, 1902." This certificate is signed by the three commissioners of highways, but it does not give the amounts to be raised for the various purposes mentioned in the certificate or statement, nor does it give the total amount which is to be raised. Section 119 of the road and bridge act requires not only that the total amount to be raised shall be stated in the levy certificate, but that the specific amounts for each one of the objects named should be stated. The certificate is fatally defective in failing to give the total amount, or the specific amounts making up the total sum. The town clerk of the town of Fox testifies that the records of the town are in his custody, and that the record of the commissioners of highways shows that all the amounts, specific and total, in the statement or certificate, are blank, as above indicated. He swears that the original certificate of levy was lost, and that he sent a copy to the county clerk, and that the copy was not signed by the commissioners. There is no evidence, however, to show that the original certificate, which is said to have been lost, contained the amounts which are omitted from the certificate as it appears in the present record. So far, therefore, as the road and bridge tax of the town of Fox is concerned, the objection was well taken, and should have been sustained.

3. As to the village tax, the objection

should have been sustained for the reasons hereinafter stated. The appropriation ordinance for the municipal year 1902 of the village of Hunt City was passed on July 7, 1902, and shows there was an appropriation of \$500 for streets and alleys, \$250 for salaries, \$200 for "miscellaneous," and \$50 for elections; amounting altogether to \$1,000. The levy ordinance, which was passed on the 1st day of September, 1902, provides "that there shall be levied, assessed and collected upon the personal and real property within the corporate limits of the village of Hunt City, as the same is or may be returned by the assessor of said village for the year 1902, the sum of \$175.00 for 'general, contingent and miscellaneous purposes,' making a total aggregate sum to be levied, assessed and collected of \$175.00." The certificate of the village clerk certifies that a tax of \$175 was levied for "general, contingent and miscellaneous purposes, making a total aggregate sum to be levied, assessed and collected of \$175.00." Neither of the three distinct purposes for which the levy of the gross sum of \$175.00 was to be made, except "miscellaneous," is mentioned in the appropriation ordinance. None of the items of the levy ordinance agree with the appropriation ordinance. The board of trustees did not "ascertain the amount of appropriations heretofore legally made and levy same," as required by section 111, c. 24, Hurd's Rev. St. 1901, and did not "specify in detail the purposes for which appropriations were made, and the sum or amount appropriated for each purpose respectively." We have held that the statute requires that a city ordinance for the levy of municipal taxes shall specify in detail the purposes for which the appropriations are made, and the amount appropriated for each purpose. *People ex rel. v. Peoria, Decatur & Evansville Railroad Co.*, 116 Ill. 410, 6 N. E. 459.

The judgment of the county court is affirmed so far as it overruled the objection to the entry of judgment upon the Willow Hill township road and bridge tax, amounting to \$36.73; but said judgment is reversed so far as it overruled the objections to the other town, road and bridge, and village taxes hereinbefore mentioned. In pursuance of section 192 of the revenue act (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3478, c. 120, par. 194), a judgment will be rendered in this court for \$36.73, with 10 per cent. damages on such amount; and it is ordered that so much of the amount deposited by appellant with the collector upon the taking of this appeal as shall be necessary to pay and satisfy said judgment be credited upon the same, and that execution issue for any balance remaining unpaid. The clerk of the court will enter judgment accordingly, and transmit to the county collector a certified copy of the same.

Affirmed in part and reversed in part, and judgment rendered in this court.

(207 Ill. 136)

GILLETT v. GILLETT.

(Supreme Court of Illinois. Feb. 17, 1904.)

DECEDENTS' ESTATES—CHILD LIVING IN FAMILY—SPECIAL ALLOWANCE—PECUNIARY CIRCUMSTANCES OF CHILD—CONTRIBUTION TO HOUSEHOLD EXPENSES.

1. 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 313, c. 3, par. 77, relative to the administration of estates, and providing that when the person dying is at the time of his death a housekeeper and the head of a family, and leaves no widow, there shall be allowed to the children residing with him at the time of his death (including all males under 18 years of age and all females), the same amount of property that is allowed to the widow by the statute, includes female children over 18 years of age.

2. The statute is not limited to dependent females, but an adult daughter residing with her mother at the time of the latter's death is entitled to an allowance, under the statute, although possessed of an independent fortune in her own right.

3. 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 313, c. 3, par. 77, declares that when a person dying is at the time a housekeeper, and leaves no widow, there shall be allowed to the children residing with him the same amount of property that is allowed by statute to a widow. Paragraph 74 allows to the widow certain articles of property, or their value in money, and provisions for herself and family for a year. A widow had at the time of her death an income of from \$15,000 to \$18,000, having a life estate in some 4,000 acres of land, and a considerable amount of personal property. *Held*, that an allowance to a daughter living with her at the time of her death of \$2,475 is not excessive.

4. 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 313, c. 3, par. 77, provides that when a person dying is a head of a family, and leaves no widow, there shall be allowed to the children residing with him at the time of his death the same amount of property as is allowed by statute to a widow. A deceased husband had left an estate valued at \$1,000,000, and the widow and one adult daughter, who lived at home, occupied the family residence. This daughter was possessed of considerable property under her father's will, and contributed \$500 annually to the household expenses, as three other daughters had while they were unmarried. During the absence of her mother, this daughter was given full charge of the house, drawing checks for expenses in her mother's name; and there was some evidence that, before the mother's death, the daughter had been released from the obligation to contribute towards family expenses. *Held*, that the daughter was not a mere boarder, but a member of the family, and was entitled to an allowance under the statute.

5. The expenses of a so-called additional abstract, containing a copy of the testimony printed in full, with the exception of that of one witness, after the filing of a proper abstract by the appellant, cannot be charged to the unsuccessful appellant.

Appeal from Appellate Court, Third District.

Objections by Nina L. Gillett to a specific allowance to Amaryllis T. Gillett from the estate of Mrs. Lemira P. Gillett, deceased. From a judgment of the Appellate Court (109 Ill. App. 126) affirming a judgment sustaining the allowance, objector appeals. Affirmed.

Mrs. Lemira P. Gillett, who was the widow of John D. Gillett, died testate on September 21, 1901. After her death the appraisers, appointed by the county court in the admin-

istration of the estate, set off to the appellee, Amaryllis T. Gillett, a daughter of Mrs. Lemira P. Gillett, an amount, equal in the aggregate to \$2,525, as a specific separate allowance. The appellant, Nina L. Gillett, filed five objections in the county court to the appraisal so made. The first, fourth, and fifth of these objections were withdrawn, and the county court overruled the second and third objections, and approved the appraisal, and the specific allowance, to the extent of \$2,475; disallowing an item of \$50 for family pictures, wearing apparel, jewels, and ornaments. The third objection to the allowance to the appellee was that it was excessive, and the result of a prejudiced and interested appraisal on the part of the appraisers; but this objection has been abandoned, or is not now insisted upon by the appellant in the argument made before this court. The second objection made to the appraisal was to the effect that the appraisers set off to the appellee, Amaryllis T. Gillett, a total of \$2,475, as an allowance to her as a female child of Lemira P. Gillett, whereas, as it is alleged in the objection, "she was a daughter of Lemira P. Gillett, past forty years of age, of independent fortune, without family, and boarding with her mother for a compensation, and had no other or further rights than those of a daughter and boarder in the family; that she is not such a person contemplated by the statute as is entitled to an award against said estate."

Appellant took an appeal from the order of the county court of Logan county approving the report of the appraisers to the circuit court of that county. After appeal to the circuit court, the parties waived the intervention of a jury, and submitted the case by consent to the court for trial without a jury. The circuit court upon the trial affirmed the judgment and order of the county court; refusing to give certain propositions of law asked by the appellant, and giving those asked by appellee. Thereupon the objector (being the present appellant, Nina L. Gillett) took an appeal to the Appellate Court, and the Appellate Court has affirmed the judgment of the circuit court. The present appeal is prosecuted from such judgment of affirmance.

Upon the trial before the circuit court, the appellant asked that court to hold, as a proposition of law, in the decision of the case, as follows: "If it appears from the evidence that, during the lifetime of Lemira P. Gillett, her daughter Amaryllis T. Gillett, who was about the age of forty-four years, and had an independent fortune in her own right of between \$200,000 and \$250,000, with a yearly income of between \$12,000 and \$15,000 per annum, made her home with her mother, occupying no position of dependence upon her mother, then the law is that out of her mother's estate Amaryllis T. Gillett is not entitled to a specific allowance." This

proposition was refused by the circuit court. The court, at the request of appellee, held as law in the decision of the case propositions of law to the following effect, to wit: "That Amaryllis T. Gillett, to whom specific allowance was made, was residing with her widowed mother at the time of the decease of the mother; that, while she was required by the mother to contribute a stated amount annually toward maintaining the household expenses and sustaining the church organization to which they belonged, she was never treated as a boarder, and was not such; that she ever maintained toward her mother that same close family relation of mother and daughter that she did while the father was living, and that her relations were not changed after the father's death. She was in the family as a daughter, to devote her time, when at home, and her energies, for the comfort and enjoyment of her mother, to aid in supplying the many wants that will arise in the declining years and in sickness, and the question of age and financial standing does not affect the right of a female person so standing to the right to claim a specific allowance."

Blinn & Harris and Beach, Hodnett & Trapp, for appellant. Hoblit & Smith, for appellee.

MAGRUDER, J. (after stating the facts). The question presented by this record relates to the construction, as applied to the facts of this case, of section 77 of chapter 3 of the Revised Statutes, in regard to the administration of estates. Section 77 is as follows: "When the person dying is at the time of his death a house-keeper, the head of a family, and leaves no widow, there shall be allowed to the children of the deceased, residing with him at the time of his death (including all males under eighteen years of age, and all females), the same amount of property as is allowed to the widow by this act." 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 313, par. 77. By the literal terms of this statute, reference is made to a widower, who is at the time of his death a housekeeper and the head of a family. In *Leshner v. Wirth*, 14 Ill. 39, it was held that the children of a widow who dies intestate, a housekeeper and the head of a family, shall take the same articles of property that they would take if the intestate was a widower.

John D. Gillett died testate at his home, near Elkhart, in Logan county, in August, 1888, leaving a very large estate—worth more than \$1,000,000. At the time of his death he left a widow, Lemira P. Gillett, and four unmarried daughters, to wit, appellant, Nina L. Gillett, appellee, Amaryllis T. Gillett (usually called "Amy" in the family), Jessie D. Gillett, and Charlotte L. Gillett. Two or three years after the death of John D. Gillett, his daughter Charlotte L. Gillett was married to Dr. Williams Barnes, of De-

catur. The only other children of John D. Gillett who were living at the time of the death of Mrs. Lemira P. Gillett were two married daughters, Mrs. Emma G. Oglesby and Mrs. Katherine G. Hill. The four unmarried daughters lived with their father at the family homestead, near Elkhart, during his lifetime, and upon his death his wife continued to occupy and live in the family homestead as her home; and with her these four daughters lived and made their home, she being the head of the family. After her marriage, Mrs. Barnes left the home. The appellant, Nina L. Gillett, left the home about the year 1897, and was abroad for a number of years. In May, 1900, Jessie D. Gillett left the home on account of the conduct of her brother John P. Gillett, who was then living with his mother. The appellee, Amy T. Gillett, continued to live with her mother up to the time of the latter's death. John P. Gillett died on September 8, 1901, and Mrs. Lemira P. Gillett died in about two weeks thereafter. The appellee, Amy T. Gillett, went abroad in January, 1900, but returned on July 3, 1900, at the request of her mother. After Jessie D. Gillett left the homestead in May, 1900, Mrs. Gillett was alone with her son John, who owned the homestead under the will of his father. He was addicted to the habitual use of intoxicating liquors, and when under their influence was quarrelsome and abusive. After his sister Jessie left the homestead on account of his conduct, and while his mother was left alone with him in the homestead, she expressed a desire that her daughter Amy should return from Europe, and appellee accordingly did so; remaining in the homestead from the date of her return on July 3, 1900, up to the death of her mother on September 21, 1901, with the exception of three brief visits away from home made during that time with the consent of her mother, and while her brother was absent. The evidence tends to show that, for more than a year before the death of Mrs. Gillett, the appellee took care of her mother, and of her brother, so far as she could, and of the house. She employed, trained, and paid the servants; attended to purchasing and paying for household supplies; looked after the linen; superintended the making of the garden; drew checks in her mother's name to make payments of various kinds; superintended the erection and painting of buildings; attended to her mother's wishes in employing the minister who had charge of the church built by her mother; and waited on her sick brother.

Mrs. Gillett had an income said to have been from \$15,000 to \$18,000 per year. Under her husband's will, she had a life interest in some 4,000 acres of land, and also a considerable amount of personal property. Each of the children had a large estate, inherited from their father. Appellee is admitted to have been worth about \$250,000,

and to have had an income from her own property of from \$12,000 to \$15,000 annually. Some sort of an arrangement was made prior to 1897, or about that year, at the suggestion of the son John P. Gillett, by the terms of which each of the unmarried daughters contributed \$500 a year, in semiannual payments of \$250 each, to their mother, towards the household expenses of the home. At her request they each also paid to her \$100 per year for the support of the Episcopal Church, which she had built.

It is clearly proven that Mrs. Gillett at the time of her death was a housekeeper, and the head of a family, and was a widow, and that appellee, Amy T. Gillett, was her female child, and resided with her at the time of her death. Therefore, under the strict letter of section 77, as above quoted, there was properly allowed to her "the same amount of property [or the money value thereof] as is allowed to the widow by this act." In the first place, it is insisted by the appellant that appellee is not such a child of the deceased, Lemira P. Gillett, as is contemplated by section 77, because she is not under 18 years of age. The statute does not refer exclusively to females who are under 18 years of age. The language is: "There shall be allowed to the children of the deceased, residing with him at the time of his death (including all males under eighteen years of age, and all females), the same amount of property as is allowed to the widow by this act." The children who are brought within the terms of the section include all males under 18 years of age, and "all females." The fact that the males to be included are specifically mentioned as being under 18 years of age, while the words "all females" are used without any qualification, clearly indicates that the Legislature intended to refer to females without reference to what their ages might be. If it had been the intention of the Legislature to include only females under 18 years of age, then the words "under eighteen years of age" would have been made to qualify females as well as males.

In the second place, it is claimed that the statute only refers to dependent females, and those who need the aid of the widow for their support. It is therefore claimed that the appellee is not included within the meaning of section 77, because she had an independent fortune and a large income of her own, and was therefore in no way dependent upon her mother. The section does not use the words "dependent females," nor is there any language in the section which seems to restrict the allowance there provided for to dependent females. There is nothing in the statute which excludes from the allowance female children who may have had property or incomes of their own.

In ascertaining the meaning of a statute, the intention of the Legislature is to be sought for. Where terms are ambiguous and

doubtful, rules of construction are applied to determine that intention, and statutes in *pari materia* with the statute under consideration are referred to. But where the language of the statute is plain and unambiguous, there is no necessity for resorting to rules of construction, and the statute must have an interpretation according to the plain and ordinary meaning of the words used. "In the enactment of statutes, the rule of interpretation is, in respect to the intention of the Legislature, that, where the language is explicit, the courts are bound to seek for the intention in the words of the act itself, and they are not at liberty to suppose or to hold that the Legislature intended anything different from what their language imports." Potter's *Dwarris on Statutes*, pp. 144, 146, par. 20. "When, indeed, the language is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise, and 'those incidental rules which are mere aids, to be invoked when the meaning is clouded, are not to be regarded.' * * * The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction." Endlich on Interpretation of Statutes, p. 6, § 4. "Where the language of the statute is plain and explicit, it cannot be controlled by the rule in *pari materia*." Endlich on Interpretation of Statutes, § 53, p. 67. In *Ottawa Gaslight & Coke Co. v. Downey*, 127 Ill. 201, 20 N. E. 20, we said: "Courts cannot, as a general rule, disregard the plain language of a statute. It is their duty to accept it as they find it, and enforce it as plainly written." Again, in *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84, we said: "It is not the province of the judiciary to make laws, but to construe and interpret them, and pass upon their validity."

By section 77, the children therein named are allowed the same amount of property "as is allowed to the widow by this act." When we turn to section 74 of the administration act (Starr & O. Ann. St. 1896, c. 3, par. 74), we find that the widow is allowed certain articles of property, or their value in money, such as beds, bedsteads, bedding, and household and kitchen furniture, necessary for herself and family, and provisions for a year for herself and family. The report of the appraisers in this case mentions each of the specific articles allowed under the proper head, and the value of the same. In passing upon the meaning of the allowance thus made, which is the same as the allowance to be made to the children named in section 77, we held in *Strawn v. Strawn*, 53 Ill. 263, that the statute providing for an allowance to a widow of such beds, bedsteads, bedding, and household and kitchen furniture as might be necessary for herself and family, and provisions for a year for herself and family, was not to be construed, in regard to the character and amount of

such allowance, without reference to the circumstances of the parties, but that, in fixing such allowance, the appraisers should take into view the condition and mode of life in which the widow was left by the death of her husband, and should regard as necessary that furniture which is the ordinary and appropriate furniture for such homesteads. In that case we said (page 274): "It cannot be supposed that the Legislature, when it used the words 'necessary furniture,' and 'provisions for a year,' designed to use the words in a rigid and unbending sense, to be construed in all cases without reference to the circumstances of the parties. If that were so, we should be obliged to say that many articles of furniture to be found in all comfortable houses were not absolutely indispensable, and that the provisions for a year might be reduced to a certain amount of bacon and corn meal. * * * So, too, in regard to the word 'family.' Inasmuch as the children of the appellee were all of age, although some of them were still members of the maternal family, it is claimed that the provisions allowed should only be such as would be required for the sustenance of the widow alone. But we are of opinion the Legislature intended by the word 'family' to include such persons as constituted the family of the deceased at the time of his death, whether servants or children who had attained their majority." It cannot be said that the allowance here made, of \$2,475, was extravagant, in view of the size of the estate and of the circumstances of the parties.

It is furthermore claimed on the part of the appellant that, because the appellee contributed \$500 per year, in semiannual payments, towards the household expenses, as did the other unmarried daughters while they lived with their mother, the appellee thereby became a mere boarder, and that for that reason she is not entitled to the award. We do not think that the contribution so made towards household expenses was a compensation for board. Notwithstanding such payment, the appellee constituted one of the private household of her deceased mother. The evidence shows that the homestead occupied by Mrs. Gillett was a large house, and had in it upwards of 18 rooms, and that each one of the daughters above named, before the death of their father and after his death, occupied one room in the house, and had one horse, and had the use of the family carriages. In view of the wealth and position of the family, it cannot be said that the small contribution thus made was intended to be an equivalent for board. The design of the statute was "to enable the widow to keep what death had spared of her domestic circle unbroken during that time, notwithstanding the loss of her husband." *Strawn v. Strawn*, supra. The mere fact that her children chose to contribute a small sum towards the family expenses, and another

small sum towards the support of the church the widow had erected at her own expense upon her premises, did not show that they were boarders, in the sense in which that term is used in the case of *Strawn v. Strawn*, supra.

In *Wolford v. Deemer*, 89 Ill. App. 524, one of the Appellate Courts in this state has held that where one at the time of his death is a housekeeper, and the head of a family consisting of himself and a daughter, and leaves no widow, the daughter is entitled to an allowance out of the estate under section 77, and that this right is not defeated by the facts that the daughter is an adult and a widow; that while her husband was alive she did not live at her father's home; that she returned thereto at her father's request; that he agreed to pay her \$2 a week for her services at home; that she owned property, and had an income from other sources; and that she shared equally with her brothers and sisters under her father's will.

It appears from the evidence that Mrs. Gillett, early in the month of July, 1901, and about three months before her death, left her home, and went north to Mackinac Island for a summer vacation, and that when she left home she left her daughter, the appellee, in charge of the homestead, and handed to her a written order, dated July 1, 1901, which order, signed by Mrs. Gillett, is in the following terms, to wit: "This is to certify that I leave my daughter, Amy, in full charge of my house, help, and all pertaining to the premises in my absence this year." She directed appellee to draw checks in her name upon her own account in the bank in Elkhart, and those checks were so drawn by appellee, and are shown in the record. When Mrs. Gillett went north in July, 1901, she not only left appellee in charge of the house, but also in charge of her son John P. Gillett, and of the entire household. Moreover, there is some evidence tending to show that, some time before the death of Mrs. Gillett, she released appellee from the obligation to pay the contribution of \$500 towards family expenses. Upon this subject there is some conflict in the evidence, but, inasmuch as the trial court saw the witnesses and heard their testimony, we are not disposed to interfere with its finding upon this subject. There are in the record quite a number of letters—some 21 in number—written by Mrs. Gillett to appellee, beginning in July, 1898, and ending August 30, 1901, shortly before the widow's death, which show that relations of confidence and affection existed between appellee and her mother. They show that she had full charge of her mother's home during her mother's absence, and was authorized to give directions to servants and nurses, and look after her sick brother and his room. It clearly appears from these letters and the other testimony that she was in the family as a daughter, and bore the same close

family relation as a daughter to Mrs. Gillett as existed between them while the father was living, thus devoting her time and energies, when at home, for the comfort and enjoyment of her mother; and it cannot be said that she bore the relation to the household of a mere boarder.

Reference is made by counsel for appellant to authorities in other states giving the same construction to statutes there as is contended for on behalf of appellant here. But an examination of the statutes so construed by such decisions will show that they differ from the Illinois statute, in providing for exemptions in favor of minors, or restricting their benefits to minors. But in *Barr's Appeal*, 1 Monag. 768, it is said: "The act of assembly gives to the widow or the children of a decedent the right to retain \$300 out of the decedent's estate. The act fixes no age or circumstances which shall deprive the children of a right so to claim. This court, in view of the spirit of the law, has held that an adult child, living apart from the father's family, and not dependent on him for support, is not entitled to claim under the statute. Here the appellee always lived with her father, the decedent, as a member of his family. She continued with him after she arrived at the age of twenty-one, just as she had before. She remained as a child, not as a servant. The language of the act does not bar her claim. The spirit and purpose thereof, in providing this sum for the family, give it to her. She fills the requirement of the statute." Inasmuch as section 77 assimilates the award to the children to that allowed to the widow by the act, and inasmuch as the widow takes without regard to dependence, we are of the opinion that an adult child, like appellee, may take without regard to dependence, where the family relation exists, and where the facts mentioned in section 77 exist.

Appellee has filed herein what her counsel calls an "additional abstract," and makes a motion that the cost and expense of the additional abstract so filed by appellee be taxed as costs against appellant. This motion is denied. What is called an "additional abstract" is in fact a copy of the testimony, printed in full, of all the witnesses who testified upon the trial, except one. The abstract required by the rules of this court is an abridgment of the record, and in it the evidence should be condensed in narrative form, so as to clearly and concisely present its substance. We think that the abstract filed by the appellant complies with the rule, and that the additional abstract, if it may be so called, filed by the appellee, was not necessary.

For the reasons above stated, we are of the opinion that the allowance made by the circuit court was proper. And accordingly the judgment of the Appellate Court affirming the judgment of the circuit court is affirmed. Judgment affirmed.

SPRINGER v. DARLINGTON. (207 Ill. 238)

(Supreme Court of Illinois. Feb. 17, 1904.)

PARTY WALL—CONSTRUCTION WITH OPENINGS—INJUNCTION—PROPERTY OF REMEDY—REIMBURSEMENT OF BUILDER—LACHES—ESTOPPEL—FORECLOSURE DECREE—COLLATERAL ATTACK.

1. The question whether in foreclosure proceedings the court could appoint a commissioner to make the sale and execute a deed, instead of directing the master in chancery to do so, cannot be raised on a collateral attack on the decree.

2. The objection to the introduction in evidence of a deed made pursuant to a foreclosure decree, that the sale had not been confirmed, cannot be urged for the first time on appeal.

3. One party to a party-wall agreement purchased the equity of redemption of the other party, and, after foreclosure and a deed to the purchaser thereunder, asserted against such purchaser the right to an alleyway and a way for underground pipes as easements, and about two years afterwards began an injunction suit to protect such easements. This litigation continued about a year, and within a month after its termination the purchaser began suit to restrain a violation of the party-wall agreement. *Held*, that the latter suit was not barred by laches, though the violation occurred more than six years before.

4. A purchaser at a foreclosure sale is not estopped to sue an adjoining owner for violation of a party-wall agreement by the fact that, as mortgagee, and while the adjoining owner also held the equity in the mortgaged premises, he knew that the violation was taking place, and failed to object thereto.

5. To replace a party wall by a wall in which numerous openings occur is a violation of the party-wall agreement.

6. A party to a party-wall agreement who replaces the wall by one in which numerous openings occur, using therefor the original foundation and part of the old wall, for one-half of which the other party had already paid, is not entitled to insist on reimbursement for half of the expense of reconstruction before being compelled to close the openings and make the wall conform to the agreement.

7. A party to a party-wall agreement who replaces the original wall by one in which occur numerous openings, and from which window caps and bases project, cannot resist the other party's suit to compel a solid wall by pleading that such other party does not intend to use his property for building purposes.

8. A party to a party-wall agreement is entitled to the intervention of equity to restrain its violation by the other party's replacing the original wall by one in which numerous openings occur, and is not remitted to an action at law for damages.

9. A decree in an injunction suit to restrain the violation of a party-wall agreement, which enjoins the defendant from maintaining openings in the wall as reconstructed by him, and from interfering with the complainant in closing them up, is not objectionable as wrongly depriving the defendant of the possession of his property.

10. An injunction restraining a party to a party-wall agreement from maintaining openings in the wall as reconstructed by him, and from interfering with complainant in closing them up, is a proper remedy for such a violation of the party-wall agreement.

Appeal from Superior Court, Cook County; Axel Chytraus, Judge.

Suit by Harry Darlington, trustee, against Warren Springer. From a decree for complainant, defendant appeals. Affirmed.

This is an appeal from a decree of the superior court of Cook county, and the following statement of facts is taken, in part, from the recitals in the decree of that court, which recitals are accurate so far as we have adopted them:

The appellee, complainant below, claims the title in fee simple to the property at 175 and 177 South Canal street, in the city of Chicago, which is known in this litigation as "complainant's lot." Appellant owns the property immediately adjoining on the north, at 171 and 173 South Canal street, and which is referred to herein as "defendant's lot." On May 21, 1889, Hibbert J. Lehman became the lessee of complainant's lot for the term of 99 years, and afterwards, on the 18th of March, 1890, became the owner thereof in fee simple. On August 23, 1889, appellant was, and at all times since has been, the owner of defendant's lot, and on that day he and Lehman entered into a written contract providing for the erection of a party wall between them 30 inches in thickness, 26 inches of which was to stand on the complainant's lot and 4 inches of which was to stand on the defendant's lot. It was further provided that Lehman should erect this wall in the first instance, and that if Springer thereafter desired to use it he should pay one-half of the value of so much of the wall, in length, as he desired to use; and the contract also contained a provision that, if it became necessary to repair or rebuild the whole or any portion of the party wall, the expense was to be borne equally by them. The contract is perpetual, and is a covenant running with the land.

On the 8th day of March, 1890, Lehman conveyed complainant's lot to Frederick H. Winston, trustee, to secure the payment of \$275,000. During that year he erected a six-story brick building covering the whole of the lot, and on November 15, 1890, conveyed the lot, by warranty deed, to appellant. Shortly after the completion of the building on complainant's lot, appellant erected a building on defendant's lot, using that part of the party wall extending 100 feet from Canal street. Both buildings were destroyed by fire on November 21, 1895. The \$275,000 debt remained unpaid. A foreclosure suit was brought, and such proceedings were had that appellee and his co-trustee, who has since died, received, on September 7, 1899, a deed, purporting to convey to them complainant's lot in fee simple, executed by Walter Butler, a special commissioner appointed by the circuit court of Cook county to execute the decree in the foreclosure proceedings.

In April, 1896, the appellant commenced, and shortly thereafter completed, the erection of a ten-story manufacturing building upon defendant's lot, and used a part of the original party wall which was still standing, being the east part of the wall, and used the foundation of the original party wall, as

first built, throughout its entire length. Starting at Canal street, and running thence west a distance of 40 feet, this wall, as constructed by Springer, is a solid wall, without openings. There is then an opening of 9 feet 6 inches in the wall. Continuing on west, there is then 2 feet more of wall, and then another opening of 9 feet 6 inches in the wall. These openings are continuous from the foundation to the highest story of the building, and with glass fronts facing complainant's lot. In the remainder of the wall, extending on west a distance of approximately 75 feet, there is 1 door and 50 window openings—5 windows on each floor of the 10 stories of the building, each having a stone cap and sill which project several inches over the south face of the party wall.

When appellant constructed this building the foreclosure suit was pending, and he was the owner of the equity of redemption in complainant's lot, and so continued to September 7, 1899, at least. After appellee received his deed he found Springer in possession of the lot. Springer then claimed a perpetual easement in complainant's lot of an alleyway 16 feet 5 inches wide, and also claimed a perpetual easement across the lot for steam pipes extending through complainant's lot, for the purpose of heating the building on defendant's lot and heating two other buildings owned by appellant in that immediate vicinity. For the purpose of preventing any interference with these alleged easements, appellant filed a bill for an injunction in the circuit court of Cook county, and a temporary writ issued on November 19, 1901. Afterwards, upon a hearing, the injunction was dissolved and the bill dismissed for want of equity. Appellant prosecuted an appeal to this court, where the decree was affirmed at the October term, 1902. Springer v. Darlington, 198 Ill. 121, 64 N. E. 709.

On November 25, 1902, appellee filed the bill in the present litigation in the superior court of Cook county, averring the foregoing facts, charging that appellant, if he desired to rebuild said party wall, should have rebuilt it as a solid wall throughout its entire length, and praying that the openings in the wall be declared a nuisance; that defendant be enjoined from maintaining any of said openings in the wall; that the complainant be decreed the right to close all such windows and openings and make the wall a solid wall; and that thereafter an accounting be had between appellee and appellant.

Springer answered, denying, upon various grounds, that appellee was entitled to the relief sought, and averring, among other things, that appellee took no title to complainant's lot under his deed from Butler as special commissioner. A hearing was had. The court found the wall in question had been rebuilt by Springer under the party-wall agreement; and that he should have built a solid wall for its entire length and

height; that the openings therein, and the projecting window caps and sills, are a continuous nuisance to the complainant; that the complainant has the right to close all such windows and openings, remove the projecting caps and sills, and make the wall a solid wall for use as a party wall. Springer is enjoined from maintaining the openings, and from interfering with the complainant in closing the same up. The court retains jurisdiction of the cause for the purpose of taking an account between the parties after the openings shall have been closed up by the appellee, when the court will determine what amount, if any, is to be paid by either party to the other on account of the construction of such wall. Springer appeals to this court.

W. N. Gemmill, for appellant. Loesch Bros. & Howell, for appellee.

SCOTT, J. (after stating the facts). Appellant denies that appellee is the owner of complainant's lot, for the reason that in the decree of foreclosure, instead of directing the master in chancery to make sale, and, after the expiration of the period of redemption, a deed, in the event that the debt was not paid and no redemption had, the court appointed Walter Butler a special commissioner to perform these duties, and the sale was made and the deed executed by him as commissioner; and for the further reason that there is no evidence in this record that the sale in foreclosure was ever approved by the circuit court. If either of these positions be correct, appellant would be the owner of the freehold claimed by appellee, as appellant was the holder of the equity of redemption in the lot at the time of the foreclosure. This, however, is in the nature of a collateral attack upon the decree of the circuit court. Whether the powers conferred upon the special commissioner were beyond those which the court could vest in such an officer is a question to be determined in a proceeding to review the decree in the foreclosure suit. So far as the absence of an order of confirmation is concerned, no such objection was made when the deed was offered. It cannot be urged for the first time in this court.

It is then insisted that, as this wall had been constructed more than six years prior to the beginning of this suit, complainant's laches bars the relief sought, and that Darlington must have known at the time the wall was constructed that it was being constructed with openings, and that his silence then amounts to consenting that the wall should be so constructed. So far as the delay is concerned, it is apparent that when appellee received his deed Springer was asserting the right to use so much and such parts of complainant's lot that appellee might well delay bringing any suit in refer-

ence to the party wall until he ascertained the extent of his interest in the property. The claims of appellant in that regard were finally denied by this court in October, 1902, and this suit was begun the following month. We think reasonable diligence was exercised by appellee. When the wall was constructed appellant was the owner of the equity of redemption. If he paid the mortgage debt, as he had a right to do, his acts in constructing the wall with the openings in it could never have been questioned. He was building a wall on his own land. The doctrine of estoppel does not apply.

Other objections urged to the decree are that appellee had an adequate remedy at law; that the injunction is not preventive in its character, and therefore is beyond the power of a court of equity; that Springer is the owner of the entire wall until he is paid for one-half, and that the decree is therefore wrong in permitting any interference therewith until Springer shall have been paid one-half the value of the wall as it now stands; that no wrong is now threatened by appellant, and that the wrong, if any, has been long since inflicted, and the court is powerless to forbid the doing of an act already done; that to permit appellee to rebuild the wall in the manner authorized by the decree is to take the possession of appellant's property from him and place such possession in the hands of appellee; and that no injury is shown to appellee, for the reason that he does not aver or show that he intends to erect a building on this lot.

The law in reference to party walls, as gathered from the decisions of the states of the Union, is clear and well defined. Where parties contract with each other for the maintenance of a party wall, a wall solid throughout its entire length and height is contemplated, unless the contract otherwise provides. The reason for this is obvious. Each party is the owner of that part of the wall which stands on his own land, subject to the easement of the other. This easement is the right of each to have his building supported by the portion of the wall which stands on the land of the other. This easement is to have the support of a wall—not of a wall weakened by such openings therein as the other party may see fit to make. If one party has a right to place openings in a wall, so has the other, and the exercise of such rights would lead to the loss of all benefit which should be derived from a party-wall contract. 22 Am. & Eng. Ency. of Law (2d Ed.) p. 246; Sullivan v. Graffort, 35 Iowa, 531; Normille v. Gill, 159 Mass. 427, 34 N. E. 543, 38 Am. St. Rep. 441; Harber v. Evans, 101 Mo. 661, 14 S. W. 750, 10 L. R. A. 41, 20 Am. St. Rep. 646; Weems v. Mayfield, 73 Miss. 287, 22 South. 892; Traute v. White, 46 N. J. Eq. 437, 19 Atl. 196; Vollmer's Appeal, 61 Pa. 118; Milne's Appeal, 81 Pa. 54; Bloch v. Isham, 28 Ind. 37, 92 Am. Dec. 287.

Graves v. Smith, 87 Ala. 450, 6 South. 308, 5 L. R. A. 298, 13 Am. St. Rep. 60; Dauenhauer v. Devine, 51 Tex. 480, 32 Am. Rep. 627; Cutting v. Stokes, 72 Hun, 376, 25 N. Y. Supp. 385.

Appellant, in constructing the wall in the manner in which he did, violated the rights of appellee under the party-wall contract. Nor does it answer to say that appellee shall have no relief until he pays one-half the expense of the wall constructed. In the first place, it includes a part of the old wall, and is constructed on the old foundation, one-half of which was paid for by Lehman, to whose rights appellee has succeeded. In the next place, to require appellee to pay one-half of the expense of such a wall as is now built between the parties is to require him to pay for a structure erected, not in accordance with the contract he made, but in accordance with the desire and to answer the purposes of the appellant alone. It is true, it does not appear what character of building, if any, will be erected on the complainant's lot. That is a matter of indifference. Appellee's right is to have a compliance with the terms of the contract. It is not for appellant to say he will not comply because Darlington does not intend to use the property in a certain way. This wall, built where it is, in the manner it is built, necessarily depreciates the value of appellee's property. It is a private nuisance of a continuing character. No excuse whatever is offered for causing the caps and bases of the windows to project beyond the wall. A wall built on this foundation in accordance with the terms of the contract would add to the value of the property. Darlington is entitled to have the aid of equity to place the wall in the condition the contract required it should be. No other remedy is adequate. To compel him to resort to a suit for damages is to say that he shall be deprived of his real property without his consent by a private individual and must be content with such compensation as a jury will give him. Appellant does not possess the power of eminent domain. Appellee had, and has, the same right to build a wall on this foundation that appellant possessed; consequently there is no merit in the contention that the decree wrongfully deprives appellant of the possession of his own property.

In Corcoran v. Nailor, 6 Mackey, 580, it was said: "It is no answer to say that the dominant owner stands ready to fill up the openings whenever the servient owner desires to use the wall as a party wall. That very statement admits that it had not meantime been a party wall, and the servitude only renders lawful occupation by an actual party wall. The occupation meantime by what is not a party wall is not the enjoyment of an easement, but is simply a trespass. * * * The injured party is entitled, therefore, to a discontinuance of the injury, and he is entitled to relief in equity. An ac-

tion of ejectment would be an inadequate remedy, for after recovery he would be at the cost and trouble of removing so much of the wall as stood on his land, or filling up the openings. So, too, repeated actions of trespass would be an inadequate remedy. We repeat, therefore, that the complainant is entitled to relief in equity. He has a clear right to require that this illegal structure shall be conformed to the law authorizing party walls, and this can be done only by closing these openings, and by doing so in such manner as shall render the filled-up spaces suitable for support and for all the purposes contemplated by the right of joint use. The brick-work used in closing the openings should not be a mere patch, but should connect with the adjoining wall in the usual manner of a continuous wall. To this end a mandatory injunction is the proper remedy. See High on Injunctions, §§ 332, 792, 852; Phillips v. Bordman, 4 Allen, 147; Dauenhauer v. Devine, 51 Tex. 480 [32 Am. Rep. 627]; Sullivan v. Graffort, 35 Iowa, 531."

In Harber v. Evans, supra, it was said: "Another objection raised to the validity of the ruling below is that the petition does not allege that the plaintiff ever intends to use the party wall. This is true, but there are several answers to that objection. Whether plaintiff intended to use the wall or not is quite immaterial, since, under the contract, he had acquired a valuable right which was the subject of sale and transfer, which right was worthy of protection, and should be protected by a court of equity."

The views expressed in the Corcoran Case and in the Harber Case find support in the following decisions: Everly v. Driskill, 24 Tex. Civ. App. 413, 58 S. W. 1046; De Baun v. Moore, 32 App. Div. 397, 52 N. Y. Supp. 1092; Bartley v. Spaulding, 21 D. C. 47; St. John v. Sweeney, 59 How. Prac. 175; Vansyckel v. Tryon, 6 Phila. 401; Sullivan v. Graffort, supra; Vollmer's Appeal, supra.

The relief granted in Corcoran v. Nailor, supra, and in Bartley v. Spaulding, supra, was of the same character as that decreed in the case at bar. We regard the remedy here awarded as appropriate and fully warranted by precedent.

The decree of the superior court will be affirmed.

Decree affirmed.

(207 Ill. 280)

SEIDSCHLAG v. TOWN OF ANTIOCH.

(Supreme Court of Illinois. Feb. 17, 1904.)

HIGHWAYS — DEDICATION — OBSTRUCTION —
FENCES — PENALTIES — NOTICE — ACTIONS
— EVIDENCE — INSTRUCTIONS.

1. Where, in an action to recover a penalty for obstructing a public road, the appeal record did not show that a written complaint was not filed, an order overruling a motion to dismiss on that ground could not be reviewed.

2. The building of a fence within the limits of a public highway is an obstruction thereof, within Road Act (2 Starr & C. Ann. St. 1896, c. 121) § 71, imposing a penalty for obstructing a public road, etc., whether the fence is built across the road, or longitudinally therewith, within its limits.

3. Road Act (2 Starr & C. Ann. St. 1896, c. 121) § 71, provides a penalty of not less than \$3 nor more than \$10 for encroaching on a public road with a fence, and another penalty, not to exceed \$3 a day, for each day an obstruction so unlawfully placed is allowed to remain after the offender has been ordered by any of the highway commissioners to remove the same. *Held*, that a person charged with violating such section is not entitled to notice to remove the obstruction, as a condition precedent to the right to recover the penalty provided for obstructing the highway, but is entitled to notice before a liability for permitting the obstruction to remain would accrue.

4. Where defendant, in an action to recover a penalty for obstructing a highway, contended that the place where the fence constituting the obstruction was erected was not within the limits of the highway, and that no highway lawfully existed there, but many witnesses testified to the existence of a public road at the place in question by continuous user for a longer time than was required to establish a public road by prescription, and there was also testimony to show dedication of the land for use as a public highway, which was contradicted, whether the place in question was a highway was a question for the jury.

5. In a suit to recover a penalty for obstructing a highway, a portion of the records of the highway commissioners, showing the lines of a road which had been petitioned for, surveyed, and ordered by the commissioners laid out in 1862, was admissible on an issue as to the actual situs of the highway as used such time, though the road was not legally established by the proceedings then had.

6. In an action for a penalty for obstructing a highway by a fence alleged to have encroached thereon, it was proper for the court to limit the evidence as to the location of the traveled track of the road to the point of encroachment.

7. A dedication of land to public use for a highway may be implied from the acts of the owner indicating an intention to appropriate it, and, where the owner's unequivocal acts and conduct tend to show a dedication, he cannot subsequently deprive them of such effect by his testimony that he did not intend to dedicate the land.

8. In an action for obstructing a highway, a requested instruction that, if the highway attempted to be laid out by commissioners was not opened within five years thereafter, the proceedings would cease to have legal effect, and that the ground would revert to and become the property of the owner, was properly modified so as to charge that the effect of failure to open the road within five years would only invalidate the proceedings by the highway commissioners.

Appeal from Appellate Court, Second District.

Action by the town of Antioch against August Seidschlag. From a judgment of the Appellate Court (109 Ill. App. 291) affirming a judgment of the Circuit Court affirming a justice's judgment in favor of plaintiff, defendant appeals. Affirmed.

R. W. Coon, for appellant. O. T. Heydecker and Charles Whitney, for appellee.

BOGGS, J. This was a suit brought before a justice of the peace, in the name of the people of the town of Antioch, against appellant, under the provisions of section 74 of chapter 121, entitled "Roads" (2 Starr & C. Ann. St. 1896, p. 3585), to recover the penalty of not less than \$3 and not more than \$10 provided by section 71 to be forfeited for obstructing a public road by building a fence therein. Trial was had, and judgment in the sum of \$5 and costs of the suit was rendered against the appellant. He prosecuted an appeal to the circuit court of Lake county, and from an adverse judgment in that court has perfected this appeal.

The style of the plaintiff was changed to "The Town of Antioch" in the circuit court. The appellant there moved to dismiss the suit for want of jurisdiction, but the motion was denied. The motion is preserved by a recital in the bill of exceptions, but the grounds thereof are not recited. Counsel for appellant says the action should have been commenced by a complaint in writing, and that the ground of the motion was that no such complaint was filed. The record does not contain a complaint. The certificate of the clerk does not, however, certify that the record is complete. The certificate is, that the transcript contains a copy of "all the papers filed in the cause as called for in the præcipe filed herein." A copy of the præcipe filed by counsel for appellant is incorporated in the record, from which it appears the clerk was not asked to make a complete copy of all the papers in the case, but only of certain specified papers; the complaint not being one of the papers so specified. We are to presume the trial court ruled correctly on the motion until the contrary is made to appear, and, as the record is silent as to whether a complaint was filed or not, we must accept the decision of the trial court as being correct. As it is not shown a written complaint was not filed, the question whether a complaint of that character is necessary, is not presented for decision.

Section 71 of the road act provides for two penalties, viz., (1) a penalty of not less than \$3 nor more than \$10 for obstructing a public road by felling trees, etc., or "encroaching upon the same with a fence"; (2) a penalty of not exceeding \$3 per day for each day an obstruction so unlawfully placed in the public road shall be allowed to remain there after the offender has been ordered by any one of the highway commissioners to remove the same. Building a fence within the limits of a public highway is an obstruction, within the meaning of said section 71, whether the fence is built across the road, or longitudinally therewith, and within the road. *Boyd v. Town of Farm Ridge*, 103 Ill. 408. One who has obstructed a public road in violation of the provisions of said section 71 is not entitled to notice to remove the

¶ 2. See Highways, vol. 25, Cent. Dig. § 418.

same, as a prerequisite to the right to sue for and recover the penalty of not less than \$3 nor more than \$10 provided by the statute for that act. Liability to the penalty of not exceeding \$3 per day for each day such an obstruction is allowed to remain does not attach until a notice or order to remove the same has been given. The action here was for placing an obstruction in the road, and no notice or order to remove was essential to the right of recovery.

The court properly overruled the motion presented by the appellant at the close of all the evidence to instruct the jury to return a verdict in his favor. That the appellant built a fence at the place in question was not denied. His contention was that the place was not within the limits of a public highway; that no highway lawfully existed there. A great many witnesses were produced, and the testimony of a number of them tended to prove the existence of a public road there by continuous user by the public for a much longer period of time than is required to establish a public road by prescription. There was also testimony tending to show a dedication of the land for use as a road to the public by the appellant. There was contradictory testimony, but it was for the jury to determine as to the truth of the controversy.

It was not error to admit in evidence a portion of the records of the highway commissioners which showed the lines of a road which had been petitioned for, surveyed, and ordered by the commissioners laid out in 1862. It was not claimed a public road had been legally established by the proceedings which had been taken by the highway commissioners, nor was the record introduced for that purpose. There was a controversy as to the actual situs of the highway as used in those early years. Testimony was produced tending to show that a road had been actually staked off and laid out on the route described in the petition and order produced in evidence, and had been used by the public, and the description in the plat and survey and order tended to fix the exact location of the line of travel thereon. The court, at the request of the appellant, granted an instruction advising the jury clearly as to the purpose for which this evidence was admitted, and limiting its competency and applicability, and, further, that it must not be regarded as conclusive or record evidence of the actual situs of the road, but that the actual location of the traveled route should be determined from all the evidence.

The plat or diagram prepared by James Anderson, county surveyor, was properly received in evidence. He testified it correctly represented the location of the objects marked thereon, and certain measurements made by him of distances. It was rendered admissible as part of the testimony of the witness. *Wahl v. Laubersheimer*, 174 Ill. 333,

51 N. E. 860; *Justen v. Schaaf*, 175 Ill. 45, 51 N. E. 695.

We think the court properly limited the evidence as to the location of the traveled track of the road to the point where the fence had encroached on the highway. If the travel had been continuous there, it was of no consequence that at some other points in the line of the road the travel had deflected to some extent from the thread of the road to avoid obstructions or for similar reasons.

The complaint the court refused to permit the appellant, in order to rebut an intent to dedicate, to testify as to his intent in moving his fence in 1882, is not well taken. The questions to which objections were sustained called for statements made by others—merely hearsay; and the answers made by appellant which were stricken were statements of others made to him, or of what he had learned from other persons. The court did not deprive him of the right to testify as to his intent.

We cannot determine whether a plat or diagram offered in evidence by the appellant and rejected should have been received, for the reason the instrument is not preserved in the bill of exceptions. It, however, seems clear from the testimony of the maker of the plat that the details of the plat and much that appeared thereon had been obtained from others, and was not within the knowledge of, nor was it the result of the personal examination of the premises by, the draftsman of the diagram.

We do not think the judgment should be reversed because of the ruling of the court in the matter of instructing the jury. The criticism of instruction No. 1 given for appellee is that it told the jury a dedication of lands to public use may be by acts or words, that no words of dedication were proven, and that "no acts not accompanied by words can show an intent to dedicate, except permitting the land to be used for a road, and such permission must continue for twenty years." The law will imply an intention to dedicate land to the public use from any acts of the owner which indicate an intention to so appropriate it, and, if the apparent dedication is accepted by the public, the dedication becomes complete. *Elliott on Roads & Streets*, § 123. Whether there was an intent to dedicate is to be determined upon consideration of the testimony of the landowner as to his intent, together with his acts and conduct. His testimony as to his intent will not prevail against unequivocal acts and conduct inconsistent with his intent as testified to, if the public relied and acted on his act. The public may rely on that which the landowner has done as indicative of his intent; and if his conduct has been such as to lead an ordinarily discreet and thoughtful man to infer an intention to make a dedication, and the public rely upon such acts as a dedication, and accept the same for public use, and use

it as a public road, the dedication becomes complete, and cannot be recalled by the owner. *City of Chicago v. Chicago, Rock Island & Pacific Railway Co.*, 152 Ill. 561, 88 N. E. 768; *Elliott on Roads & Streets*, §§ 123, 124. When a dedication is to be clearly implied from the acts and conduct of the owner, the dedication becomes effectual at once, as soon as accepted by the public, and no definite time of user is requisite. *Elliott on Roads & Streets*, § 163; *City of Chicago v. Wright*, 69 Ill. 318; *Moffett v. South Park Com'rs*, 188 Ill. 620, 28 N. E. 975; *Fairbury Union Agricultural Board v. Holly*, 169 Ill. 9, 48 N. E. 149.

Instruction No. 2 was designed to advise the jury of the different modes by which a public highway may be acquired, dedication by the owner being one of such modes. The complaint is that there was no evidence of user of the road at the point in the road where the fence was built for the length of time necessary to create a road by prescription; hence, in the view of counsel, it was error to advise the jury a public road might have been acquired by dedication. The objection to instruction No. 3 is "that, unless an intention to dedicate is manifested by writing or declarations, possession by the public for twenty years or over is necessary to constitute a dedication." What has been said in answer to the criticisms upon instruction No. 1 disposes of the complaints as to instructions Nos. 2 and 3.

The objections that instructions Nos. 6 and 9 were given for appellee, and instruction No. 8 refused for the appellant, arise out of the same erroneous views of counsel that user for some definite period of time is necessary to complete the dedication of lands to public use as a public road.

The third instruction tendered by the appellant asked the court to instruct the jury that, if the highway attempted to be laid out by the highway commissioners in 1862 was not opened within five years thereafter, the proceedings ceased to have legal effect, and that the ground "would revert to, and become the property of, the owner." The court modified the instruction to the effect that the failure to open the road within five years would render the proceedings by the highway commissioners null and void. If the public had acquired a road by dedication, the ground on which the road was located would not become the property of the appellant, as the court was asked to charge the jury by the instruction as originally drawn. The instruction ignored the claim of a road by dedication, and the proof in support thereof; and the modification was necessary, or at least highly proper, in order the jury might not be misled.

We think the record free from error of reversible character, and the judgment must therefore be, and it is, affirmed. Judgment affirmed.

(308 Ill. 35)

OWEN v. VILLAGE OF BROOKPORT et al.
(Supreme Court of Illinois. Feb. 17, 1904.)

STREETS—DEDICATION—STATUTORY DEDICATION—COMMON LAW—EXTENT—INTENTION—EVIDENCE—ACCEPTANCE—RIGHTS OF PUBLIC—RIGHTS OF DEDICATOR—ESTOPPEL—STREETS—OWNERSHIP OF FEE—NAVIGABLE RIVERS—OWNERSHIP OF BED—DEEDS—AFTER-ACQUIRED TITLE—LANDLORD AND TENANT—ESTOPPEL TO DENYING TITLE.

1. Where a plat was filed and recorded, and lots were sold by reference thereto, there was a common-law dedication of the streets designated thereon, although there was no statutory dedication because of failure to acknowledge the plat.

2. Where there is a common-law dedication of streets, title up to the center of the street is vested in the adjoining owner, subject to the easement of the public.

3. Where the proprietor of land and maker of a plat, by which streets designated thereon are dedicated to the public by a common-law dedication, sells the lots fronting on the street, he ceases to be the owner in fee of the street up to the center thereof in front of the lots sold.

4. An acceptance is necessary to make a complete statutory dedication, and, unless accepted, the fee to the street does not vest in the municipality, but remains in the original proprietor or the grantees of lots bordering on the street.

5. A dedication is purely a question of intention, and may be made by survey and plat alone, without any declaration, when it is evident from the face of the plat that it was the intention of the grantor to set apart certain ground for public use.

6. Evidence held to show an intention on the part of dedicators of a street that it should extend to the river along which it ran.

7. Where a town was incorporated by act of the Legislature, the right to control a street previously dedicated therein passed to the corporate authorities, as representing the inhabitants.

8. Where, after the dedication of a street, the dedicators divided the lots among themselves, and sold them with reference to the street, the street thereby became so dedicated as to be forever open for the use of the public as a highway, free from all claims or interference of the proprietor and those claiming under him inconsistent with such use, and the proprietor and his grantees were estopped to deny the existence of the street.

9. The proprietor of certain lands platted the same, recorded the plat, and sold lots with reference thereto. One street ran parallel with a river. Afterwards a town was incorporated, and it kept in repair three traveled roads on this street, all leading down to the river. Later the street was graded and graveled, the town putting in \$400 of \$500 worth of work. The town was subsequently incorporated under the general incorporation act, and since that time its authorities exercised control over the river front, and granted track privileges to a railroad, and wharf and ferry privileges to other persons for 50 years. The property was traveled by the public, and used uninterruptedly as a common highway. Held, that there was an acceptance of the dedication by the town.

10. A street located along a river front extends to the middle of the river.

11. Complainant in partition suit must show ownership of an undivided interest in the property sought to be partitioned.

12. Under Hurd's Rev. St. 1901, c. 30, § 7, providing that, on the acquisition of title to land by one who had previously sold the same, his title so acquired should be deemed held in trust for the use of his grantee, where a deed recited

¶ 1. See Dedication, vol. 15, Cent. Dig. § 61.

that the grantor owned a fee-simple title, and conveyed that title and the land, as well as the grantor's interest in the land, and also covenanted that the grantee should hold the same free and discharged from all claims of the grantor or persons claiming under him, the grantor could not set up an after-acquired title against the grantee, and could not convey such after-acquired title to another.

13. One who accepts a lease from a town, which gives him the privilege of landing a ferryboat at a landing on a street, is estopped during the existence of the tenancy from disputing the validity of the title of the town to the street.

14. The grantee of a lessee is bound equally with the lessee by the estoppel to dispute the landlord's title.

15. As a general rule, limitations do not run against a municipal corporation in respect to streets or property held for public use, and adverse possession of such property, for however long continued, is of no effect.

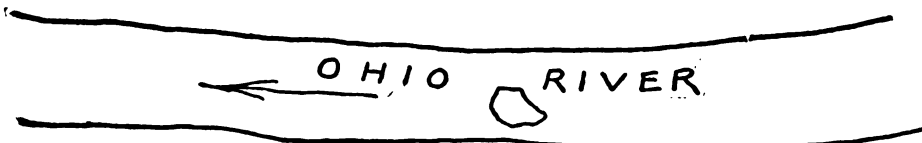
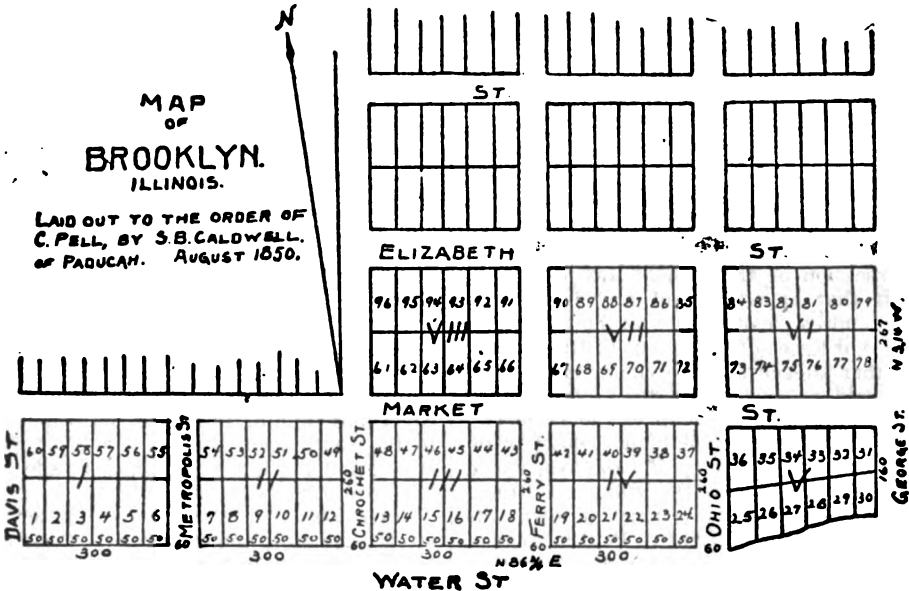
Appeal from Circuit Court, Massac County; A. K. Vickers, Judge.

Bill for partition by James Owen against the village of Brookport and the Illinois Central Railroad Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The following is the plat referred to in the opinion:

This is a bill for partition, filed in the circuit court of Massac county on March 11, 1902, by the appellant against the appellees, for the partition of a piece of land described in the bill as follows: "One-half of a tract or parcel of land, situated in the county of Massac and State of Illinois, in front of the town of Brooklyn and bounded as follows, viz.: Commencing at lot No. 1 and running to lot No. 30 in length, and commencing at low-water mark and running up to First or Front street of said town in breadth, together with all and singular the buildings and improvements, rights, privileges, immunities and appurtenances, thereunto belonging or in any wise appertaining." The bill alleges that complainant below (appellant here) was the owner of an undivided half of this tract, and that the heirs and grantees of one James Campbell, deceased, are the owners of the other undivided half thereof. Among the defendants below were several minors, for whom guardians ad litem were appointed, and filed answers. All the other defendants, except the village of Brookport and the Illinois Central Railroad Company, were defaulted. Answers were filed by the village and the railroad company, and replications

EXHIBIT "B." Filed for record September 28, 1850. John B. Hicks, Clerk.



were filed to such answers. The cause was referred to a master in chancery to take evidence, who reported back the evidence, oral and documentary. On September 9, 1903, a decree was entered, dismissing appellant's bill of complaint, and taxing the costs of the defendants against the complainant. The present appeal is prosecuted from such decree of dismissal.

The bill alleges that the village of Brookport "claims or pretends to claim some right, title, or interest in and to said tract or parcel of ground," and that the Illinois Central Railroad Company "claims some conditional right of easement or passageway over and through said tract or parcel of land by virtue of some resolution or ordinance of said village of Brookport," etc. In its answer the Illinois Central Railroad Company denied that the appellant (complainant below) had any title at all, or any right to bring suit for partition of the land described in the bill. It denied that Valentine Owen, the father of appellant, was ever in possession of the land as stated in the bill, and denied that any person or persons had any title or right to possession of said lands, except the village of Brookport and the Illinois Central Railroad Company. It alleged that the village of Brookport had the right of possession, except so far as it had granted the right of way to the railroad company to lay down its railroad tracks, and further alleged that the village, having the right to the possession and use of the said real estate, by its ordinances duly and regularly passed, gave to the railroad company the right to place its tracks on said land. In its answer the village of Brookport denied that Valentine Owen, the appellant's father, was ever at any time the owner in fee of an undivided half of the land described in the bill, or was in possession of the land at any time, and denied that appellant had any interest in said premises, "except such as he holds as a licensee or lessee of the village of Brookport." It further alleged that the village is the owner of said premises, and denies that appellant is entitled to partition of the same.

Appellant here (complainant below) introduced in evidence a map of Brooklyn, which is conceded to be now the village of Brookport, showing that said village or town was laid out, upon the order of C. Pell, in August, 1850, which plat was filed for record on September 28, 1850. The plat shows a division of the ground upon which the town or village is located into streets, blocks, and lots, which ground is situated upon the north or Illinois side of the Ohio river. The southernmost street in the town, running east and west, is designated upon the map as "Water Street." The map or plat does not give any figure or figures, showing the width of Water street; but on the south side of the space marked "Water Street" is a meandering line, intended to designate the north bank of the Ohio river. On the north side

of Water street are located certain blocks, numbered 1, 2, 3, 4, and 5; No. 1 being the west block, and No. 5 the east block. Each of these blocks is divided into six lots. All the lots front south upon Water street, which runs from west to east. The westernmost lot in block 1 is numbered lot 1, and the easternmost lot in block 5 is numbered lot 30. On the west side of block 1, Davis street runs from Market street, on the north, to Water street, on the south; between blocks 1 and 2, Metropolis street runs from Market street, on the north, to Water street, on the south; between blocks 2 and 3, Crocket street runs from Market street, on the north, to Water street, on the south; between blocks 3 and 4, Ferry street runs from Market street, on the north, to Water street, on the south; between blocks 4 and 5, Ohio street runs from Market street, on the north, to Water street, on the south. East of block 5 is a street designated as "George Street." Market street, which runs east and west, and on the north side of blocks 1, 2, 3, 4, and 5, is just south of blocks 8, 7, and 6, and there are no figures on the map to indicate its width. Elizabeth street runs east and west north of blocks 8, 7, and 6, but there are no figures to designate its width.

Campbell & Campbell and S. Bartlett Kerr, for appellant. C. L. V. Mulkey, for appellee village of Brookport. W. W. Barr and Courtney & Helm (J. M. Dickinson, of counsel), for appellee Illinois Central Railroad Company.

MAGRUDER, J. (after stating the facts). The property in controversy in this case is the levee or water front in Brookport, Ill., and comprises the sloping bank of the Ohio river, situated in front of the town. The proof tends to show that at times the Ohio river rises, so that the north line of the river upon the river front of Brooklyn shifts. In time of high water it is further north than in time of low water. The space of ground between the tier of lots, commencing at lot No. 1 and running to lot No. 30, which front to the south upon the north side of Water street, and the low-water mark of the river, has no other designation upon the map than "Water Street." Water street is the first street back from the Ohio river, on the north bank of which the town is located. It is the street that runs up and down the river immediately south of and in front of the first tier of town lots and blocks, as designated on the plat. Whether or not Water street embraces the whole of the space between this tier of lots and the river is one of the disputed points in the case. In other words, the main issue is the location of the south boundary line of Water street; that is to say, whether the boundary line is on top of the bank, as it is called in the arguments of counsel, or at the foot of the bank. The strip of ground in controversy is about 1,600 feet

long, and varies in width from 100 feet to 150 feet.

1. The plat which was made in August, 1850, and recorded on September 28, 1850, was not acknowledged as required by the statute, and therefore there was no statutory dedication, by the making and recording of the plat, of the land embraced within the streets designated thereon. But there was here a common-law dedication of such land. If the plat or map had been made in accordance with the statute, and properly acknowledged and recorded, so that it would operate as a statutory dedication, the fee in the streets or land dedicated would have been vested in the corporation in trust for the public. But the plat not having been acknowledged in conformity with the statute, so that it operated as a common-law dedication only, the title to the streets vested in the adjoining owners, subject to the easement of the public, and the title of the adjoining owners would extend to the center of the street. *Sanitary District of Chicago v. Adam*, 179 Ill. 406, 53 N. E. 743; *Mathiesen & Hegeler Zinc Co. v. City of La Salle*, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; *Village of Vermont v. Miller*, 161 Ill. 210, 43 N. E. 975; *Jordan v. City of Chenoa*, 166 Ill. 580, 47 N. E. 191.

In *Thompson v. Maloney*, 199 Ill. 276, 65 N. E. 236, 93 Am. St. Rep. 133, we said (page 282, 199 Ill., page 238, 65 N. E., 93 Am. St. Rep. 133): "In such cases the title to the streets, alleys, etc., is in the owner of the tract platted, and there remains so long as he retains the ownership of all the lots shown on the plat. If, however, he sells a lot, describing it in the deed by reference to the plat, the title to the soil of the street in front of the lot to the center of the street, by operation of law, attaches to the fee of the lot, and the proprietor of the plat ceases to be the owner in fee of such portion of the street." The proof shows that, about the time the plat was made, Charles Pell was the owner of the ground platted, either alone, or as tenant in common with one Thomas G. C. Davis. It is stipulated between the parties that Charles Pell, in his lifetime, conveyed lots fronting on Water street with reference to the plat offered in evidence; describing some of them, as fronting on Water street, and others by simply calling the lot and block. It appears from the testimony in the case that the lots fronting south on Water street are owned by different parties, and that houses have been erected upon many of them. It follows that the title to the soil of Water street in front of the tier of lots abutting thereon, as above described, to the center of that street, would attach by law to the fee of the lots. Necessarily, therefore, Charles Pell, the proprietor and maker of the plat, ceased to be the owner in fee of Water street to the center thereof in front of the lots in question. In *Clark v. McCormick*, 174 Ill. 164, 51 N. E. 215, we said (page 174,

174 Ill., and page 219, 51 N. E.): "Each purchaser of a block in the subdivision is presumed to have bought in view of the system of streets and ways designed by the proprietor of the plat to provide means of ingress and egress to and from all parts of the platted ground, not only for the use of the owners and occupants of the lots or blocks, but of all who might desire to pass along such streets and ways. The arrangement of streets and ways formed a part of the consideration of the purchase of each block or part thereof, not only as between the original proprietor of the plat and those who purchase from him, but also as between all subsequent vendors and vendees. The original proprietor sold to his vendee the rights and privileges of the streets, and each subsequent vendor passed such rights to his vendee. The law implies mutual agreements between all such parties that the streets shall always remain open for use as platted. * * * The fee to the strips in question is attached to the fee in the blocks upon which the streets abut, and rests in the owners of such blocks. It is not a title vesting in the owners of the blocks the ownership of the strips as separate, independent property, which may be detached from and sold distinct from the blocks, but it passes to any subsequent holder of the blocks."

In *Davenport Bridge Railway Co. v. Johnson*, 188 Ill. 472, 59 N. E. 497, we held that, where a plat is not authenticated as required by law, the fee to the streets does not pass to the municipality, but that the execution and recording of the plat operates as a conveyance to the abutting lot owners of the fee of the street to the center thereof, and that this fee attaches to the ownership of the lots, and passes with each conveyance of the lots, and is burdened with the easement of use in the public.

An acceptance is necessary to make a complete dedication under the statute, and, until acceptance, the fee does not vest in the municipality, but remains in the original proprietor. Such a conveyance of the lots before acceptance carries the title to the center of the street. *Hamilton v. Chicago, Burlington & Quincy Railroad Co.*, 124 Ill. 235, 15 N. E. 854; *Littler v. City of Lincoln*, 106 Ill. 353.

By an act of the Legislature entitled "An act to incorporate the town of Brooklyn, Massac county, state of Illinois," approved February 15, 1855 (Laws 1855, p. 170), the town of Brooklyn was incorporated by the name and style of "The President and Board of Trustees of the Town of Brooklyn," and by section 2 of said act the boundary of said corporation was made to commence at the water's edge opposite the lower town boundary on the Ohio river. "No particular form is requisite to the validity of a dedication. It is purely a question of intention. A dedication may be made by a survey and plat alone, without any declaration either oral or

on the plat, when it is evident from the face of the plat that it was the intention of the proprietor to set apart certain grounds for the use of the public." *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866, and cases there referred to. There are many circumstances to indicate that, when the town of Brooklyn was laid out, it was the intention of Charles Pell, or of Charles Pell and Thomas G. C. Davis, that Water street should extend in width to the water's edge, and that the whole of the space between the tier of lots fronting on Water street and the river was intended to be dedicated as a street. There is nothing on the plat to indicate what the width of Water street is, and, upon its face, the plat would seem to show that Water street lies between the northern tier of lots abutting thereon and the low-water mark of the river, or the meandering line upon the south side of the space marked "Water Street," intended to designate the northern bank of the Ohio river. Market street and Elizabeth street, running east and west, and parallel with Water street, have no figures indicating their width, but lie between the lot or block lines upon the north and south sides of said streets. If the width of Market street and Elizabeth street is to be regarded as the distance between the north line and the south line bounding those streets, then it would appear that the width of Water street would be the distance between the north line and the south line between which Water street lies; and the lines, as indicated upon the map, between which Water street lies, are evidently the north tier of lots and the bank of the river, the latter being designated by a meandering line upon the south side of Water street. It is conceded by both parties that the town of Brooklyn, including the land here in controversy, was a part of the fractional south half of section 14, etc., containing 76.96 acres. This fractional south half of section 14 was listed for taxation, and taxes were paid on it, before Brooklyn was platted; but, after the plat was made, there is no record showing that the land lying in front of Brookport was listed for taxation, or that any taxes were paid thereon. If the original owners of this ground intended to retain the ownership of it, they would have listed it for taxation after the town was platted, as they did before the town was platted. Water street is of varying width, differing in that respect from the other streets shown by the plat; and its south boundary line is not a straight line, but a wavy, irregular line, in imitation of the meanderings of a stream, evidently showing that it was the intention that the street should extend to the water's edge. The plat does not show any reservation of ground in front of the town, and the very name of the street, which is not First street or Front street as stated in the bill, but Water street, would imply that the street was meant to

border upon the river, or a body of water. In addition to all this, the town was laid out and located upon the bank of a navigable river, and such location would seem to indicate an intention that the inhabitants of the town should have free access to the river. All these facts show an intention on the part of the dedicators that Water street should extend to the river.

When the street was thus dedicated as a public highway, an easement therein arose in favor of the public, and afterwards, in 1855, when the town was incorporated by an act of the Legislature, the right to control the street passed to the corporate authorities, as representatives of the inhabitants of the town. *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866. After the dedication of the street, Pell and Davis divided the lots bordering upon the street between themselves, and then sold said lots with reference to Water street; and thereby Water street became so dedicated as to be forever open to the use of the public as a public highway, free from all claim or interference of the proprietor, or those claiming under him, inconsistent with such use, and Pell and his grantees were thereby perpetually estopped from denying the existence of the street. *Russell v. City of Lincoln*, 200 Ill. 511, 65 N. E. 1088.

There is evidence in the record showing an acceptance of the dedication thus made. "The acceptance may be an express one, evidenced by some formal act of the public authorities, or it may be one implied from their acts, such as repairing, improving, lighting, or otherwise assuming control of the lands dedicated, or it may be implied from user by the public for the purposes for which it is dedicated. * * * When the dedication is beneficial or greatly convenient or necessary to the public, an acceptance will be implied from slight circumstances." *Alden Coal Co. v. Chellis*, 200 Ill. 222, 65 N. E. 665. In the case at bar, the evidence shows that in 1860 and 1861 the town of Brooklyn had a marshal, and was acting under its charter, and that there were three traveled roads on Water street, all leading down to the river, which were kept in repair by the town authorities. Again, in 1889, the municipal authorities of Brooklyn or Brookport graded and graveled the ground in controversy, putting in \$400 or \$500 worth of work there. It would appear that the town was subsequently incorporated under the general incorporation act, and since that time the village authorities have exercised control over this river front. They granted track privileges over it to the Illinois Central Railroad, and wharf privileges to certain persons, and ferry privileges to the appellant himself and his brothers, as will be hereafter shown. The proof tends to show that this property here in controversy has been traveled by the public, and used uninterruptedly as a common highway, for some 50 years. There can be

no other conclusion, therefore, than that there was an acceptance of the dedication by the municipality.

In what has been said above as to the extension of the ownership to the center of the street, reference has been had to the ordinary street, without reference to its location on a stream or river. Here, however, Water street, being located upon the river, the street extends to the middle of the river. On the plat the southern line of Water street along the river is an irregular, wavy line, depending upon the meanderings of the river and indicating the river as a boundary. "Grants of land bounded on rivers or upon their margins, above tide water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge of the river." *Davenport Bridge Railway Co. v. Johnson*, supra. In *Village of Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90, it was held that a street bounded upon a navigable stream, above high-water mark, like a grant so bounded, will extend to the center of the stream, unless an intention is clearly shown in the grant or act laying out the street to stop at the edge of the river, and that where a street of an incorporated village, situate upon the bank of the Mississippi river, extends to the center of the stream, the fee of the street is in the corporation for the benefit of the lot owners and the public, and the village authorities may properly interpose to prevent an intruder from cutting and removing ice which may have formed upon such street; and in that case we said (page 436, 104 Ill., 44 Am. Rep. 90): "Here is a town laid out upon the bank of a navigable river, with Water street in front of the town, between it and the river; and the idea of the street not extending to the river seems preposterous. Of what use to the proprietors would be the reservation to them of anything between the street and the river, and what a lessening of the value of a town site upon a navigable stream would be the absence of a public landing? It must be supposed that such a town is laid out with reference to the use and enjoyment of the river. A public landing would be viewed as a thing of prime interest, which would be an element of value pertaining to every town lot which was to be sold. As was said by this court in a similar case (*Godfrey v. City of Alton*, 12 Ill. 29 [52 Am. Dec. 476]): 'This stream is a public highway. In contact with this another easement is granted, and the very location of it shows it was designed for the purpose of lading and unlading freight and landing passengers from the water communication, as much as the laying out of an interior street, would show it was designed for the use of travelers by land.' The western line of Water street, as marked upon the original plat, is not a straight line, but an irregular, wavy line; denoting, as we take it, the mean-

dering of the river, and thus indicating the river to be the boundary."

In view of what has been said, and of the authorities referred to, it seems to follow, as a necessary conclusion, that the original proprietor, who made this plat, divested himself of all right or title to the land lying between the northern tier of lots and the bank of the river; and, as appellant holds under the original proprietor, Charles Pell, he could not have obtained any title to this strip from Pell. Having begun a partition suit, appellant must show that he owned an undivided interest in the property sought to be partitioned, as alleged in his bill. He seeks to establish a paramount, fee-simple title to the strip here in controversy under a deed executed by Pell in 1870. If the views thus far expressed are correct, then the title to that strip, either to the center of the river, or certainly to the edge of the river, was vested by dedication and acceptance in the village of Brookport, and therefore in 1870 Charles Pell had no title, when he made the deed to Valentine Owen, appellant's father.

2. But for other reasons we are of the opinion that appellant had no title to any of the property here in controversy, aside from the question of dedication. On December 22, 1870, Charles Pell and wife executed to Valentine Owen a deed dated December 22, 1870, conveying to Valentine Owen, the father of appellant, an undivided one-half of the premises sought to be partitioned, as described in the bill. Valentine Owen died intestate in 1872, leaving certain heirs, of whom the appellant is one. Since then, appellant has obtained deeds from the other heirs, so that he is the holder of whatever title, if any, was in Valentine Owen at the time of his death. But Valentine Owen had no title at that time, because his grantor, Charles Pell, had, prior to December 22, 1870, parted with all the interest he had in the south half of fractional section 14.

Prior to September 17, 1851, Charles Pell and Thomas G. C. Davis appear to have been the owners of the south half of fractional section 14; each owning an undivided one-half thereof. On September 17, 1851, a partition deed was made between Charles Pell and Thomas G. C. Davis in pursuance of a contract for partition previously made on July 4, 1851. Prior to that, to wit, on February 8, 1851, the Legislature of Illinois passed an act granting to Charles Pell and Thomas G. C. Davis a ferry franchise from Brooklyn, Ill., to the Kentucky shore, for the term of 50 years, with right to land a ferryboat at any point on the Ohio river between lot 1 and lot 30 in Brooklyn, Ill. The partition deed of September 17, 1851, recites that Pell and Davis are seised of, and hold in fee, as tenants in common, the south half of fractional section 14, containing 76.96 acres, and that they have laid off and established a town known and called by the name of "Brooklyn"; and, by the terms of the par-

tion deed, Pell deeds to Davis, his heirs and assigns, "all that part of said tract of land situated, lying and being west, below and adjoining said town of Brooklyn, and * * * also" certain lots in the town of Brooklyn, "and all the said Charles Pell's and the said Priscilla Pell, his wife's, right, title and interest in and thereto, to have and to hold the same to him, the said Thomas G. C. Davis, his heirs and assigns, and to his 'and their use and behoof forever." The deed contains the following covenant: "And the said Charles Pell, for himself and his executor and administrator, does covenant with the said Thomas G. C. Davis, his heirs and assigns, that he and they shall and may forever hereafter have, hold, occupy, possess and enjoy the said part of said tract of land, and said town lots hereby assigned to the said Thomas G. C. Davis, free and discharged of and from all claims and demands thereto to be made by the said Charles Pell or his assigns, and all persons claiming under him or them." The words in the deed, "all that part of said tract of land situated, lying and being west, below, and adjoining said town of Brooklyn," include the property here in controversy, if such property is not embraced in Water street, and lies south thereof and between Water street and the river. The strip here in controversy, if not embraced in Water street, must be "below and adjoining said town of Brooklyn." If, therefore, there was a space of ground south of Water street, and between the river and said street, which was not embraced in that street, it passed from Pell to Davis by the partition deed of September 17, 1851. It is true that when the deed of September 17, 1851, was executed, Pell must have had merely an equitable title, as the record does not show that he had the legal title; but appellant introduced in evidence a deed from John T. Madden and wife to Charles Pell, dated December 16, 1851, conveying to Pell the south half of fractional section 14, and the chain of conveyances shows title thereto from the government down to Madden. We are of the opinion that the title subsequently acquired by Pell on December 16, 1851, inured to the benefit of Davis, his grantee in the partition deed. That deed recites upon its face that Pell owned a fee-simple title, and it conveys that title and the land itself, as well as his interest in the land; and it also contains a covenant that Davis shall hold the land deeded to him free and discharged from all claims and demands that may be made in the future by Charles Pell or his assigns, and all persons claiming under him or them. Surely, under this covenant, and in view of the fact that the deed passes a fee-simple title, Pell could not set up against Davis the after-acquired title, conveyed to him by the deed of December 16, 1851. Hurd's Rev. St. 1901, c. 30, § 7; 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 918, c. 80, par. 7; Holbrook v. Debo, 99 Ill. 372; Bowen v. McCarthy, 127 Ill. 17, 18 N. E. 757;

Guertin v. Momblean, 144 Ill. 82, 33 N. E. 49.

Subsequently, on February 16, 1854, Pell conveyed to James Campbell all his remaining interest in the south half of fractional section 14, and also in the same deed conveyed to Campbell the undivided half of the ferry privileges owned by Pell, the other undivided half of which privileges had been granted to Thomas G. C. Davis.

We are therefore of the opinion that, if the title of Pell to this strip of land here in controversy did not pass to the village of Brookport by dedication, it was conveyed away by Pell to Davis and Campbell long before December 22, 1870, and, therefore, no interest passed from Pell to Valentine Owen by the deed executed on December 22, 1870.

3. But appellant claims that, if he did not obtain paramount title through the deed from Pell to his father, Valentine Owen, yet that that deed, conveying an undivided one-half of the premises in question, was good color of title, and that, under the same, as such claim and color of title, Valentine Owen, appellant's father, and appellant and his brothers, held adverse possession of the strip in question for a period of 20 years, and more. The only evidence of possession introduced is that Valentine Owen and appellant and his brothers ran a ferryboat from the Kentucky side of the river to the village of Brookport, and landed their ferryboat at the landing or wharf upon the strip of land in question. They had a float, which they attached by stakes to the ground, in order that passengers and freight coming down from Brookport might the more easily reach the ferryboat. This float was movable, and its position was changed as the water in the river rose or fell. It was situated further up the bank in time of high water, and further down the bank in time of low water. Its location appears to have been opposite block 3, between Ferry and Crocket streets. It appears that other boats than the ferryboat of Valentine Owen and his sons landed upon this river front. It is a serious question whether the mere fact that the ferryboat landed upon this river front, and that the owners of the ferryboat used upon the bank a movable float, attached to the bank by stakes, for the purpose of more easily taking on freight and passengers upon the ferryboat, really constituted such adverse possession as is required by the law. In Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508, it was held that the landing of a ferryboat along the shore at such places as might from time to time be most suitable or convenient did not constitute adverse possession. But the evidence shows that, after the village of Brookport had passed an ordinance granting to the Illinois Central Railroad Company the right to lay down their tracks upon this strip of ground here in controversy, appellant, or one of his brothers, under whom he holds, applied to the village of Brookport for the privilege of landing

his ferryboat at the landing in question. In pursuance of his application so made, a lease was executed by the town of Brookport in the year 1891, leasing to one of appellant's brothers, who was appellant's grantor, for the term of 15 years, the privilege of landing his ferryboat at this landing. The proof tends to show that the appellant himself was the agent of his brother in negotiating this lease from the town, and, as we understand the evidence, it is not denied on the part of appellant that the landing was thus leased by his brother from the village. By taking this lease, appellant, or his grantor, admitted that the village of Brookport had title to the landing in question. When the president of the board of trustees of the village executed this lease, a record of it was made upon the records of the municipality; and the record book, showing the execution of the lease in 1891, was introduced in evidence. It is said that, while this lease was made by the village, through the president of its board of trustees, yet the same was not signed by appellant or by his brothers, Robert Owen or Henry Owen. But the evidence is quite clear that, after the execution of this lease, appellant himself and his grantor ran the ferryboat and landed it in pursuance of the lease, and in recognition of the authority of the village to control the use of the premises here in question. As this lease was to run for 15 years from 1891, it has not yet expired. During the existence of the tenancy, appellant is estopped from disputing the title of his lessor, the village of Brookport. A tenant is never permitted to deny the validity of the title of any one from whom he has accepted a lease. If the lease was made to one of his brothers, yet, as he is grantee of his brother, he is equally bound by the estoppel, as was the original lessor. *Tilghman & West v. Little*, 13 Ill. 239; *Alsop v. Stewart*, 194 Ill. 595, 62 N. E. 795, 88 Am. St. Rep. 169; *Carter v. Marshall*, 72 Ill. 609; *Fleming v. Mills*, 182 Ill. 464, 55 N. E. 373.

In what has been said, it has been assumed that the statute of limitations in regard to adverse possession for a period of 20 years can run against the village of Brookport. The general rule, however, is that the statute of limitations does not run against a municipal corporation in respect to streets or property held for public use, and that an adverse possession of such property, no matter how long continued, is of no effect. *Shirk v. City of Chicago*, 195 Ill. 298, 63 N. E. 193; *City of Sullivan v. Tichenor*, 179 Ill. 97, 53 N. E. 561; *Russell v. City of Lincoln*, 200 Ill. 511, 65 N. E. 1088; *Catlett v. People*, 151 Ill. 16, 37 N. E. 855.

In any view, which we can take of this case, we are forced to hold that appellant was not the owner of an undivided one-half of the property sought to be partitioned, and therefore was not entitled to a decree for partition. The controversy here is not be-

tween the appellant, claiming to own one undivided half, and the heirs and grantees of James Campbell, alleged to be the owners of the other undivided one-half. The heirs and grantees of Campbell have been defaulted, and make no contest. The contest here is between appellant, on the one side, and the village of Brookport and the Illinois Central Railroad Company, on the other; the latter claiming the right to use its tracks, laid down upon the strip of ground in question, under an ordinance passed by the village.

We are of the opinion that the court below correctly decided that appellant had no interest in the property, except as lessee or licensee of the village, and committed no error in rendering a decree dismissing the bill. Accordingly the decree of the circuit court is affirmed. Decree affirmed.

(207 Ill. 576)

PRESSED STEEL CAR CO. v. HERATH.

(Supreme Court of Illinois. Feb. 17, 1904.)

MASTER AND SERVANT—DANGEROUS DUTIES—CARE REQUIRED—ASSUMPTION OF RISK—EVIDENCE—QUESTION FOR JURY—PLEADING—PROOF—VARIANCE—OBJECTION—APPEAL.

1. Where the act which a servant is called upon to do by the master is attended with a degree of danger, the servant must exercise that degree of care that an ordinarily prudent man would have exercised under the circumstances in determining whether he will perform the act.

2. In an action for injuries sustained by a servant while engaged in taking down the roof of a building, evidence examined, and held that the question whether the degree of danger was so great that an ordinarily prudent man would have disobeyed the order was one for the jury.

3. An objection that there was a variance between the declaration and proof cannot be raised for the first time on appeal.

Appeal from Appellate Court, Second District.

Action by John R. Herath, as administrator of the estate of Henry W. Smith, deceased, against the Pressed Steel Car Company. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

Winston, Payne & Strawn, for appellant. J. L. O'Donnell and Barr, Barr & Barr (John Barton Payne and Ralph M. Shaw, of counsel), for appellee.

BOGGS, J. A portion of the roof of a building belonged to the appellant which had been partially destroyed by fire, and which the appellee's intestate, Henry W. Smith, and other workmen of the appellant company, were engaged in removing, fell upon said Smith and instantly killed him. In an action on the case in the Will circuit court the appellee administrator was awarded judgment in the sum of \$2,000, on the ground the death of his intestate was attributable to actionable negligence on the part of a vice principal of the appellant company. The Appellate Court for the Second District affirmed the judgment on appeal, and the appellant com-

pany has perfected this its further appeal to this court.

At the close of all the evidence the appellant company moved the court to instruct the jury before whom the case was heard to find the issues in its favor and return a verdict of not guilty. The court declined to grant the instruction, and such refusal constitutes the sole ground urged for reversal of the judgment.

The building was a large structure, 320 feet long from east to west and 80 feet wide. It was covered with two gabled roofs running lengthwise with the building, supported in the center by iron columns each 20 feet apart. Large wooden trusses, shaped like an inverted V, the inner ends of which rested on the tops of the columns and the outer ends on the walls on either side of the building, rose to the apex of the roofs. The rafters extended lengthwise of the building from truss to truss, and at either end entered a mortise in the truss. They were covered with a sheeting of plank, on which was laid a roofing of corrugated iron. The framework of the roof was therefore in sections, extending from truss to truss, a distance of 20 feet, and from the outer wall to the valley in the center of the building. In the center of the building, at the eaves of the two roofs, there had been constructed a valley or gutter of galvanized iron two feet in width and six inches deep, into which the water from the inner slopes of each of the gable roofs was discharged. The building had been quite seriously damaged by fire, which burned away some of the rafters and in other respects so damaged the roofs that it was found necessary to tear them away in order that the building might be reroofed. The work was performed by causing the sections of the roof between the trusses to fall to the floor of the building. On the 26th day of February, 1901, the day when Henry W. Smith, appellee's intestate, met his death, the roof had been taken down, except three sections at the westerly end of the building. Smith had not been engaged in the work until the day he was killed. He began work about 7 o'clock in the morning, and was killed at about the hour of 11 o'clock in the same forenoon. He saw but one section of the roof removed—the third from the west end. The section was caused to fall in the following manner: A large, strong pole, called a "gin pole," was raised from the floor to the apex of the truss, and the truss was firmly lashed to this gin pole. Carpenters then went upon the roof with axes and saws and cut or sawed away the ends of the rafters which entered the mortises in the easterly truss. The pressure of the ends of the rafters and of the sheeting against the truss would still probably support the easterly part of the roof. A block and tackle were attached to the topmost point of the gin pole above the apex of the roof, by means of which the gin pole, and the truss which was lashed to it, could be lifted upward

and slightly away from the roof, thus removing the support for the easterly end of the section of the roof. Thereupon the east end of the section would drop, and its weight would pull the remainder of the section to the floor. The deceased saw the third section removed in this manner, and he assisted in clearing away the debris from the floor. While he and his fellow workmen were engaged in clearing away the debris the gin pole was erected and lashed to the easterly truss of the second section of the roof, and carpenters were sent on the top of the roof to cut and saw away the easterly ends of the rafters of the second section of the roof. When the sections of the roof fell they usually brought with them the portion of the iron guttering in the center of the building to which the section was attached, but a considerable portion of the guttering did not come down with the third section, but remained only partially detached from its original position. After the debris of the third section had been removed, appellant's foreman caused a rope to be attached to this portion of the gutter, and ordered the workmen, including the appellee's intestate, to take hold of the rope and pull the guttering down. He placed these workmen with the rope so they would be east of and not under the second section of the roof and south of the guttering, but they were unable to pull away the guttering from that point, and he directed them to take the rope and go to the west and pull on it. This caused the workmen to pass under the second section of the roof, the easterly ends of the rafters of which had been cut away. When near the west door the foreman signaled the men to pull on the rope, and they did so two or three times, and while so engaged a portion of the easterly part of the second section of the roof came down and fell upon appellee's intestate and killed him.

The part of the roof which fell was some distance from the guttering which the workmen were attempting to pull down, and we find nothing in the testimony tending to show that this part of the roof was caused to fall by the efforts of the workmen to bring down the guttering. It was, we think, clearly shown that the foreman and the workmen, including appellee, understood that any section or part of a section might fall at any time after the points of the rafters had been sawed or cut away from the trusses, though it was the expectation of all that in order to bring down the section after the rafters had been cut away it would be necessary to move the truss by means of the gin pole.

The contention of the appellant company is that the falling of the roof, or parts of it, was one of the ordinary dangers incident to the work which the deceased had undertaken to perform; that the rule that it is the duty of the master to furnish the servant a reasonably safe place in which to work could not apply, because the work of demolishing

the roof was inherently dangerous, and made dangerous the place where the servants must work, and the employé must, of necessity, assume the ordinary dangers incident to the undertaking in which he voluntarily engaged; that the deceased had full knowledge of all the dangers of the work; and that it should have been declared, as a matter of law, that his death was caused by a peril that was ordinarily incident to his employment, and was assumed by the servant, and hence that the master could not be held liable in the action.

There is no direct proof that the deceased knew that the rafters of the second section had been cut or sawed away, but the work of cutting and sawing the rafters had been done in his sight and hearing, and it was proven that he had been for a time stationed at the proper point and ordered to keep workmen and other persons from going under the second section of the roof because there was danger it might fall. The foreman of the appellant company realized that the second section might fall at any time, the rafters, as he knew, having been cut away. We think the deceased had the same knowledge. But we think it equally clear that both the employer and the employé believed the section of the roof would remain in place until the truss should be moved so the roof would no longer be supported by it. Under these circumstances, and with the knowledge on the part of both employer and employé, the foreman ordered the employé and his fellow workmen to go beneath the second section of the roof, and in obedience to the command of the master the deceased went into a place which he knew to be, in a degree, dangerous, and was killed. It is the primary duty of an employé to obey the commands of his employer. If ordered to perform an act which he knows is attended with danger, he is called upon to decide whether he will be justified in refusing to obey on the ground that the perils of obedience are too great. In this dilemma the law requires of him to act with that degree of prudence that would have controlled an ordinarily prudent, careful, and discreet man. The fear of losing employment will not justify him in rashly and recklessly exposing himself to known danger. An inconsiderate and improper order given by the master may constitute actionable negligence, and the master may not always be allowed to escape liability on the ground the servant should have disobeyed his order and not exposed himself to danger which attended compliance therewith. The principle is thus announced in *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572, on page 583, 148 Ill., and page 574, 36 N. E.: "Questions arise whether the action of a servant is his voluntary act, or done in obedience to the commands of the master or one in authority over him. When an act is performed by a servant in obedience to a command from one having

69 N.E.—61

authority to give it, and the performance of the act is attended with a degree of danger, yet in such case it is not requisite that such servant shall balance the degree of danger, and decide with absolute certainty whether he must do the act or refrain from it; and his knowledge of attendant danger will not defeat his right of recovery, if, in obeying the command, he acted with that degree of prudence that an ordinarily prudent man would have used under the circumstances." In *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876, it was said (page 459, 162 Ill., and page 879, 44 N. E.): "In the next place, a master is liable to a servant when he orders the latter to perform a dangerous work, unless the danger is so imminent that no man of ordinary prudence would incur it. Even if the servant has some knowledge of attendant danger, his right of recovery will not be defeated, if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances. * * * The master and servant are not altogether upon a footing of equality. The primary duty of the latter is obedience, and he cannot be charged with negligence in obeying an order of the master unless he acts recklessly in so obeying. Whether he acted thus recklessly in obeying his master's order or whether he acted as a reasonably prudent person should act are questions of fact to be determined by the jury."

The application of this principle to the conceded facts of the case correctly led the trial court to the conclusion that it could not be declared, as a matter of law, that the appellant company was not liable to respond in damages for the consequences which resulted from the order of its foreman, which was clearly inconsiderate and negligent. The deceased knew that in obeying the order and going beneath the second section of the roof he was exposing himself to a possible danger, but the order did not require him to remain under the section longer than was necessary to pass under it. The evidence tended to show that he knew that it was not likely the section of the roof would fall until the truss at the eastern end thereof had been moved by means of the tackle and pulley, which were attached to the gin pole for the express purpose of moving the truss and causing the sections to fall. It was therefore a question of fact for the determination of the jury whether the degree of known danger which attended compliance with the order of the representative of the appellant company was so great that an ordinarily prudent workman should have disobeyed the order.

It is urged there is no count in the declaration upon which, under the evidence, the appellee was entitled to recover. There was no demurrer to the declaration, and the insistence is that the judgment should be reversed because of a variance between the

pleadings and the proof. The objection of a variance was not specifically raised in the trial court, where, if well taken, it could have been obviated by an amendment. It cannot be invoked in this court.

The judgment must be and is affirmed. Judgment affirmed.

(207 Ill. 247)

GALLAGHER v. PEOPLE.

O'DONNELL v. SAME.

(Supreme Court of Illinois. March 3, 1904.)

CRIMINAL LAW—APPELLATE COURT—APPEAL—JURISDICTION.

1. Const. art. 6, § 11, authorizing the creation of Appellate Courts for the review of such cases as the Legislature may provide, and providing that appeals shall lie to the Supreme Court from such Appellate Courts in all criminal cases, does not authorize an appeal to the Appellate Court in a criminal case in the absence of legislation.

2. Section 90 of the practice act (Hurd's Rev. St. 1901, c. 110, § 91), relating to appeals from the Appellate Court to the Supreme Court, providing that criminal cases may be removed to the Supreme Court by appeal in the manner provided by sections 67 and 70 (Hurd's Rev. St. 1901, c. 110, §§ 68, 71), which provide for appeals from judgments or decrees in law or in chancery, and for appeal bonds, does not authorize an appeal in criminal cases; the method of review in such cases being, as provided by division 15 of the Criminal Code (Hurd's Rev. St. 1901, c. 38, §§ 458-468), by writ of error, with provisions for supersedeas and letting to bail.

Appeal from Appellate Court, First District.

William J. Gallagher and another were convicted of conspiracy, and appeal. Heard on motion of defendant O'Donnell to consolidate his appeal with that of defendant Gallagher. Motion denied.

Stedman & Soelke and William Dillon, for appellants. H. J. Hamlin, Atty. Gen., for the People.

CARTWRIGHT, J. The appellants, O'Donnell and Gallagher, were convicted in the criminal court of Cook county for the crime of conspiracy. Gallagher was sentenced to imprisonment in the penitentiary, and O'Donnell was sentenced to pay a fine of \$2,000. The Appellate Court for the First District affirmed the judgment of the criminal court, and allowed to the appellants separate appeals to this court, which were perfected by filing appeal bonds. Gallagher has filed in this court a complete transcript of the record, and O'Donnell has filed a partial transcript, and made a motion to consolidate his appeal with that of Gallagher, so that the appeals may be heard on the same transcript.

The law does not provide for an appeal in a criminal case. Section 11 of article 6 of the Constitution authorizes the creation of Appellate Courts for the review, on appeal or writ of error, of such cases as the Legislature may provide, and also provides that ap-

peals and writs of error shall lie to this court from such Appellate Courts in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved. But that provision of the Constitution does not authorize an appeal in the absence of legislation. It is merely a limitation on the power of the Legislature to make the judgments of the Appellate Courts final in such cases, and is intended as a provision that, if Appellate Courts are given power to review cases falling within those classes, such cases may be reviewed finally in this court upon appeal or writ of error. This was the construction given to that section in *Perry v. Bozarth*, 198 Ill. 323, 64 N. E. 1076. Furthermore, an appeal is purely statutory, and there must be a statute prescribing the terms and conditions of an appeal in order to make a right to appeal effective. While in most cases a writ of error is a writ of right, the right of appeal is created and regulated by statute in connection with the Constitution; and the right must always be exercised, in such cases, upon such conditions and by such persons as are authorized by the statute. There is no statute providing for appeals or fixing the conditions upon which they may be taken in criminal cases, but the manner of reviewing such cases is provided for by division 15 of the Criminal Code (Hurd's Rev. St. 1901, c. 38, §§ 458-468), by writ of error, with provisions for supersedeas and letting to bail. Section 90 of the practice act (Hurd's Rev. St. 1901, c. 110, § 91), relating to appeals from the Appellate Court to this court, and including cases of which the Appellate Court has no jurisdiction, provides that criminal cases may be removed to this court by appeal or writ of error, in the same manner provided by sections 67 and 70 of said act (Hurd's Rev. St. 1901, c. 110, §§ 68, 71) for appeals to the Appellate Court. The purpose of section 90 was to comply with the Constitution by providing that criminal cases may be reviewed in this court. The sections of the practice act therein referred to relate only to civil cases, and section 70 is limited by its terms to judgments or decrees in law or in chancery. Section 67 provides for an appeal bond to be framed with reference to the character of the judgment, and in the case of a sentence to imprisonment it would be nothing but a bail bond, while the Criminal Code commits the power to admit to bail to the discretion of the reviewing court, or a judge of said court. To give a defendant a right of appeal in a criminal case would be to confer upon him the right, at his own will, to supersede the execution of the sentence, which was never intended. That can only be done by order of the reviewing court, or a judge thereof, upon an inspection of the transcript, in cases where there is a reasonable doubt as to the guilt of the defendant. There have been cases of appeals where the people have appeared and joined in error, and submitted the cause for decision upon the errors assign-

ed, which have been treated as being in the court upon writs of error in preference to dismissing the appeal; but in these cases there has been neither appearance nor joinder in error, and we are called upon by this motion to recognize the right of appeal. We cannot consent to do that, and, neither of the cases being in this court by any method prescribed by law, the motion is denied. Motion denied.

(207 Ill. 593)

CONSOLIDATED COAL CO. v. FLEISCHBEIN.

(Supreme Court of Illinois. Feb. 17, 1904.)

FELLOW SERVANTS—ACTION FOR DEATH OF EMPLOYE—QUESTION FOR JURY—CONCLUSIVENESS OF VERDICT ON APPEAL—REVIEW—QUESTIONS OF FACT.

1. The mere fact that a pit boss in a mine, who was directing the conduct of an employé at the time the latter was injured, also assisted in the work as a common hand, did not make him a fellow servant of the injured employé.

2. Where the facts are disputed, the question whether a pit boss in a mine was a fellow servant of an injured employé at the time of the accident is a question for the jury.

3. On an appeal from the affirmance of a judgment by the Appellate Court, all questions of fact properly submitted to the jury under the instructions are settled by the judgments of the lower courts.

Appeal from Appellate Court, Fourth District.

Action by C. P. Fleischbein, administrator of Robert Bowen, deceased, against the Consolidated Coal Company. A judgment for plaintiff was affirmed by the Appellate Court (109 Ill. App. 509), and defendant appeals. Affirmed.

This is an action brought by appellee against the appellant company to recover damages for the death of appellee's intestate, Robert Bowen, which occurred while said Bowen was at work for the appellant company in its coal mine, known as the "Richland Mine," on the Illinois Central Railroad between the city of Belleville and the village of Freeburg, in St. Clair county. The trial was before the court and a jury, resulting in a verdict in favor of appellee, as administrator, for \$3,000. Motion for new trial was overruled, and judgment was rendered upon the verdict. An appeal was taken to the Appellate Court, where the judgment has been affirmed. The present appeal is prosecuted from such judgment of affirmance.

The second amended declaration consisted of four counts. The third and fourth counts were taken from the jury by the court, and the cause was submitted on the first and second counts, to which the general issue of not guilty was pleaded. The first and second counts are substantially the same, and, as is said by the Appellate Court, "charge

the appellant with negligence in the act of its manager or foreman in permitting a loaded coal box or car to be and to remain on the tramway or track in appellant's coal mine, whereby a collision occurred with certain other cars, driven by appellee's intestate, causing his death."

The facts, as stated by the Appellate Court in their opinion deciding this case, are substantially as follows: "Through an entry leading from the bottom of the shaft to the working rooms, a distance of 1,100 feet, was a track or tramway over which ran the cars used in moving the coal taken from the mine. Near the working rooms is a switch, called a 'parting,' connecting the room tracks with the main or entry track. Mules were used in moving the cars. Robert Bowen, the deceased, was an entry driver, whose duty it was to haul the cars between the switch and the bottom of the shaft. The room drivers brought the loaded cars from the rooms to the switch. Peter Zink was pit boss and mine manager. Proof is made that, on the day of the injury, Zink, the manager, came to the switch where the trains or loads were made up for conveyance to the bottom of the shaft, complained that the coal was not moving fast enough, hitched a mule to a load of four cars, and started down the entry for the shaft. From the switch there is a sharp decline in the entry track for a distance of 75 or 100 feet, and in going down it is necessary to 'sprag' the wheels in order to control the speed of the cars. Near the foot, and beyond this steeper grade, the track is depressed or sunken three or four inches. This is called the 'swag.' When Zink with his load reached the swag and had removed the sprags, as the evidence tends to prove, he called out, 'All right; come ahead,' and moved on. Bowen, who was waiting at the switch, immediately started with his load, and at the swag collided with a car, left there by Zink, and received the injuries from which he died."

R. A. Holland, Jr., and Wise & McNulty, for appellant. M. W. Borders, for appellee.

MAGRUDER, J. (after stating the facts). The questions in this case are nearly all questions of fact, and are settled by the judgment of the circuit court, and the judgment of the Appellate Court affirming the judgment of the circuit court. No instructions upon the trial below were asked by the plaintiff, the present appellee. Upon the trial the court gave 21 instructions on behalf of the appellant, and at its request. The court refused to give 4 instructions, numbered from 23 to 26, inclusive, asked by the appellant. No complaint is made of the refusal of the court to give these four instructions. Very little objection is made as to the admission or rejection of evidence by the trial court.

The main error complained of is that the trial court refused to instruct the jury to

¶ 1. See Master and Servant, vol. 24, Cent. Dig. §§ 371, 452.

find for the defendant. This raises the question whether there was evidence tending to sustain the cause of action as set up in the declaration, and, if there was such evidence, the court did not err in refusing to instruct the jury to find the defendant not guilty.

The main contention on the part of counsel for appellant is that Bowen, the deceased, and Zink, the mine manager, were fellow servants at the time Bowen was injured, and that they were both directly engaged in the same line of employment as drivers, and that Bowen was not injured as the result of any negligent act of Zink done as a vice principal of the company. It was the duty of Bowen to haul the empty cars or boxes from the bottom of the shaft of the mine to a certain "parting" or switch in the main entry, and to haul the loaded boxes or cars from the parting or switch to the bottom of the shaft, to be hoisted to the surface. Leading from this parting, in the direction of the shaft, was a very steep decline. In order to haul the loaded boxes down this decline in safety, it was necessary to use "sprags," which were pieces of wood about two feet long placed in the wheels to control the speed of the load. They would be placed in the wheels in this parting, and taken out between 50 and 75 feet from the point of the parting at a place designated by the witnesses as a "swag," which was in reality a depression in the track. There was also a sharp curve between this swag and the shaft, and it is admitted that a driver could easily tell whether a load or four cars, drawn by a mule, were all following. The evidence tends to show that this entry was very dusty, and that the air, traveling from the bottom of the shaft towards the parting or switch, carried the dust in the face of a driver going towards the shaft. The evidence tends to show that the dusty condition of the entry was well known to the pit boss, Peter Zink, and that he had been repeatedly notified of it by the miners. One witness says that there were "clouds of dust," and another, who was the track layer of the mine, testified that "it was so dusty you could hardly see anything." The evidence also tends to show that, where four of these loaded boxes or cars were drawn by a mule down the decline towards the shaft, the boxes were liable to become uncoupled and to be left in the entry. It appears, however, that, where a train of four box cars is in motion, one of the cars cannot become uncoupled without a jar or jam, so that the driver, if he loses a box, will know of it at the time when it happens. The injury occurred on April 21, 1902, about 4 o'clock in the afternoon. At that time Zink, the pit boss, went to the deceased, Bowen, at the parting or switch, and complained that the coal was not coming out fast enough. The pit boss then took a mule, which is said to have been a "spoiled" mule—that is to say, a mule which had been

whipped or otherwise maltreated in such a way that it would not haul as large a number of loaded cars as it was able to do—and with this mule, hitched to four boxes or cars, started to haul them from the parting or switch to the bottom, where the shaft was. When Zink, the pit boss, reached the swag, he pulled his sprags, and then directed Bowen to start with his load. The evidence tends to show that the pit boss called to Bowen, and said, "All right; come ahead." The pit boss testifies that he gave no such direction to Bowen, but was merely talking to the mule; but his evidence upon this subject is somewhat indefinite, as he states that he does not know exactly whether he made use of these words or not. There is other testimony, however, tending to show that they were used, and that they were intended for Bowen.

As has been said, it sometimes happened that one of the cars, drawn by the mule towards the shaft, would become uncoupled, and the evidence is quite clear that in this case, when Zink went with his load towards the shaft, one of his cars did become uncoupled, and was upon the track in the main entry. Zink admits in his testimony that he lost one of his cars, but did not know where or at what point it became uncoupled. When Zink uttered the words, "All right; come ahead," Bowen started down the hill with his load, driving the mule, which hauled the loaded cars. We discover no evidence in the record tending to show that he was not in the exercise of due care for his own safety. It appears that his load was carefully "spragged," that is, blocked, so as not to proceed with too great a speed. When near the swag or depression in the track or entry, Bowen came in contact with and struck the box or car of coal which Zink, the pit boss, had left upon the track in the entry. The evidence tends to show that the mule, which was in front of Bowen, turned to the side and escaped injury, while Bowen was crushed between the forward car of the train, which his mule was hauling, and the box car, which had been left upon the track by Zink, the pit boss. His injuries were so serious that he died in a few days after the accident. The evidence tends to show that, after passing beyond the swag or low point, there is a down grade for a considerable distance beyond the sharp curve, and the momentum gained in going down the incline was so great that the impact of the collision caused the car, left on the track by Zink, to move forward and around the curve.

The negligence charged is that the pit boss left a loaded coal box in a dark, dusty entry on a down grade, and then ordered Bowen, who did not know that such loaded coal box had been left upon the track in the entry, to proceed down the hill with his loaded cars. It is not denied that Zink was the pit boss, and a vice principal of the company. Such a boss in a coal mine is the

company, so far as employes are concerned. In this case Zink testifies as follows: "I was pit boss at Richland mine when Bowen was hurt. I lost a car on the trip preceding Bowen in going out. I can't say where I lost that car. * * * I had full supervision of the mine and of the men, and the power to discharge and employ the men, and the power to order and direct Bowen, and I was the pit boss and acting as such that day, and had charge of Bowen and the other men, and could give them orders."

It is not denied that the position of Zink, as pit boss, was such as he states it to be in his testimony, and it is conceded by counsel for appellant that, if the negligent act of which he was guilty was performed while he was acting as the vice principal of the company, the company would be liable. But the contention of appellant is that when Zink, the pit boss, undertook to drive a mule, hauling four loaded cars, from the parting or switch to the bottom of the shaft, he abdicated his position of vice principal, and was engaged as a driver, just as Bowen was engaged, and, therefore, that he and Bowen were fellow servants. If the negligent act of Zink which caused the accident was the act of a fellow servant of Bowen, then the company would not be liable. The fact that Zink did not abdicate his position as superintendent is apparent from the further fact that he ordered Bowen to come ahead with his load, and thereby still assumed to control the action of Bowen. In *Chicago & Alton Railroad Co. v. May*, 108 Ill. 288, we said (page 298): "The mere fact that one of a number of servants, who are in the habit of working together in the same line of employment for a common master, has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority, sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case in this respect must depend upon its own circumstances." The first count of the declaration avers that, "while in the performance of his said work in hauling a load of coal cars from said parting to the bottom of the shaft, and while acting under the orders of said mine manager, and in the exercise of reasonable and ordinary care and caution for his own safety, said Robert Bowen ran against and collided with said loaded coal car, carelessly and negligently left standing in said entry at said place by the said mine manager of defendant, and which said box could not be seen by said Robert Bowen on account of the dust in said

entry." In *Norton Bros. v. Nadelok*, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842, we said (page 600, 190 Ill., and page 844, 60 N. E., 54 L. R. A. 842): "When the appellee was ordered by his superior servant to put his hand into the machine and take out the 'catch,' in the absence of any warning or notice he had the right to assume that his superior, who gave the order, would not by his own negligence make the act which he had commanded him to do, and which he was bound to obey, unsafe." So, in the case at bar, when Bowen was ordered by his superior to "come ahead," "in the absence of any warning or notice he had the right to assume that his superior, who gave the order, would not by his own negligence make the act which he had commanded him to do, and which he was bound to obey, unsafe." The commands which a vice principal, who is a direct representative of the company, gives within the scope of his authority, are the commands of the company, and, if such commands are not unreasonable, those under his charge are bound to obey, at the peril of losing their situations. Hence the company will be held responsible for the consequences. *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876. The mere fact that Bowen and Zink were working together in hauling coal from the parting to the bottom of the shaft would not necessarily relieve appellant from liability. In *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915, this court, quoting from *Chicago & Alton Railroad Co. v. May*, supra, said (page 554, 170 Ill., and page 917, 48 N. E.): "The mere fact that the servant, exercising such authority, sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. * * * When the negligent act complained of arises out of, and is the direct result of, the exercise of the authority conferred upon him by the master over his collaborators, the master will be liable. In such case, he is not the fellow servant of those under his charge with respect to the exercise of such power, for no one but himself, in the case supposed, is clothed with authority to command the others." In *Consolidated Coal Co. v. Gruber*, 188 Ill. 584, 59 N. E. 254, we said (page 588, 188 Ill., and page 255, 59 N. E.): "If the action was taken by him in the discharge of his duties as vice principal, his position was one of superiority, and not that of a fellow laborer. The fact that, in the discharge of his duties as assistant mine manager, he engaged temporarily in work usually performed by Nagle, would not justify the declaration, as matter of law, that he became a fellow servant of the appellee." In the case at bar the pit boss was displeased that the coal was not taken out or taken up fast enough, and proceeded himself to

take a load of coal down to the shaft quickly and rapidly, and ordered Bowen, whom he preceded, to come along after him as soon as he reached the "swag." His acts, as well as his words, were a part of his effort to hurry along the work, and increase the amount of coal taken out. He was acting in all respects, not merely as fellow laborer or fellow servant, but as a superintendent, directing the conduct of Bowen, so as to make the efforts of the latter speedier and more efficient. We cannot see that there was anything in the facts of the case which indicated any abdication of his authority by Zink, so as to make him a mere fellow servant of Bowen.

But the question whether the relation of fellow servant exists in a given case is one for the jury, unless the facts, admitted or proved beyond dispute, show the existence of the relation within the definition of fellow servant as given by the court, in which case it becomes a question of law. *Hartley v. Chicago & Alton Railroad Co.*, 197 Ill. 440, 64 N. E. 382. In other words, where the facts are conceded, or where there is no dispute whatever as to the facts, and they show beyond question that the relation of fellow servant exists, then the question may become one of law. But here the facts are not conceded, but are sharply contested. The question whether or not Zink and Bowen were fellow servants was submitted to the jury under the instructions of the court, asked by the appellant itself, and that question is finally settled by the judgments of the lower courts. *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669. In instruction 7, given for the appellant, the court told the jury that "it is necessary for the plaintiff to prove to you that the mine manager at the time the deceased was injured was not a fellow servant of the deceased." In the tenth instruction, given for the appellant, the jury were instructed as follows: "And it is not enough to prove that the car was left in the entry by the mine manager, but, before the plaintiff is entitled to recover under this count, he must prove that the car was negligently left by said mine manager; that said mine manager was not at that time a fellow servant within the meaning of the instructions given you, and that the deceased was using due care for his safety to prevent this collision; and, if he has failed to prove all and each of these things, he cannot recover." By this instruction, and others asked by the appellant, the question whether or not the pit boss and the deceased were fellow servants was left to the jury, to be determined by them as a question of fact. They found against the appellant upon this question of fact under the instructions given them, and, so far as we are concerned, the question is settled.

We are therefore of the opinion that the trial court committed no error in refusing to instruct the jury to find the defendant not

guilty, inasmuch as the contention of appellant's counsel that such instruction should have been given is based upon the further contention that the relation of fellow servants existed between the mine boss and the deceased, as a matter of law. Having been a question of fact, and not a question of law, it was properly submitted to the jury.

Counsel for appellant discuss in their brief certain questions of fact, such as whether there was a collision between Bowen's train and the car left upon the track by the pit boss, and whether the deceased was guilty of such contributory negligence as should prevent a recovery, and whether or not the entry was dusty, and whether or not there was room at the side of the car, at the place where deceased was hurt, to have enabled him to escape injury if there was a car upon the track. All these were questions of fact, and were properly submitted to the jury under the instructions, and are settled by the judgments of the lower courts.

We see no reason for reversing the judgment of the Appellate Court, and, accordingly, that judgment is affirmed. Judgment affirmed.

(207 Ill. 250)

MURPHY v. MURPHY et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

SUPREME COURT—APPELLATE JURISDICTION— MATTER IN CONTROVERSY.

1. Under section 8 of the act to establish Appellate Courts (Hurd's Rev. St. 1899, p. 525, c. 37, § 26), authorizing appeals to the Supreme Court where there was no trial on an issue of fact only when the amount claimed in the pleadings exceeds \$1,000, the amount involved in a suit is the amount in controversy when it was commenced, as shown by the pleadings, and if it was under that sum a subsequent accumulation of interest will not confer appellate jurisdiction.

Error to Appellate Court, Third District.

Assumpsit by James Murphy and others against Palmer Murphy. A judgment for plaintiffs was affirmed by the Appellate Court (109 Ill. App. 41), and defendant brings error. Writ dismissed.

Edwin Winter and G. F. Rearick, for plaintiff in error. Buckingham & Dysert, for defendants in error.

CARTWRIGHT, J. The writ of error in this case was sued out to bring before us the record of a judgment of the Appellate Court for the Third District affirming a judgment of the circuit court of Vermillion county in favor of defendants in error and against plaintiff in error. The suit in which the judgment was rendered in the circuit court was in assumpsit, and was commenced by defendants in error against plaintiff in error on September 19, 1898. The parties to the suit were the five children and heirs at law of Jeremiah Murphy, deceased. Jeremiah Mur-

phy was the owner of 160 acres of land, which he devised by his will one-fourth to the defendant, Palmer Murphy, and the remaining three-fourths to his bodily heirs, who were the four plaintiffs and the said defendant. The cause of action was an alleged promise of the defendant, made in compromise of a threatened litigation, and in consideration that plaintiffs would refrain from contesting said will, that the defendant would amend his bill of complaint in a suit for the partition of said land, and the prayer thereof, and cause a division and distribution of the land or its proceeds in the proportion of one-fourth to the defendant and three-fourths to the plaintiffs. The declaration alleged that complainants complied with their part of the agreement, but defendant failed to amend his bill as agreed, and caused a decree of sale to be entered and a sale of the land to be made for \$6,400, and the proceeds to be divided in accordance with the terms of the will instead of the agreement. Plaintiffs averred that defendant collected from the master in chancery, who made the sale, \$924.40 more than his share of the proceeds by the terms of said agreement, and that was the amount which the plaintiffs claimed by their declaration. The amount involved in the suit was the difference between eight-twentieths of the net proceeds of the 160 acres, to which the defendant would have been entitled under the will, and five-twentieths, which was the amount he was alleged to have agreed to take, which amounted to said sum of \$924.40.

To the declaration the defendant filed three special pleas—a plea of the statute of frauds, a plea of estoppel, and a plea of res judicata. To these pleas plaintiffs demurred, raising issues of law, first, as to the application of the statute of frauds; second, whether plaintiffs were estopped by having received from the master in chancery the shares to which they were entitled under the decree; and, third, whether the decree in the partition suit was conclusive of the rights of the parties. The court sustained the demurrers to the pleas, and, the defendant electing to stand by his pleas, the court entered judgment against him. There is no certificate of importance by the Appellate Court.

In all cases determined in the Appellate Court in actions *ex contractu* when the amount involved is less than \$1,000 the judgment of that court is final, and no writ of error can be sued out from this court to review it; and where there was no trial of an issue of fact in the trial court the amount involved is determined by the pleadings. Section 8 of the act to establish Appellate Courts, as amended in 1887, provides that in all actions where there was no trial on an issue of fact in the lower courts appeals and writs of error shall lie from the Appellate Court to the Supreme Court when the amount claimed in the pleadings exceeds \$1,000.

Hurd's Rev. St. 1899, p. 525, c. 37, § 26. In this case the declaration consisted of a single count, in which the amount claimed was \$924.40. This court therefore has no jurisdiction to issue a writ of error to review the judgment. It is true that the judgment entered in the circuit court exceeded \$1,000, but the excess above the amount claimed in the declaration consisted of interest. The suit was pending from the time it was commenced, on September 19, 1898, to the date of the judgment, on January 20, 1902. It has been before the Appellate Court three times, and during its long pendency the interest accumulated. The amount involved in a suit is the amount in controversy at the time it is commenced, and the accumulation of interest afterward will not confer appellate jurisdiction. *Kelser v. Cox*, 116 Ill. 26, 4 N. E. 384; 2 Cyc. 563.

The writ of error is therefore dismissed. Writ dismissed.

(COT Ill. 97)

CLEARY et al. v. HOOBLER et al.

(Supreme Court of Illinois. Feb. 17, 1904.)

DRAINAGE DISTRICTS—ORGANIZATION—DISSOLUTION—STATUTES—REPEAL—RETROACTIVE OPERATION—MANDAMUS—NATURE OF PROCEEDINGS.

1. A proceeding for mandamus is a suit at law, and all facts properly set forth in the petition and not denied in express terms by the answer are deemed admitted.

2. Averments, in an answer to a petition for mandamus to compel drainage commissioners of a certain district to levy assessments, that defendants do not know whether proceedings in organizing the district were in due form of law or not, and do not know under what act of the Legislature the district was established, and that they neither admit nor deny the allegations that the district was duly organized, are of no effect.

3. An intention that a statute shall operate retrospectively must be manifested by clear and unequivocal language. In case of doubt the statute will be construed to have a prospective effect only.

4. Act May 29, 1879 (Laws 1879, p. 142), providing for the organization of drainage districts, and providing for special assessments on the property benefited, was repealed by Laws 1885, p. 78, providing for drainage for agricultural and sanitary purposes, the repealing section providing, however, that drainage districts theretofore organized under the repealed acts should be held to be legally organized, and the assessments made therein to have been legally made. Laws 1889, p. 119, added a new section to the act of 1885, and provided for the dissolution of districts organized thereunder on a petition of two-thirds of the owners of the land in the district. *Held*, that the act of 1889 does not apply to districts organized under the act of 1879, and they cannot be dissolved in the manner therein provided.

5. Laws 1889, p. 119, providing for dissolution of drainage districts after notice and a hearing, applies to all drainage districts, whether organized under Act May 29, 1879, or by proceedings in the county court.

Appeal from Circuit Court, McLean County; C. D. Myers, Judge.

¶ 2. See Statutes, vol. 44, Cent. Dig. § 244.

Petition for mandamus by Michael J. Cleary and others against Charles F. Hoobler and others. From a judgment dismissing the petition, plaintiffs appeal. Reversed.

D. D. Donahue and J. J. Morrissey, for appellants. Rowell, Neville & Lindley, for appellees.

CARTWRIGHT, J. Appellants filed in the circuit court of McLean county their petition for a writ of mandamus directing appellees, as drainage commissioners of district No. 1 in Gridley township, in said county, to levy assessments on the lands benefited within the said drainage district, for the purpose of repairing and maintaining the main ditch of the district through the lands of petitioners, and to repair and maintain the same so as to carry off the water flowing into it. The defendants answered the petition, setting up as a defense that the district had been dissolved and ceased to exist. Petitioners demurred to the answer generally and specially, and, the demurrer being overruled, they elected to stand by it. The court thereupon dismissed their petition, and entered judgment against them for costs. The appeal was taken to this court on the ground that the constitutionality of the statute authorizing the dissolution of a district organized before its passage is involved in the litigation.

The petition alleges that drainage district No. 1 in Gridley township, in McLean county, was organized in the year 1884 under an act entitled "An act to provide for the organization of drainage districts and to provide for the construction, maintenance and repair of drains and ditches, by special assessments on the property benefited thereby," approved May 29, 1879, in force July 1, 1879 (Laws 1879, p. 142), and amendments to said act passed in 1881 (Laws 1881, p. 87) and 1883; that the petitioner Cleary is the owner of 240 acres and the petitioner Stokes is the owner of 80 acres in township 26, range 2, in Gridley township and in said district; that the main ditch of the drainage district was constructed over their lands; that a large territory lying southwest, west, and northwest, within the district, is drained through the ditch; that the ditch has become filled up by its banks caving in and the clay and other material being washed into it from the lands drained, and the weeds and grass have been permitted to grow in it, so that the ditch is inadequate and insufficient to carry off the water drained into it from said territory; that the waters flowing into the ditch from other lands have during the last two years overflowed the banks and spread over the lands of petitioners, making them unfit for cultivation and destroying their crops; and that petitioners have made demands on the defendants to levy an assessment and to repair and improve said ditch so as to carry off the water drained into it.

In answering the petition defendants seem to have misapprehended the nature of the suit, and the answer is somewhat after the form of an answer in chancery. The proceeding for mandamus is a suit at law, and the rules of pleading are the same as in other suits at law. All the facts properly set forth in the petition which are not denied in express terms by the answer are admitted to be true. *Chicago & Alton Railroad Co. v. Sufferin*, 129 Ill. 274, 21 N. E. 824; *People v. Crabb*, 156 Ill. 155, 40 N. E. 819; *Mayor of Roodhouse v. Briggs*, 194 Ill. 435, 62 N. E. 778; 13 Ency. of Pl. & Pr. 784. The answer admits some of the averments and contains no direct or express denial of any specific fact alleged in the petition, and the facts alleged are therefore admitted. Averments that the defendants do not know whether the proceedings in organizing the district were in due form of law or not, that they do not know under what act of the Legislature the district was established, and that they neither admit nor deny the allegations that the district was duly organized, have no effect whatever.

The defense that the district has ceased to exist is founded upon the following allegations of the answer: That the act of 1879, under which the district was organized, was repealed by an act entitled "An act to provide for drainage for agricultural and sanitary purposes, and to repeal certain acts therein named," approved June 27, 1885, in force July 1, 1885 (Laws 1885, p. 78); that said act of 1885 took the place of the previous act of 1879, and the district continued to exist as a drainage district under the act of 1885; that section 47½ was added to said act of 1885 by an act approved June 8, 1889, in force July 1, 1889 (Laws 1889, p. 119), providing for the dissolution of districts organized under said act of 1885, and that the drainage district was dissolved on August 10, 1895, in pursuance of the provisions of that section, on petition of two-thirds of the owners of land in the district.

The grounds upon which it is claimed that the court erred in overruling the demurrer to the answer are: First, that section 47½, which was added to the act of 1885 by way of amendment in 1889, does not authorize the dissolution of drainage districts organized under the act of 1879; second, that said section is in violation of various provisions of the Constitution as applied to districts organized before its passage; and, third, that the proceedings for the dissolution of this drainage district are null and void. The second and third of said propositions are fairly involved in the case, but we have not found it necessary to consider any question except the first one, relating to the application of section 47½ to this district.

Generally, statutes are to be treated as establishing rules for the future, and, even where the Legislature may lawfully limit or

affect existing rights, an intention to do so will not be presumed unless it clearly appears. The rule is well established that a retrospective operation of a statute is not favored. Such an intention must be manifested by clear and unequivocal language, and in case of doubt the statute must be construed to have a prospective effect only. *Thompson v. Alexander*, 11 Ill. 54; *McHanev v. Trustees of Schools*, 68 Ill. 140; *Means v. Harrison*, 114 Ill. 248, 2 N. E. 64; *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519. This is a case where that rule ought to be applied if it can be, and the statute should be restricted in its operation to districts organized after its enactment, unless it is clear that the intention of the Legislature was otherwise.

The act of 1879 provided for the organization of drainage districts and the construction of ditches by assessments of benefits and damages to the landowners within the district. It contemplated that some lands would be benefited and other lands would be injured; that some would be both benefited and damaged; that the benefits might exceed the damages or the damages exceed the benefits; and that assessments should be made of damages and benefits, so as to do justice to all the owners within the district. Section 38 (page 152) provided for maintenance and repair and for future assessments, and was as follows: "All ditches and drains shall, at all times, be kept in good order and repair by the commissioners, and the lands affected by said work shall pay their proportionate amount of costs, which shall be in the same proportion that the lands were originally assessed." Penalties were imposed upon the commissioners for failure to perform the duties imposed upon them by the provisions of the act, and there was no provision for the dissolution of a district, or the release of those benefited from their obligation and the imposition of the entire burden upon those who are injured. This district was organized under that law, which created an obligation to maintain the drains and ditches on petitioners' lands at all times, and the property benefited thereby was liable to be assessed for such maintenance. If the commissioners failed to keep the ditch in repair, the law gave petitioners a remedy, by mandamus, to compel them to levy assessments and make repairs, and the commissioners were also liable to penalties for failure to perform duties. If the right of way for the ditch was obtained by agreement it was in view of the provisions of the law with reference to maintenance and repair, and if it was condemned it was upon that basis. To apply the subsequent statute in a retrospective way to a district so organized would be contrary to natural justice, and deny to petitioners a right to have the ditch maintained so as to carry off the

water cast upon their lands, as the law provided would be done. The intention to commit such an act of injustice should not be attributed to the Legislature if it can be avoided. A construction of the statute which would continue the use of the ditch on petitioners' land for the benefit of other proprietors who are released from their obligation should not be considered within the legislative intent unless such intent is clear, regardless of any constitutional question.

In our opinion the language of the statute does not manifest such an intention, but rather the contrary. The act of 1885 in express terms repealed the act of 1879, under which the drainage district was organized, together with amendments thereto and other acts named in the repealing section. The act of 1885 was not an amendment of previous acts, but was declared to be an amendatory revision and consolidation of the acts repealed, and an independent act, except as it was a codification and amended successor of the first three acts mentioned in the repealing section, which included the act of 1879 and the amendments. The repealing section contained the following provision: "All drainage districts heretofore organized under any one or more of the acts hereby repealed shall be held, and they are hereby declared to be legally organized, and the assessments made therein shall be held to be legally made * * * The officers, under the repealed act, and proceedings begun, shall be continued under this act, and shall have and possess all the rights, powers and privileges the same and to the same extent as though the whole proceedings were commenced and carried on under the provisions of this act, and only affected as to the future as herein provided." There was no provision in the act of 1885 for the dissolution of a drainage district, but in 1889 the act referred to in the answer was passed, by which section 47½ was added, providing that a drainage district should be dissolved without notice or a hearing, or any adjustment of rights or duties, whenever two-thirds of the owners of land owning two-thirds of the land in the district should sign a petition for the dissolution. It provided that the district should still have the use of the drains, and a person over whose lands a ditch had been constructed should not be allowed to obstruct the use or proper working of the ditch. The effect of the provision would be to release the lands benefited by the drainage furnished by the ditch from assessments to maintain and keep it in repair, while the owners still have the right to gather the waters on their lands and cast them into the ditch. The operation of the section is limited to drainage districts organized under the act of 1885, the language being, "any drainage district organized under this act." This district was not organized under that act, but under the previous independent act of 1879, which was expressly repealed by the act of 1885. The

district was continued as a drainage district under the act of 1885 by virtue of the above provision that all drainage districts previously organized under any one or more of the acts repealed should be continued under the new act. Such districts are nowhere referred to in the act of 1885 as being organized under it, but, on the contrary, are described as districts organized under the acts thereby repealed.

Counsel for appellants say that if land-owners were authorized to proceed to obtain a dissolution of the district they should have proceeded under the general act providing for such dissolution in force July 1, 1889 (Laws 1889, p. 117), which provides for notice and a hearing, and which was held not in conflict with the Constitution in the case of *Hollenbeck v. Detrick*, 162 Ill. 388, 44 N. E. 732. The validity of that act was established by that decision, and it applies to all drainage districts, whether organized as this district was or by proceedings in the county court.

It is urged that petitioners are estopped to question the dissolution of the district by delay in bringing their action. It is not contended that they are barred by any statute of limitations, and there is nothing appearing which could amount to an estoppel.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to sustain the demurrer to the answer.

Reversed and remanded.

(207 Ill. 492)

STONE v. CITY OF CHICAGO et al

(Supreme Court of Illinois. Feb. 17, 1904.)

MUNICIPAL CORPORATIONS — INDEBTEDNESS — CONSTITUTIONAL LIMITATION — ISSUANCE OF BONDS — PAYMENT OF JUDGMENT INDEBTEDNESS.

1. Section 1 of article 7 of the city and village act (Hurd's Rev. St. 1901, c. 24, § 83) provides that the fiscal year shall commence at the date of the annual election of officers, or at such time as may be fixed by ordinance. Section 2 (section 89) requires the passage of an ordinance within the first quarter, known as the "Annual Appropriation Bill," specifying such sum or sums as are deemed necessary to defray necessary expenses and liabilities, and the objects and purposes thereof, and the amount appropriated for each; and prohibits further appropriations within the year unless sanctioned by vote as therein prescribed. Section 3 (section 90) restricts the annual expenses to the annual appropriation, excepting the right to order and provide, as therein prescribed, for improvements necessitated by casualty or accident; and provides, as to paying any judgment obtained against the city, for borrowing a sufficient amount for a space of time not exceeding the close of the next fiscal year, which sum, with the interest, is to be included in the general tax levy of the next year. Section 4 (section 91) prohibits any contract without an appropriation, except as otherwise provided by statute. *Held*, that these sections pertained to annual expenditures and the raising of funds to meet pressing financial wants by short loans, extending in no event beyond the close of the

next fiscal year, and neither expressly nor impliedly limited the powers otherwise conferred to borrow money on 20-year bonds, or to make long-time loans and issue bonds therefor.

2. The borrowing of money by the issuance of bonds to pay the judgment indebtedness of a city is a pledge of its credit for corporate purposes, within the meaning of City and Village Act, art. 5, § 1, par. 5 (Hurd's Rev. St. 1901, c. 24, § 62), authorizing bonds for such purposes.

3. The general power conferred by City and Village Act, art. 5, § 1, par. 5 (Hurd's Rev. St. 1901, c. 24, § 62), to issue and sell 20-year bonds, is not affected by the power to issue funding bonds, conferred by Act Feb. 13, 1865, as amended (Hurd's Rev. St. 1899, c. 113) as the latter act, on its face, did not in any way purport to be exclusive.

4. A notice of an election to authorize the issuance of funding bonds by a city pursuant to Act Feb. 13, 1865, as amended (Hurd's Rev. St. 1899, c. 113), published only once, and not for three successive weeks, was sufficient.

5. If the ballot used at an election pursuant to Act Feb. 13, 1865, as amended (Hurd's Rev. St. 1899, c. 113), to authorize the issuance of funding bonds by a city, is in form substantially like the one prescribed by the statute, it is sufficient.

6. A judgment against a city is within the designation "other evidences of indebtedness issued for money," as used in Act Feb. 13, 1865, as amended (Hurd's Rev. St. 1899, c. 113), in describing the debts for which it authorizes the issuance of funding bonds.

7. The World's Fair bonded indebtedness of the city of Chicago was created pursuant to Const. 1870, art. 9, § 13, for the purpose of conferring power to issue bonds beyond the constitutional limitation, and therefore should not be taken into consideration in determining the amount of the city's indebtedness under the constitutional limitation.

8. Judgments against a city, unprovided for, should be included in determining its indebtedness with reference to the constitutional limitation.

9. The amount held in a city treasury with which to pay special assessment bonds is not a debt in the sense of the constitutional limitation.

10. The amount which a city has been assessed for public benefits in assessment cases, and which remains unpaid, is not a debt in the sense of the constitutional limitation.

11. "The water fund debt" of a city is a debt within the sense of the constitutional limitation.

12. The amount of anticipation tax bonds is not a debt of a city within the sense of the constitutional limitation.

13. The amount held by a city treasurer as due the sinking fund is not a debt of the city within the sense of the constitutional limitation, and should be deducted from its bonded indebtedness included within such limitation.

14. Where the money with which to pay the floating indebtedness of a city is in the treasury, it should not be computed in determining the amount of its indebtedness under the constitutional limitation, but it is otherwise as to the accrued interest thereon.

Appeal from Circuit Court, Cook County: Lockwood Honoré, Judge.

Bill by Charles A. Stone against the city of Chicago and others. From a decree in favor of defendants, complainant appeals. Affirmed.

This was a bill in chancery filed by the appellant, a resident and taxpayer of the city of Chicago, in the circuit court of Cook

county, against the city of Chicago, its mayor, Carter H. Harrison, and Lawrence E. McGann, its comptroller, to enjoin the issue and sale of \$4,000,000 20-year 3½ per cent. bonds of the city about to be issued and sold, the proceeds arising from the sale of which were to be used in paying an equal amount of judgments before that time rendered by the federal courts and the courts of record in the state of Illinois against the city of Chicago. An answer and replication were filed, and upon final hearing the bill was dismissed for want of equity, and the record has been brought to this court for review by appeal.

The appellant contends that the issue and sale of said bonds should be enjoined upon the following grounds: First, the city has no power to issue 20-year bonds, from the sale of which to obtain a fund with which to pay its judgment indebtedness; second, if the power of the city to issue 20-year bonds for the purpose of obtaining a fund from the sale thereof with which to pay its judgment indebtedness be conceded, nevertheless, as the indebtedness of the city, in the aggregate, exceeds 5 per centum of the value of its taxable property as ascertained by the last assessment for state and county taxes, the city is prohibited from issuing said bonds by virtue of the inhibition contained in section 12 of article 9 of the Constitution of 1870, which in part is as follows: "No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness."

The record shows that at a regular meeting thereof on the 22d day of September, 1902, the city council of the city of Chicago duly passed an ordinance providing for the issue and sale of \$4,000,000 20-year 3½ per cent. bonds under the provisions of paragraph 5, § 1, art. 5, c. 24, Hurd's Rev. St. 1901, which reads as follows: "To borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and form, and on such conditions as it shall prescribe, but shall not become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate to exceed five (5) per centum on the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness; and before or at the time of incurring any indebtedness, shall provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years after contracting the same."

The ordinance contained the following preamble: "Whereas, the city of Chicago is indebted to divers persons on account of judgments heretofore recovered against the city of Chicago, which said judgments the city of Chicago desires to pay, and to that end to issue negotiable bonds therefor and with the proceeds thereof to satisfy said judgments in full." And section 3 reads as follows: "Said bonds shall be sold by the comptroller of the city of Chicago at public or private sale, at a price not less than their face or par value, and the proceeds thereof shall be used for the exclusive purpose of canceling and retiring the like amount of the indebtedness of the city of Chicago evidenced by judgments recovered against it in the federal courts and in the courts of record of the state of Illinois. Said bonds shall be issued and delivered simultaneously with the surrender, cancellation, satisfaction and release of a like amount of the judgment indebtedness which said bonds are issued to pay."

It further appears that at a regular meeting of the city council of the city of Chicago held on the 16th day of March, 1903, there was presented to the city council a petition, signed by 10 legal voters of said city, asking the corporate authorities of said city to submit to the voters of the city, at the general election to be held therein on the 7th day of April, 1903, the question of issuing \$4,000,000 20-year 3½ per cent. bonds for the purpose of raising a fund with which to pay and discharge the judgments theretofore rendered against said city in the federal courts and the courts of record in the state of Illinois; that upon the presentation of said petition the city council duly passed an ordinance for the issue and sale of \$4,000,000 20-year 3½ per cent. bonds, under the provisions of section 1 of an act entitled "An act to amend an act approved April 27, 1877, entitled 'An act to amend an act entitled an act relating to county and city debts, and to provide for the payment thereof by taxation, in such counties and cities,' approved February 13, 1865, and to amend the title thereof," approved June 4, 1879, in force July 1, 1879 (Hurd's Rev. St. 1899, p. 1301, c. 113), which in part reads as follows: "That in all cases where any county, city, town, township, school district, or other municipal corporation, has issued bonds or other evidences of indebtedness, for money, or has contracted debts, which are the binding, subsisting legal obligations of such county, city, town, township, school district, or other municipal corporation, and the same, or any portion thereof, remain outstanding and unpaid, it shall be lawful for the proper corporate authorities of any such county, city, town, township, school district, or other municipal corporation, upon the surrender of any such bonds or other evidences of indebtedness, or any number or portion thereof, to issue, in lieu or place thereof, to the owners or hold-

ers of the same, new bonds prepared as hereinafter directed, and for such amounts, upon such time not exceeding twenty years, payable at such place, and bearing such rate of interest, not exceeding seven per centum per annum, as may be agreed upon with the owners or holders of such outstanding bonds or other evidences of indebtedness. * * *

And it shall also be lawful for the proper corporate authorities of any such county, city, town, township, school district, or other municipal corporation, to cause to be thus issued, such new bonds, and sell the same to raise money to purchase or retire any or all of such outstanding bonds or other evidences of indebtedness; the proceeds of the sales of such new bonds to be expended, under the direction of the corporate authorities aforesaid, in the purchase or retiring of the outstanding bonds or other evidences of indebtedness of such county, city, town, township, school district, or other municipal corporation, and for no other purpose whatever."

The ordinance contained the following preamble: "Whereas, the city of Chicago is indebted to divers persons on account of judgments heretofore recovered against the city of Chicago, which said judgments the city of Chicago desires to pay, and to that end to issue its negotiable bonds therefor pursuant to an act of the legislature of the state of Illinois approved February 13, 1865, and amendments thereto; and whereas, by a petition signed by ten (10) legal voters, resident therein, the corporate authorities of said city have been requested to submit to the voters thereof, at the next general election, the question of issuing such bonds to the amount of \$4,000,000." Section 3 reads as follows: "Said bonds shall be sold by the comptroller of the city of Chicago at a price not less than their face or par value, and the proceeds thereof shall be used for the exclusive purpose of canceling and retiring the like amount of indebtedness of the city of Chicago evidenced by judgments recovered against it in the federal courts and in the courts of record of the state of Illinois. Said bonds shall be issued and delivered simultaneously with the surrender, cancellation, satisfaction and release of a like amount of the judgment indebtedness which said bonds are issued to pay."

The election was held on April 7, 1903, and the majority of all the votes cast were in favor of the proposition to issue \$4,000,000 20-year 3½ per cent. bonds. It also appears that the value of the taxable property in the city of Chicago for the last assessment for state and county taxes was \$402,495,181, 5 per cent. (the debt limit) of which was \$20,124,756.

It is agreed that the judgments mentioned in the ordinance dated September 22, 1902, and the ordinance dated March 16, 1903, are the same judgments, and that the city does not intend to issue bonds in amount in excess of \$4,000,000.

The following statement, made by Mark M. Foote, general accountant in the city comptroller's office, was introduced in evidence as defendant's "Exhibit 1":

Statement of all Debts of City of Chicago Sept. 30, 1903:		
I. Bonds (general).....		
" (world's fair).....	\$6,863,000 00	
" (water).....	4,517,000 00	
	<u>2,643,000 00</u>	
		\$15,123,000 00
II. Judgments vs. city, unprovided for..		
		4,571,152 33
III. Due special assessment fund		
Public benefits due from city April 30, 1901, as per verbal report Haskins & Sells	\$1,518,943 33	
	<u>1,744,847 03</u>	
		3,263,290 36
IV. Water Fund Debt.		
Water certificates.....	\$ 750,000 00	
Water pipe extension certificates	462,657 43	
Accrued interest.....	47,680 24	
Outstanding warrants on treasurer and deposits..	<u>38,866 72</u>	
		1,347,184 39
V. Anticipation tax warrants.....		
		4,093,800 00
VI. Due sinking funds.....		
Portion included in this amount due sinking funds for which there is no provision by the city	\$1,384,049.87	
VII. Accrued interest (corporate)		
Bonds and coupons matured, covered by deposit for payment of same	\$ 205,668 54	
Unpaid pay-rolls covered by funds with city paymaster	22,202 28	
Due trust and special deposit funds, covered by cash with treasurer.....	368,027 06	
Warrants on city treasurer outstanding.....	514,513 06	
Due pension fund covered by cash in treasury.....	512,773 30	
	<u>43,677 44</u>	
		1,906,180 30
Total		\$32,797,474 15

Robert R. Baldwin, for appellant. Edgar Bronson Tolman, Corp. Counsel (Colin C. H. Fyfe, of counsel), for appellees. Pence & Carpenter, in support of refunding bond issue, by leave of court.

HAND, O. J. (after stating the facts). It is first contended that, as cities are given power to borrow money with which to pay judgments recovered against such municipalities by the last paragraph of section 3 of article 7 of the city and village act (section 90, c. 24, Hurd's Rev. St. 1901), that method of raising funds with which to pay the judgment indebtedness of a city is exclusive. By section 1 of said article 7 it is provided that the fiscal year of cities shall commence at the date established by law for the annual election of municipal officers therein, or at such other time as may be fixed by ordinance. By section 2, that city councils shall, within the first quarter of each fiscal year, pass an ordinance, to be known as the "Annual Appropriation Bill," in which shall be specified such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporations, together with the objects and purposes thereof, and the amount appropriated for each object and purpose, and that no further appropriation

shall be made at any other time within such fiscal year unless the proposition to make such appropriation has been first sanctioned by a majority of the legal voters of the city, either by petition or at a general or special election. By section 3, that neither the city council nor any department or officer of the city shall have the right to add to the corporate expenses in any one year anything over and beyond the amount provided for in the annual appropriation bill for that year, and that no expenditure for any improvement to be paid for out of the general fund of the city shall exceed in any one year the amount provided for such improvement in the annual appropriation bill, but that the city council may by a two-thirds vote order any improvement, the necessity of which is caused by any casualty or accident happening after the annual appropriation has been made, and that the city council, by a two-thirds vote, may order the mayor and finance committee to borrow a sufficient amount to provide for the expense necessary to be incurred in making any improvement the necessity of which has arisen by reason of any casualty or accident which has happened since the annual appropriation has been made, for a space of time not exceeding the close of the next fiscal year, which sum, and the interest thereon, shall be included in the next general tax levy; and, should any judgment be obtained against the city, the mayor and finance committee, under the sanction of the city council, may borrow a sufficient amount to pay the same, for a space of time not exceeding the close of the next fiscal year, which sum and interest shall in like manner be added to the amount authorized to be raised in the general tax levy of the next year. And by section 4, that no contract shall be made by the city council, or any committee or member thereof, and no expense shall be incurred by any officer or department of the city, whether the object of the expenditure has been ordered by the city council or not, unless an appropriation shall have been previously made concerning such expense, except as otherwise provided by statute.

The sections of article 7 above referred to pertain to the annual expenditures of cities, and a method is provided therein whereby funds may be raised to meet the temporary pressing financial wants of such municipalities by a system of short loans, which in no event shall extend beyond the close of the next fiscal year. Those sections do not, in express terms or by implication, refer to or limit the powers of cities to borrow money on 20-year bonds, conferred upon such municipalities by paragraph 5 of section 1 of article 5 of the city and village act, or by section 1 of the act of 1865, as amended. Neither is the power to make the temporary loans provided for in article 7 inconsistent with the powers conferred upon cities under said other legislative enactments to make long-time loans and issue bonds therefor, and

from a consideration of all the legislation upon the subject it seems plain that cities have the power to issue 20-year bonds for the purpose of obtaining funds for corporate purposes, and with which to raise money to retire outstanding bonds issued by, or other indebtedness due from, such municipalities; and that section 3 of article 7 of the city and village act contains no limitation upon those powers, but that such powers are as full and complete as though said section 3 was not in force.

In the case of *City of Huron v. Second Ward Savings Bank*, 30 C. C. A. 38, 86 Fed. 272, 49 L. R. A. 534, one of the objections made to a recovery upon the bonds sued upon was that the power granted by the charter to the city council to pay current expense warrants of the city by a tax levy implies the exclusion of the power to fund such warrants by the issue of negotiable bonds. The court said: "The contention would be worthy of serious consideration if the express power to issue negotiable bonds was not also granted to the city council by this charter; but the charter grants to the council authority 'to appropriate money and provide for the payment of the expenses and indebtedness of the corporation,' and gives it both the power to levy taxes and the power to borrow money and issue bonds for this purpose. It cannot be that the grant of either of these powers excludes either, and the choice of the method by which the indebtedness of the city should be paid is left to the discretion of the council."

The question then arises, is the borrowing of money by the issuing of 20-year bonds, from the sale of which a fund is to be raised wherewith to pay the judgment indebtedness of the city, the pledging of the city's credit, within the meaning of paragraph 5 of section 1 of article 5 of the city and village act, for corporate purposes? Those purposes have been defined to be such purposes as are germane to the objects of the welfare of the municipality, or at least have a legitimate connection with those objects, and a manifest relation thereto. *Anderson's Law Dic.* p. 265; *Board of Supervisors of Livingston County v. Welder*, 64 Ill. 427; *People v. Dupuyt*, 71 Ill. 651; *Burr v. City of Carbondale*, 76 Ill. 455. In *Taylor v. Thompson*, 42 Ill. 9, a tax for a corporate purpose was said to be one to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it. In *National Life Ins. Co. v. Mead*, 13 S. D. 37, 82 N. W. 78, 48 L. R. A. 785, 79 Am. St. Rep. 876, suit was commenced to compel the treasurer of the city of Pierre to pay certain interest coupons. One defense was that the city was without power to issue funding bonds. The statute under which the bonds were issued was identical with paragraph 5 of section 1 of article 5 of the city and village act of this state. The court said (page 43, 13 S. D., page 79, 82 N. W., 48 L. R. A.

785, 79 Am. St. Rep. 876): "It will be observed that this law gives express power to borrow money by issuing bonds for corporate purposes. Did this confer power to issue bonds for the purpose of funding the floating indebtedness? An affirmative answer to this inquiry is supported by the following decisions: *Morris & Whitehead v. Taylor* (Or.) 49 Pac. 660; *City of Huron v. Second Ward Savings Bank*, 30 O. C. A. 38, 86 Fed. 272 [49 L. R. A. 534]; *Portland Savings Bank v. City of Evansville* (O. C.) 25 Fed. 389. * * * The statute expressly makes the power to issue bonds coextensive with the power to borrow money. Either may be exercised for any corporate purpose, and the payment of legal municipal debts is clearly a corporate purpose. If a city has power to borrow money by issuing bonds for the purpose of lighting its streets, it clearly has power to borrow money in the same manner to pay an indebtedness incurred for the same purpose. Had the Legislature contemplated there would be no floating indebtedness under any circumstances, cities would have been authorized to borrow only for the purpose of paying outstanding bonds. We think the city was authorized to issue bonds for the purpose of funding its indebtedness." In *City of Huron v. Second Ward Savings Bank*, supra, which was a suit to recover upon municipal bonds, the court said: "Another objection to these bonds is that the city of Huron was without power to issue them. The position is not entitled to extended consideration, because the power granted by the charter of the city of Huron is plenary. It was general, not special. It was not limited to specific purposes, but was to borrow money and issue bonds for all municipal purposes. It was 'to borrow money, and for that purpose to issue bonds of the city in such denominations, for such length of time not to exceed twenty years, and bearing such rate of interest not to exceed seven per cent. per annum, as the city council may deem best.' The whole is greater than any of its parts, and includes them all. The power to borrow money and issue bonds for all municipal purposes includes the power to do so to pay or refund the indebtedness of the municipality." If it be a corporate purpose—as we think it is—to issue and sell 20-year bonds to pay the judgment indebtedness of a city, the bonds in question may be issued under the authority of paragraph 5 of section 1 of article 5 of the city and village act, notwithstanding that the same power may be conferred by the act of February 13, 1865, as amended, as that act upon its face does not in any way purport to be exclusive. The power given by paragraph 5 of section 1 of article 5 of the city and village act is a general power; and, although other acts may confer on cities and villages the power to issue bonds, the general power conferred upon cities by the city and village act is not thereby taken away.

If the city has power to issue the bonds, the issue and sale of which are sought to be enjoined, by virtue of paragraph 5 of section 1 of article 5 of the city and village act, a consideration of the power of the city under the act of 1865, as amended, to issue said bonds, would seem to be unnecessary. We have, however, thought it best briefly to examine the power of the city, under that act, to issue said bonds. As preliminary to the question of the right of the city to issue said bonds under the act of 1865, as amended, it is said the notice of the election should have been published for three successive weeks, instead of once, as was done, and the ballot used at the election was not in the form prescribed by the statute. Under the authority of *Weld v. Rees*, 48 Ill. 428, and *Jenkins v. Pierce*, 98 Ill. 646, the notice was sufficient; and the only criticism made upon the form of the ballot is that it contained more, rather than less, than the law required. The ballot was in form substantially like the one prescribed by the statute, and was sufficient.

It is next contended that a judgment does not fall within the designation "other evidences of indebtedness issued for money," within the meaning of the language used in the act of 1865, as amended, and does not, therefore, fall within the purview of that statute. One authority, only, in point—that of *City of Port Huron v. McCall*, 46 Mich. 565, 10 N. E. 23—has been cited upon the proposition that judgments are within the meaning of the language used in that statute. The city of Port Huron had issued its bonds in aid of the construction of the Port Huron & Lake Michigan Railroad. Default was made, and judgment was rendered for the amount thereof against the city. New bonds were issued, and said judgment indebtedness was refunded under the provisions of the following section of the city charter: "No loan, bond or other evidence of debt not expressly authorized by this act, or any act hereby continued in force, shall be made or issued by the common council or any board or officer of the corporation: provided, however, that the common council, subject to the approval of the board of estimates, may issue new bonds for the refunding of bonds and evidences of indebtedness already issued." The new bonds having matured, and default having been made in the payment thereof, suit was brought thereon, and the city defended on the ground that the judgment was not evidence of debt already issued, and that the city council was therefore without power to issue said bonds, under the foregoing section of its charter, with which to refund said judgment. The trial court overruled the city's contention, and its judgment was affirmed by the Supreme Court. Judge Cooley, in speaking for the court, in part said: "It is also said that refunding bonds may be issued only for the refunding of 'bonds and evidences of indebtedness already issued,' and a

judgment is not an evidence of indebtedness issued. A judgment is the act of a court; but the refunding provision intends the obligations which the city itself has issued as evidences of its indebtedness, the bonds, notes, etc.; and this view is strengthened by the following section (section 12, p. 231), which provides that 'all bonds and evidences of debt, when refunded, shall be canceled and destroyed by the treasurer, in the presence of the comptroller and a special committee of the common council appointed for that purpose. He shall record and keep an accurate description of all bonds and evidences of debt thus canceled and destroyed.' A judgment, it is said, cannot be thus canceled and destroyed. * * * This view of the statute is * * * very narrow and technical. * * * It is easy to say that a judgment is not an evidence of indebtedness issued, but it is just as easy to say the contrary, and with quite as good reason. A judgment is not only an evidence of indebtedness, but it is of the highest and most conclusive nature. And there is no straining of language in saying that the judgment is issued. * * * And what difficulty there can be in canceling and destroying a judgment I do not understand. The utterance of the judge pronouncing it cannot be destroyed; the book in which it is entered is to be preserved as a perpetual record; but the judgment as an evidence of indebtedness is canceled when it is paid and receipted. * * * There is a principle of law that municipal powers are to be strictly interpreted, and it is a just and wise rule. Municipalities are to take nothing from the general sovereignty except what is expressly granted; but when a power is conferred, which, in its exercise, concerns only the municipality, and can wrong or injure no one, there is not the slightest reason for any strict or literal interpretation with a view to narrowing its construction." The reasoning found in the opinion in that case is satisfactory and convincing, and conclusive of the right of the city of Chicago to issue said bonds under the act of 1865, as amended, to raise a fund from the sale thereof with which to pay its outstanding judgment indebtedness. The bonds, when issued, will be no less valid by reason of the fact that they may properly be issued under either act—that is, under paragraph 5 of section 1 of article 5 of the city and village act, or under the act of 1865, as amended.

We will next consider the indebtedness of the city of Chicago with the view of determining whether the issue of said bonds is prohibited by the constitutional prohibition which fixes the limit of said indebtedness at an amount not to exceed 5 per centum of the value of the city's taxable property as shown by the last assessment for state and county taxes. This will be done, taking defendant's Exhibit 1 as a basis.

Item I. In item 1 of said exhibit appears, "Bonds (world's fair) \$4,517,000." These bonds were issued under section 13 of article 9 of the Constitution of 1870, which section was adopted as an amendment to the Constitution in the year 1890. The funds arising from the sale of said bonds were used in aid of the World's Columbian Exposition. At the time the amendment was adopted the city was in debt beyond the constitutional limit, and the object of the amendment was to confer upon the city power to issue said bonds notwithstanding the constitutional limit of 5 per cent. It is therefore clear that said bonds should not be taken into consideration in determining the amount of the city's indebtedness under the debt limit of 5 per cent. fixed by the Constitution.

Item II. An elaborate argument has been presented by the solicitor for appellee with a view to induce the court to hold that the item, "Judgments vs. city, unprovided for, \$4,871,182.83," should not be included in the computation in ascertaining how much the indebtedness of the city is with reference to the constitutional limitation. In *City of Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982, it was held that judgments were debts against the city, and that the amount thereof should be computed in ascertaining whether the constitutional limitation had been exceeded. We are not disposed to recede from the position taken in that case.

Item III. The amount, "Due special assessment fund, \$1,518,943.92," is money held by the city treasurer with which to pay assessment warrants when presented, and is in no sense a debt of the city. The amount of "Public benefits due from city April 30, 1901, as per verbal report Haskins & Sells, \$1,744,347.02," represents the amounts which the city has been assessed for public benefits in numerous assessment cases, and which remain unpaid; and under the authority of *Jacksonville Railway Co. v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478, is not a debt of the city in the sense of the constitutional limitation.

Item IV. The "Water fund debt," amounting to \$1,347,184.39, is an indebtedness of the city. *City of Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861.

Item V. The amount of "Anticipation tax warrants, \$4,093,000," under the authority of *City of Springfield v. Edwards*, 84 Ill. 626, is not, in the constitutional sense, a debt of the city.

Item VI. The evidence shows that \$1,049,606.22 is the total amount in the city treasurer's hands which can be properly applied for sinking fund purposes. The item, "Due sinking funds, \$2,433,656.09," is not a debt of the city, but the amount in the hands of the city treasurer belonging to the sinking fund should be deducted from the amount of the city's bonded indebtedness other than World's Fair bonds. *Rice v. City of Mil-*

waukee, 100 Wis. 516, 76 N. W. 341; Kelly v. City of Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281.

Item VII. This item represents the floating indebtedness of the city, and the money with which to pay the same, with the exception of "Accrued interest (corporate), \$205,606.54," is in the city treasury. The "accrued interest" item is a debt. The other items are not debts of the city within the constitutional limitation.

We conclude, therefore, that the following items found in said Exhibit 1 in a constitutional sense constitute the debts of the city, and must be taken into account in determining its debt limit:

I. Bonds (general).....	\$3,953,000 00	
(water).....	3,642,000 00	
		\$10,606,009 00
II. Judgments vs. city, unprovided for..		4,871,123 83
IV. Water Fund Debt.		
Water certificates.....	\$ 750,000 00	
Water pipe extension certificates	462,657 48	
Accrued interest	47,660 24	
Outstanding warrants on treasurer and deposits..	86,866 72	
		1,347,184 20
VII. Accrued interest (corporate).....		205,606 54
		\$17,630,083 76
From which must be deducted the cash sinking fund on hand.....		1,049,606 22
Total indebtedness		\$15,980,427 54

From the foregoing statement it appears that the issue of the \$4,000,000 bonds sought to be enjoined would not increase the indebtedness of the city of Chicago beyond the sum of \$20,124,756, its constitutional debt limit.

The position has been taken by appellees that, even though the city were found to be indebted beyond the limit prescribed by the Constitution, nevertheless the issue of the bonds in question would be valid for the reason that their issue does not increase the indebtedness of the city of Chicago, as the ordinances authorizing their issue provide, "Said bonds shall be issued and delivered simultaneously with the surrender, cancellation, satisfaction, and release of a like amount of the judgment indebtedness which said bonds are issued to pay." In view of the fact that the indebtedness of the city does not exceed its debt limit within the meaning of the Constitution, the question thus raised has not been considered, and no opinion with reference thereto is expressed.

The decree of the circuit court of Cook county will be affirmed. Decree affirmed.

(69 Ohio St. 487)

PITTSBURG, C. & ST. L. RY. CO. v. CITY OF GREENVILLE.

(Supreme Court of Ohio. Feb. 2, 1904.)

EMINENT DOMAIN—EXTENSION OF STREET—USE OF RAILROAD RIGHT OF WAY—INJUNCTION.

1. Where a municipal corporation exercises the power to appropriate for the purpose of opening or extending streets or alleys across railway tracks and lands held or owned by a

railway company, under Rev. St. § 2233, and cognate sections, and is about to file in the probate or common pleas court an application for the assessment of compensation to the holder or owner of such railway property, the company may resort to a court of equity by filing a petition against the municipality, alleging sufficient facts to show that such extension of the streets or alleys will unnecessarily interfere with reasonable use of said tracks and other property to be affected; and the court may, upon such petition, restrain further proceedings for the assessment of compensation until the claim of the company may be judicially determined.

2. The petition involved in this case states a cause of action for the relief therein prayed for.

(Syllabus by the Court.)

Error to Circuit Court, Darke County.

Action by the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company against the city of Greenville. Judgment for defendant, and plaintiff brings error. Reversed.

The action commenced in the court of common pleas is for an injunction against the city of Greenville, to prevent it from extending Wayne and Harrison avenues, in said city, across the tracks, side tracks, yards, and other property of the railway company. Facts are alleged in the petition tending to show that the extensions proposed will unnecessarily interfere with the reasonable use of said property by the railway company, and that the city has passed a resolution to appropriate for the extensions a part of the said railroad property, and is about to apply to court for the assessment of compensation. Other averments are noticed in the opinion. The petition prays for an injunction against the city taking any steps for the purpose of having compensation assessed for the property appropriated, and that the city be enjoined from taking possession of the premises, and from interfering with the plaintiff's use of the same, and that its rights be declared paramount to the rights of the city. General equitable relief is prayed for. The city of Greenville, by its solicitor, demurred to this petition on the ground that it does not state facts sufficient to constitute a cause of action against the city, and does not state facts sufficient to warrant the court in granting the relief prayed for. The demurrer was sustained by the court, and petition dismissed, and upon appeal the circuit court rendered a like judgment. Thereupon the railway company filed its petition in error in this court, seeking to reverse the judgment of the circuit court.

Anderson, Bowman & Anderson and C. B. Heiserman, for plaintiff in error. Guy O. Baker, City Sol., and D. L. Gaskill and J. M. Bickel, for defendant in error.

PRICE, J. (after stating the facts). The questions involved in this proceeding are of more than ordinary interest, and deserve a careful review. The petition is elaborate with description of the property of plaintiff,

the date of its acquirement, and the serious inroads about to be made upon it and its proper use. It is fruitful of apprehensions of impending danger to its property, and spreads before us for consideration the nature and extent of its possessions and rights in the city of Greenville, which will surely be affected and inevitably injured if the defendant in error is allowed to proceed with the work of appropriation. It is alleged that the council of the city of Greenville has passed an ordinance which, by its terms, appropriates portions of the plaintiff's premises for the extension of Wayne and Harrison avenues across the railway property, tracks, and yards—the Wayne street extension to be 66 feet in width—and that the railway company acquired the premises so to be crossed long prior to the establishing of either of said avenues, and that it had located and constructed its station and yards so as to be able to transact its business conveniently and safely, and at the same time accommodate the public. It has constructed and for many years maintained upon its premises its main railway track and three side tracks, with the necessary switches and yards, and upon the same land has erected and maintained its freight depot, stock pens, and weighing scales, all of which are in daily use, and absolutely necessary for the transaction of its business. The side tracks, switches, and yards are used by the plaintiff to shift cars and make up trains to deliver to and remove from the station at Greenville loaded and empty cars, and the side tracks are usually wholly occupied by freight cars, a large number of which are required to carry on the company's business, and that the side tracks and switches at the points of threatened extension are so arranged that daily a large number of vehicles and teams are driven upon the premises for the purpose of carrying away freight, or bringing in freight for shipment to other points. It also appears by averment that other and sufficient streets have heretofore been extended across the company's lands to amply accommodate the traveling public, and that the company has no other grounds or lands which can be used or occupied for its business, and that none can be secured within the city limits. If the proposed extensions are made, the petition says, the railroad yards will be cut into three sections, of about 800 feet each in length, and that, to manage and make up its trains, it will be impossible to comply with the laws of Ohio with reference to blockading of street crossings, and its property will thereby be rendered valueless to the company for the uses to which it is now devoted. The petition then says that the appropriation of said property and the extension of said avenues will unnecessarily interfere with the reasonable use of the plaintiff's property for railroad purposes, and it will be prevented from the full and free exercise of its rights and privileges under the law.

There are other averments in the petition, which we need not at present set out. The company would have the city enjoined from making the extensions. Both of the lower courts held the petition bad on demurrer, and we are asked to determine whether their judgments shall stand.

The questions raised by the demurrer, as stated by counsel, are: (1) Is the petition sufficient to entitle the plaintiff to an injunction? (2) Has the plaintiff an adequate remedy at law?

There is no doubt of the power of a municipal corporation to lay out and establish streets or alleys across railroad tracks and lands, if one condition fixed by the law is not broken. The easement or right of a railroad company, acquired by appropriation in the exercise of the right of eminent domain, or its tracks and lands acquired by purchase for railroad purposes, may alike be subjected to the use of a municipal corporation, in the form of streets and alleys, if done in accordance with the provisions made by our general assembly on the subject. Appropriations by municipal corporations are not governed or controlled by the general statute for the appropriation of private property by corporations, as found in sections 6414 to 6453, Rev. St., inclusive. That there should be no doubt about this, section 6453 expressly provides that "the provisions of this chapter shall not apply to proceedings by state, county, township, district or municipal authorities, to appropriate private property for public uses, or for roads or ditches. * * *". Therefore we may lay aside the rules of procedure provided in those sections, and look to the municipal code as the sole authority for the appropriation of property by municipal corporations. It begins in section 2232, Rev. St., and thereby "each city and village may appropriate, enter upon and hold real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied: (1) For opening, widening, straightening and extending streets, alleys and avenues; also for obtaining gravel or other material for the improvement of the same. * * *". Then follow in detail the numerous purposes for which appropriation may be made. In April, 1873, the municipal code was so amended that the section as amended, and now section 2233, Rev. St. 1892, reads: "The power to appropriate may also be exercised for the purpose of opening or extending streets or alleys across railway tracks, and lands held or owned by railway companies, * * * where such appropriation will not unnecessarily interfere with the reasonable use of the property so crossed by any such improvements. * * *".

The next inquiry is, how may it (the municipal corporation) appropriate? This is answered by section 2235, Rev. St., which is, in part: "When it is deemed necessary by

any municipal corporation to appropriate private property as hereinbefore provided, the council, board of legislation, or other legislative body, as the case may be, shall order by a ye and nay vote, of which due record shall be made and kept, a resolution prepared declaring such intent, defining therein the purpose of the appropriation, and setting forth a pertinent description of the property designed to be appropriated; and immediately upon the introduction of such a resolution, and before the passage of the same, the mayor of the corporation shall cause written notice of such resolution to be given to the owner or owners of every piece of property sought to be appropriated, or to his, her or their authorized agent. * * * And such written notice shall be served by an officer of the corporation designated for the purpose, and return made by such officer in the same manner as in provided by law for the service of summons in civil actions; * * * and no action shall be taken upon such resolution until all the owners of property sought to be appropriated shall have had notice as herein provided; and on the passage of such resolution the yeas and nays shall be taken and entered on the record of the proceedings of the council or legislative body. * * * When the resolution has thus been acted upon, passed, and recorded, the municipal power has been exercised, and the appropriation made. The further proceedings are for compensation to the owner whose property has been appropriated. The next step, therefore, is under section 2236, which is that, "upon the passage of the resolution by the requisite majority, application in writing shall be made to the court of common pleas of the proper county, or to a judge thereof in vacation, or to the probate court of the county, which application shall describe as correctly as possible the property to be taken, the object proposed, and the name of the owner of each lot or parcel of the property." The next section provides for notice and its service. Section 2238 gives the scope of inquiry preliminary to calling a jury: "If it appear to the court or judge that such notice has been served five days before the time of the application, or has been published as provided in the preceding section, and that such notice is reasonably specific and certain, the court or judge may set a time for the inquiry into and assessment of compensation; by a jury of twelve men. * * * Section 2239 provides, in substance, that if the application be in the common pleas, and that court is not in session on the day fixed for the inquiry and assessment of compensation, the judge "shall hold a special term of court for the purpose of hearing and determining such inquiry and assessment, and shall direct a jury to be summoned for the purpose of making such inquiry. * * * Following this is the method of obtaining the jury, and the order of proceedings at the trial. Where in all

these provisions is there a forum in which can be determined the condition to the exercise of power to appropriate in such cases, to wit, that "such appropriation will not unnecessarily interfere with the reasonable use of the property so crossed by any such improvements," as found in section 2233? This fact must be found somewhere, in order that the municipality may extend "streets or alleys across railway tracks and lands held or owned by railway companies." No doubt exists that the inquiry may be made before the village or city council where the resolution to appropriate is pending, and the notice to the holder or owner of such railroad property is required, in order that objections to the appropriation may be made before the passage of the resolution. But is such opportunity, or remedy, if it be one, exclusive? Is it adequate? Let us see. The council has no authority to call or summon or swear witnesses. No issue can be made up before it on the important question. The statute makes no provision for any finding by the council on the subject, and none for recording such finding if one should be made. Neither error nor appeal will lie as to its decision. In no sense can the hearing before the council be called a judicial trial, for it has none of its essentials. Nor can it be regarded as a remedy at law of any kind to settle the question whether the appropriation will or will not "unnecessarily interfere with the reasonable use of the property so crossed by any such improvements." Before the council the railway company may object, and give its reasons for the objection, and urge the interference with the reasonable use of its property. This privilege cannot be called an adequate remedy at law. The council is a legislative body, and possesses no judicial functions.

But counsel for defendant in error state in their brief that the right to appropriate under the condition fixed by section 2233 can be determined in the probate or common pleas court, where the application is filed as provided in section 2236. The brief says:

"Upon a hearing in such a suit brought by the city, an answer may be filed by the railroad company, and the same questions may be heard and determined by the court in which the appropriation proceedings are brought; and the statute gives the railroad company the right of appeal, or the right to prosecute error."

This paragraph is full of assumption. We have said that in proceedings to appropriate for streets and alleys, etc., by municipal corporations, the council makes the appropriation by resolution, and, when that is properly done, the next step is the filing of an application in one of the courts, in order to have compensation to the owner made by a jury in a constitutional manner. The application may be filed in the probate court, which on such subjects has merely statutory jurisdiction. And if it be filed in the court of com-

mon pleas, it still is a special proceeding, and strictly regulated by statute.

There is no provision by which the railway company has a right to file an answer to the application in either of the courts. Answer to what? The application would contain the proceedings before the council, including the resolution to appropriate and the giving of the preliminary notices, and a pertinent description of each parcel of property appropriated, and ask for the impaneling of a jury to assess compensation. An answer to such application would present no issue on the right to appropriate. The court on such an application makes no order of appropriation, if the statute is followed, because section 2283 provides that "if it appear to the court or judge that such notice has been served five days before the time of the application, or has been published as provided in the preceding section, and that such notice is reasonably specific and certain, the court or judge may set a time for the inquiry into and assessment of compensation by a jury," etc. Nor is there any authority for filing a cross-petition by the railway company, setting up the unnecessary interference with its property. No provision is made for the making or trial of such an issue, and the court is without authority to render a judgment upon such issue if made. In practice, counsel may instance a case or cases where some such pleadings were allowed to be filed against the application, and an inquiry made under it. We cannot find any authority for it, even by implication from the statutory provisions on the subject. Even if, in the exercise of the discretion of the court, such an answer or cross-pleading can be filed, it cannot be respected as a remedy—much less, an adequate remedy at law. A party has no adequate legal remedy if it exists wholly in the discretion of a court. To be adequate and legal, it should be one that he can invoke, without let or hindrance, as the assertion of his rights.

But counsel for defendant in error assert that this court has affirmed *Toledo & Ohio Central Ry. Co. v. The City of Fostoria*, 4 Cir. Ct. Dec. 602; *Id.*, 7 Cir. Ct. Rep. 293—where a contrary view was taken. The affirmance, without report, appears in *Railway Co. v. Fostoria*, 56 Ohio St. 726, 49 N. E. 1115. Inasmuch as the opinion of the circuit court in that case has been the source of some confusion, we have examined the printed record filed in this court, and which was the subject of review in *Railway Co. v. Fostoria*, 56 Ohio St. 726, 49 N. E. 1115. Resolutions to appropriate railroad property for extension of streets had been passed by the council of Fostoria, and applications filed in the probate court under the provisions of the statute. Notices were given, and assessments of compensation had by a jury, and verdicts confirmed. Appeal was taken to the court of common pleas, where the court entered upon a preliminary hearing as to the

passage of the resolution by the necessary vote, the sufficiency of the notice for the hearing of the application, and as to whether the extension of the streets would unnecessarily interfere with the reasonable use of the railroad property. The entry shows that the court heard evidence and arguments, and thereupon found generally for the railway company, and adjudged that it go hence and recover costs. The city took the case on error to the circuit court on petition in error and a bill of exceptions containing the evidence adduced on the hearing. The circuit court, as shown by its judgment entry, found, in substance, that the common pleas erred (1) in finding that the notice of the application for assessing damages was insufficient; (2) in holding that the ordinance for the appropriation was not passed as alleged in the application; (3) in finding that the appropriation would unnecessarily interfere with the reasonable use of the property by the railway company. And for these errors the judgment of the court of common pleas was reversed, and the case remanded for trial. The railway company prosecuted error in this court to reverse the judgment of the circuit court, and its petition in error assigned specially the above findings, upon which the court of common pleas was reversed. On this condition of the record, this court affirmed the judgment of the circuit court, in general terms, and without report. Looking to the third ground of reversal, as found by the circuit court in the entry, the record does not inform us whether that court held that the court of common pleas lacked jurisdiction to pass on that question, or that the evidence in support of the holding was insufficient. An examination of the briefs and record shows that the right of the court of common pleas to adjudicate that question was not mooted or discussed, and the judgment entry does not show that the circuit court passed upon it. It may have based its finding upon the ground that the court of common pleas found against the decided weight of the evidence, and the affirmance by this court may have been on the ground that it would not review the point on the weight of the evidence. The same remark may be made as to the findings of the common pleas on the evidence as to the sufficiency of the notice of the application, and as to the passage of the ordinance of appropriation. There is nothing in the record of that case which was filed in this court to indicate that the circuit court held that, as one of the preliminary questions, the probate or common pleas court has jurisdiction to hear and determine whether or not the opening or extension of a street across the property of a railway company will unnecessarily interfere with the reasonable use of its property. And this court, in reviewing that record, determined no such question, but affirmed the judgment of the circuit court on the case as presented in the record, and not as discussed

in the published opinion in *Railway v. Foster*, 4 Cir. Ct. Dec. 602; *Id.*, 7 Cir. Ct. Rep. 293. This investigation of that record may illustrate the value of an unreported case as authority.

Recurring now to the case before us, we are of opinion that the petition contains facts which, if established, will strongly tend to show that the extension of the two avenues will unnecessarily interfere with a reasonable use of the tracks, yards, and depot of the plaintiff company; that it asserts that the city has ample streets in that vicinity to accommodate the public; and that the extensions will irreparably injure the plaintiff, for which it cannot be compensated in money. If allowed to proceed and assess compensation, and the company should appeal or prosecute error, by making the deposit and giving a bond as provided in section 2253, Rev. St., the municipal corporation may take and hold the condemned property. This statute, with the facts alleged in the petition, we think, furnishes sufficient warrant for a court of equity to entertain the plaintiff's case, and restrain further proceedings to assess compensation until the issue of unnecessary interference with the property of the company has been heard and determined.

The judgment of the circuit court is reversed, demurrer overruled, and cause remanded for further proceedings. Judgment reversed.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, and CREW, JJ., concur.

(69 Ohio St. 473)

LEWIS, Hamilton County Auditor, v. STATE
ex rel. KRAMER.

(Supreme Court of Ohio. Feb. 2, 1904.)

TAXATION—ASSESSMENT—NEW STRUCTURES—
NOTICE—BOARD OF EQUALIZATION.

1. Under the provisions of section 2753, Rev. St. 1892, an annual assessor, at the time of taking the lists of personal property, is required to make and return a list of all new structures of any kind, and affix a value thereto, if the value thereof exceeds \$100; and where the owner of a building during the preceding year has remodeled and reconstructed it internally, and has also reconstructed with new material some or all of its walls, so as to substantially enhance the value of the premises, such new parts and the remodeling and improvement of the old may be listed, valued, and returned by the assessor as new structures, within the meaning of said section.

2. The owner of the premises is not entitled to notice of the increase so made of the taxable value of his property, and the annual board of equalization may review and increase the valuation so returned by the assessor without notice to the owner, under section 2804, Rev. St. 1892.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Application by the state, on the relation of Kramer, for writ of mandamus to Lewis, auditor of Hamilton county. From an order granting the writ, defendant brings error. Reversed.

The action in the lower court was in mandamus, wherein the defendant in error prayed for a writ commanding the auditor of Hamilton county to correct his tax list, as to certain errors set out in the petition, and that he be required by the writ to call the attention of the commissioners of said county to such errors, to the end that the commissioners may cause to be refunded to the relator the amount of taxes erroneously charged and collected. The relator's property is in the city of Cincinnati, and the relator alleges that the valuation thereof for taxing purposes in the year 1899 was in the sum of \$5,440, and that Lewis, auditor, in making the tax list and duplicate for the year 1900, listed the same property for taxation at \$6,890; being an increase in valuation in the sum of \$1,450. The relator charges that the increase was so made by the auditor in consequence of an addition made in that sum by order of the board of supervisors of Cincinnati, acting as the annual board of equalization of said city for the year 1900, and without notice of any kind to him, and that erroneous taxes on the property were collected in December, 1900, in the sum of \$18.84. The said errors have been called to the attention of the auditor, and he has been requested to call the attention of the commissioners thereto, with a view of obtaining a refunder of the taxes paid. In answer to the petition of relator, the auditor, in substance, says, that during the year prior to April, 1900, the relator placed a new structure upon the real estate, by remodeling, altering, and almost entirely rebuilding the structures thereon, and that the assessor of the ward in which the premises are situate fixed and returned the valuation of the new structure at \$1,100, allowing a deduction of \$250 for the destroyed portion of the old structure, leaving the addition of the valuation at \$850, and that this amount was returned by the assessor for the year 1900. The answer further relates that, after the assessor's returns had been made, the board of supervisors of the city, acting as an annual board of equalization, considered said return, viewed the new structure so made, and found the same to be of the value of \$1,450, and ordered the sum to be added to the valuation of the premises. In compliance with the order, the auditor entered the increase on the tax duplicate for the year 1900, and charged the regular taxes against the same. The auditor claims that the increase was properly made, and that he was justified in refusing to call the attention of the commissioners thereto. He also alleges that the relator had full knowledge of the increased valuation for the year 1900, and that he voluntarily paid on this increased valuation, but the relator denies this in the reply. The court of common pleas found for the relator, Kramer, and granted the writ of mandamus so prayed for. The case was taken to the circuit court on appeal, where the facts were agreed upon between the parties, and which appear

in the opinion. On these, the circuit court found for the relator, and granted the writ of mandamus. The auditor, Lewis, prosecutes error in this court to obtain a reversal of the judgment of the circuit court.

Ampt, Ireton, Collins & Schoenle, for plaintiff in error. Dan Thew Wright, for defendant in error.

PRICE, J. (after stating the facts). The relator, Kramer, relies on the provisions of section 1038, Rev. St. 1892, as the ground for his action in mandamus. So much of that section as is necessary to quote in this proceeding may be stated as follows: "The auditor shall, from time to time, correct all errors which he discovers in the tax list and duplicate * * * in the amount of such taxes or assessments * * * and if at any time the auditor discovers that any erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto, at any regular or special session of the board; and if the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer, in favor of the person or persons paying the same, for the full amount of the taxes or assessments so erroneously charged and collected, and the county treasurer shall pay the same out of any surplus or unexpended funds in the county treasury * * * but no taxes or assessments shall be so refunded, except such as have been so erroneously charged and collected in the five years next prior to the discovery thereof by the auditor. * * *" His amended petition is framed with the view of compelling the auditor to perform a certain specific duty imposed by the foregoing section, and the lower court, following the averments of the petition thereunder, ordered the auditor to call the attention of the commissioners of Hamilton county to the erroneous taxes that had been charged and collected against relator's property on account of an addition to its valuation illegally made. The auditor had refused to call the attention of the commissioners to the errors of the duplicate complained of, and to enforce the performance of this alleged duty is the purpose of the action.

Under the section quoted, if the auditor complies with the request, before suit, or with the writ, after suit, and calls the attention of the commissioners to the supposed grievances, and that board finds "that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer, in favor of the person or persons paying the same, for the full amount of the taxes or assessments so erroneously charged and collected, and the county treasurer shall pay the same out of any surplus or unexpended funds in the county treasury.

* * *" Another clause of the above section is worthy of notice: "* * * and if at any time the auditor discovers that any erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at any regular or special session of the board, and if the commissioners find," etc. It would seem that, before the auditor is required to give information to the board, errors of the kind mentioned must be discovered by him. In this case the auditor strenuously asserts there are no such errors, and therefore he had discovered none. Hence he had no information in that respect to impart to the commissioners. Insisting that no errors are on the duplicate against relator, and that he has discovered none, we observe the use of the extraordinary writ of mandamus to compel him to discover them and give information thereof to the commissioners. It will be claimed, however, that he discovers that which he ought to discover.

One or more members of this court doubt the right to the remedy in mandamus in such a case, and the reasons for the doubt are quite forcible. But inasmuch as this court, in *Lewis, Auditor, v. State ex rel. Mullikan*, 59 Ohio St. 37, 51 N. E. 440, entertained the remedy by mandamus upon allegations somewhat similar to those made here, invoking the aid of the same section of the statute (section 1038, Rev. St. 1892), we have concluded to dispose of the controversy as the parties have made it.

What are the grievances of the relator, Kramer? The facts agreed upon are that he owns a lot and building in Cincinnati fronting 28 feet on north side of Court street. The building originally was a three-story brick. In the year 1899 he changed and remodeled it by taking out the entire front and rear walls, and replacing them with new walls. The new walls were constructed of two thicknesses of brick; the outside brick being new, and the inside being old brick, taken from old walls. The front wall was faced with new buff pressed brick. On the floors above the ground floor, new bay windows were constructed, two on each floor, extending 4 feet over the sidewalk. Before the change the ground floor was divided into 2 storerooms, with a central hall and stairway between them. The upper floors were divided into 10 living rooms, 5 on each floor. As reconstructed, these floors were made into 16 living rooms, being divided into 4 flats, of 4 rooms each; being 8 rooms on each floor. A new roof was constructed on the entire building, and new kitchen plumbing was put on each floor for the use of each flat. The new roof and plumbing is worth more than \$100. In the year 1900 the annual assessor for the Ninth Ward, where the premises are situate, returned these improvements as a new structure, at a valuation of \$1,100, but allowed a deduction of \$250 for the destroyed portion of the building; making a net addi-

tion of \$850 to be added to the valuation of the property as it then stood on the duplicate. When the board of supervisors, acting as an annual board of equalization, came to consider the returns of the annual assessors, including the return in controversy, and after viewing the premises, they found the improvements to be of the value of \$1,450 for taxation, and increased the assessor's return \$600, and ordered that \$1,450 be added to the valuation on the duplicate for the year 1900, which addition was made by the auditor. No notice was served on Kramer of this added valuation, under section 2804, Rev. St. 1892. Kramer paid the taxes in December, 1900, on the new valuation, without protest. So much for the facts. The action of the annual assessor above described, and the proceedings of the board increasing the assessor's return in the sum of \$600, are both assailed, and branded as not only erroneous, but illegal, and the circuit court ordered the auditor, because of these errors, to "call the attention of the commissioners thereto," in order that the taxes which Kramer had paid on the increased valuation may be restored to him.

Counsel for the parties, in oral argument and in their briefs, have discussed the various statutory provisions made for the listing of property and collection of taxes; also for the correction of the tax lists and tax duplicates, so that errors of omission and commission may be corrected. But we decline to assume the unnecessary burden of construing all such provisions. It is sufficient to say that, while it is to be lamented that our system of statutes relating to the subject of taxation is not made clearer and more harmonious, it does appear that, in its various provisions, the Legislature has intended to reach, for purposes of taxation, the property of every citizen, whatever its form may be, and which is not by law exempt, to the end that all shall bear their just share of the public burdens.

In this case, the action of the annual assessor is said to be justified by section 2753, Rev. St. 1892. For the purpose of this case, we quote it in part: "At the time of taking the lists of personal property the assessor shall also take a list of all real property which shall have become subject to taxation and is not on the tax list, and affix a value thereto, according to the rules prescribed for district assessors in assessing real estate; and he shall also make and return a list of all new buildings or other structures of any kind of over \$100 in value, the value of which shall not have been previously added to, or included in the valuation of the land on which such structures have been erected, specifying the tract or lot of land on which each of such structures has been erected, the kind of structure and the value which, in his opinion, has been added to such tract or lot by the erection thereof. * * *" It is further provided in this section that if the

assessor ascertains that any structure of any kind, or orchards, timber, or ornamental trees, have been destroyed by fire, flood, cyclone, or storm, the value of which is over \$100, and which have been included in the valuation of the preceding year, he shall determine how much less valuable the tract or lot has been rendered, and make due return thereof. It will be observed, in the part of the section quoted, that the assessor, in performing his duties in relation to new buildings and any other structure, shall proceed according to the rule prescribed for district assessors in assessing real estate; and one of the rules is found in section 2793, Rev. St. 1892, as follows: "For the purpose of enabling the assessor to determine the value of buildings and other improvements, he is hereby required to enter, with the consent of the owner or occupant thereof, and fully to examine all buildings and structures of whatever kind, which are by this title either liable to or exempt from taxation." In the case at bar, no "new buildings" were found by the assessor, nor what can properly be called "additions" to existing buildings. The case turns on what meaning we attach to the words "other structures of any kind," as found in section 2753. We are aided in arriving at this meaning by section 2730, Rev. St. 1892, which is: "In this title the terms 'real property' and 'land' shall be held to mean and include not only land itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures, and improvements, and fixtures of whatever kind thereon. * * *" Section 2753 follows in the same title. The "structure," if not over \$100 in value, escapes return, so that minor improvements and repairs are not to be valued. The "structure" contemplated must be of a substantial character, such as to attract attention, and show a marked change in the appearance and condition of the property, rather than such change as occurs in making incidental and necessary repairs. The "structure" need not be a "new building," or an addition to an existing building, as an "addition" is generally constructed on the ground, and annexed to the original building, or placed on top of the same. Kramer made substantial changes in his building, as we have seen. Preserving the outlines, dimensions, and shape, he made new front and rear walls, using new material for the purpose—in the front, more costly and ornamental brick—and constructing bay windows in the front of the upper stories; thus adding convenience and beauty to the entire building. He remodeled the upper floors, and made 4 flats, having, in all, 16 rooms. Did all this constitute a "structure of any kind," within the meaning of the statute? This word certainly is not confined to a structure independent of any other existing building or structure, for such meaning would render the word inoperative. The Century Dictionary

defines the word "structure" as follows: "A fitting together, adjustment, building, erection, a building, edifice, structure. (1) The act of building or constructing; a building up. (2) That which is built or constructed; an edifice or building of any kind; in the widest sense, any production or piece of work artificially built up, or composed of parts joined together in some definite manner; any construction." The Standard Dictionary gives a similar definition. Taking the latter branch of the definition, we have no difficulty in reaching the conclusion that the changes made and new work and material placed in the building by Kramer constitute a "structure," within the meaning of that word as used in the statute. The conclusion is made somewhat clear by the subsequent language of the section, where the annual assessor is required to note the destruction of structures, orchards, timber, etc., by fire, storm, and cyclone, and fix the proper deduction to be made from the former valuation, and return the same to the auditor, so that the owner may have the benefit of a corresponding reduction of valuation.

It has been suggested that in section 2803, Rev. St. 1892, provision is made for circumstances like the present, wherein the auditor is clothed with authority to act. It reads, in part: "In all cases where any county auditor shall discover, or have his attention called to the fact, that any assessor in any previous year shall have omitted to return, or shall in any future year omit to return any lands, town lots, or any improvements, structures or fixtures, thereon, subject to taxation, situated within his county, * * * it shall be the duty of said auditor to ascertain the value thereof for taxation, as near as may be, and to enter said lands, town lots or improvements, upon the duplicate," etc. In our judgment, this section adds argument in favor of our construction of section 2753, because it is plain that the duty as to such structures, improvements, etc., rests primarily on the annual assessor, and it is on his omission of duty that the auditor may proceed and place such property on the duplicate, and fix its taxable value. In short, all provisions of the tax laws aim at a proper return of all species of property for taxation that is not lawfully exempt, and demonstrate that the state, through its various agencies, is a very industrious tax gatherer.

Another proposition urged against the charges made against Kramer on the duplicate is that he received no notice of the increase in valuation of his property, made either by the assessor, or the addition thereto made by the annual board of equalization. This board, after viewing the premises, added \$600 to the return made by the annual assessor; and this, too, without notice to Kramer, under section 2804, Rev. St. This is one of the facts agreed upon. There is no provision that requires the assessor to give notice of an addition that he may make to former

valuation. It was the duty of Kramer to list the new structure, and, if he did not do so, the assessor could do so while visiting the owner for the purpose of ascertaining what he owned that is subject to taxation. Does the statute (section 2804) require the annual board of equalization to give notice to the property owner before it can increase the valuation? As bearing upon the question, we quote from the section: "Said board shall have power to hear complaints, and to equalize the valuation of all real and personal property, moneys, and credits within the county, * * * provided, that said board shall not reduce the value of the real property of the county below the aggregate value thereof as fixed by the state board of equalization, nor below its aggregate value on the duplicate of the preceding year, to which shall be added the value of all new entries and new structures over the value of those destroyed, as returned by the several township assessors for the current year; provided, further, that except as to new structures, and structures destroyed, and lands and lots brought onto the tax list since the preceding decennial state board of equalization, the annual county board shall not increase or reduce the valuation of any real estate, except upon reasonable notice to all persons directly interested, and an opportunity for a full hearing of the question involved. * * *" It is quite obvious from the above language that as to new structures, and certain other property described, no notice to Kramer was necessary; and the annual board, whose time of meeting is fixed by statute, may increase the value placed on new structures by the annual assessor without previous notice to the owner of the property. The new structure in question was not in existence at the preceding decennial valuation, but came into existence during the running of the decennial period; and it would seem that, from the tenor of section 2804, there is no inhibition against the annual board adding the value of a new structure without notice to the owner. It was his duty to have listed the structure himself, and the board was undertaking to perform an omitted duty. In *Glenn et al., Exrs., v. Raine, Auditor*, 55 Ohio St. 682, 48 N. E. 1112, this court affirmed the judgment of the superior court of Cincinnati, at general term, wherein a question very similar to ours was decided. See 30 Wkly. Law Bul. 30. In that case, Hunt, J., speaking for the court, sums up the controversy as follows: "There is nothing in the law requiring the board of equalization, before it reviews the action of the ward assessor in the matter of new structures, to serve notice on the owner. No such construction has been given our tax legislation, and a careful examination of the law shows no provision which requires it to be done. * * *" A careful reading of that case convinces us that the principle there announced met the approval of this court in

Glenn v. Raine, Auditor, 55 Ohio St. 682, 48 N. E. 1112.

On the whole case, as it appears in the record, we hold that the circuit court erred in awarding mandamus, and its judgment is reversed, and the petition of the relator is dismissed.

(69 Ohio St. 514)

MURDOCK-WEST CO. v. LOGAN et al.

(Supreme Court of Ohio. Feb. 2, 1904.)

OIL AND GAS LEASE—CONSTRUCTION—AMBIGUOUS CONDITIONS—RENT PAYMENT—DAMAGES.

1. An oil lease for and during the term of 60 days from the date thereof "and as much longer thereafter as oil or gas shall be found in paying quantities" contained the following language: "The drilling of one well to be commenced on these premises within sixty days from the execution of this lease, unavoidable delays excepted, and in case of failure to commence drilling of a well within such time as herein specified, the parties of the second part agree to pay the parties of the first part, for such delay, the sum of fifty dollars per month from the time limited for completing such well, payable by check in advance or directly to the party of the first part, and the parties of the first part agree to accept such sum as full consideration and payment for such delay until one well shall be completed unless this lease is surrendered before said payment is due. It is hereby expressly agreed that a failure to commence, prosecute and complete the drilling of any well or wells or to pay any rental hereinbefore mentioned within the time limited for the same shall render this lease null and void." This language is ambiguous, and whether the payment of \$50 per month as therein stipulated may be construed as payment of rent, thereby extending the term of the lease, as claimed by the lessees, or whether it must be construed as a payment of liquidated damages for delay, as is claimed by the plaintiffs, is not decided; but, on the hypothesis that the term was extended for 60 days in addition to the original term, the lessees could not hold over longer than such additional time unless they actually found and produced oil in paying quantities within that time. A finding of indications of oil, or the existence of conditions which rendered it probable that oil in paying quantities would be found if the well were operated in a certain way, is not sufficient, of itself, to extend the term of the lease.

2. The stipulation in the lease that the term shall continue "as much longer thereafter as oil or gas shall be found in paying quantities" requires that oil or gas shall be actually discovered and produced in paying quantities within the term.

3. Upon the hypothesis that the payment of \$50 per month, under the stipulations of the lease, was payment of rent, the failure of the lessees to pay \$50 for the month from April 22, 1900, to May 22, 1900, rendered their lease null and void from and after April 22, 1900.

(Syllabus by the Court.)

Error to Circuit Court, Washington County.

Action by the Murdock-West Company against Logan and others. The plaintiff in error, a partnership, is a lessee from John Lightner and wife under a lease for operating and drilling for petroleum oil and gas, dated May 23, 1900; and this suit was instituted by the plaintiff in error to enjoin the

defendants in error from operating under a prior lease for like purposes, dated December 22, 1899. The court of common pleas granted a perpetual injunction, as prayed for, against the defendants in error. On appeal the circuit court found for the defendants, making a special finding of facts, and entered a decree thereon for the defendants. Reversed.

McConica & Dwiggins, C. O. Middleswart, and M. R. Paterson, for plaintiff in error. A. D. Follett, A. Leo. Weil, and Charles M. Thorp, for defendants in error.

DAVIS, J. The lease to the defendants in error, also defendants below, contained the following clause: "The parties of the second part, or their assigns, to have and to hold the said premises, for the said purpose only, for and during the term of sixty (60) days from the date thereof, and as much longer thereafter as oil or gas shall be found in paying quantities." The defendants did not commence to drill a well on the leased lands within 60 days from the date thereof, and therefore no oil or gas was found within that time, so that, if the rights of the defendants were to be determined solely by that clause, their lease expired on the 22d day of February, 1900. But the defendants claim that the term of their lease was extended to April 22, 1900, and that within that time oil in paying quantities was found, which entitles them to a continuance of the lease thereafter so long as oil or gas shall be produced in paying quantities. The basis of this contention is the principle that, when a lessee holds over after the expiration of the term of the lease, the lessor has the option to treat him as a trespasser or as a tenant, under the terms of the original lease. The lessor, John Lightner, in this instance, accepted payment from the defendants of \$50 on March 1, 1900, and \$50 on March 22, 1900, whereby it is claimed he treated the defendants as his tenants, and extended the term of the lease to April 22, 1900, "and as much longer thereafter as oil or gas shall be found in paying quantities." The plaintiffs maintain, on the other hand, that these payments were not received as rent, but that they are in the nature of liquidated damages for unavoidable delays in commencing and completing the drilling of a well on the leased lands. Gas Co. v. George, 161 Pa. 47, 51, 28 Atl. 1004. The provisions of the lease which lead to these opposite propositions are as follows: "The drilling of one well to be commenced on these premises within sixty (60) days from the execution of this lease, unavoidable delays excepted, and in case of failure to commence drilling of a well within such time as herein specified, the parties of the second part agree to pay the parties of the first part for such delay, the sum of fifty dollars per month from the time limited for completing such well, payable by check in advance or directly to the party of the first part, and the

parties of the first part agree to accept such sum as full consideration and payment for such delay until one well shall be completed unless this lease is surrendered before said payment is due. It is hereby expressly agreed that a failure to commence, prosecute and complete the drilling of any well or wells or to pay any rental hereinbefore mentioned within the time limited for the same shall render this lease null and void." The diversity of views as to the true meaning of this language, and as to the legal effect of acts done in performance of it, is, perhaps, pardonable, for the language itself is ambiguous. The payment of \$50 per month would seem, from one point of view, to be spoken of as "rental hereinbefore mentioned," and it is spoken of as "payment for such delay"; that is the "unavoidable delays" previously mentioned. The "rental" hereinbefore mentioned may refer to the royalty of one-eighth of the oil which should be produced, and the payment of \$100 per annum for each and every well from which gas should be sold, which are elsewhere and "hereinbefore mentioned." But accepting the construction of the lease contended for by the defendants, if, nevertheless, "oil or gas in paying quantities" was not found within the term of the lease as extended to April 22, 1900, the right of the defendants to hold and operate upon the leased lands expired at that date. But the defendants say that the circuit court found that a well was drilled by the defendants, and "that oil was found in paying quantities in said well on April 8, 1900," the day before the pumping began. We think that this "finding" is a mere argumentative conclusion from the special findings of fact by the court, that it is inconsistent with and is unwarranted by the facts found, and that, upon a review of the whole evidence, there is no competent evidence to support it.

The circuit court finds that the defendants on April 8, 1900, completed an oil well under their lease, "which was drilled through the oil-bearing sand which underlay said tract of land, and from which oil was then being produced in paying quantities on premises adjoining said tract of land." There is not a word in the testimony, nor in this finding, that oil was actually produced on the day the well was completed. It is further found that "after completing said well on April 8, 1900," the defendants "pumped the same with the drilling machine which had drilled said well, commencing on the morning of April 9, 1900, until about noon on April 12, 1900, when they ceased pumping the same, and * * * that said well was not pumped again until June 1, 1900, when it was pumped by means of a power; such pumping continuing until June 3, 1900," at which time further pumping by the defendants was enjoined. The pumping in June was after the lessor had declared the lease void, and after the plaintiffs had acquired their title; and the defendants were, no

doubt, moved to do this pumping by the action of the lessor and the plaintiffs. But with the exception of the finding "that oil was found in paying quantities in said well on April 8, 1900," the day the well was drilled in, and the day before the pumping began, we look in vain in the findings of the circuit court or in the evidence for anything which shows that oil was produced in paying quantities prior to April 22d, when the lease, as extended by the payments of \$50 per each month, would expire. The circuit court finds that the pumping in April, 1900, was for the purpose of testing the well, and that "the results of such tests showed that said well would produce oil in paying quantities, as was then and there believed by the owners of said lease and the owner of said tract of land." It is further found that the defendants, "upon such test," ascertained "that such well would probably produce oil in paying quantities," and, further, that the defendants, "having decided, as a result of such test, that such well would produce oil in paying quantities, determined to pump said well by means of a power," etc. All this demonstrates that, while the parties interested may have entertained a well-founded opinion as to the outcome of the well, oil in paying quantities had not yet been found, obtained, or produced. In order to continue their lease beyond the stipulated time, it was necessary for the lessees to find oil in paying quantities. For this purpose it was not sufficient to complete a well having some indications of oil, or a well which might be developed into a well producing oil in paying quantities, but the lessees must actually find oil in paying quantities, and this is the same as obtaining and producing it in paying quantities. *Cassell v. Crothers*, 193 Pa. 359, 365, 367, 369, 44 Atl. 446. This the defendants did not do before April 22, 1900, and their rights under the lease ended when they ceased to operate the well on April 12, 1900, and did not complete it to the point of producing oil in paying quantities within the term ending April 22, 1900. *Detlor et al. v. Holland*, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266; *Gas Co. v. Tiffin*, 59 Ohio St. 420, 54 N. E. 77. Nor is this all. If the defendants were justified in believing, and did believe, that the well could be developed into a well which would produce oil in paying quantities by the use of a power, and they set about completing the well to that extent by that means, with the consent of the lessor, the obligation was upon them, by their contract, to compensate the lessor for the unavoidable delay in doing so, by continuing to pay \$50 a month in advance; and, upon the hypothesis that such payment was rent which would extend the original term of the lease, then, by the express terms of their contract, the failure of defendants to pay \$50 for the month from April 22d to May 22d rendered the lease null and void. Lightner was thereafter at liberty to make a new lease,

and the lease to the plaintiffs, dated May 23, 1900, is valid.

Judgment of the circuit court reversed, and judgment for plaintiffs.

BURKET, C. J., and SPEAR and PRICE, JJ., concur.

(69 Ohio St. 500)

SCHUMACHER v. McCALLIP et al.

(Supreme Court of Ohio. Feb. 2, 1904.)

ADMINISTRATORS—TRUST COMPANIES—CONSTITUTIONAL LAW—DENIAL OF APPOINTMENT—REVIEW.

1. Trust companies are without capacity to receive and exercise appointments as administrators of the estates of deceased persons, because the legislation evincing an intention to clothe them with such capacity (sections 3821c, 3821f, Rev. St.) is void, being of a general nature, and not of uniform operation throughout the state, as is required by section 28, art. 2, of the Constitution.

2. The court of common pleas has jurisdiction to review an order of the probate court denying the right to administer the estate of a deceased person, which section 6005, Rev. St., confers upon the next of kin, if a suitable person.

(Syllabus by the Court.)

Error to Circuit Court, Franklin County.

Application by Sarah C. McCallip for an appointment as administrator, and application by Mary M. Schumacher for the appointment of the State Savings Bank & Trust Company as administrator under the will of Cotton H. Allen. From an order affirming the judgment of the common pleas reversing an order appointing the trust company, Mary M. Schumacher brings error. Judgment of circuit court reversed.

The will of the late Cotton H. Allen having been admitted to probate in Franklin county, it became necessary for the probate court to appoint an administrator, with the will annexed, of his estate. Application for such appointment was made by Sarah C. McCallip, his sister, as next of kin. An application was also made by Mary M. Schumacher, plaintiff in error, for the appointment of the State Savings Bank & Trust Company as administrator. The probate court, upon the evidence adduced, found that Mrs. McCallip is the next of kin, but that she was unsuitable for the discharge of the trust, and therefore denied her application. It appointed the trust company to administer. A bill of exceptions was signed, showing the evidence upon which the court based its finding against Mrs. McCallip; and a petition in error was filed by her in the common pleas court for the reversal of the order appointing the trust company, as well as of the order refusing her appointment. The court of common pleas reached the conclusion that the trust company was not entitled to administer, and that the probate court had erred, upon the evidence submitted to it, in finding that Mrs. McCallip is not a suitable person to administer, and reversed both orders of the probate court. Upon a petition in error filed in the circuit court, that court affirmed

the judgment of the court of common pleas in reversing the order appointing the trust company, and reversed the judgment of the court of common pleas in reversing the order refusing the appointment of Mrs. McCallip.

Bargar & Bargar, for plaintiff in error. Booth, Keating & Peters and W. H. Jones, for defendant in error State Savings Bank & Trust Co. Arnold, Morton & Irvine and R. W. McCoy, for defendant in error Ohio Trust Co. Edward L. Taylor, J. W. Mooney, and Edmund Smith, for defendant in error McCallip.

SHAUCK, J. (after stating the facts). The plaintiff in error and the State Savings Bank & Trust Company insist that the probate court had authority to appoint the trust company as administrator, and that the court of common pleas and circuit court erred in adjudging that its appointment was void. In support of that view, it is said that the authority is derived from sections 524, 6005, Rev. St., which are of uniform operation. The former of these sections, following the provisions of the Constitution, vests in the probate court exclusive jurisdiction to grant and revoke letters of administration, and to control the conduct and settle the accounts of executors and administrators. It does not attempt to define the qualifications of administrators. The two sections, being in pari materia, should obviously be construed together. The latter section prescribes the order in which competent persons are entitled to administer: First, husband or widow of the deceased; second, the next of kin of the deceased; third, a creditor of the deceased; and, fourth, an appointment from the other classes falling, "such other person as it shall think fit; provided, however, that letters of administration shall not be issued upon the estate of an intestate until the person to be appointed has made and filed an affidavit that there is not, to his knowledge, any last will and testament of the alleged intestate." Not only does the latter section confer no authority for the appointment of the trust company, but, by prescribing an indispensable condition, with which a corporation can not comply, it forbids the conclusion that such authority is conferred by either section. Apart from this consideration, the view suggested conflicts with the established and very familiar doctrine that corporations have only such authority as is vested in them by the law of their creation.

Another consideration urged in favor of the validity of the appointment of the trust company is that it is justified by sections 3821c, 3821d, 3821f, Rev. St., subsequently enacted for the purpose of authorizing such corporations, among other things, to exercise the functions of administrators and other trustees. The pertinent provisions are found in the first and last of the three sections cited. The general grant of authority contained in section 3821c is "to accept and execute all

such trusts of every description as may be committed to such company by any person or persons, or any corporation, by grant, assignment, devise, or bequest, or which may be committed or transferred to, or vested in said company, whether the same be to act as executor, administrator, assignee, guardian, receiver or trustee, or in any other trust capacity, by order of any court of record or probate court, in the county in which such company is located, and its principal business is transacted." Section 3821f is as follows: "The provisions of sections 3821c, 3821d and 3821e relating to the power of the probate judge to appoint any such company to act as executor, administrator, assignee, guardian, receiver or trustee, shall apply to probate courts in all counties containing a city of the first class, and to all probate courts in counties containing a city of the second class, containing by the last preceding federal census a population of less than 33,000." The constitutional validity of this legislation is denied because, being upon a subject of a general nature, it is not of uniform operation throughout the state, as is required by section 26, art. 2, of the Constitution. In support of the validity of the legislation, it is contended that its object is to grant jurisdiction to the probate court, and that being within the provisions of section 8, art. 4, of the Constitution, which, in defining the jurisdiction of that court, provides for "such other jurisdiction, in any county, or counties, as may be provided by law," the subject is released from the operation of section 26 of article 2. But it is obvious that the purpose of this legislation was not to confer upon the probate court jurisdiction to appoint administrators, for that had been conferred upon it by the Constitution of 1851, and the laws which were at once enacted pursuant to it, and it has been in that court continuously until the present time. The obvious purpose of the legislation is to confer upon the corporations named authority to receive and exercise the appointments therein mentioned, including that of administrator. The qualifications of administrators, being as universal as the administration of estates, should be admitted to be a subject of a general nature. It does not seem necessary to repeat what has been said upon that subject in recent decisions. It is further urged that section 3821f gives to these provisions a uniform operation throughout the state because it extends them to every county which contains a city of the first class or a city of the second class having a population less than 33,000. Of this section nothing need be said, except that it is the perversion of a classification which is void, even for the purposes for which it was contrived. Its value is that of a counterfeit bill purporting to have been issued by an insolvent bank.

We are also asked to adopt the view that the power in question is conferred upon trust companies by section 3821c, and that that section is of uniform operation throughout

the state, and that we may give it effect by wholly rejecting section 3821f. Manifestly that would be to legislate by judicial interpretation by giving to an act of the General Assembly an operation which the legislative department had never intended. A brief has been filed in the present case on behalf of the Ohio Trust Company, which desires to exercise powers of this character. It presents the view that section 3821f, in its present form, is a later enactment than the preceding sections, and, since it is void for repugnancy to section 26 of article 2, the repealing section annexed to it is not effective to repeal former legislation. That the repeal of a valid act in a void act intended to supersede it may itself be void, is familiar doctrine. But in order that it may be effective for one who invokes it, it is indispensable that the authority or right which he claims must have been given by the former valid act. In recognition of this requirement, counsel cite the act of April 17, 1882 (79 Ohio Laws, p. 101), which contained no section equivalent to section 3821f. The obvious purpose of that act was to enlarge the powers of such corporations as these, but it contained no terms suggestive of the legislative intention to endow them with capacity to administer the estates of deceased persons. Such capacity cannot be inferred from authority to act as testamentary trustee in "the care and management of property," and to act as depositaries for administrators and others occupying positions of trust. The next act cited as meeting the requirements of this doctrine is that of April 28, 1891 (88 Ohio Laws, p. 407). Conceding that this act contains terms appropriate to confer upon these corporations the capacity now claimed, its operation was defined and limited by section 3821f, then enacted as a part of the same statute; the section then giving to the act even a more restricted operation than does the section in its present form. An analysis of all the legislation upon the subject leads to two conclusions, either of them fatal to the claim that the trust company has capacity to administer: (1) The Legislature has never attempted to clothe corporations with capacity to act as administrators in Franklin county; (2) it has not, by a valid act, authorized them to act in that capacity anywhere. We do not follow counsel to the consideration of the alleged benefits to result from clothing corporations with such powers. Such considerations are, in the first instance, at least, for the General Assembly. Until it shall attempt to exercise such power by enacting a statute which affects every constituency, and thus engages the attention and interest of every Senator and member, the judicial consideration of its power will be premature.

By a cross-petition in error, Mrs. McCallip seeks the reversal of the judgment of the circuit court against her. The probate court had found, upon the evidence, that she is the next of kin of the decedent, but that

she is not a suitable person to administer the estate. On her petition in error, presenting the evidence upon which the probate court had reached the conclusion that she is not a suitable person to act as administrator, the court of common pleas found that the conclusion was not justified by the evidence, and reversed the order of the probate court in that regard. The circuit court reversed the judgment of the court of common pleas in favor of Mrs. McCallip, and, proceeding to render the judgment which it thought the court of common pleas should have rendered, it dismissed the petition in error which she had filed in the court of common pleas. This, of course, implies the opinion of the circuit court that the court of common pleas was without jurisdiction to review the order of the probate court denying the right which the statute confers upon the next of kin, if a suitable person. The conclusion of the circuit court is said to be authorized by *Monger v. Jeffries*, 62 Ohio St. 149, 56 N. E. 654, and the cases which are there cited. But that case, and two of those which it cites, related to the conclusiveness of an order of the probate court removing an administrator previously appointed. The third case cited related to the conclusiveness of an order of the probate court respecting the appointment of a trustee in insolvency. None of them involved the effect of statutory provisions conferring the right to administer, such as is conferred upon the next of kin by section 6005, Rev. St. The effect of that section upon the conclusiveness of an order of the probate court denying the right to administer which it confers was the precise subject of consideration in *Todhunter v. Stewart*, 39 Ohio St. 181, where it was held that an appeal from such order might be taken to the court of common pleas. The case is authority for the conclusion that an order of the probate court denying the right of administration which the statute confers upon the next of kin is reviewable.

The judgment of the circuit court affirming the judgment of the court of common pleas against the right of the trust company to administer should be affirmed, and its judgment reversing the judgment of the court of common pleas in favor of Mrs. McCallip should be reversed. Judgment accordingly.

SPEAR, DAVIS, PRICE, and CREW, JJ., concur.

(66 Ohio St. 462)

**KELLY ISLAND LIME & TRANSPORT CO.
v. PACHUTA.**

(Supreme Court of Ohio. Feb. 2, 1904.)
MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT.

1. An employer is not liable to one servant in his employ for the negligence of another servant, when both are engaged in a common service, and no power of control is given to the one over the other, where the negligence complained of consists only in the nonperformance of some

act or duty incidental to the general employment, and to the proper and safe conduct and prosecution of the business in which both are engaged.

2. P. was employed by the plaintiff in error as a laborer in its limestone quarry. S. and O. were employed as workmen in the same quarry. Neither had any authority or control over the other, but the three were all under the immediate direction and control of the same foreman, and were all engaged in the same common enterprise and common business, viz., that of quarrying and getting out limestone. In working and operating said quarry, one of the methods adopted for breaking up and getting out the stone was that of "battery blasting." S. was charged with the duty of preparing and firing these battery blasts, and of giving notice and warning to the other workmen in the quarry whenever such blast was about to be exploded. O. assisted S. in the preparation of these battery blasts, and it was the custom for one or the other of these men to give warning or notice. P., while working in said quarry, was, because of the failure to give him proper warning, struck by a stone thrown out by the explosion of a battery blast, and received injuries from which he died. *Held*, that they were fellow servants, and that the negligence of S. in failing to give P. warning was the negligence of a fellow servant, for which the employer is not liable.

(Syllabus by the Court.)

Error to Circuit Court, Ottawa County.

This action was originally brought, in the court of common pleas of Ottawa county, by the defendant in error, Anna Pachuta, as administratrix of the estate of her deceased husband, John Pachuta, against the plaintiff in error, the Kelly Island Lime & Transport Company, to recover damages for the alleged wrongful death of her said husband, caused, as she averred in her petition, by the negligence of said company. The trial in the common pleas resulted in a verdict and judgment in favor of the plaintiff (the defendant in error here) for \$3,000. This judgment was affirmed by the circuit court, and defendant brings error. Reversed.

Squire, Sanders & Dempsey and S. P. Alexander, for plaintiff in error. William Gordon and John F. McCrystal, for defendant in error.

CREW, J. At the time of the injury to John Pachuta which resulted in his death and gave rise to this action, he was employed by the plaintiff in error as a quarryman in its limestone quarry at Marblehead, in Ottawa county, Ohio. He had been in the employ of and had worked for said company for about 20 years, and for about 9 years had been so employed in the company's quarry at Marblehead. There were in this quarry two ledges of rock, an upper ledge, known and designated in the evidence as the "flux ledge," and a lower ledge, known as the "limestone ledge" or "lower rock ledge." These ledges were from 9 to 12 feet in height, and the upper or flux ledge, which was furthest south, was about 500 feet distant from the lower or limestone ledge. At the time he was injured, the deceased, John Pachuta, with other workmen, was working upon this lower or limestone ledge, and was engaged in quarrying and breaking up and removing

stone from said quarry. The method employed in this quarry for loosening and getting out the stone was that of blasting. Holes were drilled short distances apart along these ledges of rock, these holes were loaded or charged with powder or dynamite, and the charge was then exploded by means of an electric battery. This was called "battery blasting," and the usual effect of such blast was to sever the edge of the ledge of rock along which the blast was placed from the main body, after which the rock so severed or blown off was broken up by the workmen into smaller pieces, and when so broken up and prepared it was then taken to the kiln for burning, or to railroad cars for shipment. The blasting at this quarry was, and for several years had been, in the immediate charge of one John Schaffer, whose duty it was to superintend the preparation and firing of these "battery blasts," and to give warning and notice to the other workmen in the quarry, when a blast was about to be fired, that they might seek a place of safety before such blast should be discharged. Schaffer had as an assistant in the preparation and firing of these battery blasts a man by the name of Onko, and, in obedience to instructions issued by the general quarry foreman, Mr. Fillabaum, it was usual for one or the other of these two men—Schaffer or Onko—after a blast had been prepared and was ready to be discharged, to give notice to the other workmen in the quarry that a blast was about to be fired, and this they did, according to the custom of the quarry, by going near to such other workmen and calling out the word "fire," after which sufficient time was allowed them to get under cover or to withdraw to a place of safety before the blast was discharged. Schaffer, who in the language of the quarry was known as the "powderman," had no authority or control over Pachuta or the other workmen employed in said quarry; but Schaffer, Onko, and Pachuta were each and all of them directly and immediately under the same foreman, Mr. Frank W. Fillabaum. On the day of and immediately prior to the injury received by Pachuta, which resulted in his death, a number of holes had been drilled in the upper or flux ledge of said quarry, and these holes had been loaded with dynamite. After the blast had been so prepared, Schaffer sent Onko to the lower ledge to notify the men then working there, one of whom was Pachuta, that a blast was about to be discharged. Onko went along the lower ledge and gave the usual warning by calling out "fire." Several of the workmen heard the warning, and withdrew to a place of safety; others claimed they did not hear it. Pachuta, who is not shown to have heard the warning, remained where he was then at work, and when the blast was discharged he was struck by a stone thrown out by said blast, and received injuries from the effects of which, four days later, he died. To recover damages for causing his death, this

action was brought by his administratrix against the plaintiff in error, the Kelly Island Lime & Transport Company, she alleging in her petition that his death was caused by, and resulted from, negligence on the part of said company. While acts of negligence other than that of a failure to give notice were charged by defendant in error in her petition, no claim was made that the company did not exercise due care in the selection of its servants, nor is there any charge that such servants were incompetent, and upon the undisputed facts of this case no right of recovery exists in her favor, and no liability on the part of plaintiff in error is shown, unless such right exists and such liability arises from a failure to give notice or warning to Pachuta that a battery blast was about to be exploded.

Assuming, then, as we do in this case, that from the evidence the jury was authorized to find that no such notice was given him, and that the death of Pachuta resulted from, and was in consequence of, the failure of Schaffer to give, or cause to be given, proper notice of the intended discharge of said blast, the only question we have thought it necessary to consider upon this record is whether such neglect and failure upon the part of Schaffer is in law imputable to the plaintiff in error, the Kelly Island Lime & Transport Company, who was the common employer of Schaffer, Onko, and Pachuta, and whether such company is liable for, and legally chargeable with, the results of such negligence. The determination of this question involves a consideration of the question as to whether or not Schaffer, Onko, and the deceased, John Pachuta, were fellow servants. The general rule that a common master cannot be made responsible for injuries resulting to a servant from the negligence of a fellow servant is a principle now well established in almost all jurisdictions. This rule in Ohio was recognized and announced by this court almost half a century ago in the case of Railroad Co. v. Keary, 3 Ohio St. 201, and has since been followed by a long and uninterrupted line of decisions to the same effect.

It remains, then, only to determine whether, under the rule in Ohio defining and prescribing who shall be deemed and held to be fellow servants, John Pachuta was a fellow servant, engaged in a common employment, with the parties Schaffer and Onko, who had charge of the battery blast at the time Pachuta was injured. At the time of the accident these persons were all engaged in the common employment of getting out stone from this quarry—Schaffer and Onko in blasting the stone off from the ledges, and Pachuta, after it was so blown off, in breaking it up into smaller pieces, and thus preparing and making it ready for the kiln or for shipment. Although working in different parts of the same quarry, their work was in connection with each other, and had relation to the same common end, that of getting out

the stone, and their co-operation was necessary to bring about that result. They were all employed by and were serving the same master; neither was in a position of subordination to, or subject to the order and control of, the other, but they were each and all of them under the immediate control and authority of the same foreman, Frank W. Fillabaum, and were all engaged in the same general work. In Ohio, the test to be applied in determining whether a particular servant is a vice principal or a fellow servant, except in certain cases where the rule has been modified by statute, is whether or not he has been placed by his employer in a position of control or authority over his co-employee. That this, rather than the nature and character of the work being done, is the controlling and governing test in this state, would seem to be well settled by the following authorities: *Railroad Co. v. Keary*, 3 Ohio St. 201; *Railway Co. v. Lewis*, 33 Ohio St. 196; *Railway Co. v. Ranney*, 37 Ohio St. 665. In *Railroad Co. v. Keary*, we find the following syllabus: "But a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other. They stand as equals to each other, and are alone liable for the injuries they may occasion. But when the failure occurs in that branch of the service committed by the principal to the subordinate servants, it is their fault, and not that of their employer, and a breach of their obligations, and not his; and, where they enter the service with a knowledge that several are to be engaged, each takes upon himself the hazards of the employment, including that of negligence by fellow servants, and public policy requires that they should be interested in exercising supervision over each other."

In *Railway Co. v. Lewis*, supra, Day, J., in the opinion, says, at page 199, 33 Ohio St.: "A master, whether an individual or a corporation, is responsible to his servants for his own negligence, but not for that of their fellow servants. This is the general rule, subject, however, to the modification, recognized in the jurisprudence of this state, that where one servant is placed in a position of subordination to, and subject to, the orders and control of another servant of a common master, and the subordinate servant, without his fault, is injured through the negligence of the superior servant while both are acting in the common service, the master is liable therefor. *P., Ft. W. & C. Ry. Co. v. Devinney*, 17 Ohio St. 197; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287 [27 Am. Rep. 510]."

Again, in the case of *Railroad Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11, Judge Bradbury, in discussing the question of who are fellow servants, at page 141, 51 Ohio St., page 13, 37 N. E., says: "Was the engineer in charge of this locomotive a fellow servant of Margrat, for the consequences of

whose negligence the company was not liable to the latter? Margrat and the engineer in charge of the locomotive that struck him were in the employment of the same master. The former was a brakeman on one train, while the latter was an engineer on another train of the same company. Neither had been clothed with authority over the other; therefore the relation of superior and subordinate between them had not existed in fact. In the absence of such relation, their common employer would not be liable to either for injuries received through the negligence of the other, unless the rules of law upon the subject heretofore announced by this court have been abrogated."

In the light of these authorities, upon the undisputed facts in this case, the conclusion that Schaffer, Onko, and Pachuta were fellow servants is inevitable. It is, however, contended in this case, by counsel for defendant in error, that, because of the nature of the work, a duty was by law imposed upon the master, the Kelly Island Lime & Transport Company, in respect to furnishing a safe place for its workmen, and that the duty so imposed included the duty and obligation to give notice and warning to such workmen whenever a blast was about to be discharged in said quarry; that this duty on the part of the master was an absolute duty, and that it could not be delegated by the master so as to absolve him from liability in case of the failure to perform such duty by the person to whom the same might be delegated. We need not here enter upon a discussion of the rule as to the liability of an employer for failure to furnish a "safe place," inasmuch as such rule can have no application to a case such as we are now considering. In this case the deceased, John Pachuta, at the time he was injured, was working in an open quarry, engaged with other workmen in getting out, quarrying, and removing stone therefrom. The quarry itself was not an unsafe place, and, if it became so, it was only by reason of the negligence of a fellow servant engaged in a common employment with decedent, and during the progress, and while performing a part, of the work incident to such common employment. To such condition of facts the rule of "safe place" can, in Ohio, have no application. *Railroad Co. v. Webb's Adm'r*, 12 Ohio St. 475; *Coal & Mining Co. v. Adm'r of Clay*, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905.

In support of the claim that the dangerous character of the work and the obligation of the master to maintain a safe place imposed upon the plaintiff in error the absolute duty of giving actual notice to the workmen in the quarry before the discharge of each battery blast, counsel for defendant in error cite us to the case of *Mooney v. Belleville Stone Co.* (N. J. Err. & App.) 39 Atl. 764, 39 L. R. A. 834, where it is held, upon a state of facts very similar to those in the

case at bar, that the giving of warning was a duty owed by the employer to the employes, and the failure of the foreman of a gang of workmen to perform this duty carefully was imputable to the defendant as employer. This case is directly in point. But the rule therein laid down cannot, we think, be taken and accepted as the law in Ohio. In holding the master liable in this case, the New Jersey Court of Appeals does so upon the theory that the duty of the master to maintain a "safe place" is imperative and absolute, and that such duty is violated, and the master made liable, if, through the negligence of a fellow servant, because of his failure to give proper warning, the place is made temporarily dangerous and unsafe by the doing of that which in the prosecution of the particular business was usual and necessary to be done, and the doing of which was but a part of and incidental to the proper conduct and management of such business itself. In other words, the court, in effect, holds that the obligation and duty of the master is that of a guarantor or insurer. Such is not the law in Ohio. Hence the doctrine of this case can have no application in this state. *Railroad Co. v. Webb's Adm'x*, 12 Ohio St. 475; *Railroad Co. v. Fitzpatrick*, 42 Ohio St. 318. Further, the New Jersey rule for determining the liability of a master, and as to who are fellow servants, is not the same as the rule in Ohio. In New Jersey, the character of the work being performed is the governing test (*Knutter v. N. Y. & N. J. Telephone Co.*, 67 N. J. Law, 648, 52 Atl. 565), while in Ohio the question of control is the test to be applied.

In the case at bar, the only negligence shown being the negligence of a fellow servant of the decedent, John Pachuta, the master, the Kelly Island Lime & Transport Company, cannot be held liable for the results of such negligence. The plaintiff in error was, upon the record, entitled to have judgment in its favor, and its motion to arrest the case from the jury, and for judgment, should have been sustained.

Judgment reversed, and judgment for plaintiff in error.

SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

(69 Ohio St. 402)

HAMILTON, G. & C. TRACTION CO. v. HAMILTON & L. ELECTRIC TRAN-SIT CO.

(Supreme Court of Ohio. Jan. 19, 1904.)

STREET RAILWAYS — RIGHT OF WAY — CONFLICTING GRANTS — INJUNCTION.

1. When a city council has, by ordinance, legally granted to one street railway company the right to construct its railway and lay its track on and over a particular part of a designated street within said city, and such company has duly accepted said grant, and entered upon and taken possession of the right of way so specifically granted, a subsequent grant by said city

council, or its successor in office, the board of control, of the same right of way, or a substantial part thereof, to another street railway company, for like purposes, will not of itself confer upon the second grantee the right to enter upon and take possession of the route or right of way so granted, where such entry and possession by it will materially and injuriously interfere with, interrupt, and abridge the first grantee's use and enjoyment of the said right of way. And where said second grantee threatens and is about to take possession of said route and right of way under and by virtue of its said grant, without the consent and against the will of said first grantee, and without having appropriated the right so to do, it will be restrained from so doing by injunction.

(Syllabus by the Court.)

Error to Circuit Court, Butler County.

Action by the Hamilton & Lindenwald Electric Transit Company against the Hamilton, Glendale & Cincinnati Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On the 4th day of August, 1891, the city council of Hamilton, Ohio, by ordinance duly passed, granted to the Hamilton & Lindenwald Electric Transit Company, defendant in error, the right to construct, operate, and maintain an electric street railroad in, upon, and along East avenue from Grand Boulevard to John street, and beyond, within said city, and in pursuance to said grant the city authorities located said street railroad in the central portion of said East avenue. In accordance with said grant and location, the defendant in error immediately thereafter constructed in said central portion of said East avenue an electric street railroad with a gauge of 4 feet 8½ inches, and in accordance with the terms and conditions of said ordinance it has ever since been and is now engaged in operating and maintaining its said street railroad in, upon, and along the central portion of said avenue. The franchise so granted to said street railroad was for a term of 25 years and the same is still in full force, effect, and operation. On the 22d day of September, 1901, the board of control of the city of Hamilton, Ohio, which board was and is the successor of said city council, passed an ordinance granting to the plaintiff in error, the Hamilton, Glendale & Cincinnati Traction Company, the right to construct, maintain, and operate a street railroad in, upon, and along said East avenue from Grand Boulevard to John street, and by the terms and conditions of said last-named ordinance said Hamilton, Glendale & Cincinnati Traction Company was to construct its tracks with a gauge of 5 feet 2½ inches, said tracks to be laid as near the center of said East avenue as practicable, the rails of its said track being placed in juxtaposition to the rails of the track of defendant in error theretofore laid and constructed in said avenue; that is, the plaintiff in error was to place the east rail of its track along the right of way and roadbed and across and over the ties of defendant in error's road 8 inches west of the east rail of said plaintiff in error's track, and to place the west

¶ 1. See *Street Railroads*, vol. 44, Cent. Dig. § 42.

rail of said plaintiff in error's track 14 inches west of the west rail of said defendant in error's track, and to make excavation under the rails and between the ties on said defendant in error's roadbed for the purpose of constructing its said road by putting its ties therein and its rails thereon. The defendant in error, the Hamilton & Lindenwald Electric Transit Company, brought suit in the court of common pleas of Butler county, Ohio, against the plaintiff in error, the Hamilton, Glendale & Cincinnati Traction Company, to enjoin it from constructing its said road in the manner above described, alleging and claiming in its petition that such construction would be in violation of its (plaintiff's) franchises and vested rights in and to said portion of East avenue then and theretofore used and occupied by it for the purposes of its street railway under grant from the city council of said city of Hamilton, and that such construction would interfere with the operation and maintenance of its said street railroad in, upon, and along said portion of said East avenue, and would destroy its property rights and franchises, and deprive it of its right to use the same, and its rights under its grant from the city of Hamilton. The case was heard in the common pleas court, and was afterward appealed to the circuit court of Butler county, Ohio. On the trial in the circuit court the following judgment and decree was rendered by that court: "It is therefore considered, adjudged, and decreed by the court that the defendant be, and it is hereby, perpetually enjoined from occupying, constructing, laying, or maintaining a street railroad in said East avenue from Grand Boulevard to John street under the grant of the 10th day of August, 1901, made by the board of control of the said city of Hamilton, unless the defendant acquires the right by appropriation; and this order is made without prejudice, if the defendant has the right so to do; and it is further ordered that the plaintiff recover its costs herein, taxed at \$—; to all of which the defendant excepts." The plaintiff in error seeks by the present proceeding to obtain a reversal of this judgment and decree of the circuit court.

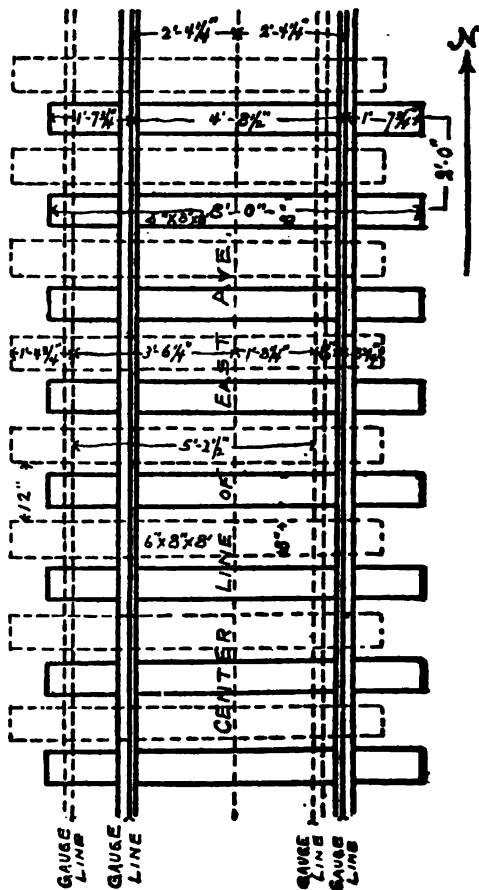
Burch & Johnson and John W. Warring, for plaintiff in error. Shepherd & Shaffer, for defendant in error.

CREW, J. (after stating the facts). On the trial of this case in the circuit court, the court, on the application of the defendant, the Hamilton, Glendale & Cincinnati Traction Company, made and stated its finding of facts separately from its conclusions of law. It found and stated as its conclusions of fact: "That the plaintiff owns and is operating a street railroad in the city of Hamilton under grant duly made to it over and along East avenue, in said city of Hamilton, from Grand Boulevard to John street and northwardly beyond, and that said street railroad is constructed in, on, and along the center of said East avenue, and that the same has

been in operation for more than ten years last past; that the construction of defendant's road by straddling the west rail of the tracks of the plaintiff's road and by placing their ties between and in and upon the roadbed of the said plaintiff's road as now constructed, would be an interference with the franchises and vested rights of said plaintiff company. This finding is without prejudice to the defendant appropriating the rights, if authorized by law so to do." And as its conclusions of law: "The court finds as a conclusion of law that the defendant has no right to interfere with the franchises or vested rights of the Hamilton & Lindenwald Electric Transit Company by placing its tracks as it is proposed and intended to be done, or straddle the tracks of the plaintiff company which now occupies the center of said East avenue from Grand Boulevard to John street." The following diagram and map will show the proposed plan of construction of the track and road of plaintiff in error in and along said East avenue, and will serve to illustrate the relative position and location of the same, if constructed, to the road and tracks of the defendant in error:

PLAN OF PROPOSED TRACK CONSTRUCTION,
EAST AVE. FROM CARTRIDGE PIKE NORTH.

— PRESENT TRACK OF H. & L. E. T. CO.
--- PROPOSED TRACK OF H. G. & C. T. CO.



It is conceded in this case by counsel for plaintiff in error that the finding of facts as made by the circuit court was not only warranted by the evidence, but that "the facts as found are absolutely true"; but it is claimed and argued by them that the court's deduction therefrom, and its application of the law to the facts so found, is "logically and legally untrue," for the reason, as they insist, that the Hamilton & Lindenwald Electric Transit Company had no private property in its roadbed or right of way, and that it had not, nor could it have, any franchise or vested interest or right in any other than its physical, tangible property, such as its tracks, ties, and other structures placed upon and over its roadbed for the purpose of enabling it to maintain and operate its street railway thereon, and that, inasmuch as no part of said property would be taken or used in the construction of plaintiff in error's railway in the manner proposed, plaintiff in error, under its grant from the board of control of the city of Hamilton of August 10, 1901, has the right to enter upon, occupy, and use the roadbed of defendant in error in the construction and operation of its proposed road without legally appropriating such right, and without making or paying any compensation therefor to said the Hamilton & Lindenwald Electric Transit Company. Whether it may rightfully do this is the question here presented for determination.

The power to regulate and control the public streets and avenues in the municipalities of this state is by statute lodged in the municipal authorities, and under the general statutory powers conferred upon such authorities in each municipality to control the use of the streets within its corporate limits and to prescribe the terms and conditions upon which they may be used and occupied by street railways it cannot be doubted that the local authorities of each municipality may, in the exercise of such power, grant to a street railway company the use of its streets for railway purposes, and may designate and prescribe the particular streets and avenues that shall be subject to such use, and the particular part of each upon which the tracks of such company shall be constructed and laid. By the ordinance of August 4, 1891, the city of Hamilton granted to the Hamilton & Lindenwald Transit Company a certain franchise, whereby said company was authorized to construct its street railway in, over, and upon certain of the streets and avenues of said city of Hamilton, among which was East avenue in said city; and by the terms and conditions of said grant said railway was to be located and constructed as near the center of said East avenue as practicable. This grant was accepted by the Hamilton & Lindenwald Transit Company, and its street railway was constructed in conformity with the terms and conditions of said grant, and, as found by the circuit court, for more than 10 years said street railway

has been, and it still is, operated and maintained by said company over and along said East avenue. Whether, then, any vested or exclusive property rights were acquired by the Hamilton & Lindenwald Transit Company by virtue of said grant and its subsequent possession taken under it in or to that part of East avenue actually occupied and used by it in the construction and operation of its said street railway is the primary and controlling question in this case. That a city council may not, by express grant, give to a street railway company the absolute and exclusive right to occupy and use the streets of the city for street railway purposes, thus creating a monopoly, would seem now in this state to be well settled, and that the city council of the city of Hamilton did not, by the making of said grant to the Hamilton & Lindenwald Transit Company, exhaust its powers, or deprive itself or its successors of the right, to make additional grants to other street railway companies for like purposes in and to the unoccupied portions of the same street or avenue, would seem to be abundantly sustained by the authorities. But it is, we think, equally well settled that where the right is given by ordinance to a street railway company to occupy and use particular parts of certain streets, and the grant so made is accepted and acted upon by the grantee, the city authorities are thereafter, so long as said grant remains in full force, unforfeited and unrevoked, without right or authority to grant to another street railway company for like use the right to have and occupy without appropriation or the making of compensation therefor to the first grantee, precisely the same ground or right of way first granted. To permit this would be to sanction and allow the impairment of the obligation of an existing contract by subsequent municipal legislation or grant. This may not rightfully be done. *Cooley's Const. Lim.* 383; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672, 6 Sup. Ct. 252, 29 L. Ed. 516; *City Railway Co. v. Citizens' Railroad Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; *Canal Co. v. Railroad Co.*, 4 Gill & J. 1; *The State ex rel., etc., v. Gas Light & Coke Co.*, 18 Ohio St. 282, 292; *The Brooklyn Central Railroad Co. v. The Brooklyn City Railroad Co.*, 32 Barb. 358.

While it is undoubtedly true that a street railway company, under a grant authorizing it to occupy and use certain streets for the purpose of constructing, operating, and maintaining thereon its street railway, acquires no fee in the soil upon which its roadbed is constructed and its ties and tracks are laid, it nevertheless does acquire therein a franchise and easement, which becomes and is its private property; and it has the right, during the life of the grant, to the possession and enjoyment of that franchise and easement without interruption or obstruction

from any other company, until such time, at least, as it may voluntarily surrender the same, or be legally divested thereof by an authorized appropriation and the payment of full compensation therefor, as required by the Constitution and laws of the state of Ohio. The right which the grantee acquires by such grant is more than a mere license. It is a vested property right, in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; and such grant carries with it the right of exclusive occupancy and user of that portion of the street for the purposes for which it is granted, in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public; and where, as in this case, there are conflicting claims asserted by rival companies, each claiming the same location under grant from the city authorities, and for the same character of use, such claims, even were both grants authorized, should be settled and determined by applying the rule that the first of said grantees to rightfully occupy the street has the superior and better claim of right thereto. Judge Elliott, in discussing this question in his valuable work on Roads and Streets, at section 750, says: "If the company which secures the first grant actually occupies the streets it is authorized to use, then there is much reason for affirming that its right to the part of the street actually occupied and used is permanent and exclusive. By actually taking possession of the street and using it for the accommodation of the public, the company first in point of time does such acts as vests its rights." The rule as thus laid down by Judge Elliott is not in conflict with the spirit and policy of the law which forbids municipal corporations from creating monopolies by favoring one corporation to the exclusion of another. As said by the court in the case of *The Indianapolis Cable St. Ry. Co. v. The Citizens' St. Ry. Co.*, 127 Ind. 388, 24 N. E. 1060, 26 N. E. 893, 8 L. R. A. 539: "Many things which are lawful are from their nature and of necessity monopolies. * * * As a street railway company has no legal right to lay its track upon the streets of a city without the permission of the common council, if the city should grant such right to one company and refuse to grant it to another the company to which the right was granted would have a monopoly until such time as the common council should grant a similar right to some other person or company. So, if the common council should grant to a street railroad company the right to lay its track on certain streets which were too narrow to admit of being occupied by other street railroad tracks, such company would have a monopoly of such streets. It is plain, therefore, that while monopolies, as a general rule, are unlawful, there are many exceptions to the rule. The rule applies only to such things as are of common right, and is never to be applied to

such things as are in their nature a monopoly." Again, it is said in Elliott on Roads and Streets, § 746: "To deny the power of the Legislature to make such a grant would lead to the unwarranted conclusion that in no case can the Legislature grant the right to lay or operate a street railroad in a road or street, for, if the power to make such a grant be conceded, it necessarily and unavoidably results that the occupancy of the part of the road or street is exclusive, as two railroads cannot occupy the same space. But it does not follow from this that a monopoly is created, for other parts of the road or street may be granted to competing lines. * * * The effect of a grant to use a designated part of a highway is to license the company first in point of time to occupy and use the designated space, but it does not follow from this that the statute creates a monopoly, since others may occupy other parts of the same highway." The grant from the city authorities of the city of Hamilton to the Hamilton & Lindenwald Electric Transit Company, being then a valid grant, whatever the nature and extent of the right and interest required thereunder by said company to that particular part of East avenue included in said grant, and subsequently possessed and occupied by said company, it follows that whatever interest it did acquire is its private property, although acquired and held for a public use, and is therefore within the protection of the constitutional prohibition "that private property shall not be taken for public uses without just compensation."

It remains, then, only to consider whether the construction of plaintiff in error's railway in the manner proposed, viz., by placing one of the rails of plaintiff in error's track on the roadbed and between the two rails of defendant in error's track, would constitute and be a taking of defendant in error's property, within the constitutional meaning of that term. To constitute a taking of property it is not necessary that there should be an exclusive appropriation, a total assumption of possession, or an absolute and total conversion of the entire property. One of the valuable incidents of absolute property is the right of user, and this right of user necessarily includes the right and power to exclude others from its use. Hence any serious abridgment or interruption of the common and necessary use of property may amount in law to a taking, and entitle the owner to compensation. "A partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part is as much forbidden by the Constitution as taking the whole. The difference is only one of degree. The quantum of interest may vary, but the principle is the same." Wood's Railway Law, § 231. In this case the interruption and injury that would necessarily result to the use of defendant in

error's property is at once manifest from the nature of the right claimed by plaintiff in error, for it is not susceptible of doubt that the imposition of a portion of plaintiff in error's track upon the roadbed and track of defendant in error would be productive of delay and obstruction to the cars of the latter in the reasonable and necessary operation of its road. Indeed, the obstruction and delay would be precisely the same as if the two companies were running and operating their cars over the same track. Yet plaintiff in error would admittedly be without right to run its cars over the tracks of defendant in error without its consent, or unless it should first have obtained the right so to do by an authorized appropriation.

Upon the facts of this case as found by the circuit court we are of opinion that the defendant in error was entitled to the injunction prayed for, and the judgment of the circuit court is therefore affirmed.

DAVIS, SCHAUCK, and PRICE, JJ., concur.

(69 Ohio St. 521)

STATE v. FERRELL.

(Supreme Court of Ohio. Feb. 2, 1904.)

CRIMINAL LAW—CONDUCT OF JURY—CAUSE FINALLY SUBMITTED—SEPARATION OF JURY—COURT PROCEDURE.

1. A cause is finally submitted to the jury, within the meaning of section 7312, Rev. St. 1892, at such time as the court directs the jury to enter upon its deliberations, and not necessarily at the conclusion of the charge of the court to the jury.

2. Where, at the conclusion of the reading of the court's charge, the jurors are permitted to separate for the purpose of the noon meal, being at the time instructed that the cause has not then been finally submitted to them, and directed to return at 1 p. m. and retire to the jury room for deliberation, and being carefully admonished as to their conduct, as provided in said section, and upon their return at the hour named the indictment, the court's written charge, and blank verdicts are for the first time delivered to them, and they then retire to deliberate upon their verdict, the cause will be held to have been finally submitted at the hour of reassembling and not at the time of such separation, and, in the absence of a showing that such separation has worked prejudice to the defendant, the fact of separation will not be ground for a new trial.

(Syllabus by the Court.)

Error to Circuit Court, Marion County.

James H. Ferrell was convicted of crime. From a judgment of the circuit court reversing the conviction, the state brings error. Reversed.

At the April term, 1902, of the court of common pleas of Marion, James H. Ferrell was convicted, under section 6815, Rev. St. 1892, of the crime of attempting to procure a miscarriage, from which attempt the woman died, and was sentenced to two years in the penitentiary. The judgment of the court in imposing sentence was reversed by the circuit court, on the sole ground that "the court erred in permitting the jury to sep-

arate after the case was submitted." To this judgment of reversal the state brings error.

It appears, by the undisputed evidence given at the hearing of the motion for new trial, that the evidence and arguments of counsel in the case were concluded shortly before noon of June 21st, and that the court then proceeded to charge the jury, the same being a written charge; that at its conclusion the court informed the jury that the cause was not then submitted to them, and then directed the jury not to have any conversation either among themselves or with any one else concerning the cause, nor allow any one to speak to them concerning the same; that they should not form or express any opinion about the case until it should be finally submitted to them; and that they should return to the courtroom at the hour of 1 p. m., and retire to the jury room, elect one of their number foreman, who should sign their verdict when found, when and at which last-named hour the cause would be finally submitted to them for deliberation. The jury did return at that hour, and immediately retired to the jury room to deliberate, in charge of the sheriff, who then handed them the indictment, the written charge of the court, the exhibits, and the blank verdicts, none of which papers had before been received by any of the jury; that they thereupon proceeded to elect one of their number foreman, and there was no separation of the jury until after the verdict had been returned into open court, and the same read in the presence of the defendant and his counsel, and the jury thereupon discharged.

Fred E. Guthery, Pros. Atty., for the State.
Chas. H. Garberson and Scofield, Durfee & Scofield, for defendant in error.

SPEAR, J. (after stating the facts). Whether or not the cause had been finally submitted to the jury at the time that body was permitted to separate at the noon hour is the important question in the case. Primarily it is a question of fact, but, the actual facts not being in dispute, it becomes a question of law.

Without doubt it is the policy of our statutes that the jurors to whom shall be committed the question of the guilt or innocence of one charged with crime should be prevented from receiving impressions during the trial calculated to influence the verdict, except such as are legitimately conveyed to them by the evidence, the arguments of counsel, and the charge of the court. Hence our statute (section 7312, Rev. St. 1892) provides that: "When the case is finally submitted, the jurors must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict, or are discharged by the court; the officer having them in charge shall not suffer any communication to be made to them, nor make any himself, except to ask them if they have agreed upon

a verdict, unless by order of the court; * * * and if the jurors be permitted to separate during the trial, they should be admonished by the court that it is their duty not to converse with, nor suffer themselves to be addressed by, any person, nor to listen to any conversation on the subject of the trial, nor to form or express an opinion thereon, until the cause is finally submitted to them." This section, as it stood in the Criminal Code (section 164), prohibited the separation of jurors in the trial of felonies, after being sworn, until discharged, and in the trial of misdemeanors separation was forbidden, after the charge of the court, until discharged. The clear implication is that, by the amendment now embodied in the section above cited, it was intended to permit separation in all criminal cases during trial, and before submission, coupled with the admonition to the jury above stated, and that such separation would not naturally tend to subject the jury to improper influences, nor in any way prevent a fair trial. Another feature of the amendment is of importance in this connection. "After receiving the charge of the court" is the concluding phrase of the old section; "until the cause is finally submitted to them" is the concluding phrase of the section as it now stands; and the entire section (7312) hinges on the condition with which the section begins, viz., that the case has been "finally submitted." Another implication from this same section would seem to be fairly clear, and that is that the giving of the charge of the court might not in all cases afford the test of whether or not the case had been finally submitted. It is true that a preceding section (7800) provides that at the conclusion of the evidence either party may request instructions to the jury on points of law to be given before argument, and it is suggested that these instructions might be regarded as a charge, and that this induced the changed phraseology of the amendment. But this provision was also embodied in the Criminal Code (section 151), and remains substantially the same. So that the fair inference is that the charge referred to in the Code is the general charge which is to be given immediately after argument. This inference is strengthened when we remember that it has been customary in our courts from time immemorial for the court, at the end of the argument, or of the evidence where no argument is had, to give a general charge to the jury; and our legislation respecting the conduct of trials always has been, and we think should be, construed in the light of the practice which has prevailed. Hence, when the old statute forbade separation of the jury after receiving the charge of the court, it was this general charge which was referred to, and, were that language in the present law, no doubt would exist as to the requirement to keep the jury together, after receiving the charge, until discharged.

It is the contention of defendant in error that while the language of the old and the new is different, yet there is no difference in the meaning; therefore that the separation of the jurors was a violation of the mandatory provision of the statute—a statute enacted to protect the rights of persons charged with crime—and prejudice will be conclusively presumed; hence the error is fatal to the judgment. Several objections occur to this proposition. If it had been the purpose of the lawmakers to provide that the giving of the judge's charge should invariably be regarded as a final submission, no reason whatever is apparent for the change of the statute. The former rule was a simple one, easily understood, and as easily followed. For some reason the change was deemed important. We think the natural inference is that it was intended to remove the ironclad rule and leave some discretion in the trial judge as to when he would finally submit the case. The statute requires the delivery to the jury of the written charge when a written charge has been requested, and it is usual to deliver also the indictment, blank verdicts, and such exhibits as may be put in evidence, and the submission would not be fully completed until that had been done. Nor does it follow, though this separation be deemed an irregularity, that prejudice to the rights of the defendant is to be presumed. We suppose the rule is well settled that, where the failure to observe a statutory requirement naturally works prejudice to a party, the burden is not on him to show that he was in fact prejudiced. It is observed in *McHugh v. State*, 42 Ohio St. 154, opinion by Okey, J., that: "Ordinarily, if a statutory provision or principle of the common law, applicable to the case, is disregarded on the trial of a person charged with crime, where its enforcement would tend to preserve his right to an impartial trial, he is to be regarded as prejudiced in his substantial rights, as he is always to be deemed so prejudiced where he is deprived of a constitutional guaranty designed for the protection of the person. Still, if there has been a failure to observe some mere matter of form, where the officer or other person charged with the duty acted in good faith, the court must determine whether the failure to observe such form tended in any way to deprive the accused of a fair trial, and whether, looking to the statutory provisions relating to criminal procedure, it was intended that such failure should necessarily require a reversal of the judgment." But in this case the jurors, by virtue of the statute, might properly be permitted to separate before the evidence and arguments had been concluded, and this permission of the statute is on the assumption that such a separation will not naturally work prejudice. If this be true, how can it be affirmed that a separation at the conclusion of the charge, the jurors being instructed that they had

not yet received the case finally, as they, in fact, had not, and being carefully cautioned, would naturally work prejudice to the defendant? We think the assumption unwarranted. The situation would be essentially different if that body had entered upon its deliberations, and there is manifestly strong reason for the statutory requirement that during deliberation they be kept together.

Affidavits of the jurors were given in evidence, all showing that they had obeyed the court's caution, and tending to rebut any presumption of prejudice. We do not regard this evidence as relevant, there being no issue as to prejudice, although it is somewhat comforting. In the days when courts were prompted, because of the rigidity of the criminal law, to look for technicalities in order to protect human rights, it was natural, perhaps, to give strained construction to language in order to secure that object. But in this enlightened day there is no occasion for unnatural scrutiny. A reasonable construction of language we think more in consonance with the spirit of our law.

It is our conclusion that giving fair construction to the statute, the evidence shows that the case was not finally submitted until the return of the jury at 1 p. m., and the indictment, written charge, and other papers then delivered. The judgment of the circuit court will therefore be reversed, and that of the common pleas affirmed.

DAVIS, SHAUCK, PRICE, and CREW,
JJ., concur.

(162 Ind. 667)

McKEE et al. v. TOWN OF PENDLETON
et al.¹

(Supreme Court of Indiana. Feb. 4, 1904.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—REMONSTRANCES—TIME FOR FILING—ASSESSMENTS—STATUTES—CONSTRUCTION—INJUNCTION—ADEQUATE REMEDY AT LAW.

1. Acts 1889, p. 237, § 1 (Burns' Rev. St. 1901, § 4288), provides that town officers may cause street improvement work to be done by contract given to the best bidder after advertising for three weeks in a newspaper, and Acts 1889, p. 411 (Burns' Rev. St. 1901, § 4289a), requires a remonstrance to be filed before the improvement is advertised for contract. An advertisement that a contract for such work would be given to the best bidder on July 20, 1901, and asking proposals therefor, was duly published on June 28, July 5, 12, and 19, 1901. *Held*, that a remonstrance filed July 20, 1901, was filed too late; the three weeks of advertising having expired on July 19th, and the additional notice inserted on that day being unnecessary.

2. Acts 1889, p. 237, §§ 3, 5-7 (Burns' Rev. St. 1901, §§ 4290, 4292-4294), relating to the improvement of streets, and providing (section 4294) that any person feeling aggrieved shall have the right to appear before the board of trustees of the town which shall have ordered the improvement, and shall be accorded a hearing, gives to the property owner abutting on the street to be improved an opportunity to be heard before a tribunal empowered to adjust

all questioned assessments to the basis of actual special benefits received by the improvement, and hence such owner cannot enjoin the construction of the improvement on the ground that the cost thereof was to be assessed by the front foot, without regard to benefits to the several lots bordering on the improvement.

Appeal from Superior Court, Madison County; H. C. Ryan, Judge.

Action by Samuel McKee and others against the town of Pendleton and others. From a judgment for defendants, plaintiffs appeal. Transferred from Appellate Court, under section 1337u, Burns' Rev. St. 1901. Affirmed.

Kittinger & Diven, for appellants. L. V. Mays and Chipman, Keltner & Hendee, for appellees.

DOWLING, J. The board of trustees of the town of Pendleton on June 27, 1901, by a vote of all its members, passed an ordinance for the improvement of one of the public streets of the said town, known as "Pendleton Street," by paving, curbing, and sidewalk paving. An advertisement that the contract for the work would be given to the best bidder on July 20, 1901, and asking proposals therefor, was published in a newspaper of general circulation of the town on June 28, July 5, July 12, and July 19, 1901. July 20, 1901, a written remonstrance, signed by two-thirds of the resident owners of the whole line of lots bordering on that part of the street upon which the improvement had been ordered, was filed with the clerk of said board. On the same day the appellants herein, six in number, residents of said town of Pendleton, and owners of real estate bordering and abutting on said street, brought this suit against the town and its board of trustees to enjoin the construction of the said improvement. The principal grounds for such injunction stated in the complaint were (1) that, before the improvement was advertised for contract, a remonstrance, signed by the requisite proportion of the owners of lots bordering on the street ordered to be improved, resident on said street, was filed with the clerk of the board of trustees of the town; and (2) that the cost of the improvement was ordered to be assessed against the lots bordering or abutting on said improvement according to their frontage, and without regard to the benefits received by said lots. No question was raised touching the sufficiency of the complaint, and an answer in two paragraphs was filed, one of which was a general denial, and the other a special plea alleging that the proceedings were taken under the act for the improvement of streets in towns, known as the "Barrett Law." Reply in denial of the special answer. At the request of the parties, a special finding of facts was made by the court, with conclusions of law thereon in favor of the appellees. The appellants excepted to each conclusion of law, and moved for a re-statement of such conclusions and for a new

¹ Rehearing denied.

trial. These motions were denied, and the rulings thereon are assigned for error.

The foregoing statement sufficiently discloses the grounds on which the decision of this cause must rest.

The statute under which the proceedings for the improvement of the street were taken provides that the board may cause the work to be done by contract given to the best bidder, after advertising for three weeks in some newspaper published within the town. Section 4288, Burns' Rev. St. 1901 (Acts 1889, p. 237). The act of March 4, 1899, p. 411 (section 4289a, Burns' Rev. St. 1901), which authorizes a remonstrance against such improvements, requires that the remonstrance be filed before the improvement is advertised for contract. Assuming that this provision may be construed as permitting the remonstrance to be filed at any time before the expiration of the period during which the advertisement or notice of the letting of the contract must run, the remonstrance in this case was not filed in time. The notice was published June 23, July 5, July 12, and July 19, 1901. The three-weeks advertisement prescribed by the statute expired July 19th, and the additional notice inserted on that day was unnecessary. The remonstrance was not filed until July 20, 1901, or one day after the improvement was advertised for contract. It was filed too late.

The other objection, that the cost of the work was to be assessed by the front foot, without regard to the benefits to the several lots bordering on the improvement, is without merit. The ordinance must be read in connection with the law under which it was enacted. The assessment provided for was *prima facie* a fair and equitable one. The property owner was not denied redress in any case where such assessment might be unjust and oppressive. It was said by this court in *Taylor v. City of Crawfordsville*, 155 Ind. 403, 405, 406, 58 N. E. 490, 491, that "the statements in the declaratory resolution and the averments of the complaint that the city will assess the total cost of the improvement against the abutting property, without reference to the question of benefits, and assess against the plaintiff's property an amount largely in excess of the benefits, cannot avail in support of injunction. It is a general rule that a defendant cannot enjoin the prosecution of illegal proceedings upon grounds which he may make available as a defense in such proceedings. *Palmer v. Hayes*, 93 Ind. 180; *Martin v. Orr*, 96 Ind. 27; *Board, etc., v. Dickinson*, 153 Ind. 682 [53 N. E. 929]. * * * Sections 3, 5, 6, and 7 of the Barrett law [Burns' Rev. St. 1901, §§ 4290, 4292-4294] must be construed together, and, so construed, they give to the abutter an opportunity to be heard before a tribunal empowered, and duty bound, to adjust all questioned assessments to the basis of actual special benefits received by the improvement. See *Adams v. City of Shelbyville*

[154 Ind. 467, 57 N. E. 114]. If appellant avails herself of this remedy, she may avoid injury, even though the primary allotment of the cost by the city engineer is placed at a sum greater than her benefits; and it is firmly settled in jurisprudence that, where a party has a clear and adequate remedy at law, he is denied the extraordinary remedy of injunction." See, also, *Brown v. Central Bermudez Co.* (Ind. Sup.) 69 N. E. 150.

The court found that there was no fraud in the proceedings of the common council, and the evidence sustains the finding upon this, as well as the other facts stated in the special finding. The conclusions of law were authorized by the facts found. There is no error in the record. Judgment affirmed.

(162 Ind. 693)

WINONA, W. E. & S. B. TRACTION CO. v. COLLINS.

(Supreme Court of Indiana. Feb. 2, 1904.)
RECEIVERS—APPOINTMENT—PENDENCY OF ACTION.

1. The court has no jurisdiction to appoint a receiver on mere petition demanding no money judgment, or any other legal or equitable remedy beyond the appointment of a receiver, and presented without the filing of a complaint or the issuance of a summons or any other process.

Appeal from Circuit Court, Elkhart County; Joseph D. Ferrall, Judge.

Application for the appointment of a receiver by Samuel A. Collins against the Winona, Warsaw, Elkhart & South Bend Traction Company. From an interlocutory order appointing a receiver, defendant appeals. Reversed.

Hervey Bryan Hicks and Miller, Drake & Hubbell, for appellant. Dodge & Dodge, for appellee.

HADLEY, J. Appeal from an interlocutory order appointing a receiver. It appears from the record that on July 13, 1903, appellee, without filing any complaint in the Elkhart circuit court, or causing or requesting any summons or other process to be issued out of said court, presented to the judge of said court, at his chambers in the city of Lagrange, Lagrange county, Ind., his verified petition for the appointment of a receiver to take charge of all the assets, books, papers, maps, franchises, surveys, documents, and all other property of the appellant. It is averred in the petition that appellant is an Indiana corporation, and has its principal office in Elkhart, Ind. The petition demands no money judgment, and no other legal or equitable remedy beyond the appointment of a receiver. It sets forth causes for the appointment of a receiver without notice. In the absence of the defendant, the judge appointed a receiver upon the verified petition, in accordance with the prayer thereof, approved the receiver's bond, administered the

¶ 1. See *Receivers*, vol. 42, Cent. Dig. § 5.

oath of office, and, so far as anything appears by this record, that was a final disposition of the cause.

There was no action commenced and pending in the circuit court to which the application for a receiver was ancillary, hence the judge had no jurisdiction to appoint a receiver. The case is fully ruled by *Alexandria Gas Co. v. Irish*, 152 Ind. 535, 53 N. E. 762, and cases there cited.

The order appointing a receiver is therefore reversed.

(162 Ind. 127)

MAY, Clerk of Court, v. STATE ex rel. RIFE.

(Supreme Court of Indiana. Feb. 5, 1904.)

JUDGMENTS—SATISFACTION—POWERS OF CLERK—APPLICATION OF PROCEEDS.

1. Burns' Rev. St. 1901, § 7936 (Horner's Rev. St. 1901, § 5850), authorizing clerks of the several courts to receive money in payment of all judgments, dues, or demands of record in their respective offices, constitutes the clerk, in receiving money on judgments, no more than a special agent for that purpose, his authority being limited to that conferred by statute, and does not empower him to withhold any part of the money, thus paid to him, in satisfaction of clerk's and sheriff's costs assessed in another action against the person for whom he receives the money, which, under the provisions of the fee and salary law of 1895, are the property of the county, and in no sense that of the officers who perform the services.

Appeal from Superior Court, Madison County; H. C. Ryan, Judge.

Action by the state, on the relation of Lavinia Rife, against Isaac E. May, clerk of the Madison circuit court. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Rev. St. 1901, § 1337u. Affirmed.

M. A. Chipman, S. M. Keltner, and E. E. Hendee, for appellant. Alfred E. Ellison and Willis S. Ellis, for appellee.

JORDAN, J. The facts agreed upon by the parties in the lower court are substantially as follows: In March, 1899, the plaintiff below, appellee in this appeal, recovered a judgment in the Madison superior court against one Alfred Clark on a contract for \$400. This judgment, it appears, was made payable by installments, and the last installment of \$100 became due on March 14, 1901, and was paid by the judgment debtor to appellant, as clerk of the Madison circuit court. He received this money in his official capacity as clerk, and not otherwise. On the 29th day of the same month, after the payment of the money, appellee demanded of said clerk that he pay over to her the said \$100 which he had received as aforesaid upon her judgment. This he refused to do, on the ground that he had the right, as clerk, to apply said money upon an unpaid judgment, for costs, which had been rendered against appellee by the Madison circuit court, and which was of record in his office. It further appears that in April, 1896, appellee instituted a suit

in the Madison circuit court against said Alfred Clark to set aside and annul a certain contract. On March 5, 1898, she dismissed this action, and the court rendered judgment in favor of the defendant for costs. Among the costs legally taxed against her in the said action so dismissed were the following amounts for services performed by the clerk and sheriff of the court, and which costs were of record in said clerk's office:

To appellant, as clerk.....	\$ 95
To Edmund Johnson, former clerk.....	7 55
To John Starr, sheriff.....	61 40

Total \$69 90

The two last-mentioned officers had, prior to November, 1898, each received his salary in full from the county. Prior to March 14, 1901, a fee bill had been issued against appellee, by the clerk of the Madison circuit court, to enforce the collection of said costs, but said writ was returned by the sheriff unsatisfied, he being unable to find any property of appellee in said county. At the time the \$100 was paid on the aforesaid judgment appellee was a married woman, and so continued, but at the time the judgment was rendered in her favor, and at the time the aforesaid judgment was rendered against her for costs, she was unmarried. The sole ground upon which appellant refused to pay the \$100 on demand to appellee was because he claimed and asserted that he had the right to retain the same to reimburse Madison county to the amount of \$100 on the costs taxed to appellee in the action which she dismissed as hereinbefore stated. He still holds said money, in his official capacity, under his said claim of right to apply it upon said costs. The position assumed by appellant is that, under the law, he had the right, at least, to withhold \$69.90 of the \$100 received by him as aforesaid, for the purpose of applying it in payment of the costs taxed against appellee.

Counsel for appellant, however, point us to no statute of this state to sustain this contention. It is claimed that by section 7936, Burns' Rev. St. 1901 (section 5850, Horner's Rev. St. 1901), which authorizes clerks of the several courts of this state to receive money in payment of "all judgments, dues or demands of record in their respective offices," the clerk thereunder is made the agent of the party owning or holding such judgments, dues, or demands, to receive the money thereon and receipt for the same. The clerk of the court, by force of this statute, cannot be said to be the general agent of the party owning the judgment or dues, but is simply empowered by the statute to receive the money when paid in satisfaction of the judgment or dues, as the case may be, and his authority to receipt therefor is incidental to the power conferred. His agency in such cases is quite limited and special.

It is held in the case of *Chapman v. Harwood*, 8 Blackf. 82, 44 Am. Dec. 736, that a

sheriff, in the sale of property upon execution, "is a special agent, and cannot exceed the powers which the law gives him." The clerk, in receiving money on judgments, or other dues of record in his office under the statute above cited, is likewise nothing more than a special agent for that purpose, and the statute is the warrant of such agency, and he is limited to the power which it confers upon him in such matters.

In *Sibert v. Humphries*, 4 Ind. 481, it was held that money collected by a sheriff on execution and paid over by him to the clerk of the circuit court was not, while in the hands of the clerk, subject to a levy upon execution issued against the person in whose favor the clerk had received and held the money. The court in that appeal affirmed that the identical bills and coins paid as money to the clerk by the sheriff did not become the property of the party in whose favor they had been received until he had accepted them from the clerk. Therefore the money, not being his property while in the hands of the clerk, was not subject to the levy of the execution in question.

Winton v. State ex rel., 4 Ind. 321, was a suit on the official bond of the sheriff on account of his refusal to pay over money on the demand of the relator, in whose favor that officer had collected it. The money in that case collected by the sheriff consisted of bank bills and silver coins, and the court held that such bills and coins, while in the hands of the sheriff, were not subject to levy upon execution which had come into his hands against the relator. The sheriff based his right to levy upon the money, while the same was in his hands, upon the authority of the statute of 1843, which provided that "upon execution the officer may levy upon any current gold or silver coin or current bank notes, belonging to the judgment debtor." The court denied this contention, and held that while the bills and coins were in the possession of the sheriff they were in the custody of the law, and did not belong to the relator, and therefore were not subject to execution until they had been turned over to him by the sheriff.

In *Hooks v. York*, 4 Ind. 636, it was held that current bank notes received by a justice of the peace in payment of a judgment rendered by him were not subject to levy upon execution against the judgment plaintiff. In that appeal it is said: "It has been decided that money collected by a sheriff on execution cannot, while in his possession, be levied on. While it remains there, it is in the custody of the law. It does not belong to the judgment creditor until it is paid over to him."

The decisions in these cases are quite applicable and influential in the decision of the question presented in this appeal. The money in dispute in this case was officially received by the clerk on appellee's judgment, and while in his hands was in the custody of

the law, and, in the absence of any statutory provision regulating the matter, it was not her property, to be applied by the clerk in payment of any dues or demands against her of record in his office. He could not legally have surrendered it to the sheriff in satisfaction of any execution or fee bill that might have been issued against her. If he had no right or power to turn the money over to the sheriff to be applied in satisfaction of an execution or fee bill against her, what reason can there be for asserting that he had the right to withhold the money from her after the demand which she made, for the purpose of applying it either in whole or in part in satisfaction of the fees arising out of the services rendered for her by the sheriff and clerk in the litigation in question? Certainly none. The fees taxed against appellee for the services of the officers mentioned were, under the express provisions of the fee and salary law of 1895, the property of the county, and in no sense the property of the officers who performed the services. Under the circumstances appellant could assert no other or different right to retain and apply the money in satisfaction of these fees, merely because they were dues or demands of record in his office belonging to the county, than he could for retaining the money for the purpose of applying it in satisfaction of any judgment, dues, or demands against appellee in favor of some other person.

The lower court having reached a right conclusion in adjudging that appellant should pay over to appellee the money in controversy, the judgment is therefore affirmed.

(162 Ind. 106)

CLEVELAND, C. C. & ST. L. RY. CO. v. BERGSCHICKER.

(Supreme Court of Indiana. Feb. 3, 1904.)

SERVANT'S INJURIES—ACTIONS—LIMITATIONS—EVIDENCE—FELLOW SERVANT ACT—RAILROADS—RULES OF OPERATION—CONSTRUCTION.

1. An action for injuries to a locomotive fireman was commenced within the time limited by law, the complaint being founded on the employers' liability act, and charging defendant's engineer with an affirmative act of negligence in applying the steam and causing the locomotive to back. Subsequently, and after the expiration of the period of limitations, an additional paragraph was filed charging negligent acts of omission of the engineer in the manner of adjusting the machinery of the locomotive. On the trial, and after the close of the evidence, the original paragraph of the complaint was dismissed, and judgment was had on the other paragraph. *Held*, that limitations had not run, the cause of action in both paragraphs being the same.

2. In an action for injuries to a locomotive fireman, occurring while his engine was standing opposite a coaling station to take coal, the court should, on application, have construed a rule of defendant to the effect that enginesmen must not leave their engines with steam on unless in charge of an employé, and also providing

¶ 1. See *Limitation of Actions*, vol. 32, Cent. Dig. § 544.

the precautions to be taken when an engine is placed on a siding to stand, and, if it appeared on its face to be irrelevant, should have excluded it.

3. A rule of a railroad providing that engine-men must not leave their engines with steam on except in charge of an employé, and that when an engine is placed on a siding or elsewhere to stand the throttle must be fastened shut, the reverse lever fixed on the center, and the tender brakes shut tight, has no application to an engine while under the direct and immediate control of its engineer.

4. A rule of a railroad providing for the precautions to be taken when an engine is "placed upon a siding or elsewhere to stand" has no application to a locomotive which the engineer has brought to a temporary stop on the main track, as the words "or elsewhere" must be construed to refer to things of the same kind as the word "siding."

5. Under Burns' Rev. St. 1901, § 7083, subd. 4, declaring a railroad liable for injury to an employé caused by the negligence of a servant having charge of a locomotive engine, a railroad is liable for injuries to a fireman while his engine, in charge of the engineer, was taking on coal; although the fireman was authorized to indicate to the engineer where to stop the locomotive, when the injury was caused by the engineer's subsequent negligence in permitting the locomotive to move.

6. In an action for injury to a locomotive fireman, caused by the engineer moving his engine while it was coaling, as it was necessary to show that the engineer had notice as to where the fireman was, it was competent for plaintiff to show what the general practice of firemen running with the particular engineer had been.

Appeal from Circuit Court, Henry County; W. A. Barnard, Judge.

Action by John W. Bergschicker against the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court under Burns' Rev. St. 1901, § 1337u. Reversed.

John T. Dye, for appellant. Engle, Caldwell & Parry and Theodore Shockney, for appellee.

GILLET, C. J. Appellee, who was a locomotive fireman, brought this action to recover for injuries sustained in having his legs crushed between the roof of the cab of a locomotive and a steel apron which was being used to guide coal from a coal chute into the tender of said locomotive. The injury occurred on the 19th day of December, 1898. There was a verdict and judgment for appellee.

The first question in the case relates to the statute of limitations. The action was instituted on the 25th of January, 1900. There were originally two paragraphs of complaint. A demurrer was sustained to the first of said paragraphs. On the 15th day of January, 1901, and while said second paragraph of complaint was still pending, appellee filed an additional paragraph of complaint. On the 20th day of May, 1901, while the pleadings were in the situation indicated, appellee filed fourth and fifth paragraphs of complaint in the action. On the conclusion of the hearing of the evidence, appellee dismissed the sec-

ond, third, and fifth paragraphs of his complaint. Said second paragraph, which was filed within the period of time required by law, was founded on the employers' liability act, and charged appellant's engineer with an affirmative act of negligence in applying the steam and causing the locomotive to back. The fourth paragraph, on which the verdict and judgment of appellee rests, charges that there were negligent acts of omission on the part of the engineer in the manner of adjusting the machinery of said locomotive, whereby the steam escaped into the steam chests and caused said locomotive to back. The statute of limitations has not run against appellee. The cause of action throughout has been the same. *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 51; *Chicago, etc., R. Co. v. Bills*, 118 Ind. 223, 20 N. E. 775; *Ohio, etc., R. Co. v. Stein*, 140 Ind. 62, 39 N. E. 246; *Shirk v. Coyle*, 2 Ind. App. 355, 27 N. E. 638. It is not material that the second paragraph was subsequently dismissed. There has been throughout but one action, and the character of the demand has remained the same.

The evidence shows that the accident occurred in the nighttime. The locomotive was headed west, and had been stationed opposite the coaling station at Union City, on the main track, to take coal. After arranging the apron, appellee pulled the chain which unlatched the gate to the coal chute, and seated himself upon the roof of the cab, with his legs hanging over the back of it, while the coal ran over and along the apron into the tender. After about one ton of coal had run in, the locomotive moved back, injuring appellee as before stated. The theory of appellee was that the throttle leaked or was not closed tight, and, further, that ordinary care, in the circumstances, required, in addition to closing the throttle, that the reverse lever should have been put on the center, the cylinder cocks opened, and the air brakes applied. Just what was done, and what the engineer should have done, in the exercise of ordinary care in the circumstances, were questions of fact that formed a considerable part of the controversy before the jury.

Over the objection and exception of appellant, appellee, after the proper introductory evidence, read to the jury the following rule, found in appellant's book of rules under a subdivision entitled "Enginemen": "264. They must not leave their engine with steam on unless it is in charge of an employé of this company. When it is placed upon a siding, or elsewhere, to stand, the throttle must be fastened shut, the reverse lever fixed on the center, and the tender brakes must be shut tight." At the proper time appellant tendered the following instruction, which was refused by the court: "Rule No. 264 of the defendant company has been given in evidence. That rule has no application to a locomotive engine while under the

direct and immediate control of its engineer." An exception was duly reserved to the refusal to give this instruction, and this ruling, as well as the ruling admitting the rule in evidence, were assigned as grounds for a new trial. It is clear that it was the duty of the trial court in this case, upon proper instruction tendered, to construe the rule, and, if it appeared on its face to be irrelevant, the court should have refused to permit it to go in evidence.

The first sentence of the rule was not applicable to the case on trial, but it furnishes a context of some importance in determining the meaning of the next provision. That provision has no application except as a locomotive is "placed upon a siding or elsewhere to stand." Considering that it purports to be a rule that admits of no exception as to cases coming within its terms, and that all of these precautions would in many circumstances be wholly unnecessary if the locomotives were under the direct and immediate charge of the engineer, it appears to us that appellant's view, as announced in the instruction tendered, is correct. Moreover, we think that the rule in question had no application to a locomotive which the engineer had brought to a temporary stop upon a main track. The words "or elsewhere" following the word "siding" are within the *eiusdem generis* doctrine. In the construction of statutes, contracts, and other instruments of writing, the rule is that general words following the mention of a particular person or thing are ordinarily to be construed as *eiusdem generis*. *Miller v. State*, 121 Ind. 294, 23 N. E. 94; *Nichols v. State*, 127 Ind. 406, 26 N. E. 839; *Potter's Dwarries on Statutes*, 236; 17 Am. & Eng. Ency. of Law (2d Ed.) 6; 21 Am. & Eng. Ency. of Law (2d Ed.) 1012 et seq., and cases cited; *Suth. Stat. Const.* § 276 et seq. As within this rule, it may be further stated that general words are ordinarily not interpreted as extending to persons or things in a class superior to those which have been before specifically mentioned. *Archbishop of Canterbury's Case*, 2 Rep. 46; *Copeland v. Powell*, 1 Bing. 369; *Casher v. Holmes*, 2 Barn. & Adol. 592.

Attention may be called to the case of *State v. Camden*, 52 N. J. Law, 239, 19 Atl. 539, since it involved the interpretation of the words "or elsewhere," when used in circumstances similar to their use in the rule under consideration. That case was a prosecution under an ordinance defining and prohibiting disorderly conduct "in the streets and highways or elsewhere within the city." It was held that the word "elsewhere," as used, must be regarded as signifying places *eiusdem generis*, namely, parks, squares, and places frequented by the public. By the use of the words "siding or elsewhere," there is naturally suggested to the mind, not the main track, a relatively superior thing, that presumably would have been mentioned first, if it had been intended to be within the rule, but places like

sidings, as switches, turntables, roundhouses, etc. Nor do we think that in thus construing the rule we fail to give it a practical construction. It is true that the main track should be regarded as a place of constant danger, but for that reason it may be supposed that there was no written rule applicable to locomotives thereon, since it would be assumed, without a rule, that a locomotive would not be permitted "to stand" upon the main track in the absence of the engineer. While there might be circumstances in which it would be proper or even necessary for an engineer to comply with the directions in the latter part of the rule, while the locomotive of which he was in charge was standing upon the main track, yet we perceive no reason inherent in such a state of circumstances which would lead us to affirm that it was the purpose of the rule to direct his conduct in such cases, regardless of every situation which might confront him. It is evident from an examination of the record that the existence of said rule had no unimportant part in the result attained. The leading contention upon the trial seems to have been over the question as to what should have been done by the engineer, in view of the circumstances, to acquit him of the charge of negligence, and, with the rule in evidence, the jury could but infer that appellant's contention that all of the precautions mentioned in the rule were unnecessary was disputed by the deliberate provision of the company, made in advance of the accident, as to the engineer's duty.

Appellant's counsel contend that the evidence, without contradiction, shows that in taking coal appellee was in no respect subject to the directions of the engineer, but was free to act upon his own judgment and discretion, and that therefore he has not shown himself within the employers' liability act. We cannot affirm that the verdict is contrary to law, in view of the opening language of the fourth subdivision of the first section of said act. Section 7083, Burns' Rev. St. 1901. Although appellee was authorized to indicate to the engineer where to stop the locomotive when coal was to be taken, yet the locomotive was in the immediate charge of the engineer, and in a proper case the company would be liable for a subsequent act of negligence on his part in permitting such locomotive to move. See, as to the construction of said portion of the statute, *Baltimore, etc., R. Co. v. Little*, 149 Ind. 167, 48 N. E. 862; *Indianapolis, etc., R. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792.

Appellee was permitted to prove upon the trial that for some time prior to his injury there had been a usage, or rather a practice, among the firemen of appellant's locomotives, in coaling at Union City, when such locomotives were headed west, to remain between the apron and the cab. As it was nec-

essary in this case to show that the engineer had such notice concerning the situation of appellee that a duty to exercise care for his safety arose, the judges agree that it was competent to show what the general practice of firemen running with the particular engineer had been. Whether the evidence could take any broader scope than this the court will not determine until a case shall arise in which it is essential to dispose of such question.

Many other matters have been urged upon our consideration by counsel for appellant as grounds of reversal, but, as they may not arise upon a subsequent trial of the cause, it is unnecessary to consider them.

Judgment reversed, with a direction to sustain appellant's motion for a new trial.

MONKS, J., did not participate.

(162 Ind. 125)

BOARD OF COM'RS OF JAY COUNTY v. BLISS.

(Supreme Court of Indiana. Feb. 5, 1904.)

APPEAL—BILL OF EXCEPTIONS—TRANSCRIPT—EMBODYING ORIGINAL BILL—ELECTIONS—BRIBERY—COMPLAINT—FURNISHING OF EVIDENCE—REWARD—PERSONS ENTITLED TO.

1. Burns' Rev. St. 1901, § 638a, enacts that, to make the evidence a part of the record on appeal, it shall be sufficient if the transcript contain the original bill of exceptions, embracing all the evidence, and that it must appear that the bill was presented for signature within the time permitted by law, and filed with the clerk. *Held*, that where, on appeal, the certificates of the clerk showed that the bill was filed in his office within the time limited, and that the original bill of exceptions containing the evidence was embodied in the transcript, the evidence was properly in the record.

2. Burns' Rev. St. 1901, § 2329, imposes a penalty for agreeing, on consideration, to refrain from voting; and section 2330 provides that any person having knowledge of a violation of the former section, and who shall furnish testimony securing a conviction, shall be entitled to a specified reward. *Held*, that a person who pays another for a promise not to vote cannot collect the reward.

Appeal from Circuit Court, Jay County; John M. Smith, Judge.

Action by Felix Bliss against the board of commissioners of Jay county. From a judgment in favor of plaintiff, defendant appeals. *Reversed*.

George W. Bergman and Emerson E. McGriff, for appellant. Adair & La Follette, for appellee.

MONKS, J. This action was brought by appellee to recover the reward provided by section 2330, Burns' Rev. St. 1901, for furnishing the testimony necessary to secure the conviction of one Sitzman for a violation of section 2329, Burns' Rev. St. 1901. A trial of said cause resulted in a verdict in favor of appellee, and, over a motion for a new trial, judgment was rendered against appellant.

It is insisted by appellee that the evidence is not in the record, and that for this reason no question presented by the motion for a new trial can be considered. On June 27, 1903, the motion for a new trial was overruled by the court, and 60 days were given in which to prepare and file a bill of exceptions. The certificates of the clerk show that the bill of exceptions was duly filed in his office on July 24, 1903, and that said original bill of exceptions containing the evidence is embodied in the transcript. It is clear that, under the act of 1897 (Acts 1897, p. 244, being section 638a, Burns' Rev. St. 1901), the evidence is in the record. *Minick v. State*, 154 Ind. 379, 56 N. E. 851; *Hauger v. Benua*, 153 Ind. 642, 646, 647, 53 N. E. 942; *Ewbank's Manual*, § 32, p. 43.

Appellee was a witness in his own behalf, and testified, in substance, that he paid George Sitzman \$2 on the day of the general election of 1902 in Portland, Jay county, Ind., in consideration of which Sitzman promised that he would not vote at said election, but "would stay away from the polls and not vote." Sitzman signed a receipt for said \$2, which was read in evidence, and was as follows: "Received of Felix Bliss two dollars to stay away from the polls on Nov. 4, 1902. [Signed] George Sitzman." It was also shown that, on the testimony furnished by appellee, and an affidavit signed and sworn to by him, said Sitzman was prosecuted and convicted, on a plea of guilty, in the Jay circuit court. This court held in *Board, etc., v. Davis* (this term) 69 N. E. 680, on grounds of public policy, that the words "any person or persons," in section 2330, supra, did not include the person or persons who violated, or procured, counseled, or caused to be violated, any of the provisions of section 2329, supra, or in any way aided or abetted therein. This was on the ground that no person shall be permitted to profit by or take advantage of his own wrong, or to found any claim upon his own iniquity. It is clear from appellee's evidence that he does not come within the provision of said section 2330, supra, and is not entitled to recover said reward. *Board, etc., v. Davis*, supra, and cases cited. A constitutional question is argued by counsel for appellant, but the conclusion we have reached renders the decision of that question unnecessary.

Judgment reversed, with instruction to sustain appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

(162 Ind. 102)

WABASH R. CO. v. YOUNG.

(Supreme Court of Indiana. Feb. 3, 1904.)

STATUTES—TITLE—EMBRACING SUBJECT—CONSTITUTIONALITY—LIBEL—PRIVILEGE—WORDS LIBELOUS PER SE—LABOR AGITATOR—INTERFERENCE WITH OCCUPATION—COMMON-LAW LIABILITY.

1. Act March 9, 1889 (Acts 1889, p. 315; section 7077, Burns' Rev. St. 1894), entitled "An

act for the protection of discharged employes and to prevent blacklisting," in so far as it applies to employes not discharged, but who have voluntarily left the master's employment, is void, under Const. art. 4, § 19, such provision not being embraced in the title.

2. A general allegation in a complaint that defendant has prevented plaintiff from obtaining employment, and caused him to be dismissed from a position secured by him, states no cause of action, being indefinite and not amounting to a statement of fact.

3. It is not libelous per se to accuse one of being a labor agitator.

4. An allegation in a complaint to the effect that defendant, by whom plaintiff had previously been employed, had "blacklisted" plaintiff, showed no cause of action in libel in the absence of any allegation that blacklisting imputed to plaintiff the commission of a crime, or other conduct exposing him to public hatred, punishment, and disgrace.

5. A complaint alleged that defendant prevented the plaintiff from being employed by a certain railroad company, by stating to the company in question that plaintiff was a labor agitator, and connected with the Order of Railroad Telegraphers of North America, and the complaint stated in substance that plaintiff was a member of such order, and that he assisted in the organization of that association. *Held* that, for all that appeared in the complaint, defendant's statement was true, and hence the complaint failed to show cause of action.

6. The statement of a railroad company that a person was a labor agitator could not amount to a libel, where the statement was made in answer to an inquiry addressed to it by another railroad, which contemplated employing him.

7. A complaint alleged that defendant railroad prevented the plaintiff from being employed by a certain other railroad company by stating to such company that plaintiff was a labor agitator and connected with the Order of Railroad Telegraphers of North America, and the complaint stated, in substance, that plaintiff was a member of such order, and that he assisted in the organization of that association. *Held*, that the complaint did not show any such malicious interference with plaintiff's business as to create a common-law liability.

Appeal from Circuit Court, Miami County;
C. W. Watkins, Judge.

Action by John W. Young against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Stuart, Hammond & Simms, for appellant.
D. E. Rhodes, for appellee.

DOWLING, J. This is a proceeding by the appellee against the appellant for the review of a judgment against him. The case is here for the second time. Wabash Railroad Company v. Young, 154 Ind. 24, 55 N. E. 853. Upon the reversal of the judgment first rendered in this proceeding, the appellee filed an amended complaint in the trial court. A demurrer by the appellant for want of facts was overruled, and, upon its refusal to plead further, judgment was rendered in favor of the appellee reversing the judgment reviewed. The demurrer to the amended complaint questioned the sufficiency of that pleading as a whole, and also separately, in detail, as it related to the first and second paragraphs of the complaint in the original action. Error is assigned upon the several rulings on these demurrers.

The action in which a review of the proceedings and judgment is sought was for damages for the alleged blacklisting of the appellee by the appellant, and for certain wrongful acts charged to have been done by the appellant whereby the appellee was prevented from obtaining employment, and from retaining employment when secured by him. Counsel for appellee insist that the complaint is sufficient both under the statute (Acts 1889, p. 315; section 7077, Burns' Rev. St. 1894) and under the rule of the common law. On the other hand, counsel for appellant argue that the statute does not apply to the case made by the complaint, and that no common-law liability is shown.

The title of the act of March 9, 1889, *supra*, in force at the time the supposed grievances occurred, was "An act for the protection of discharged employes and to prevent blacklisting." The section of the act relied upon by appellee is as follows: "Sec. 2. If any railway company, or any other company, or partnership, or corporation, in this state, shall authorize or allow any of its, or their, agents, to blacklist any discharged employes, or attempt by word or writing, or any other means whatever to prevent such discharged employes, or any employes who may have voluntarily left said company's service, from obtaining employment with any other person or company, except as provided in section one of this act, such company or copartnership shall be liable in treble damages to such employes so prevented from obtaining employment, to be recovered by him in a civil action."

An act of the Legislature can embrace but one subject and matters properly connected therewith, which subject must be expressed in the title. If any subject is embraced in an act which is not expressed in its title, such act is void as to so much thereof as is not expressed in its title. Section 19, art. 4, Const. The subject of the act of March 9, 1889, *supra*, is the protection of discharged employes. The prevention of blacklisting of discharged employes was a matter properly connected with this subject. But the subject of the protection of discharged employes does not include the protection of employes who have not been discharged, or who voluntarily quit the service of their employer. Nor is the protection of employes who voluntarily quit their employment matter properly connected with the subject of the protection of discharged employes. Every section of the act refers to employes who have been discharged, and only in the second section is any provision found which relates to employes who have voluntarily left the service of an employer. This single provision is the prohibition of any attempt, by word, writing, or other means, to prevent a discharged employes, or any employes who may have voluntarily left such service, from obtaining employment with any other person, except as authorized in the first section of the act.

So far as the provision just referred to applies to any employé who may have voluntarily left the service of an employer, it is not embraced in the subject of the act as expressed in its title, nor is it properly connected therewith. The protection of discharged employés was a proper and complete subject for an act of the Legislature. But, under that title, provisions for the protection of employés who had not been discharged could not be included without a violation of section 19, art. 4, of the Constitution. The blacklisting prohibited by section 2 of the act is expressly confined to discharged employés. The complaint does not allege that the appellee was a discharged employé of the appellant, but, on the contrary, it avers that he voluntarily left the service of the company. Therefore, he does not come within the purview and protection of the statute, and his action cannot be maintained under its provisions. *Indianapolis, etc., Co. v. Foreman* (No. 20,253, at present term) 69 N. E. 669.

The question remains whether the complaint is good under the rule of the common law in such cases, either as charging the appellant with libel or with a wrongful interference with appellee's occupation. The material facts alleged against the appellant in the first paragraph of the complaint are that, shortly after the appellee voluntarily left its employment, the railroad company, by its agents, falsely accused him of being a "labor agitator," and that by letters, words, and influence the appellant caused the discharge of the appellee after he had obtained employment, and by the same means prevented him from obtaining employment. It is not stated where he was employed, by whom, in what capacity, for what time, or at what wages, or any other particulars concerning the employment of which he was deprived or which he was prevented from obtaining. The general allegations that the appellant caused him to be discharged from employment he had obtained, and had prevented him from obtaining employment, are not averments of substantive facts, but are conclusions of the pleader. A further and more specific charge is made that the appellant prevented the appellee from being employed by the Atchison, Topeka & Santa Fé Railroad Company, at Denver, Colo., in November, 1894, by representing and stating to that company that the appellee was a "labor agitator," and unfit for said company to have in its employment, and that he was connected with the Order of Railroad Telegraphers of North America. The second paragraph of the complaint in the original action states substantially the same facts as the first, although with a little more particularity. It alleges that the appellee was a member of the Order of Railroad Telegraphers of North America, and that he assisted in the further organization of that association after he left the service of the appellant, by receiving into

that order a large number of telegraphers employed by the appellant and by other railroad companies. This paragraph contains the further allegation that in August, 1894, appellee applied to the officers of the Denver & Rio Grande Railroad Company for employment on said railroad, and that his application was accepted, subject to reference to the appellant; that the appellant, by its agent, wrote to the officers of the Denver & Rio Grande Railroad Company a letter containing the words following: "If you want a man who is strictly a labor agitator, this is your man" (meaning the appellee); that by reason of this false statement the appellee was refused said employment.

The general averments in each paragraph of the complaint that the appellant prevented the appellee from obtaining employment, and that it caused him to be dismissed from positions secured by him, constituted no cause of action against the appellant. They are not indefinite and uncertain merely; they state no facts; they show no wrongful acts on the part of the appellant; they disclose no legal injury to the appellee. The more particular averments that the appellant accused the appellee of being a "labor agitator," and that it blacklisted him, in the absence of allegations that the words "labor agitator" bore an actionable meaning, or that "blacklisting" imputed to the appellee the commission of crime, or other conduct exposing him to public hatred, punishment, disgrace, or derision, and that the fact of such blacklisting was wrongfully communicated to some person or persons, were not sufficient in law to render the appellant liable for a libel.

Nor was either paragraph of the complaint good as a charge of unlawful interference with appellee's occupation. It appears that no act was done by the appellant through its agents except to inform the officers of the Atchison, Topeka & Santa Fé Railroad Company and the Denver & Rio Grande Railroad Company that the appellee was a member of a labor organization, and that he was a labor agitator. It is not alleged that a charge of this nature was calculated to injure the appellee, or that any odium attached to members of such orders or to labor agitators. The charge was not libelous per se, and no connection is shown between the statements alleged to have been made by appellant's agents, and the failure of the appellee to obtain employment or his loss of any position. Besides, while the complaint avers that the statements alleged to have been made by the appellant were false, by other averments of each paragraph of the pleading it is admitted that the appellee was, in fact, a member of a labor organization, and that he did actively engage in organizing such an association, and in receiving into it the telegraphers employed on appellant's railroad and on other railroads. Just what constitutes a labor agitator does not appear.

Ordinarily, the term would justly apply to one actively engaged in promoting the interests of laboring men. It does not imply the use of unlawful or improper means. For all that is shown in the complaint, the statement made by the appellant's agents concerning the appellee was true, and, if true, it could not render the appellant liable. It is also shown by the complaint that the information given to the officers of the Denver & Rio Grande Railroad Company was not volunteered by the appellant, but was given in answer to an inquiry made by the last-named company. The complaint does not describe and allege such a malicious interference by the appellant with the business of the appellee as created a liability at common law. *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 834, 11 Am. St. Rep. 367. The demurrers to the complaint should have been sustained.

Judgment reversed, with directions to the court to sustain the demurrers to the complaint, and for further proceedings in accordance with this opinion.

(162 Ind. 616)

WEBB et al. v. JOHN HANCOCK MUT. LIFE INS. CO. et al.*

(Supreme Court of Indiana. Feb. 2, 1904.)

MARRIED WOMEN—CONTRACTS—SURETYSHIP—STATUTORY PROHIBITION—EVASION—MORTGAGE OF TENANCY BY ENTIRETY—KNOWLEDGE OF MORTGAGE—EVIDENCE—BURDEN OF PROOF—SPECIAL FINDINGS—ESTOPPEL—PLEADING.

1. Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), forbidding married women to enter into contracts of suretyship, prohibits married women from either personally obligating themselves as sureties for another, or mortgaging their separate property as security for the debt of another.

2. Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), forbidding married women to enter into contracts of suretyship, prohibits married women from mortgaging property held by themselves and husbands as tenants by entireties to secure either the debts of their husbands or of any other person.

3. An estoppel in pais is not available under a general denial, but must be specially pleaded.

4. Where a husband and wife, as tenants by entireties, conveyed property to a trustee, to convey to the husband, in consideration of \$1 passing to the wife, a mortgage thereafter executed by the husband and wife to enable the husband to procure a loan for his own use was an evasion, and within the prohibition of Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), forbidding married women to enter into contracts of suretyship, either as indorsers, guarantors, or otherwise.

5. Where a mortgagee knew that the mortgagors were husband and wife; that two years before the execution of the mortgage the property had been conveyed to them as tenants by entireties, and that they had continued to so hold it until a few days before the execution of the mortgage, at which time it was conveyed through a trustee to the husband for the nominal consideration of \$1, whereas its loan value was over \$4,000; and that within three days the husband applied for the loan—it was put upon inquiry, such as to charge it with knowledge that the conveyance to the husband was resorted to for the purpose of evading Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, §

5119), forbidding married women from entering into contracts of suretyship.

6. Where one has knowledge of facts sufficient to excite the attention of a person of ordinary prudence and put him upon further inquiry, he is required to make such inquiry with good faith and with diligence; and, in the absence of so doing, he will be chargeable with knowledge of the particular point or fact which such inquiry would have revealed.

7. Where a mortgagee knew that the mortgagors were husband and wife, and that the property had been held by them as tenants by entireties, it was bound to know the protection afforded the wife's tenancy by Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), forbidding married women to enter into contracts of suretyship, either as indorsers, guarantors, or otherwise.

8. Where a mortgagee had knowledge at the time it made a loan to the husband of the fact of an evasion of Burns' Rev. St. 1901, § 6964 (Horner's Rev. St. 1901, § 5119), forbidding married women to enter into contracts of suretyship, and was afforded the same means of knowledge at the time it made a second loan to him, and accepted a second mortgage on the same property, it must be held chargeable with the same knowledge at the time of accepting the second mortgage.

9. A defendant who filed a cross-complaint to a suit to foreclose a mortgage, also demanding the foreclosure of another mortgage executed on the same property, must be treated, as to the mortgagors, as though it had, in an independent and separate action, sought to foreclose its mortgage.

10. Knowledge that a mortgagor was in 1896, at the time he acquired title to premises, a married man, did not charge one who accepted a mortgage in 1900 with knowledge that the marriage relation continued to exist.

11. In a suit to foreclose a mortgage, the burden was on defendant to prove coverture of a mortgagor, and execution of the mortgage by her as surety, and knowledge of such facts by the mortgagee.

12. In a suit to foreclose a mortgage, where the special finding was silent in regard to knowledge of the mortgagee as to the fact of a mortgagor's coverture, it would be treated as an express finding of that fact against such mortgagor, as no omission of fact can be supplied by intendment in a special finding.

Appeal from Circuit Court, Marion County; Henry Clay Allen, Judge.

Action by the John Hancock Mutual Life Insurance Company against Benjamin L. Webb and Sallie Webb, his wife, the State Bank of Indiana, and others. From a judgment for plaintiff, and for defendant State Bank of Indiana on its cross-complaint, defendants Webb appealed to the Appellate Court, where the judgments were affirmed (66 N. E. 470), and defendants again appeal. Reversed as to plaintiff, and affirmed as to defendant State Bank.

L. O. Walker and Harding, Hovey & Wiltzie, for appellants. W. J. Hammond, L. J. Hackney, and E. B. Raub, for appellees.

JORDAN, J. The John Hancock Mutual Life Insurance Company, one of the appellees in this appeal, instituted this action as plaintiff in the Marion circuit court against Benjamin L. Webb and Sallie M. Webb, his wife, and other defendants therein named. The complaint is in two paragraphs. By the first the plaintiff seeks to recover a per-

*Rehearing denied.

sonal judgment against said Benjamin L. Webb on a principal promissory note executed by him on September 29, 1896, for the sum of \$4,000, and also to recover on five coupon interest notes executed by him concurrently with the principal note. The plaintiff further seeks, under this paragraph, to foreclose a certain mortgage against all of the defendants to the action. This mortgage was executed by Webb and wife on certain real estate situated in the city of Indianapolis, Marion county, Ind., to secure the payments of the notes set up and described in said paragraph. By the second paragraph of the complaint, appellee seeks to recover a personal judgment against said Benjamin L. Webb on certain other promissory notes executed by him to said appellee company on the 11th day of January, 1898, and to foreclose a second mortgage of even date executed by him and his wife on the same real estate to secure the payment of the notes set up in the said paragraph. The State Bank of Indiana, a defendant in said action, and one of the appellees herein, filed its cross-complaint, seeking thereby to recover a personal judgment against Benjamin L. Webb and one William H. Schmidt upon a promissory note executed by them to the bank on the 6th day of October, 1900, for \$928.22, and to foreclose a mortgage executed alone by Benjamin L. Webb on the same day upon the real estate in controversy to secure the payment of the note set out and described in this paragraph of the complaint. Appellant Benjamin L. Webb answered the complaint of the insurance company by a general denial. Sallie M. Webb, his wife, filed her separate answer to the first paragraph of the complaint, alleging and showing therein, among other things, that on the 23d day of September, 1896, she was the wife of her codefendant Benjamin L. Webb, and had been for many years prior thereto; that on said day she and her husband were the owners, as tenants by entireties, of the real estate described in the first paragraph of the complaint, and had been such owners for several years prior to that date; that on said date she and her husband united in a deed of conveyance for the real estate in question to one John M. Wall, trustee, without any consideration whatever, with direction to him, in the said conveyance, that he should reconvey the real estate to her husband, which he did on that day; that no consideration of any kind passed between the said parties on account of the said conveyances; that there was no sale of said real estate, and that the conveyances were made for the purpose hereinafter stated; that said conveyances were placed on record on said day in the recorder's office of Marion county, Ind., that being the county in which said real estate was situated; that, before the aforesaid conveyances were made, said Benjamin L. Webb alone had applied to the plaintiff for a loan of money from it to him,

which was to be secured by a mortgage on said real estate; that the said conveyances were made to place the title in said Benjamin L. Webb in order that he might complete said loan, and mortgage said real estate to secure the note in suit, and for no other purpose. It is further alleged and shown that the note sued on in the first paragraph of the complaint was executed to the plaintiff to secure a loan made personally to the husband for the amount of money named in the note, and that no part of said money was for the use or benefit of the said defendant Sallie M. Webb, nor was any part of it to be used for the benefit of the real estate mortgaged, or for any other real estate in which said defendant had any interest, and that no part of said money arising out of said loan to her said husband was ever used for her personal benefit, or for the betterment of any estate in which she had any interest, but that all of said money was borrowed for the personal use of her said husband alone, and was so used by him in his business, and for the payment of his personal debts. It is further alleged that the plaintiff, at the time it received the application for said loan of money, and before the execution and acceptance of the mortgage to secure the same, knew the condition of the title to said realty—that the same had long been held by this defendant and her said husband as tenants by entireties, and that the same was, without any consideration, transferred through a trustee to said Benjamin L. Webb but a few days before said mortgage was executed; that the plaintiff knew “that this defendant was a married woman, and, on proper inquiry, might have known, and did know, that said debts so secured by said mortgage were alone the debts of her husband, and that no part was for her benefit or for the benefit of any of her property, and that said device was adopted for the purpose of evading the statute of the state which prevents a married woman from becoming the surety of her husband or any other person.” She further alleged that she had made no statements in writing or otherwise to any one as to said loan. The paragraph closes with the averment that the mortgage in suit ought not to be foreclosed on said real estate, etc. The second paragraph of the answer, which was addressed to the second paragraph of the complaint, set out and disclosed substantially the same facts as did the first paragraph, so far as they were material to the mortgage therein sought to be foreclosed. To this separate answer of the wife, Sallie M. Webb, appellee insurance company replied by a general denial. Appellant Benjamin L. Webb answered the cross-complaint of the State Bank of Indiana by a general denial. His wife also filed her separate answer to this cross-complaint, whereby she alleged facts in regard to the title of the real estate mortgaged, and her being a surety for her husband, substan-

tially as alleged in her answer to the complaint of the insurance company. To this answer of the wife the cross-complainant replied by a general denial. Upon the issues joined between the parties by the pleadings herein mentioned, the court upon request at the trial made a special finding of facts, and stated its conclusions of law thereon adversely to appellants, upon the question of the foreclosure of the mortgages herein in controversy.

The special finding of facts made by the court and the conclusions of law of which the appellants complain are as follows:

"First. That on the 6th day of January, A. D. 1894, and prior thereto, said Benjamin L. Webb and Sallie M. Webb were husband and wife, and have ever since been, and are still, such. That on the 6th day of January, 1894, the defendant Benjamin L. Webb purchased the real estate described in the complaint of one William N. Harding, and caused the same to be conveyed to said Benjamin L. Webb and Sallie M. Webb, as husband and wife. That the full consideration therefor was paid by Benjamin L. Webb, who at that time was not indebted, and was worth over fifty thousand dollars in money and property. And they so held said property until the 23d day of September, 1896.

"Second. That on the 23d day of September, A. D. 1896, the said Webb, with his wife, joined in a deed conveying said real estate, to wit, lot No. 31 in William H. Morrison's First Addition to the city of Indianapolis, Marion county, Indiana, to John M. Wall, as trustee, for the use and benefit of said Benjamin L. Webb. The consideration for conveyance was stated therein to be one dollar, but no sum was in fact paid in money or property. It was expressly provided in said conveyance that said real estate should be reconveyed by said John M. Wall to said Benjamin L. Webb upon demand by said Webb for such conveyance. That said Wall immediately on said date executed a deed of conveyance of said real estate to said Webb in pursuance of the provisions of said first-named deed, the consideration therein stated being one dollar, but in fact no sum was paid in money or property. Both of said deeds were entered for record in the recorder's office of Marion county on said date. That said conveyances were made and procured by the said Webb and wife to enable the former to make a loan on said real estate thereafter as he might find opportunity, and to secure the same by mortgage on said property. And said Webb and wife agreed between themselves that, after executing said mortgage or mortgages as said Webb might desire, the said property should again be conveyed to said Benjamin L. Webb and wife, as it was formerly held.

"Third. That on the 28th day of September, A. D. 1896, the said Webb made a written application to the plaintiff for a loan of

four thousand dollars, to be secured by mortgage on said real estate, and said application was signed, 'Benjamin L. Webb, applicant and owner,' and expressly provided that the costs of examining the title and preparing the papers by the counsel of the plaintiff were to be paid by the applicant in case of acceptance or rejection of loan, and to be paid at the time of closing the loan. That the commission was paid by said Webb, and was divided between Appel and Hammond.

"Fourth. That the receipt of said written application was communicated by said Hammond to the plaintiff, who accepted the same if the title to said real estate should be approved by said Hammond, as its agent and attorney.

"Fifth. That afterwards, on the 29th day of September, 1896, the defendant Webb, by his agent, presented to the agent of the plaintiff an abstract showing the chain of title to said property up to and including the 28th day of September, 1896. That said abstract of title showed on its face the conveyance for said property from Harding and wife to said Webb and wife, as husband and wife, and also showed the record of conveyance of Webb and wife to John M. Wall, trustee, executed on the 23d day of September, 1896, and also the conveyance of Wall, trustee, on the same day to Benjamin L. Webb. That the plaintiff had no knowledge of the purpose of the making of the conveyance to said trustee, or the making of the deed by said trustee to said Benjamin L. Webb, except such as was disclosed by the record aforesaid and said abstract of title; and neither the plaintiff, nor any agent of the plaintiff, ever made any inquiry of Webb, or his wife, or of Appel, as agent, or of any other agent or person, as to the purpose of said conveyance to Wall, trustee, or the conveyance by said Wall to said Webb, the first of which conveyances contained this recital, to wit, 'This deed is made upon the express condition that said trustee shall convey such described real estate to said Benjamin L. Webb upon demand being made by him for such conveyance,' which recital was shown on the abstract of title furnished to and examined by said U. J. Hammond when plaintiff made its said loans.

"Sixth. That the plaintiff, through said Upton J. Hammond, accepted said application for a loan, examined and approved said title, and on the 30th day of September, 1896, the defendant Benjamin L. Webb and Sallie M. Webb, his wife, executed to the plaintiff a mortgage on said property to secure notes executed by said Webb of date of September 29, 1896, and delivered to the plaintiff on said 30th day of September, 1896, one principal note for four thousand dollars, due in five years from date, with interest at eight per cent. per annum after maturity; also ten interest coupon notes, each for the sum of one hundred and twenty dollars."

Certain parts of the special finding in regard to the maturity of the notes and stipulations therein are omitted as immaterial to the question involved.

"Seventh. That the sole purpose of making said loan was to raise money to put into a certain manufacturing business in which said Webb was interested, and for the purpose of raising money with which to pay his individual debts. That said Sallie M. Webb had no interest whatever in said business, and was not liable for any of the debts of said Benjamin L. Webb, and that no inquiry was ever made by any one on behalf of the plaintiff—either of said Webb or his wife, or any one representing them, or either of them—as to what was to be done with the proceeds of the loan. That the plaintiff paid all of the proceeds of said loan to Benjamin L. Webb through draft payable to his order, and that no part of the proceeds of said loan was received by the defendant Sallie M. Webb, and that no part of it went to pay any debt due from her, and no part of the same was used upon, or for the betterment of, any of her estate, and that she received no benefit from any of the proceeds of said loan, nor any of her estate, personal or real, but that the entire proceeds of said loan were used by said Benjamin L. Webb alone in the payment of his individual debts, and by the payment of the same by him into his individual business.

"Eighth. That on the 8th day of January, 1898, said Webb made his written application to the plaintiff for a second loan in the sum of \$2,500, in addition to said sum of \$4,000, and on the 11th day of January, 1898, presented to the plaintiff his said abstract, certifying the chain of title of said real estate to the 10th day of January, 1898, and showing that no conveyances or other changes in the title to said property had been placed of record since the recording of the deed to John Wall, trustee, and by him to said Webb. That said application contained no statement as to who was the owner of the real estate. That said application was accepted, and Webb executed his principal note to the plaintiff for the sum of \$2,500, bearing the date of January 11, 1898, and payable three years after date, with interest at the rate of eight per cent. per annum after maturity, without relief from valuation or appraisal laws, and with five per cent. attorney's fees. At the same time Webb executed his six coupon interest notes, each for the sum of \$75, bearing interest at the rate of eight per cent. per annum after maturity, with five per cent. attorney's fees, and waiving relief from valuation or appraisal laws, etc. [Here follows a description of the notes.] That on said 11th day of January, 1898, said Webb and his wife executed their mortgage on the real estate hereinbefore mentioned to secure said last-named principal note and coupon interest notes. That said mortgage contained the stipulation that if any part of the debt secured by the same,

or any interest note, should not be paid when due, the whole debt thereby secured, together with five per cent. attorney's fees thereon, should, at the option of the mortgagee, be deemed due and collectible, and that said mortgage might be foreclosed accordingly. Said last-named mortgage was duly entered for record on the 12th day of January, 1898. That the loan was made for the sole purpose of raising money with which to pay the debts and carry on the individual business of said Webb. That the proceeds of said loan were paid to the said Webb alone, directly to his order, and that no part of said proceeds was received by defendant Sallie M. Webb, or was used for the payment of any debt due from her, or for the betterment of any property or estate in which she had an individual interest, and that in the making of said last-mentioned loan no inquiry was ever made by the plaintiff, or any one representing it, of the said defendant Webb or his wife, or of any agent of either of them, as to what was to be done with the proceeds of said loan, or as to the purpose of the making of the aforesaid deeds, or either of them, and that neither Webb, nor his wife, nor any one representing them, or either of them, made any representation or statement to any one at the time of making said loans, or either of them, or at any time, as to what was to be done with the proceeds arising from said loans, or either of them.

"Ninth. That at the time of and prior to the execution of the last-named notes and mortgage, as well as at the time of the execution of the said notes and mortgage to cover the loan of said \$4,000, plaintiff had no actual knowledge that said deeds of conveyance to and from said Wall, trustee, were to enable said Webb to secure a loan to himself, nor that it had been agreed between Webb and his wife that the said property should be reconveyed to said Webb and wife, nor did it know anything of said two deeds in the chain of title to said property, except as the same were shown by the abstract of title. That the plaintiff made the two loans aggregating \$6,500 to the defendant Webb, and accepted the several obligations mentioned herein, relying in good faith upon the ownership in his own right by Webb of said real estate, as shown by said abstract. The defendant Sallie M. Webb, at the time of the execution of each and all of the several obligations above described, knew that the plaintiff was lending to her husband the sums of money for which said principal notes were executed by him, and she also knew that the mortgages of said real estate were being executed to secure the said several sums." Here follows the finding of the amount or amounts due upon the notes of appellee insurance company.

"Tenth. On the 8th day of November, 1900, said Webb and wife executed a deed of said real estate to John M. Wall, trustee, who on the same day, in execution of the trust

under said deed, conveyed the said real estate to Benjamin L. Webb and Sallie M. Webb, husband and wife, in pursuance of the agreement between Webb and wife made September 23, 1896."

The 11th, 12th, 13th, 14th, 16th, and 17th findings embrace facts relating to subsequent lienholders, whose rights are not involved in the question presented in this appeal; hence these findings are omitted.

In regard to the special finding upon the issues between appellants and the State Bank of Indiana, we omit all that part thereof relating to the title of the real estate as held by appellants, and the conveyances thereof in question, for the reason that it is substantially the same as hereinbefore set out. After omitting this part, the finding proceeds as follows:

"Fifteenth. That on the 6th day of October, 1900, the defendant Webb, being threatened with suit upon a note held by cross-complainant, the State Bank of Indiana, against him, executed and delivered to said cross-complainant a renewal of said former note—being the note sued upon in this cause by said cross-complainant—and at the same time, and as a part of the same transaction, and for the purpose of securing the payment of said new note and of avoiding suit, said Webb executed and delivered to the cross-complainant the mortgage in this cause sought to be foreclosed by said bank, covering and describing said real estate. That said note dated October 6, 1900, so secured and sued upon in this cause, was for the sum of \$928.22, due forty days after date, bearing interest at the rate of eight per cent. per annum after date, provided for attorney's fees, and was without relief from valuation or appraisal laws. That said mortgage was duly acknowledged before a notary public, and was received for record in the office of the recorder of Marion county, Indiana, on the 8th day of November, 1900, and was recorded in Mortgage Record. That the total amount due and owing on said note to said bank, of principal, interest, and attorney's fees, is \$1,050.83. That William H. Schmidt is a surety on said note. That the money so loaned to said Webb by said bank, and for which said note was given, was used by him in payment of his individual debts. That the defendant Sallie M. Webb received no part of said sum, and none of said money was used for the benefit of her estate in any manner. That said Benjamin L. Webb alone executed said mortgage on said real estate described in said cross-complaint to secure the payment of said note of October 6, 1900."

The court, upon its special finding of facts, stated, among others, the following conclusions of law:

"Second. That said plaintiff's first mortgage . . . is a valid and subsisting lien upon said property.

"Third. That said mortgage is senior and superior to each and all claims of the sev-

eral defendants and cross-complainants, and should be foreclosed as to each and all of them.

"Fourth. That said plaintiff's second mortgage is a valid and subsisting lien upon said property.

"Fifth. That said mortgage is senior and superior to all claims of the several defendants and cross-complainants herein, and should be foreclosed against all of them."

"Seventh. That the State Bank of Indiana should recover the amount found due against Benjamin L. Webb, and that its mortgage should be foreclosed against all parties to the suit, except Sallie M. Webb."

The other conclusions of law declare the rights of certain junior lienholders. These latter conclusions, however, are not before us in this appeal for review.

On the facts found, the court rendered a judgment against Benjamin L. Webb on the notes in suit in favor of the John Hancock Mutual Life Insurance Company for \$7,954.45. A judgment was also rendered against him and William H. Schmidt, his surety, in favor of the State Bank of Indiana for the sum of \$1,050.83. The court ordered and decreed that both of the mortgages of the insurance company, and also the mortgage of the State Bank of Indiana, be foreclosed against appellants and other defendants. Benjamin L. Webb, and Sallie M., his wife, alone appeal, and claim a reversal of the judgment of the Appellate Court upon the ground that it erred in affirming the judgment of the Marion circuit court, and also a reversal of the judgment of the latter court upon the ground that it erred in its conclusions of law upon the special finding whereby it affirmed the validity of each of the mortgages in suit.

Counsel for appellants earnestly contend (1) that the real estate held by Benjamin L. Webb and his wife as tenants by entireties was under the protection or prohibition of section 6964, Burns' Rev. St. 1901 (section 5119, Horner's Rev. St. 1901), which section declares that "a married woman shall not enter into a contract of suretyship, whether as an endorser, guarantor, or in any other manner, and such contract as to her shall be void"; (2) that the sole and express purpose of appellants, as disclosed by the facts, in executing a conveyance of the property in question to a trustee and through him to the husband, was but a contrivance or a scheme to place the title thereto in the husband, in order that he might incur the same by mortgage as a security for the money borrowed by him from appellee for his own benefit, and therefore was a circumvention or evasion of the statute. The contention is further advanced by appellants that appellee, under the facts, is at least chargeable with constructive notice of the attempt or scheme to evade the statute on the part of appellants.

Counsel for appellee contend that inasmuch as this court, in the appeal of Leach

v. Rains, 149 Ind. 152, 48 N. E. 858, affirmed the right of a married woman to convey her separate real estate, through the intervention of a trustee, to her husband, as a gift or for a valuable consideration, subject to be avoided for fraud or undue influence on the part of the husband, therefore, the wife having the legal right to do so, the conveyances in question in this case rebut any inference of an intent on the part of appellants to evade the statute in controversy. The further insistence is that, even though the conveyance on the part of Webb and his wife was made for the purpose or in order to circumvent or evade the statute, the facts disclosed by the special finding do not show that appellee, at the time it loaned the money to the husband, and accepted the mortgages as security therefor, had notice of that fact. It is settled by repeated decisions of this court that the statute in dispute prohibits a married woman from either personally obligating herself as a surety for another, or from mortgaging or putting up her separate property as security for the debt or obligation of another person. It is equally well affirmed by our decisions that real estate held by husband and wife as tenants by entireties, in like manner as the separate property of the wife, falls within the protection or prohibition of the statute, and cannot be legally mortgaged by them to secure either the debts of the husband, or to secure the debt or debts of any person, other than the debts of the wife. A mortgage executed by a husband and wife, in violation of the statute, upon lands held by them as tenants by entireties, is voidable not only as to the wife, but equally so as to the husband. In support of the foregoing propositions, see McCormick, etc., Co. v. Scovell, 111 Ind. 551, 18 N. E. 58, and cases there cited; Abicht v. Searls, 154 Ind. 594, 57 N. E. 246, and cases cited. It will be observed that appellee replied only by the general denial to the separate answer of Mrs. Webb whereby she set up her suretyship. Consequently, under the pleadings, it is not in a position to claim that she is bound by any estoppel in pais. Facts constituting estoppel, in order to be available in a case, must, under our Civil Code, be especially pleaded. Wood v. Ostram, 29 Ind. 177; Bowles v. Trapp, 139 Ind. 55, 38 N. E. 406; Board, etc., v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Field v. Noblett, 154 Ind. 357, 56 N. E. 841; Fleener v. Claman, 112 Ind. 288, 14 N. E. 76; Peters v. Griffes, 108 Ind. 121, 8 N. E. 727; Center School Tp. v. State, 150 Ind. 168, 49 N. E. 961; International B., etc., v. Watson, 158 Ind. 508, 64 N. E. 23; 8 Ency. Pl. & Prac. p. 7. In considering the question of the circumvention or evasion of the statute in controversy in the appeal of Government B., etc., v. Denny, 154 Ind. 261, 55 N. E. 757, we said: "It is an ancient legal maxim that, when anything is prohibited directly, it cannot be done indirectly, or, in other words, a prohibition

which the law imposes cannot be evaded by any circuitous contrivance. Barton's Leg. Max. p. 77; Broom's Leg. Max. p. 488. Hence, in obedience to this rule, a married woman cannot evade the positive prohibition of the statute in question by vesting the title to her real estate in her husband, or some other person, for the sole purpose, as alleged in the answer of appellee, of permitting it to be mortgaged to secure a debt other than her own, where the party accepting such security knows that the contrivance was resorted to for the purpose of evading the law." Had appellants mortgaged the premises in question direct to appellee to secure a loan of money to the husband, for his use and benefit, before the conveyances which were executed on September 23, 1896, under the circumstances the validity of such mortgage could not be controverted. In such a case the wife would not be concluded from avoiding the mortgage unless it could be shown by sufficient facts that she was estopped from so doing. As Mrs. Webb in this case, under the statute, was directly prohibited from mortgaging the real estate in controversy to secure the debts of her husband, therefore, to effectually carry out the object of the law, it must, as the authorities affirm, be so construed as to defeat all contrivances or shifts by her and her husband to evade it. In a leading work on the Interpretation of Statutes, the author, in considering the construction which should be placed upon statutes in order to prevent their evasion, deals with the question as follows: "It is the duty of the judge to make such construction as shall suppress all evasions for the continuance of the mischief. * * * When the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly. When the thing done is substantially that which was prohibited, it falls within the act, simply because, according to the true construction of the statute, it is the thing thereby prohibited. Whenever courts see such attempts at concealment 'they brush away the cobweb varnish,' and show the transaction in its true light. They see things as ordinary men do, and see through them. Whatever might be the form or color of the transaction, the law looks to the substance of it. In all such cases it is, in truth, rather the particular transaction than the statute which is the subject of construction; and if it is found to be, in substance, within the statute, it is not suffered to escape from the operation of the law by means of the disguise under which its real character is masked." Maxwell, Int. of Stat. (3d Ed.) c. 4, § 1, p. 157. See, also, Endlich on Int. of Stat. § 138. In Floyer v. Edwards, 1 Cowp. 112, it was well affirmed by Lord Mansfield, concerning the act prohibiting usury, that if the contract in truth was

an usurious loan, "the wit of man cannot find a shift to take it out of the statute."

The facts in the case at bar fully disclose that the conveyances made by appellants to the trustee, and by him to Benjamin L. Webb, the husband, were made to enable the latter to obtain a loan of money as he might find opportunity to do so, and to secure the loan by a mortgage on the property. It appears that after securing such loan it was provided by an agreement between him and his wife that he should cause the premises to be reconveyed to them to be held as they formerly had been. After placing thereon all of the mortgage liens here involved, he appears to have complied with this agreement, and the realty was reconveyed to him and his wife, through the intervention of a trustee. That the facts, as found by the court, clearly reveal a shift, device, or contrivance on the part of appellants to avoid, in an indirect or circuitous manner, that which the statute expressly prohibited, is certainly not a debatable question. When such attempts to evade a positive law are shown, it is the duty of a court, as the authorities affirm, "to brush away the cobweb varnish, and show the transaction in its true light." Enforcing this well-established rule, and it follows, under the circumstances in this case, that the act of appellants in mortgaging the real estate in dispute must be held to fail as fully within the prohibition of the statute as though the conveyance of the property to the husband had not been made.

The next inquiry is, can appellee insurance company, at the time it accepted the first mortgage, be chargeable with notice or knowledge that the shift or contrivance of appellants in causing the premises to be conveyed to the husband was resorted to for the purpose of evading the law? The court found that appellee had no knowledge of the purpose of making the conveyances of date September 23, 1896, to the trustee, and by the latter to the husband, "except such as was disclosed by the record aforesaid, and said abstract of title." In considering the question as to whether constructive knowledge of the evasion in question can be imputed to appellee, we may properly call attention to some of the facts and circumstances, among others, of which it was apprised by an examination of the record and abstract of title. It is shown to have had knowledge at the time the loan was made that appellants were husband and wife, and that in 1894 the real estate in question had been conveyed to them as husband and wife, and that they continued to so hold it until September 23, 1896, on which date, by the deeds in controversy, it was conveyed to the husband for the nominal consideration of \$1, as expressed in both deeds. It also knew, or must be presumed to have known, that the condition upon which the land had been conveyed to the trustee was that he should

convey it to the husband on demand. It was also apprised of the further fact that the husband was seemingly in haste to secure a loan on the property, for it appears that within three days after the conveyances thereof to him he made application for the loan in controversy. It seems that the company at once agreed to loan him the money, if his title to the property should be approved by Mr. Hammond, its agent and attorney. The abstract was examined and approved by the latter, and on September 30, 1896, the loan was made to the husband for \$4,000, and the mortgage in suit was executed and accepted by it as a security for said loan. Notwithstanding all of the means of knowledge afforded to appellee, it made no further inquiry whatever of appellants, or either of them, or of any other person, in regard to the object or purpose of the conveyances made on September 23, 1896. Under the circumstances, appellee had no sufficient reason to rest content in the mere belief that the wife, in good faith, had sold the property to the husband for the mere pittance of \$1, upon which it accepted a mortgage as security for \$4,000 and over. It would appear, when all of the facts and circumstances of which appellee had knowledge are considered, that its neglect to make further inquiry can only be explained upon the theory that it desired to remain ignorant. It was not at liberty to close its eyes and make no further inquiry or investigation, and then, as it does in this action, attempt to shield itself upon the plea that it was ignorant of the purpose of appellants to evade the law by executing the conveyances in question. We do not mean to affirm that appellee can be prejudiced by any secret agreement between appellants of which it had no knowledge. The proposition with which we are called upon to deal is not in regard to any secret agreement between appellants of which appellee had no notice, but the question is, what knowledge, under all of the circumstances, ought to be imputed to it in respect to the particular point here involved? In *Ward v. Berkshire, etc., Co.*, 108 Ind. 301, 9 N. E. 361, this court, in considering a mortgage executed by a married woman on her separate property, said, by Elliott, J.: "The question is, not what facts were known to the mortgagors, but what facts did the appellee have knowledge of, or ought, under the circumstances, to be charged with having knowledge of? It is true that the appellee, having notice of Mrs. Ward's coverture, was bound to inquire whether she had capacity to make the contract; but, when reasonable care and diligence are exercised, the party contracting with a married woman may rely upon her representations." In *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565, this court affirmed that "one contracting an incumbrance on the estate of a married woman cannot, however, deal with her at arm's length, knowing that

she is married, and that by law she is prohibited from contracting for the benefit of another; and, knowing that she is about to incumber her separate estate in his favor, he is bound to inquire concerning the consideration, and ascertain, if he may, by reasonable inquiry from her, whether it is for her benefit, or for the benefit of another, and, unless misled by the conduct or representations of the wife, he will be held to have acquired a knowledge of the facts which prudent inquiry would have disclosed. * * * Considering the importunities to which they are liable, the statute should be construed so as to answer the purpose for which it was enacted." In *Cummings v. Martin*, 128 Ind. 20, 27 N. E. 173, it is said: "It is only where the lender is a party to, or is chargeable with knowledge of, the attempted evasion of the statute, that the contract is invalidated."

The principle is elementary, and one well supported by authorities, that where one has knowledge of facts sufficient to excite the attention of a person of ordinary prudence and put him upon further inquiry, he is required to make such inquiry in good faith and with diligence, and, in the absence of so doing, he will be chargeable with the knowledge of the particular point or fact which such inquiry would have revealed or imparted. *Kuhns v. Gates*, 92 Ind. 66; *Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 696; *Perrine v. Barnard*, 142 Ind. 448, 41 N. E. 820; *Hawes v. Chaille*, 129 Ind. 435, 28 N. E. 848; *Filmore v. Reithman*, 6 Colo. 120; *Wade on Notices*, §§ 10, 11. In fact, it may be asserted that the rule as to the knowledge which will be imputed to the grantee in a case of fraudulent conveyance, and likewise the rule recognized in respect to the knowledge which a purchaser of real estate is held, as a matter of law, to have acquired from the conditions, recitals, etc., in deeds and other instruments of record which constitute his chain of title, are applicable to the question of knowledge as here involved. The rule is well settled that, in an action to set aside a fraudulent conveyance, it is not necessary that the grantee of the fraudulent grantor shall have actual knowledge of the intent of the latter to hinder or defraud creditors. A leading author deals with the question of knowledge in such cases as follows: "A knowledge of facts sufficient to excite the suspicions of a prudent man, and to put him on the inquiry, or to lead a person of ordinary perception to infer fraud, or the means of knowing by the use of ordinary diligence, amounts to notice, and is equivalent to actual knowledge, in contemplation of law." The nature and circumstances of the transaction may sometimes be such as must apprise the grantee of its character and object." *Bump on Fraudulent Conveyances*, § 184. In the case of a purchaser of real estate, he is required to take notice of conditions and recitals in deeds of record in his chain of title which affect

such title. *Wade on Notices*, §§ 307, 308, 313. In the latter section the author says: "The reason alleged for the rule is that the purchaser is entitled to see all the muniments of title, and therefore must be presumed to have seen them, and to have taken notice of all other recitals which in any way affect his purchase, as the omission on his part to take such precaution would amount to gross negligence." In *Webb on Record of Titles*, § 176, the author says: "The record is notice of everything deducible from its contents, as matter of law. * * * The record will charge constructive notice of fraud in the execution of the deed where there is matter on the face of the instrument indicating fraud, but not otherwise." In section 178 of the same work, it is asserted that, "as to matters of fact recited or alluded to in the record, and as to other instruments referred to therein, it may be stated as a general rule that, if there is sufficient contained in the record to reasonably induce an inquiry in the mind of an intelligent person, it will charge notice of the facts so contained, and of all facts which an inquiry suggested by such information diligently prosecuted would have disclosed. In many instances the constructive notice imparted by the record is in the same transaction blended with that arising from recitals in other instruments in the same chain of title, and also with that growing out of the duty of inquiry suggested by some matter of fact entirely outside of the record." In section 179 the same author says: "Recitals of an unusual character will ordinarily excite attention and charge notice by imposing the duty of inquiry. Thus the recital of an inadequate consideration, especially if it be grossly disproportionate to the real value of the property, is often regarded as a cogent circumstance so loudly informing the purchaser of fraud that he will not be permitted to shelter himself behind the want of actual knowledge." See, also, 23 Am. & Eng. Ency. of Law, p. 513; *Hume v. Franzen*, 73 Iowa, 25, 34 N. W. 490; *Hoppin v. Doty*, 25 Wis. 573; *Worthy v. Caddell*, 76 N. C. 82, 86; *Eck v. Hatcher*, 58 Mo. 235; *Knapp v. Bailey*, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295.

The real estate held by appellants as tenants by entireties was so far within the protection of the law as, generally speaking, not to be subject to the debts or obligations of either the wife or husband. Neither could convey or mortgage it without the other joined, and, in case of mortgage, only to secure the obligations of the wife. As appellee appears to have known that appellants were husband and wife, and that the property was held by them as such, it was bound to know of the protection afforded it under our laws. Under these circumstances, it would seem that the natural or reasonable inquiry suggested thereby would be, why should the wife be moved to convey the property to the husband in consideration of the mere sum of

\$1, thereby subjecting it to all obligations or debts which might legally exist against him? Her action, on the face of the transaction, certainly so far as the matter of her property rights or interests were concerned, could not be said to conduce to her betterment. The very character and circumstances of the transaction leading up to the execution of the mortgage are apparently so singular, or beyond the ordinary, as to have excited the attention of an ordinarily prudent person, and put him, as the authorities assert, "upon further inquiry" in regard to the purpose or motive of conveying the real estate to the husband. Had an inquiry been made in good faith and with diligence, it may be assumed that appellee would have ascertained and been fully apprised of the purpose or motive of appellants in making the conveyances in controversy on the 23d day of September, 1896. As appellee had the means of knowledge in regard to this particular fact or point, in contemplation of law it must be held as chargeable with knowledge of such fact. *Ray v. Yarnell*, 118 Ind. 112, 20 N. E. 705; *Singer, etc., Co. v. Jacobs (C. C.)* 3 McCrary, 638, 11 Fed. 559; *Runkle v. Gaylord*, 1 Ven. 123; and other authorities hereinbefore cited.

As the special finding discloses that appellee had the same means of knowledge in regard to the purpose or motive of appellants to evade the statute at the time it accepted the second mortgage on the premises to secure an additional loan from it to the husband as it had when it made the first loan to him, it is in no better attitude to shield itself upon the ground of want of notice than it was in regard to the first mortgage. Between the dates of the two mortgages, it appears that the title to the real estate remained unchanged, no other conveyances thereof having been made. As appellee is shown to have had knowledge of the fact of the evasion in question at the time it made the first loan to the husband, as the court finds, and was afforded the same means of knowledge at the time it made the second loan to him and accepted a mortgage upon the identical real estate, it must be held as chargeable with knowledge at the time of the purpose or motive of appellants in making the conveyances in controversy.

It is affirmed by the authorities that where a person already has notice, either actual or constructive, of a fact material to a new transaction, "the new dealing must be judged and the rights of the parties must be determined on the assumption that the fact of which he had prior notice, actual or constructive, was then known to him. In other words, notice to a party, actual or constructive, in a particular transaction, of a fact which exempts a defendant from liability in that transaction, is notice in all subsequent transactions of the same character between the same parties." *Cox v. Pearce*, 112 N. Y. 637, 20 N. E. 566, 3 L. R. A. 563. The

facts in the appeal of *Long v. Crosson*, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783, cited by appellees, are easily distinguishable from those in the case at bar. In that case the deed of record whereby the real estate, which was a lot in the town of Fowler, had been conveyed to the husband, disclosed on its face a consideration of \$1,500. On the face of the deed, aside from any other notice that might have been imputed to the mortgagee, that amount might have been presumed to have been a full consideration for the lot. The title to the premises therein had stood in the name of the husband for six months prior to the time he secured the loan thereon. It is stated in that case that the lender or mortgagee had no knowledge that the title of the wife to the realty had been transferred to the husband for the purpose of evading the statute.

Under the circumstances and facts in this case, we conclude that, at the time appellee insurance company accepted each of the mortgages in suit, it must be held as chargeable at least with constructive knowledge of appellants' purpose or object to evade the statute.

It appears that appellee the State Bank of Indiana became a cross-complainant in this suit for the purpose of foreclosing its mortgage. So far as the question between it and appellants herein is concerned, it must be treated as though it had as plaintiff in an independent and separate action sought to foreclose that instrument. The first, second, and fifteenth paragraphs of the special finding are the only ones which can be said to affect the bank. Upon these findings the seventh conclusion of law is based. Counsel for the bank insist that this conclusion, under the facts, is justified. Some of the facts, among others, which Mrs. Webb, in her separate answer to the bank's cross-complaint, alleged, substantially, are (1) that the records of the recorder's office showed the conveyances of September 23, 1896, by which the title to the real estate in question had been transferred to Benjamin L. Webb; (2) that the bank on October 6, 1900, when it accepted the mortgage from him as security for the new note, knew of the purpose for which the title thereto had been placed in him, viz., in order to enable him to mortgage the premises to secure his own indebtedness; (3) she further charged that she, under the mortgage, was a surety, which fact was well known by the bank at the time it accepted said instrument. It will be noted that the special finding discloses that Webb alone executed the mortgage to the bank, his wife not joining therein, and that in the matter of said mortgage the bank dealt entirely with him in whose name the title, as shown by the records, then stood, and had so continued to stand for over a period of four years. It will be further observed that there is an entire absence of any facts in the special find-

ing, so far as it applies to the bank, which even tend to show that, at the time the mortgage was accepted from Webb, it either knew or ought to have known that he was a married man. It is true that it may be said that the deed made September 23, 1896, by which he acquired the title to the premises, disclosed on its face that he was at that time the husband of Sallie M. Webb; but certainly when the period of time which had elapsed between September 23, 1896, and October 6, 1900, is considered, the bank, under such circumstances alone, cannot be held as chargeable with knowledge that such marriage relation continued to exist. In the absence of anything to the contrary, the bank, from the mere fact that it may be said to have had notice from the record that Benjamin L. Webb was a married man on September 23, 1896, was not bound to assume that such conjugal relations still continued to exist on October 6, 1900. See *Craig v. Bennett*, 146 Ind. 574, 45 N. E. 792; *Crowder v. Riggs*, 153 Ind. 153, 162, 53 N. E. 1019. Her suretyship, as alleged, and her coverture at the time the bank accepted the mortgage, and the further fact that the bank had knowledge of these facts, were material, and the burden was upon her to prove them in order to sustain her alleged defense. As the special finding is silent in regard to any knowledge which the bank had in respect to the fact of her coverture at the time of the transaction with Mr. Webb, it must be treated, under the rule so repeatedly affirmed by this court, as an express finding of that fact against her. The office of a special finding is to find facts, and no omission of a fact therein can be supplied by intendment. *Bell v. Corbin*, 136 Ind. 269, 36 N. E. 23; *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445; *Metropolitan, etc., Co. v. Bowser*, 20 Ind. App. 557, 50 N. E. 86; *Elliott's App. Proc.* § 757. As, under the circumstances, we are compelled to presume that Mrs. Webb failed to establish the fact in regard to knowledge on the part of the bank, it must follow, for this reason alone, if for no other, that her exceptions to the court's seventh conclusion of law were properly overruled.

We conclude that the Appellate Court erred in affirming in whole the judgment of the Marion circuit court, and that the latter court, under the facts, erred in sustaining the validity of each of the mortgages of appellee insurance company, and in enforcing foreclosures thereof.

The judgment of the Appellate Court is reversed in part, and likewise that of the Marion circuit court, and the cause is remanded to the latter court, with instructions to restate its conclusions of law consistently with this opinion, and render judgment accordingly.

GILLETT, J., concurs in the result.

*Rehearing denied. Transferred to Supreme Court, from files and cause remanded to Appellate Court,

(36 Ind. App. 1)

UNITED STATES EXPRESS CO. v. JOYCE
et al.*

(Appellate Court of Indiana, Division No. 2.
Feb. 4, 1904.)

CARRIERS—SHIPMENT OF LIVE STOCK—VALUATION IN CONTRACT—BURDEN OF PROOF—EFFECT AS LIMITING DAMAGES.

1. The burden of proof is on the shipper, suing for injuries to live stock, to show that a valuation placed on the property in the contract of shipment, on which the rates of transportation were based, was invalid and not binding on him.

2. Where the valuation in a contract for the shipment of live stock is made the basis of the transportation charges, and the contract provides that in the event of injury to the shipment the carrier shall be liable only to the extent of actual damage, which shall in no event exceed the valuation declared by the shipper, damages are recoverable for negligent injury to the stock during transportation, though, on arrival at its destination, the shipment sold so as to net the shipper an excess over the valuation made.

Appeal from Circuit Court, Gibson County; O. M. Weiborn, Judge.

Action by John E. Joyce and others against the United States Express Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Baker & Daniels and Fields & Harmon, for appellant. Buskirk & Brady and Embree & Benson, for appellees.

ROBY, J. Action by appellees for damages on account of alleged negligence in the transportation of two car loads of horses by appellant for them from Princeton, Ind., to Buffalo, N. Y., the dates of shipment being May 23 and June 18, 1901. The trial court, upon request, made a special finding of facts, and stated conclusions of law thereon, in accordance with which judgment was rendered against appellant for \$2,195 on account of damages to the shipment of May 1st, and \$1,499.60 on account of damages to the shipment of June 18th, interest being included in both cases. Exceptions by appellant to the conclusions of law against it were duly taken, and the correctness of such conclusions thereby presented to this court.

The facts found, so far as their statement is necessary, are as follows: Contracts between the parties were entered into on the respective dates named, containing, among others, the following provisions:

"Notice to Shippers—The Shipper will Value His Stock, Which Valuation will be Inserted in This Contract, the Charge for Carriage will be Based on Such Valuation. United States Express Company. Limited Liability. Live Stock Contract. (Duplicate.) To be given to the shipper. This contract witnesseth: * * *

"(1) That the Express Company undertakes to forward to the point reached by the Express Company which is nearest to destina-

§ 2. See *Carriers*, vol. 3, Cent. Dig. § 84.

72 N. E. 865. Opinion of Supreme Court stricken
76 N. E. 1117.

in a damaged condition, caused by the negligence of the carrier. If appellant's proposition were granted, it would follow that, notwithstanding a full valuation in the contract, a rising market would bar recovery, without regard to the negligence of appellant or the injury to the horses. Its liability cannot be made dependent upon such condition. The carrier undertakes to convey the property safely. If it fails to do so, it ought to make good the loss of the shipper thereby caused. The inquiry is not how much are the remaining horses worth, but how much damage has been done to the lot. The appellant must respond for all such damages up to an amount not exceeding the stipulated value of the property. This is in accordance with the terms of the contract: "And in such event the express company shall be liable only to the extent of actual damage, which shall in no event exceed the valuation declared by the shipper." A construction relieving appellant from all liability would, if placed upon the contract, result in rendering it obnoxious to the law, and prevent its enforcement by the courts. A number of cases are cited tending to support appellant's contention. They are referred to by the Massachusetts Supreme Court as follows: "If they are not distinguishable from the case at bar we cannot follow them." *Brown v. Steam Ship Co.*, 147 Mass. 58, 16 N. E. 717. Appellant's proposition must be answered in the affirmative. *Brown v. Ship Co.*, supra; *Starnes v. Ry. Co.*, 91 Tenn. 516, 19 S. W. 675; *Hart v. Ry. Co.*, 112 U. S. 331, 341-343, 5 Sup. Ct. 151, 28 L. Ed. 717, and cases cited; *Railroad v. Reid*, 91 Ga. 377, 17 S. E. 934.

Judgment affirmed.

(34 Ind. App. 95)

PITTSBURGH, C. C. & ST. L. RY. CO. v. WEST.¹

(Appellate Court of Indiana, Division No. 1
Feb. 5, 1904.)

RAILROAD CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

1. Recovery cannot be had for death of a person killed in collision of his team with a train at a crossing, though signals were not given, where he, when at any point within 40 feet of the track, could have heard or seen the train; *Burns* Rev. St. 1901, § 359a, making contributory negligence a matter of defense, in no way relieving a traveler of his duty.

Appeal from Circuit Court, Grant County; *E. A. Huffman*, Special Judge.

Action by Joseph A. West against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

G. E. Ross, for appellant. W. S. Marshall, for appellee.

HENLEY, C. J. About 2:30 o'clock a. m. on the 2d day of August, 1901, one Frank

West was driving north on a highway running through the village of Mier, which said highway crossed appellant's railway track at right angles in said village. The said West was in a rubber-tired, top buggy, drawn by one horse, and, as he passed over appellant's railroad track, was struck by a locomotive and train of cars running at the rate of about 35 miles an hour, by which collision he was killed. The servants and employes in charge of the locomotive and train of cars which struck and killed said West did not sound the whistle or ring the bell in approaching said crossing, as it is provided by law that they should do. Appellant's right of way at the crossing is 80 feet wide, and the track on which appellant's train was running is located in the center of the right of way. It is 40 feet from the center of the track to the south line of the right of way. Decedent was driving north, and the train that struck and killed him was coming from the west, and the headlight of the locomotive could have been seen by a person approaching appellant's right of way from the south, looking to the west, for a distance of 2½ miles. There was nothing to prevent decedent from seeing the approaching locomotive and train of cars after he entered upon appellant's right of way. The facts above stated are such as a jury were warranted in finding, from both the disputed and undisputed evidence. The evidence concerning the sounding of the whistle and the ringing of the bell was conflicting, but the evidence concerning the surroundings at the crossing where the decedent was killed is not conflicting, nor is the fact disputed that decedent might have seen the approaching train for a long distance, had he looked. The jury found specially, by way of answers to interrogatories, that there was no evidence as to whether or not decedent looked for approaching trains before he attempted to cross the railway track; that there was no evidence as to whether or not decedent listened to see if he could hear the approaching train before he drove upon appellant's track. But they found that the locomotive which struck decedent carried a headlight as it approached the crossing which he attempted to cross, and that this headlight could have been seen by decedent, had he looked, at a distance of 15 rods from the crossing; that decedent could have heard the noise of the approaching train, if he had listened, at any point within 40 feet before he reached the railroad track; that decedent was possessed of good eyesight and good hearing, and, if he had looked to the west, the direction from which the train was approaching, at any point within 40 feet before he reached the track, he could have seen the approaching train.

Without considering the questions raised concerning the sufficiency of the complaint filed in this action, the one question is left for consideration, is appellee entitled to a recovery under the evidence produced and

¹Rehearing denied. Transfer to Supreme Court denied.

facts found in this case? The act of February 17, 1899 (Acts 1899, p. 58; section 359a, Burns' Rev. St. 1901), makes contributory negligence a matter of defense. But this act does not in any manner change or abate the duties imposed upon a traveler approaching and attempting to cross a railroad track, as laid down by the decisions of the courts of appeal in this state prior to the passage of that act; nor does that act change or alter the legal presumptions which arise from the surroundings and acts of the injured party. In *Southern Indiana Railway Company v. Peyton*, 157 Ind. 690, 61 N. E. 722, the court said, in speaking of this act: "The statute before us does not in any manner excuse or relieve the plaintiff from the consequences of contributory negligence, long recognized by law, nor make the presence of concurrent fault less effective to the defendant in escaping liability." In *Malott v. Hawkins*, Adm'r, 159 Ind. 127, 63 N. E. 308, the court said in speaking of the same act: "This statute cannot be held to abate the legal requirements as to the care that a traveler crossing a railroad track must use, and it does not change the rule that it is presumed that the traveler saw and heard or was heedless of that which, as an ordinarily prudent man, he ought to have taken notice of." The fact that appellant's conduct in failing to perform the duty imposed upon it by statute to sound the whistle and ring the bell when its locomotive was approaching the crossing is negligence per se did not relieve decedent from the duty of looking and listening to ascertain for himself whether or not a train was approaching. *Cincinnati, etc., Ry. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138; *Cadwallader v. Louisville, etc., Ry. Co.*, 128 Ind. 518, 27 N. E. 161; *Olesen v. Lake Shore, etc., Ry. Co.*, 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; *Chicago & Erie Ry. Co. v. Thomas*, 155 Ind. 634, 58 N. E. 1040; *Pittsburgh, etc., Ry. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033; *Towers v. Lake Erie, etc., Ry. Co.*, 18 Ind. App. 684, 48 N. E. 1046; *Cleveland, etc., Ry. Co. v. Helne*, 28 Ind. App. 163, 62 N. E. 455.

It is also the law that the quantum of care required of a traveler approaching and desiring to cross a railroad track at a highway crossing at a place with which he is familiar is prescribed as a matter of law. *Aurelius v. Lake Erie, etc., Ry. Co.*, 19 Ind. App. 584, 49 N. E. 857; *Cleveland, etc., Ry. Co. v. Griffin*, 26 Ind. App. 368, 58 N. E. 503; *Smith v. Wabash Ry. Co.*, 141 Ind. 92, 40 N. E. 270; *Olesen v. Lake Shore, etc., Ry. Co.*, supra; *Lake Erie, etc., Ry. Co. v. Stick*, 143 Ind. 449, 41 N. E. 365; *Cincinnati, etc., Ry. Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37. And if, on account of "physical infirmities, darkness, snow, fog, smoke, steam, the inclemency of the weather, noise of any kind, buildings, or other obstructions or hindrances, it is more difficult to see or hear, greater precautions must be taken." *Olesen v. Lake*

Shore, etc., Ry. Co., supra; *Chicago, etc., Ry. Co. v. Thomas*, Adm'r, supra.

The presumption arises that a traveler approaching and about to cross a railroad track saw whatever was in the range of his vision, had he looked, and heard whatever he might have heard, had he listened. *Baltimore, etc., Ry. Co. v. Musgrave*, 24 Ind. App. 295, 55 N. E. 496; *Lake Shore, etc., Ry. Co. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812; *Baltimore, etc., Ry. Co. v. Talmage*, 15 Ind. App. 203, 43 N. E. 1019; *Pittsburgh, etc., Ry. Co. v. Frazee*, 150 Ind. 579, 50 N. E. 576, 65 Am. St. Rep. 377; *Lake Erie, etc., Ry. Co. v. Stick*, supra; *Smith v. Wabash Ry. Co.*, 141 Ind. 92, 40 N. E. 270; *Mann v. Belt Ry. Co.*, 128 Ind. 138, 26 N. E. 819. In the case of *Mann v. Belt, etc., Ry. Co.*, 128 Ind. 138, 26 N. E. 819, the court said: "The courts cannot close their eyes to matters of general notoriety and matters of everyday observation. We must know that a train of cars passing over iron or steel rails at the speed of thirty miles an hour does not do so without noise. We must know, too, that where a person possessing good eyesight, located within 100 feet of the track, has an unobstructed view of said track for a distance of near one-half mile, he cannot fail to see an approaching train before it reaches him, if he looks attentively, and that, if he is possessed of ordinary hearing, he could not fail to hear it, when listening attentively, if running at a speed of thirty miles an hour."

It seems to us that but one conclusion can be reached from the evidence and findings of the jury in this case, and that is that decedent might have avoided the collision which resulted in his death. He was familiar with the crossing, having passed over it almost daily for years. The headlight on the locomotive which struck and killed him could have been seen by him, when he approached within 40 feet of the track, continuously for a distance of $2\frac{1}{2}$ miles. He could have heard the noise of the approaching train, if he had listened, when he was 40 feet from the track, and must have heard the noise of this train, if he had listened, a much farther distance from the track. It thus affirmatively appears from the evidence that decedent did not use due care to discover the approach of the cars upon appellant's track before he attempted to cross the same, and there can be no recovery.

The judgment of the trial court is reversed, with instructions to sustain appellant's motion for a new trial.

(33 Ind. App. 133)

VALPARAISO CITY WATER CO. et al. v. CITY OF VALPARAISO.¹

(Appellate Court of Indiana. Feb. 4, 1904.)
WATERWORKS—PURCHASE BY MUNICIPALITY—
NOTICE—CONSTRUCTION OF ORDINANCE—FORFEITURE.

1. A provision, in a waterworks ordinance, for the purchase of the plant by the city after

¹Rehearing denied. Transfer to Supreme Court denied.

the lapse of a certain time, at a valuation to be ascertained by appraisers, is not in the nature of a provision for a forfeiture, but is a contractual obligation imposed on the company.

2. A waterworks ordinance accepted by the company is not to be strictly construed against the city on the theory that it has been prepared with care and at leisure by it, and accepted by the company without opportunity to consider its provisions.

3. An ordinance granting a waterworks franchise, and providing for the purchase of the plant by the city after a certain length of time, is to be construed favorably to the city, as are all grants of franchises by the public.

4. An ordinance granting a waterworks franchise provided that, at any time after the expiration of 15 years from the completion of the plant, the city should have the right to purchase the same by giving the owners one year's notice in writing. The franchise granted was for 50 years. *Held*, that the city was not compelled to await the expiration of the 15-year period before serving a notice, but could serve it one year before the period expired.

Henley, C. J., dissenting in part.

Appeal from Circuit Court, Lake County; W. C. McMahan, Judge.

Suit by the city of Valparaiso against the Valparaiso City Water Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

N. L. Agnew, for appellants. H. H. Loring, for appellee.

BLACK, J. This cause having been commenced in the Porter circuit court, the venue was changed to the court below. It has been transferred to this court by the Supreme Court.

In 1885 the common council of the city of Valparaiso, appellee, the plaintiff herein, adopted an ordinance authorizing certain persons named therein, and their successors and assigns, to construct, maintain, and operate a system of waterworks in and for that city, and for that purpose to locate and maintain, through the streets, alleys, and public grounds of the city, a system of piping, for a term of 50 years, and on the same day the persons so named duly executed and filed with the city clerk their written acceptance of the ordinance. In compliance with the provisions of the ordinance, the persons so named therein constructed and installed the system of waterworks to the satisfaction and acceptance of the city, and it was completed and in operation on December 31, 1885, and was accepted and approved by the city April 16, 1886. Afterward, September 8, 1886, the persons so authorized duly assigned all their rights and franchises under the ordinance, and all the property and plant connected with the system, to the Valparaiso City Water Company, which ever since has held and enjoyed the possession, operation, and control of the same, and has operated the system, and has used and occupied, without interruption or hindrance, the streets and alleys of the city, and has enjoyed all the rents, income, and profit thereof.

Section 11 of the ordinance was as follows: "At any time after the expiration of fifteen

years from the completion of said waterworks, the city shall have the right to purchase the same by giving the owners thereof one year's notice in writing; and in case of such purchase, the city shall pay a reasonable value for the same, which shall be ascertained by three disinterested hydraulic engineers; one to be chosen by the city, one by the owners of the waterworks, and the third selected by the two thus chosen. The appraisement fixed by such engineers, or, in the event they do not all agree, the appraisement fixed by any two of them, shall be conclusive and binding upon the parties as the purchase-price of said waterworks; provided, that nothing shall be paid for the unexpired franchise of said persons named in the ordinance, "their successors and assigns."

The parties have continued, in substantial compliance with the contract, in the operation of the waterworks and the service to the city, and the payment by the city of what was stipulated in the contract to be paid. June 23, 1899, the city, by resolution of its common council, duly passed, elected to purchase the waterworks of the water company as provided in section 11, above quoted, of the ordinance, and a copy of the resolution was served upon the company July 6, 1899, and in the written notice stating such election to purchase, transmitted with the copy of the resolution, the company was notified that the city, on January 1, 1901, in pursuance of said section 11, would select a disinterested hydraulic engineer to meet with a like engineer to be selected by the company, a third hydraulic engineer to be selected by the first two, to appraise and fix the value of the plant for the purchasing of the same, in pursuance of the provision of that section. December 14, 1900, the city, by its common council, selected as its appraiser a certain hydraulic engineer to act for and in behalf of the city in appraising the waterworks, as provided in section 11 of the ordinance, and December 19, 1900, the company was notified, by the mayor of the city, in writing, of such selection of such engineer for such purpose, pursuant to section 11 of the ordinance, and it was stated in the notice that the city would like to know as speedily as possible "whom you have chosen as an appraiser, so that the city may have time and opportunity to consider his character as to disinterestedness, and the work of appraisement proceed as rapidly as convenient." May 11, 1901, there was served upon the company a duly certified copy of a resolution adopted by the common council of the city May 10, 1901, referring to the resolution of June 23, 1899, and the selection of an appraiser by the city December 14, 1900, and the above-mentioned request that the company select an appraiser, and stating that the city still adhered to its said selection, and that if the company should neglect, within 10 days from the service upon it of a copy of this resolution, to make and

report to the mayor or the clerk of the city a selection on its part of an appraiser to act in conjunction with the city's said appraiser, such neglect would be taken as a refusal on the part of the company to join in securing such appraisement, and, in case of such neglect or refusal, the city attorney was directed to take such action as he might deem best to enforce the rights of the city under said section. The water company having neglected and refused to choose an appraiser, or to comply with the request and notice of the city to proceed, under section 11 of the ordinance, to ascertain the reasonable value of the waterworks, the appellee brought this action May 24, 1901, for the purpose of ascertaining the reasonable value of the waterworks with a view to the purchase thereof. It was found that the present "physical value" of the waterworks system was \$59,996, including water rights, and that the "going value," by reason of the connections with private consumers and its being a live and going concern, was \$26,710, and that the "reasonable value" of the system, at the commencement of the suit and at the time of the finding, including its physical value and its going value, was \$86,706; and it was found by the court below that upon the payment or tender of that sum on or before October 1, 1903, the appellee would be entitled to a conveyance and the possession and control of the waterworks, and that a commissioner should be appointed to make the transfer; and it was so adjudged.

The controlling question of the cause, as presented by counsel, relates to the notice provided for by section 11 of the ordinance, it being contended, on behalf of the water company, that the contract provides that such notice shall be given after the end of 15 years from the completion of the waterworks, and that therefore the notice given by the appellee, somewhat more than a year before the expiration of the period of 15 years, was of no avail. We are unable to agree with the theory proposed by counsel that the language of the section in question is in the nature of a provision for a forfeiture. It is not contemplated in that section that the water company shall be divested of its property, without compensation, by reason of a default or an offense. On the contrary, the section in question contains a contractual provision for the reservation by the city granting the franchise of a right to purchase the property of the grantee of the franchise before its expiration by lapse of time, the manner of indicating the city's desire to purchase, and the method to be pursued by both parties for the ascertainment of the reasonable value to be paid, being agreed to by them as parts of the contract. If the water company parts with its property in pursuance of the provisions of this section, it will be, but the performance of a promise of a contract upon a valuable and sufficient consideration.

Nor can we regard the contract as one to be construed as to this particular portion more strongly against the city than the water company, by reason of its being a contract prepared with care and at leisure by the former, and accepted by the latter without like opportunity to consider its provisions, as in case of a policy of insurance. The city granting the franchise reserved the right to terminate the enjoyment thereof by the grantee, and to acquire, for its reasonable value, the property used in such enjoyment, the manner of exercising this right on the part of the city being stipulated in the contract, whose language should be construed in the sense in which it may be supposed to have been understood by the parties at the time of the making of the contract, doubt as to their intention being resolved in favor of the city rather than of the water company. The grant of the franchise by the municipal corporation is to be strictly construed, and to be taken most strongly against the grantee, and nothing is to be taken by implication against the municipal corporation representing the public, except what necessarily arises from the nature of the terms employed. *Indianapolis, etc., Co. v. Citizens' Street R. Co.*, 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539. If there be any doubts arising upon the language of the contract between the city and its grantee of the franchise as to the rights of the latter under the contract, such doubts are to be resolved against the grantee and in favor of the city. *Western, etc., Co. v. Citizens' Street R. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. Rep. 462; *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 43 L. R. A. 41. Doubtful questions involved in the construction of such contracts made by agents of the public are to be resolved liberally in favor of the public. *Muncie Natural Gas Co. v. City of Muncie* (Ind. Sup.) 66 N. E. 436, 60 L. R. A. 822. There are in the section in question a leading or predominating idea and a subordinate idea. The leading idea is the purpose to accomplish something, and the subordinate idea relates to the manner of accomplishing it. The prominent and controlling purpose is to provide a minimum period during which the water company could not be deprived of its enjoyment of the franchise, and at the end of which the city might terminate it and acquire the tangible property and water rights of the company at their reasonable value. That minimum period was 15 years, not 16 years. The language which embodies the leading idea is: "At any time after the expiration of fifteen years from the completion of said waterworks, the city shall have the right to purchase the same." In providing the method of accomplishing such a result, it is stipulated that this right to purchase at any time after the expiration of 15 years shall be exercised by the city by giving the owners

of the property one year's notice in writing. Undoubtedly, there must be a compliance with the requirement such as will fulfill the expressed meaning of the parties. In the second section of the ordinance it was provided that the privileges and franchises granted "shall continue for a term of fifty years; * * * such rights, privileges and franchises, however, are subject to the condition hereinafter provided." It was the apparent intention of the parties to contract for an enjoyment by the grantees, their successors and assigns, for 50 years, with the right on the part of the city to cut down that period to one ending "at any time after the expiration of fifteen years from the completion of said waterworks." If it be agreed that such strictness of performance shall be required as is requirable of a party seeking to purchase, who, being bound to perform a condition precedent, was not bound to purchase and could not be required to do so, while the other party was bound to sell, yet, in ascertaining what was to be performed, the meaning of the contract is to be determined from all the language used and the consideration of the nature of the transaction in which the language was employed, no greater advantage being given in the construction of the language to those dealing deliberately for their own private gain than to the municipal corporation represented in the making of the contract by its personally disinterested officials, but doubt, if any, being solved in favor of the city. The purchase and the giving notice were distinct from each other. While the one year's notice was requisite, the right to purchase was to come into existence at any time after the expiration of the certain definitely ascertained period of 15 years, and its existence in present was to be preceded by the giving of one year's notice; and the contract must be regarded as equivalent to an agreement to sell at any time after the expiration of 15 years, upon performance of the conditions precedent.

We are of the opinion that a notice in writing of intention to exercise the right of purchase at a time after the expiration of 15 years, served upon the owner of the waterworks one year before that time, would constitute the giving of one year's notice within the meaning of the contract, and, therefore, that the notice given by the appellee was sufficient.

Judgment affirmed.

COMSTOCK, ROBINSON, ROBY and WILEY, JJ., concur.

HENLEY, C. J. (dissenting). I cannot agree with the opinion of the majority of the court as to the construction to be given to the contract between the parties to this action. It is true that there can be no controversy concerning the law, as stated in the prevailing opinion, to the effect that, where doubt exists as to the construction to be giv-

en a contract in which a municipal corporation is a party, the doubt shall be resolved in favor of the city. But, in the case at bar, the construction of the contract for which I contend is the direct effect of giving the words employed therein their plain, ordinary meaning, thus eliminating any reason for resolving any part of the contract in favor of one party more than another. The right granted the city in the contract is the right to purchase "after" a certain period. It is a right limited as to time and plan, and must be pursued under the terms of the contract. The water company's rights do not, under the contract, end at the expiration of 15 years. The right granted was for 50 years, and it is not provided that the city could purchase at the expiration of 15 years, but it is provided that "after" the expiration of 15 years, by doing certain things, the city might purchase the property. The failure of the city to give notice at any special time did not forfeit its rights which it could, under the procedure marked out by the contract, enforce any time during the 35 years following the expiration of the 15 years. The water company's rights were not for 15 years, but for 50 years. Its ownership and control were as absolute at the expiration of 40 years as at the expiration of 1 year, unless the city proceeded under the contract to purchase the property. The city was not required to proceed to purchase the property after 15 years. It lost no right under the contract by refusing to do so. Its right to purchase was not forfeited, and such right extended over the whole period of 35 years. The contract between the parties to this action is not like a contract creating a tenancy which could be terminated by notice at the expiration of a certain time, or on or before a certain time. If likened to a tenancy, then the term of the lessee must have been for 50 years, and the right to terminate or the option to terminate must be "after" 15 years of the tenancy has expired. I think it is the plain meaning of the contract between the parties to this action that the right to purchase did not accrue until after the expiration of 15 years, and all the acts necessary to be performed by the city in order to acquire the ownership of the property must be performed after the 15-year period has expired. Any other construction would give to the city the right to do and perform the most essential part necessary to accomplish its purpose prior to the expiration of the 15-year period, within which time, under the plain construction of the contract, it had no right to proceed. It is also plain to me that the parties intended that the construction here contended for should obtain; and it is also plain that the best interests of both parties to the contract called for such a construction. The taxpayers of the city of Valparaiso had a right to know the exact time when their agents, the members of the city council, would have a right to purchase the

water company's property under this contract. Under the construction given to the contract in the prevailing opinion, any city council elected prior to the expiration of the 15-year period could give the notice provided for under this contract. It seems that the best interests of the citizens of the city of Valparaiso would be subserved by holding, as the plain meaning of the words, we think, warrant, that no city council elected prior to the expiration of the 15-year period would have the right to exercise any power or do anything towards the purchase of the waterworks under this contract.

I think the judgment should be reversed.

**EVANSVILLE & T. H. R. CO. v.
KEVEKORDES et al.***

(Appellate Court of Indiana, Division No. 2.
Feb. 3, 1904.)

CARRIERS—LIVE STOCK—LIMITATION OF LIABILITY—VALIDITY—CONSIDERATION—PRESUMPTION—BURDEN OF PROOF—PLEADINGS—VARIANCE.

1. Where a contract of shipment was in writing, the shipper could not sue on the special contract and recover on an implied contract, or count on a parol agreement and recover on the bill of lading.

2. A bill of lading containing the agreement of a carrier to transport at a specified price, and of the shipper to pay the price, is to be construed as containing the complete agreement of the parties.

3. The obligation of a common carrier is fixed by law, and is as much a part of the contract of shipment as though written therein.

4. Where the parties to a contract of shipment fix the value of the property to be transported, by a contract freely and fairly made, and supported by a good consideration, such value, so fixed, may be made the measure of the carrier's liability; but, in order to make the stipulation effective, there must be some other consideration than the original contractual relations between the parties.

5. A contract between a shipper and a carrier providing for the transportation of live stock, and also fixing its value in case of loss or damage, is divisible; and the lack of consideration for the agreement fixing the value eliminates it, but leaves the agreement for transportation in full force and effect, so that the shipper may bring his action on the written contract of shipment without thereby adopting the independent clause limiting the value.

6. The validity of a contract of shipment, fixing the value of the property shipped, depends on the facts connected therewith; and, the issue of its invalidity being tendered by plaintiff, he is entitled to have it determined as an issue of fact.

7. Where a shipper executed a contract of shipment of live stock, containing a stipulation limiting its value, it will be presumed, in the absence of fraud, mistake, imposition, or incapacity, and no protest having been made by him, that he knew and consented to its terms.

8. The burden of establishing the absence of consideration for a contract limiting the value of live stock shipped rested on the shipper, where he alleged absence of such consideration in his complaint.

Appeal from Circuit Court, Posey County;
O. M. Welborn, Judge.

* See Carriers, vol. 9, Cent. Dig. §§ 641, 644.

* Superseded by opinion, 73 N. E. 1135.

Action by Clem H. Kevekordes and another against the Evansville & Terre Haute Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

John E. Iglehart, Edwin Taylor, and G. V. Menzies, for appellant. A. J. Clark and J. E. Williamson, for appellees.

ROBY, J. Appellee recovered judgment against appellant for \$1,000. The complaint was in two paragraphs. The averments therein contained show facts as follows: Appellant was on and since October 1, 1900, a common carrier. Appellee was on the 14th of said month the owner of a certain horse, of the value of \$2,500, and one Clate McKinney was also the owner of a horse; and he and the appellant entered into a contract with appellee, "by the terms whereof it was agreed that, in consideration of both the plaintiff and McKinney shipping their said horses . . . in one car, and in charge of the drivers of said horses, the defendant would transfer over its said railroad, from Evansville to Vincennes and return, both of said horses, and the two drivers, for the sum of \$20 for the said transfer, or \$10 to be paid by each, the plaintiff and the said McKinney." Said horses were delivered to appellant, and by it safely transported to Vincennes, and half the contract price paid. When ready to return, notice was given appellant, and thereupon said horses were loaded into one of its cars. Appellant owns the only railroad between Evansville and Vincennes, and, "when they delivered said horses . . . to defendant, the defendant required these plaintiffs to sign a shipping contract, the material parts of which are as follows, to wit:

"Read This Contract.

"Evansville & Terre Haute R. R. and associated lines.

"Live Stock Contract.

"Liability limited to the declared valuation by shippers, but not to exceed the following:

Each horse or pony (gelding, mare or stallion) mule or jack.....	\$100
Each ox or bull.....	50

"And in no event shall the carrier's liability exceed twelve hundred dollars per car.

"Agents are not permitted to receive or ship animals of a higher value than as stated above, unless by special agreement noted hereon, and a proper contract or release is signed by the owner or shipper thereof. And it is agreed between the owner and shipper of these animals and the said railway company, that in case of accident, resulting in injury to said animals, the value thereof shall in no case exceed the valuation named above.

"Shipments of Live Stock in Car Loads, or less than car loads will only be taken at the rates named herein, after this contract or

agreement shall have been signed by the Company's Station Agent and the owner or shipper, by which it is agreed and understood * * *.

"J. B. Cavanaugh,

"General Freight Agent.

"Freight Office, Evansville & Terre Haute R. R. and Associated Lines.

Vincennes Station	10-14	1900	11	hour	p. m.
Received of	O. McKinney.				
2 horses	to be delivered to				
O. C. McKinney	at				
Evansville	Station, at the following rates:				
2 Horses	\$10.00	per car for horses.			

"In consideration of which, and for other valuable considerations, it is hereby mutually agreed that said company shall not be liable, * * * and that the rules and regulations printed above are an essential part to this contract.

"Evansville & Terre Haute R. R. Co.,

"By E. L. Cory, Agent.

"C. C. McKinney, Owner."

It is averred at some length: That the \$20 paid for transportation was the price appellant charged, and all that was asked or demanded by it, and appellees were not informed at any time of any other or different rate. That the valuation named in said contract was printed in the rules and regulations, and arbitrarily fixed by appellant, and appellees were required to sign said contract, as the only condition on which appellant would ship said property. The duty of appellant to receive and ship said property for reasonable hire, to wit, the sum of \$10, which sum the defendant demanded and the plaintiff agreed to pay upon delivery at Evansville. "That said sum was the only consideration moving from the plaintiff to the defendant for such service, and the only consideration moving from the defendant to the plaintiff was its agreement to transfer said property. * * * No other or different consideration obtained between the parties for any purpose or purposes whatever." That no consideration of any kind or character existed for reducing the value of said horse to \$100, and that the value of said horse was not represented by appellee to be \$100. That they were not called upon to, and did not, state its value, and that appellant well knew the value of the property. It is further averred that the car in which said horses were shipped was thrown from the track, took fire, and appellee's horse burned to death. The second paragraph differs from the first only in the statement of certain specific acts by appellant causing the derailment of the train, and averred to have been negligently done. Appellee had verdict and judgment for \$1,000.

The correctness of the rulings of the court upon demurrers to appellant's answers, upon its motion to strike out evidence, and its

refusal to give instructions requested by appellant, as well as in the giving of instructions, is challenged, but need not be considered in detail, inasmuch as the right of appellee to recover a greater sum than \$100, in view of the terms of the contract, determines the quality of each legal proposition argued.

The contract between the parties by which the appellant agreed to transfer the property, and appellee agreed to pay the stipulated price therefor, was in writing, and is made the basis of the action. It is established that in such a case as this the plaintiff cannot set up a special contract, and recover upon the implied contract. *Jeffersonville v. Worland*, 50 Ind. 339; *Sanders v. Hartge*, 17 Ind. App. 243-250, 46 N. E. 604. The corollary of the proposition (i. e., that he cannot count on a parol agreement, and recover upon the bill of lading) is also settled. *Ry. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106; *Ry. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. 1138. It is asserted by both parties in their respective pleadings that the undertaking to transport by the carrier at a specified price, and the undertaking of the shipper to pay that price, is evidenced by the written contract, which both treat as valid. The rule is elemental that the written contract contains the complete agreement of the parties. *Ry. Co. v. Wilson*, 119 Ind. 352-358, 21 N. E. 341, 4 L. R. A. 244. The obligation of a common carrier is fixed by law, and becomes as much a part of the contract as though written therein. *Snow v. Ry. Co.*, 109 Ind. 422, 9 N. E. 702. The duty of the carrier, as fixed by law, does not depend upon the mere fact that the contract is written or verbal. In the absence of valid conditions and limitations, the carrier's duty is uniform. The common carrier cannot, by any act of its own, without the assent of the shipper, limit its responsibility. Nor does the assent of the shipper render such limitation effectual, unless it is based upon a consideration. When the parties fix the value of the property to be transported by contract, freely and fairly made, and supported by a good consideration, such value so fixed may be made the measure of its liability. *Adams Ex. Co. v. Carnahan* (Ind. App.) 63 N. E. 245; *Earnest v. Express Co.*, 1 Woods, 573, Fed. Cas. No. 4,248. The contract entered into by the parties hereto purports to fix the value of the property. In order to make such stipulation effective, there must be some other consideration therefor than the original contractual relations of the parties. *Lake Erie v. Holland* (Ind. Sup.) 69 N. E. 138-140, and authority cited. "A divisible contract is one in its nature and purposes susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other; nor is it intended by the parties that they shall be." One whose provisions and considerations are independent. *A. & E. Ency. of Law*, vol. 7,

p. 95; *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255. The contract between the carrier and shipper in this case was a divisible contract, and therefore the lack of consideration for the agreement fixing the value of the property results in the elimination of that particular portion thereof, leaving the residue in full force and effect. *A. & E. Ency. of Law*, vol. 5, p. 319; *Trentman v. Wahrenburg*, 30 Ind. App. 304, 65 N. E. 1057; *Bank v. City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518-524. In bringing his action upon the written contract of shipment, appellee did not adopt the independent clause whose invalidity is set up in his complaint. The carrier is permitted to limit its liability, to the agreed value of the property, because to do so is entirely just to both parties. The shipper is thereby enabled to fix in advance the fair value of his property, and the carrier to charge a fair and adequate rate. An arbitrary valuation by the carrier does not in any wise satisfy the reason or the requirements of the law. The shipper and carrier "do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgler and stand out, and seek redress in the courts. His business will not permit such a course." *Railroad v. Lockwood*, 21 L. Ed. 627, 17 Wall. 357; *Russell v. Pittsburgh*, 157 Ind. 311, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214. The validity of the contract fixing value depends upon the facts connected therewith. It may be valid and binding, and it may be invalid. The appellee, having tendered an issue thereon, was entitled to have the facts involved determined as other issues of fact are determined. It follows that the trial court did not err in its rulings upon the demurrers to the pleadings.

Its refusal to instruct the jury to find for the appellant presents a different question. If there was evidence tending to sustain appellee's contention, the peremptory instruction was correctly refused, and the submission of the issues to the jury, as was done by the instructions given, was correct. On the other hand, an absence of such evidence left no question of fact to be determined. Evidence introduced in behalf of the appellant was to the effect that McKinney, the week before the Vincennes Fair, came into the appellant's freight office at Evansville, and stated to its assistant freight agent that he wanted a low rate on two horses to Vincennes; that his entry fees and expenses were heavy, and he did not feel like paying a very great freight rate; that after some further talk the agent named a rate of \$10, on the valuation fixed, each way, and told him "that, if he desired to use it, he must let me know before making the shipment, so that I could give necessary instructions for the protection of the rate." This conversation is denied by McKinney, but it is not denied that the horses were afterward shipped at the rate indicated, nor is the exist-

ence of the facts disclosed by the asserted conversation controverted. Subsequently the contract of shipment was executed. Appellee and his agent deny that the value fixed upon the horses was stated to them, or that they were informed that the rate was based upon a \$100 valuation, or that any opportunity to pay a greater rate was given them. Upon these questions the evidence was also in direct conflict. However, the contract in suit was executed; the appellees were experienced business men; no fraud appears to have been practiced; no mistake, imposition, ignorance, or incapacity is claimed; no protest was made by them, and their assent is presumed. They must be held to have known the terms. *Stewart v. Ry. Co.*, 21 Ind. App. 218, 52 N. E. 89; *Smith v. American Ex. Co.*, 108 Mich. 577, 66 N. W. 479.

The serious question is not that of assent by the shipper, but whether any consideration in fact existed for the limitation of value. The burden to establish the absence of such consideration rested upon appellee, he having alleged its absence in his complaint. It is true that the contract in suit does not, in terms, state a consideration for the stipulation as to value, as was done by the contracts considered in most cases where the burden is declared to be upon the shipper; but, under the issues in this case, the shipper suing upon a written contract, and seeking to be relieved from a certain clause thereof upon the ground that it is without consideration, he must establish such allegation, or fail in excluding such clause, severable though it be.

Counsel has not indicated, and an examination of the record has not disclosed, any evidence to the effect that the freight rate fixed by the contract was not a reduced one. It is not a question of what was or was not said to the shipper as to the rate being a reduced one. Such conversations go to the point as to whether the contract was fairly entered into. The proposition now is that the rate was not a reduced one; that no consideration was received. In the absence of proof, the terms of the contract control, and the court should have so instructed the jury. Judgment reversed.

(32 Ind. App. 157)

PAUL v. BALTIMORE & O. R. CO.*

(Appellate Court of Indiana, Division No. 1.
Feb. 2, 1904.)

APPEARANCE—SPECIAL—REMOVAL OF CAUSE—REMANDMENT—EFFECT ON APPEARANCE—INTERROGATORIES—MOTION TO STRIKE—EFFECT.

1. A special appearance in the state court, for the purpose of making application therein for removal of the cause to the United States court, does not constitute a submission to the jurisdiction of the state court for any other purpose.

2. Where a party appeared in a state court, specially, to petition for removal to the United

* 1. See *Appearance*, vol. 3, Cent. Dig. § 53.

*Rehearing denied. Transfer to Supreme Court denied.

States court, and nothing was done in the latter court except to transmit the transcript and direct its filing there, such party's appearance in the United States court should be regarded as made merely for that purpose, and not as constituting a general appearance to the action.

3. The remandment of a cause by the United States court to the state court on the ground of wrongful removal, and the consequent denial of defendant's motion to strike the complaint for want of jurisdiction, did not establish a general appearance of defendant, which had appeared, specially, only for the purposes of the motion to strike.

4. A motion to strike a complaint, and filing an answer in abatement on a special appearance, did not confer jurisdiction over defendant.

5. Interrogatories and motions to strike the same are not a part of the record, when not saved by bill of exceptions.

6. Under Burns' Rev. St. 1901, § 362, providing that interrogatories relevant to the matter in controversy may be filed with the pleadings, interrogatories may be propounded when the matter in controversy is presented by answer in abatement.

7. Where defendant had, under a special appearance, answered in abatement, and plaintiff had filed interrogatories, a motion to strike out interrogatories relating to the answer in abatement would not change defendant's special appearance into a general appearance.

Appeal from Circuit Court, Steuben County; Stephen A. Powers, Special Judge.

Action by Frank S. Paul against the Baltimore & Ohio Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Frank M. Powers and Robert W. McBride, for appellant. Pam, Calhoun & Glennan, J. E. & J. H. Rose, and Miller, Elam & Fesler, for appellee.

BLACK, J. The appellant, in 1888, brought an action against the Baltimore & Ohio & Chicago Railroad Company in the De Kalb circuit court to recover damages for a personal injury alleged to have been suffered by him, while in the employment of that company, through the negligent action of its agents. The cause having been removed, on the application of the defendant, to the Circuit Court of the United States, it was remanded by that court to the De Kalb circuit court, upon a verified motion of the plaintiff, showing that the defendant was a corporation formed by the consolidation of an Ohio corporation and an Indiana corporation, and that the consolidated company, known by the name of the Baltimore & Ohio & Chicago Railroad Company, was the sole defendant in the cause. Afterward, there being on file in the cause an answer of the defendant in two paragraphs, the first a general denial, and the second an answer alleging, amongst other things, that the plaintiff at all times mentioned in his complaint, and at the time of his alleged injury complained of, was an employé of the Baltimore & Ohio Railroad Company, and not of the answering defendant, the venue was changed to the court below. Thereafter in that court the cause was tried by jury, and a verdict was returned in favor of the plain-

tiff against the defendant therein for \$10,000, upon which judgment was rendered against the defendant therein, the Baltimore & Ohio & Chicago Railroad Company, from which judgment that company appealed to the Supreme Court of Indiana, by which the judgment was reversed (40 N. E. 519, 28 L. R. A. 216), with instructions to the trial court to render judgment for the defendant, and the trial court, February 22, 1896, did render judgment in accordance with that mandate, in favor of the defendant, against the plaintiff. No verdict was returned, and no judgment was at any time rendered, in that cause against the Baltimore & Ohio Railroad Company, a distinct corporation of the state of Maryland, which, at the times mentioned in the complaint in that action, was engaged in the operation of the railroad which was owned by the defendant in that action, the Baltimore & Ohio & Chicago Railroad Company, on which the plaintiff in his complaint claimed to have been injured. During the above-mentioned trial of that cause in the Steuben circuit court, in 1891, the Baltimore & Ohio Railroad Company appeared therein specially, and for the purpose, and no other, of filing a petition and bond, which it did, for the removal of the cause to the Circuit Court of the United States for the District of Indiana, in which petition it was alleged, amongst other things, that the suit was brought by the plaintiff against the Baltimore & Ohio & Chicago Railroad Company to recover from it \$10,000 damages, and that therefore it involved more than the sum of \$2,000, exclusive of interest and costs; that the plaintiff, at the time of the commencement of the suit, and thereafter, was a resident and citizen of the state of Indiana, and that the petitioner, the Baltimore & Ohio Railroad Company, was a corporation organized under the laws of the state of Maryland, and at the commencement of the suit, and since, was a citizen of that state; that it operated several lines of railroad west of the Ohio river, one of which was known as the Chicago Division of the Baltimore & Ohio Railroad Company, running from Chicago Junction, in Ohio, and passing through De Kalb county, in Indiana, to the city of Chicago, Ill.; that the Baltimore & Ohio & Chicago Railroad Company was a corporation of the state of Indiana as claimed by it, but of the states of Ohio and Indiana as claimed by the plaintiff; that the suit had proceeded to trial against the last-named company until the testimony had been taken in part therein, when the plaintiff had called witnesses to prove that one John M. Hooken, upon whom the summons in said cause was served, was the agent of the corporation that operated the line of railroad in the petition described, and that the summons having been served on Hooken, the plaintiff, Paul, was claiming on the trial the right to proceed against the corporation so operating the railroad; that as the petitioner did, in fact,

operate the same during all the times complained of in the plaintiff's complaint, and before and ever since that time, the right so claimed by the plaintiff was the right to proceed against the petitioner, the Baltimore & Ohio Railroad Company, and on the defendant named in the complaint and the summons therein issued, viz., the Baltimore & Ohio & Chicago Railroad Company. The petitioner for removal further alleged that the court, during that trial, sustained the claim of the plaintiff, in so proceeding against the operating company, over the objection of the defendant, and admitted, over such objection, the testimony so offered by the plaintiff, and held that the plaintiff might proceed against the petitioner, the Baltimore & Ohio Railroad Company, and that, this being the first notice the petitioner, the Baltimore & Ohio Railroad Company, had of the claim of the plaintiff to so prosecute said suit against it and obtain judgment against it, it objected and protested against such proceeding, and denied the right of the plaintiff so to proceed, and presented said petition and bond for the removal of the cause into the Circuit Court of the United States for the District of Indiana, and prayed that the removal be ordered. The Steuben circuit court refused the prayer of that petition, and afterward, May 2, 1892, the Baltimore & Ohio Railroad Company, in pursuance of its petition for removal, filed in the office of the clerk of the United States Circuit Court for the District of Indiana its transcript of the proceedings had and the papers filed in the Steuben circuit court in the case of Frank S. Paul against The Baltimore & Ohio & Chicago Railroad Company. No proceedings were had in the United States court in the cause, taken by either of the parties, and no orders were made by that court therein, until after the decision of the Supreme Court of Indiana before mentioned; but on December 13, 1895, the plaintiff, by leave of court, filed an amended complaint, wherein he named the Baltimore & Ohio Railroad Company as the sole defendant in the cause, and sought to recover damages from it for the same injuries alleged to have been sustained by him in the complaint originally filed in the De Kalb circuit court, as aforesaid, against the Baltimore & Ohio & Chicago Railroad Company, alleging in the amended complaint that in the original complaint aforesaid there was a misnomer of the defendant, in that the defendant was therein designated as the Baltimore & Ohio & Chicago Railroad Company, instead of the Baltimore & Ohio Railroad Company, but that process in the case was served upon the last-named company, and that it appeared to the action and procured the removal of the cause into the United States court. Afterward, December 28, 1895, the Baltimore & Ohio Railroad Company entered its special appearance in the United States court in said cause, and filed its written motion to strike said amended complaint from the files and

to dismiss the cause, alleging in said motion that the Baltimore & Ohio Railroad Company was not then and never had been a party to the suit, and that the circuit court of Steuben county never had acquired jurisdiction over it, nor had the circuit court of De Kalb county, and that the United States court had no jurisdiction whatever over that company, and that it was not a party to the suit. Afterward, February 26, 1896, the plaintiff, in opposition to this motion of the Baltimore & Ohio Railroad Company, filed his own affidavit and the affidavit of one of his attorneys. In his affidavit he stated that the record was filed in the United States court by a certain person who was an attorney of record, who presented with the record a letter to the clerk of the United States court, referring therein to the accompanying record as a transcript in the cause of Frank Paul against The Baltimore & Ohio Railroad Company, which he therein requested the clerk to file and docket, the letter being signed by said attorney as "Counsel for Defendant."

It was further shown in the plaintiff's affidavit that the record or transcript was filed by the clerk of the United States court and docketed as a pending cause, and, when so docketed, the name of a certain attorney for the defendant was entered on the docket as an attorney for the defendant, and had been so entered on the dockets of that court ever since; that the defendant did not by counsel, or otherwise, indicate a purpose to question the jurisdiction of the United States court, either over the subject-matter or the persons in the litigation, or that their appearance would be special, or that it would be other than a full and general appearance, until after the plaintiff had filed his amended complaint, and until the filing of the motion to strike out that complaint. The affidavit of the plaintiff also recited the facts relating to the appeal to the Supreme Court of Indiana, and the judgment of that court before referred to, and stated that, while the cause in the state court was entitled "Frank S. Paul v. The Baltimore & Ohio & Chicago Railroad Company," there never was any service of process upon that company, and that it was shown in the trial that the summons had been served on one John M. Hooken, who at the time was the agent and employé of the Baltimore & Ohio Railroad Company, and that, by the testimony adduced by the defendant in the state court, the Baltimore & Ohio & Chicago Railroad Company, at the time the cause of action accrued, and when the suit was commenced, had no officer, agent, or employé whatever in the state of Indiana, and that the attorneys who appeared as attorneys and conducted the defense were the attorneys for the Baltimore & Ohio Railroad Company, and that upon said trial it was admitted of record by the parties that since September 1, 1886, the only officers of the Baltimore & Ohio & Chicago

Railroad Company were its president, secretary, treasurer, and general engineer, and that none of these had resided in Indiana; that the state court in which the cause was tried acquired jurisdiction over the person of the Baltimore & Ohio Railroad Company, and that it was the only person actually contesting the cause in the state court; that after the Baltimore & Ohio Railroad Company filed its petition for removal, as before stated, the plaintiff did not, in person or by counsel, take any steps to secure the correction of the misnomer alleged in his affidavit, but that believing that there were, in fact, two separate and distinct corporations, one named the Baltimore & Ohio & Chicago Railroad Company, and the other the Baltimore & Ohio Railroad Company, and that the former actually owned the line of railroad, and therefore was responsible, as he believed, and that the judgment, if any should be recovered against it, would be collectible, and believing that the facts and circumstances surrounding the cause were sufficient to justify recovery against the Baltimore & Ohio & Chicago Railroad Company, as the owner of the railroad, he allowed the cause to proceed to final judgment as against it, and did not seek to recover a judgment against the Baltimore & Ohio Railroad Company, except as the interests of that company were interblended and connected with the interests of the Baltimore & Ohio & Chicago Railroad Company, and might be affected by a judgment rendered against the latter company, and that the plaintiff had not at any time taken any steps or done anything with the purpose and intention of waiving any right or claim against the Baltimore & Ohio Railroad Company. In the affidavit of the plaintiff's attorney before mentioned it was stated that the affiant had carefully read the record filed in the Supreme Court of Indiana as aforesaid, and also the record filed in the United States Circuit Court, and that the claim that Hooken, upon whom process was served, was the agent of the Baltimore & Ohio Railroad Company, was sustained by the testimony set out in the record in the Supreme Court, mentioning the names of certain witnesses, and stating their testimony to such effect, and also testimony to the effect that the Baltimore & Ohio & Chicago Railroad Company had no officer except a president, a secretary, a treasurer, and a general engineer, and had nothing to do with the operation of the railroad, and that the employees running trains thereon were in the employ of the Baltimore & Ohio Railroad Company, and that a certain attorney who appeared as such for the defendant was at all times the attorney of the Baltimore & Ohio Railroad Company, and acting for it in the cause, and that a certain special agent of the Baltimore & Ohio Railroad Company, as such, prepared the cause for trial in the state court.

Such proceedings were had in the United

States court that, March 2, 1896, the motion of the Baltimore & Ohio Railroad Company to strike out the amended complaint and to dismiss the cause was overruled, and that court found that the cause was wrongfully removed from the Steuben circuit court to the United States court by that company, and it was ordered that the suit be remanded to the Steuben circuit court, and that the costs occasioned by the removal should be adjudged against the Baltimore & Ohio Railroad Company. Thereafter a transcript of the proceedings had in the United States court was, by the plaintiff, filed in the Steuben circuit court, and the cause was placed on the docket as a cause pending therein. Afterward, April 21, 1896, the Baltimore & Ohio Railroad Company appeared in the cause specially, and for the purpose of its motion only, and moved to strike from the files the amended complaint filed in the United States court, for the reason that that company was not a party to the suit, that the United States court had no jurisdiction over the cause or over that company, and that the Steuben circuit court had not at any time any jurisdiction over that company. No further proceedings were had in the cause until May 8, 1900, when the motion last mentioned was overruled, and the plaintiff thereupon filed his further amended complaint against the Baltimore & Ohio Railroad Company, wherein he sought to recover damages for the same injury complained of in said complaint originally filed in the De Kalb circuit court. No further proceedings were then had until April 16, 1901, when the Baltimore & Ohio Railroad Company appeared specially in the cause for the purpose of filing its answer, and for no other purpose, and filed its answer by way of plea in abatement to the jurisdiction of the court. After the filing of this answer, the plaintiff filed 17 interrogatories to the defendant to be answered under oath, and the defendant thereupon moved to strike out 2 of these interrogatories, which motion was by the court overruled, to which ruling the defendant excepted.

The foregoing facts were in substance stated by the court below in a special finding, wherein it was further specially found that the Baltimore & Ohio Railroad Company was not a party of said suit of Frank S. Paul against the Baltimore & Ohio & Chicago Railroad Company, or Frank S. Paul against the Baltimore & Ohio Railroad Company, until the filing of the amended complaint in the United States court, except as it may have made itself a party thereto by filing the petition for removal, and in filing the record and proceedings in the United States court. That the Baltimore & Ohio Railroad Company never appeared in the cause of Frank S. Paul against the Baltimore & Ohio & Chicago Railroad Company, or Frank S. Paul against the Baltimore & Ohio Railroad Company, nor authorized any one else to appear

for it in either of said causes, except as hereinbefore set out, and that no summons or other process was ever issued or served upon the Baltimore & Ohio Railroad Company requiring it to appear in either of said causes.

The subject of the discussion of counsel is the question as to the jurisdiction of the court over the person of the appellee. It is insisted, on behalf of the appellant, that the court below had jurisdiction of the appellee acquired by its voluntary appearance, which it is claimed the record shows. Reference is made by counsel to those portions of the record showing an appearance of the defendant by its counsel in the United States court, and its filing of the transcript therein, and the letter above mentioned which accompanied the transcript; all this without any express entry of a special appearance for the purpose of raising the question as to jurisdiction of the person of the defendant, the record showing that the persons who did these things were attorneys for both of the railroad companies; attention being called also to the fact that the cause remained on the docket of the United States court for a number of years, and until the plaintiff had filed an amended complaint, before the jurisdictional question was presented.

It is claimed also that the action of the United States court in overruling the motion to strike out the amended complaint and to dismiss the cause involved the question presented by the plea in abatement afterward filed in the Steuben circuit court, and that the action of the latter amounts to permitting a collateral attack upon the judgment of the United States court, and reverses the judgment of that court. Furthermore, it is claimed that the act of the appellee in filing its motion to strike out two of the interrogatories which were filed by the appellant after the filing of the answer in abatement, and its taking an exception to the ruling of the court upon that motion, conclusively showed a general appearance of the appellee to the action. The appellee was not, in fact, required by the local law or rule of the court to answer or plead to the complaint, but being apprehensive that steps would be taken to hold it responsible, from indications justifying such apprehension, it appeared specially in the state court for the sole purpose of making application therein for the removal of the cause to the United States court. No suit, indeed, was actually pending in the state court against the appellee when it filed its petition and bond for removal. In *Goldey v. Morning News*, 156 U. S. 518, 525, 15 Sup. Ct. 559, 562, 39 L. Ed. 517, it is said: "Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail

himself, in the Circuit Court of the United States, of any and every defense duly and seasonably reserved and pleaded to the action, 'in the same manner as if it had been originally commenced in said Circuit Court.'"

In the case cited, as in the case at bar, there was a special appearance for the sole purpose of presenting the petition for removal, and it was therefore said that the question was not involved as to how far a petition for removal, in general terms, without specifying and restricting the purpose of the appearance in the state court, might be considered, like a general appearance, as a waiver of any objection to the jurisdiction of the court over the person of the defendant; and it was held that in case of such a special appearance in the state court, "whether the attempt to remove should be successful or unsuccessful," the special appearance could not be treated as submitting the defendant to the jurisdiction of the state court for any other purpose. In that case, also, the defendant, immediately after the action had been removed into the Circuit Court of the United States, filed a motion for an order setting aside the summons and the service thereof, it being expressed in this motion that the defendant appeared by its attorney specially for the purpose of applying for such order. The court, saying that irregularity in a proceeding by which jurisdiction is to be obtained is in no case waived by a special appearance of the defendant for the purpose of calling the attention of the court to such irregularity, concluded that the defendant's right to object to the insufficiency of the service of the summons was not waived by filing the petition for removal in the guarded form in which it was drawn up, and by obtaining the removal accordingly. In *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 481, the court went further and held that the filing by the defendant in an action in the state court of a petition for its removal to the Circuit Court of the United States, without expressing the purpose to appear specially, does not amount to a general appearance, but to a special appearance only, and does not prevent the defendant, after the removal, from moving in the United States court to dismiss for want of jurisdiction of the person of the defendant in the state court or in the United States court. See *National Acc. Soc. v. Spiro*, 164 U. S. 281, 17 Sup. Ct. 996, 41 L. Ed. 435; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Cady v. Associated Colonies (C. C.)* 119 Fed. 420; *Moon, Removal of Causes*, § 206.

There is no bill of exceptions in this record. It appears, by the court's special finding, that no proceedings in the cause were had in the United States court by either of the parties, and no orders were made therein by the court until the decision on appeal by the state court, where the amended complaint was filed naming the appellee as sole defend-

ant, the transcript which had been filed in the office of the clerk of the United States court being a transcript of the proceedings and papers in a case of the appellant against another railroad company. The appearance then made by the appellee was expressly special, and limited to the purpose of the motion. On the hearing of that motion, as appears from the special finding, affidavits were presented. The alleged facts stated in those affidavits do not come before this court as facts established and found. It is found only that such affidavits were before the United States court as evidence on the hearing of the appellee's motion. Assuming them to be true, the letter which accompanied the transcript, directing the filing of the transcript "in pursuance of the removal," and the mere entry upon the docket of the appearance of one of the attorneys who was of counsel for each of the railroad companies, cannot be regarded as constituting a general appearance to an action against the appellee, if it be true that the taking of the removal did not amount to more than a special appearance, the party taking it having the right to raise in the United States court the question as to the jurisdiction of the person. Nothing having been done except the transmitting of the transcript and the directing of the filing thereof, the appearance of counsel should be regarded as, made for such purpose. The court overruled the motion to strike out the amended complaint and to dismiss the action, and at the same time, finding that the cause was wrongfully removed from the state court by the appellee, the court ordered the suit to be remanded to the state court, adjudging the costs of the removal against the appellee, it having caused the wrongful removal. This action of the court was a conclusive determination that the cause was improperly removed. The portion of its action which consisted of a denial of the motion made upon special appearance cannot be regarded as establishing a general appearance of the appellee. If the court had authority to sustain such a motion in a cause improperly removed, as to which we need not express an opinion, it did not conclude itself from remanding the cause at any time when it found it had no jurisdiction. Nothing preceding the remanding of the cause and the filing of the transcript in the state court precluded the appellee from questioning the jurisdiction in that court. Its motion therein and its answer in abatement, being made and filed upon its special appearance, did not confer jurisdiction over it.

The only matter remaining for consideration is the question as to the effect of the filing and the overruling of the motion to strike out two interrogatories propounded after the filing of the answer in abatement and the appellee's exception to that ruling. The interrogatories and the motion to strike out a part of them are not in the record, not having been saved by bill of exceptions. *Kling-*

ensmith v. Reed, 31 Ind. 389; *Dudley v. Pigg*, 149 Ind. 363, 48 N. E. 642; *Tilden v. Louisville, etc., R. Co.*, 157 Ind. 532, 62 N. E. 81; *Crystal Ice Co. v. Morris* (Ind. Sup.) 87 N. E. 502. Therefore, what we may know concerning the interrogatories and the proceedings relating to them is found in the special finding following the statement concerning the filing of the answer in abatement, as follows: "That after the filing of said answer the said plaintiff filed seventeen interrogatories to the defendant, to be answered under oath; that said defendant thereupon moved the court to strike out two of said interrogatories, which motion was by the court overruled, to which ruling the defendant excepted." Under the statute either party to a civil action may propound interrogatories, to be filed with the pleadings, relevant to the matter in controversy, and require the opposite party to answer the same under oath. Section 362, Burns' Rev. St. 1901. They may be proposed with a purpose to use the answers on the trial of the matter in controversy to which they relate, or to elicit answers on which to strike out a pleading of the opposite party as sham. *Combs v. Union Trust Co.*, 146 Ind. 688, 48 N. E. 16; *Tilden v. Louisville, etc., R. Co.*, supra. They may be filed at any time before the issues in the case are closed. *Sherman v. Hogland*, 73 Ind. 472. Interrogatories may be propounded when the matter in controversy is presented by an answer in abatement. *Combs v. Union Trust Co.*, supra. If the interrogatories which the appellee moved to strike out related to the matters presented by the answer in abatement, it is not perceived by us how the making of the motion and the exception to the ruling thereon would change its special appearance, made for the purpose of presenting the matter in abatement alone, into a general appearance to the action. We cannot assume that the interrogatories did not relate to matters set forth in the answer. It does not seem to be necessary to inquire whether the appellee, having filed its answer in abatement, might have moved to strike out interrogatories, subsequently filed, relating to the merits of the cause stated in the complaint, not expressly stating in the motion that it was made upon special appearance, without thereby making a voluntary appearance to the action generally.

Judgment affirmed.

HITCHCOCK v. COSPER.*

(Appellate Court of Indiana, Division No. 1.
Feb. 4, 1904.)

TRUSTS — AGENT FOR INVESTOR — EQUITABLE REMEDIES — DILIGENCE — INTEREST — LIMITATIONS — TERMINATION OF RELATION — DE-LAY.

1. Where, by agreement between the parties, one took possession of the funds of the other, and invested them as he saw fit, and made collections relative to the investments, he was liable as a trustee.

*Superseded by opinion in Supreme Court, 73 N. E. 264.

2. Where a trustee loaned trust funds to one whose property was mortgaged for more than its value, he was chargeable with the loss, though he acted in good faith.

3. Where, by agreement between the parties, one took possession of the funds of the other, and invested them as he saw fit, and he loaned a sum, taking a note in his own name, and delivered it to the other, the fact that she made no objection was not a ratification of the loan.

4. Where one who has charge of the funds of another for purposes of investment loans money, taking a note in his own name, the legal title to the note is in him, and the equitable title in the other.

5. Where a trustee for the investment of the others' funds negligently loaned a sum without sufficient security, though he acted in good faith, he was chargeable with interest from the time of the loan.

6. Where, by agreement between them, defendant took possession of the funds of plaintiff and invested them as he saw fit, and he loaned a sum on worthless security, limitations did not begin to run against an action against defendant for the sum negligently loaned, and lost, until the termination of the trust relation.

7. A demand for an accounting and settlement was necessary to terminate the trust relation.

8. By agreement between plaintiff and defendant the latter took charge of the former's funds for investment, and for six years made collections on investments and paid them over. One loan made the first year was not paid by the borrower for nine years, when plaintiff demanded an accounting and settlement. Defendant from time to time had advised that the borrower would pay. *Held*, in a suit against defendant for the amount of the note and interest, that there was no delay on plaintiff's part in making demand.

Appeal from Circuit Court, Noble County;
E. A. Bratton, Special Judge.

Suit by Emeline K. Cosper against Don R. Hitchcock. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

H. G. Zimmerman, for appellant. L. H. Wrigley, for appellee.

ROBINSON, J. Suit by appellee to recover money alleged to have been placed in appellant's hands to be invested. Upon a special finding of the facts the court stated conclusions of law, upon which judgment was rendered in appellee's favor.

The facts found are substantially as follows: Appellant is, since 1884, the son-in-law of appellee, whose husband died in 1893. That appellant's connection with appellee's business affairs commenced in 1890, when at his suggestion she purchased, through him as her agent, a mortgage and notes of \$1,000, which were transferred to appellee, but remained in appellant's hands until the spring of 1891, when he collected the same and paid the proceeds to appellee. Appellee's entire estate consisted of \$1,600. In November, 1892, appellee, at appellant's suggestion, placed in his hands \$600, which, it was "agreed between them at the time, he received as her agent, to be by him placed at interest for her." Appellee asked for no receipt and none was given. Appellant deposited the \$600 in bank to his own credit, and loaned to John

Freed \$200, to William Donat \$340 (which is the transaction in question in this suit), and the balance, of \$60, remained in his hands until a settlement between the parties in 1901. From the time appellant received the \$600 "continuously until the time of said settlement, defendant acted as plaintiff's adviser in her business affairs and as her business agent. That the relation which during said period existed between plaintiff and defendant with reference to plaintiff's money and her business affairs was one of continuing trust and confidence on the part of plaintiff in the defendant with reference to said matters. That after the death of plaintiff's husband, in 1893, and up to the time of such settlement, plaintiff depended upon defendant entirely in connection with her business affairs, and he transacted her business for her generally, collected her money for her, attended to the payment of her taxes, and made her returns to the assessor for taxation." Nothing was ever said or agreed between them about appellant's being compensated for such services. While so acting for appellee, appellant collected and paid over to her various sums of interest, and also collected for her one note for \$480, another for \$223, and another for \$250, which were all collected prior to 1896, except portions of the last-named note, which were paid in 1897 and 1898, all of which sums remained in appellant's hands and subject to his use until the settlement in 1901, appellee consenting thereto and having no written evidence from appellant therefor. In August, 1900, at appellee's request, an accounting was had with reference to the money belonging to appellee then in appellant's hands, amounting to \$1,013, and in the winter of 1901 appellant executed to appellee a note for \$900 in settlement therefor. No interest was charged against appellant for the money that had been in his hands. The Donat loan was not included in the settlement. Acting as appellee's agent, appellant made the Donat loan, taking a note of \$340 dated November 30, 1892, due 11 months after date, at 7 per cent. interest, signed by William Donat and his son Allen Donat, and payable to appellant in his individual name. There was nothing about the note to indicate that the money was appellee's. No part of the note has been paid. When appellant took the note, he knew appellee would depend on him to collect it, and he took the note payable to himself with the intention of collecting it and transacting all the business in connection with the loan, and its collection. That he has never taken any steps to collect the note, aside from soliciting payment from the maker. That within a day or two after the note was executed, appellant delivered it, without indorsement, to appellee, who took the same without objection, and has since had control and possession of it, except when she gave it to appellant at different times to collect. That when doubt was expressed,

when the note was given to appellee, about the note being collectible, appellant stated to appellee that the maker was honest and would pay. That upon different occasions after the note became due, the last of which was in the summer of 1901, appellee requested appellant to proceed and collect the note, and in each instance appellant advised her to wait, and that no suit be brought. That in September, 1901, appellee demanded of appellant that he account to and pay over to her the amount of the loan, which he refused to do, and denied all liability. On September 17, 1901, she made a written demand for the amount, with interest, which was refused, and liability denied. This suit was brought September 21, 1901. Appellant made the loan in good faith, believing Donat to be honest. That appellant, in 1890 and 1891, had loaned like sums of his own money to Donat to pay interest and life insurance premiums, which sums Donat had paid. That they belonged to the same fraternal order, and appellant felt a friendship and sympathy for Donat on account of his financial difficulties. That he made no examination of the public records, and made no inquiries as to his financial standing, and exercised no care or diligence in making the loan, aside from inquiring from Donat himself, who represented that the only lien against his land was an insurance company mortgage for \$1,800, and that after the payment of two or three more premiums on a policy on the life of Allen Donat the same would be matured, and the money used to discharge the mortgage debt. Appellant knew, when he made the loan, that Donat's wife was living and that he was a householder. Allen Donat has never owned any real estate, and when the note was given he owned only \$40 or \$50 worth of personal property, and has owned no greater amount since, except in 1893 and part of 1894 he owned personal property of the value of \$200 or \$250. In 1889 and until 1895 William Donat owned 157 acres of land, 117 acres in one tract and 40 acres in another. In 1889 he and his wife executed a mortgage on the 117 acres to an insurance company to secure a note for \$1,800, and the interest coupon notes, also four premium notes for \$159.19 each. That in the same year he and his wife executed a mortgage on both tracts for \$700 and interest notes. That in 1889 and 1890 he and his wife executed other mortgages to secure notes aggregating \$791.87. That each of these mortgages was duly recorded within 15 days. That when the note in question matured, Donat owned personal property to the value of about \$500, and at no time thereafter owned any greater amount. In 1894 the insurance company brought suit to foreclose its mortgages, making the junior mortgagees parties, and under a decree the insurance company purchased both tracts of land for \$3,224.58. That the lands were not redeemed, and a sheriff's deed was executed to the

company in August, 1895. In 1892 both tracts of land were worth \$8,000.

As conclusions of law the court stated: (1) That the action is not barred by the statute of limitations; (2) that appellant is liable to appellee for the amount of the Donat loan, \$340; (3) that appellant is also liable for \$201 interest, that sum being 6 per cent. interest from the date of the loan to October 21, 1902; (4) that appellee is entitled to judgment for \$541. Judgment was rendered for that amount.

Appellant's objections to the complaint will be considered in connection with the questions raised by the exceptions to the conclusions of law.

There are facts stated in the complaint which show, and the facts found by the court show, that appellant, from the time the loan was made, in 1892, until September, 1901, occupied toward appellee a relation of actual and continuing trust and confidence. This relation was created by express agreement. The findings very clearly show that the equitable obligations resting upon appellant with respect to appellee's money and business affairs were equally as strong as those resting upon a trustee, and a court of equity should accord to her the remedies given to a cestui que trust. Not only do the findings show that he undertook to loan the money, but also to collect the money when due. From the death of her husband, in 1893, until in 1901, appellee depended entirely upon appellant in her business affairs. He knew that appellee would depend upon him to collect the note, and he took the note payable to himself with the intention of collecting it and transacting all the business in connection with the loan and its collection. After the note became due, and during the subsequent years, he assumed to look after its collection. Not only did he fail to take sufficient security when he made the loan, but he did nothing towards trying to collect it.

It cannot be said that when the loan was made it was such a loan as an ordinarily prudent man, acting in his own affairs, would make. The security was practically worthless, and an examination of the public records would have disclosed that the property of the principal was incumbered by mortgages securing an amount far in excess of the total amount of appellee's estate. The security afforded appellee by a mortgage given when the loan was made would have been valueless. *Slauter v. Favorite*, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106. See *Shuey v. Latta*, 90 Ind. 136.

Nor can it be said that appellee acquiesced in the loan as made, or in any way ratified it. It is true she received the note from appellant a few days after it was executed, without objection, and retained possession of it except at times when she would give it to appellant to collect. The finding that she made no objection is not a finding of

the fact that she ratified the transaction. "The silence of a party," said the court in *Haggerty v. Juday*, 58 Ind. 154, "with a knowledge of what has been done for him in his name, is evidence of ratification, of more or less force, according to the circumstances in which it occurs." *City of Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784. Moreover, it does not appear that she received the note with a knowledge of all the facts. Appellant was not to secure for her a borrower, but was to make the loan and determine for himself the sufficiency of the security.

Appellant took the note payable to himself. He delivered it to appellee without indorsement. By such delivery appellee acquired only an equitable title, the legal title to the note remained in appellant. *Keller v. Williams*, 49 Ind. 504; *Foreman v. Beckwith*, 73 Ind. 515.

Appellant's counsel also argues that appellant is not chargeable with the interest, if liable at all, except from the date of demand. If appellant was in default only from the time the demand was made, in 1901, he should be chargeable with interest only from that time. But from the findings it is clear he was in default from the date of the note, when he paid appellee's money over to Donat. The relation that was entered into by agreement between the parties continued until 1901. It was a breach of the duty which he assumed to perform by virtue of this agreement and the relation which the findings show existed between him and appellee—to loan the money on what was practically the individual note of the borrower. It is true it is found that he acted in good faith. But from the facts found it certainly cannot be said that he used proper care and diligence. He may have acted under a conviction that he was doing best for the interests of appellee, but it is found that he exercised no care or diligence in making the loan, aside from making inquiries from the borrower himself. Having made a loan that was not proper, and at different times having advised that no effort be made to collect it, making no effort himself to collect it, although he knew it was his duty to do so, he is liable for such losses as resulted from his acts, which is the amount of the loan, with the legal rate of interest thereon from the time he was in default.

Nor is the action barred by any statute of limitation. Whether the facts show an express continuing trust in the strict sense of the term or not, they do show that there was a relation in the nature of a trust, which, as we have said, should be governed by the same rules. Appellant received the fund of \$600 at his own suggestion, and agreed to loan it, giving no receipt, but assuming absolute control over it, and in fact retaining part of it in his hands until the settlement in 1901. Before the note fell due, appellee was depending upon him entirely in

her business affairs. The relation between the two grew stronger, and by 1898 he had in his possession over \$1,000 of appellee's money, the greater part of her estate. He held this money until in 1901, with appellee's consent, without interest, and without giving appellee any written evidence therefor. In the meantime she was following his advice concerning the Donat loan. This relation continued until 1901. It certainly cannot be said that no trust relation existed. No time was fixed when this relation should terminate, and it was manifestly intended, when the relation was entered into, that it should continue indefinitely, and it did not in fact terminate until 1901. It cannot be said from the finding that appellee should have terminated the relation long before she did. It is manifest that neither party desired to terminate it. We think a demand was necessary on appellee's part to terminate the relation between the parties. There was no delay, within the meaning of the law, on appellee's part, in making the demand. As there was no repudiation of the relation prior to the demand, the statute did not begin to run until appellee made the demand as shown in the findings. See *High v. The Board, etc.*, 92 Ind. 580.

Judgment affirmed.

(32 Ind. App. 398)

BLANCHARD-HAMILTON FURNITURE CO. v. COLVIN.

(Appellate Court of Indiana. Feb. 5, 1904.)

MASTER-INJURY TO SERVANT-STATE FACTORY INSPECTION LAWS-FAILURE TO PROPERLY GUARD MACHINE-NEGLIGENCE-THEORY OF CASE-COMPLAINT-INSTRUCTIONS-EVIDENCE-ADMISSIBILITY-CONTRIBUTORY NEGLIGENCE-QUESTION FOR JURY.

1. Where a complaint is uncertain, the remedy is by motion to make more specific.

2. Where more than one cause of action is stated in a single paragraph of complaint, the remedy is by motion to separate or by demurrer for misjoinder.

3. In an action by an employé for personal injuries received in operating a machine, predicated on Acts 1899, p. 234, c. 142, § 9 (*Burns' Rev. St. 1901, § 7087i; Horner's Rev. St. 1901, § 5169k*), making it the duty of manufacturing establishments to have the machinery properly guarded for the use of operators, a complaint alleging a failure to properly guard the machinery is not insufficient as pleading a conclusion.

4. An appellate court will look to the whole record to determine the theory of the case.

5. When facts pleaded may be construed as proceeding on different theories in the statement of the cause of action, the construction placed thereon by the trial court will be the theory on which they will be considered by the appellate court on appeal.

6. In an action by an employé for personal injuries received in operating a machine, predicated on Acts 1899, p. 234, c. 142, § 9 (*Burns' Rev. St. 1901, § 7087i; Horner's Rev. St. 1901, § 5169k*), making it the duty of manufacturing establishments to have the machinery properly guarded for the use of operators, a charge which recites the statutory duty of the employer to

¶ 1. See Pleading, vol. 29, Cent. Dig. § 1174.

properly guard the machine on which the employé is assigned to work, and states that, if it was not properly guarded by some one for the defendant, the use of it by the plaintiff cannot be regarded as negligence on his part, is not cause for reversal as invading the province of the jury to determine under the existing circumstances the negligence of the plaintiff, where the jury were told in other instructions that the plaintiff could not recover if his negligence contributed to the injury.

7. Under Acts 1899, p. 234, c. 142, § 9 (Burns' Rev. St. 1901, § 7087i; Horner's Rev. St. 1901, § 5169k), making it the duty of manufacturing establishments to have machines properly guarded for the use of operators, the duty is not dependent on the request of the employé to have the machines guarded.

8. In an action by an employé for personal injuries received in operating a machine, predicated on Acts 1899, p. 234, c. 142, § 9 (Burns' Rev. St. 1901, § 7087i; Horner's Rev. St. 1901, § 5169k), making it the duty of manufacturing establishments to properly guard machines for the use of operators, the court charged that if defendant had instructed the plaintiff as to the adjustment of the guard and operation of the machine in doing other work than that which he was doing when hurt, and if he discovered, when he understood how to do the work, that the guard should be readjusted, then he was not required to do anything in the way of readjustment or in connection with the work he intended to do, until or unless he was further instructed. *Held*, that the objection of the defendant that the charge proceeded on the theory that plaintiff was an inexperienced employé, and entitled to be instructed as to the particular work he was required to do, whereas the theory of the complaint was that he was an experienced employé of mature years, is without merit, where defendant alleged in its answer that it had instructed plaintiff in the use of the guard, and that he was injured because he refused to use it.

9. Where the defense was that a proper guard had been furnished, and the construction of the guard and the manner of its attachment to the machine were particularly described to the jury, though it was improper to permit plaintiff, while testifying in his own behalf, to answer a question asking what class of work the guard that was furnished was made to be used on, the ruling was harmless, it being for the jury to determine whether it was a proper guard.

10. A letter from the state factory inspector to the defendant, notifying defendant to comply with the law by requiring it to provide guards for its machines, including the particular kind of machine used by plaintiff, was admissible, though the defendant had, after receiving the letter, changed its name, and though the notice contained in the letter was not one contemplated by the statute.

11. The defense being that a proper and sufficient guard was furnished to plaintiff for use on a machine, the refusal of the court to permit one of defendant's witnesses to answer a question whether he had ever heard any complaint from plaintiff that the guard furnished could not properly be adjusted to the machine, which question was put for the purpose of showing that plaintiff had not made any such complaint, is not cause for reversal of a judgment for plaintiff, the plaintiff having testified that he never made any such complaint.

12. Where there was no evidence that defendant was insured against accidents, error in permitting a witness for defendant to be asked, and requiring him to answer, if he remembered the circumstance of an agent of an insurance company that had insured defendant against accidents coming to defendant's factory after the accident, is not cause for reversal of a judgment for plaintiff, since it was proper for the purpose of laying a foundation for contradicting the witness, on which ground plaintiff's

counsel based their right to ask the question and have it answered.

13. Refusal of the court to permit a witness for defendant to state what the duty of a man was who operated the particular kind of machine on which plaintiff was injured was proper, all of the facts connected with the operation of the machine, and the conduct of plaintiff and defendant as master and servant with reference thereto, having been detailed to the jury.

Appeal from Circuit Court, Shelby County; Douglas Morris, Judge.

Action by Stephen Colvin against the Blanchard-Hamilton Furniture Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hood & Adams, for appellant. Carter & Morrison, for appellee.

COMSTOCK, J. Appellee sued and recovered judgment for \$1,650 in the court below, for injuries sustained by him while working for appellant on a frizzer which was not properly guarded, and which injuries would not have happened had the machine been so guarded. The action is based upon a statutory liability. Burns' Rev. St. 1901, § 7087i; Horner's Rev. St. 1901, § 5169k; Acts 1899, p. 234, c. 142. The errors relied upon for reversal are the action of the court in overruling appellant's demurrer for want of facts to the complaint, and its motion for a new trial.

The complaint is in one paragraph. It contains, among other things, the following: "That during all of said time said company was required by law to properly guard its machines and said frizzer, and to put upon them and it proper safeguards; that said guards were so required for the purpose of protecting from injury the men who worked on such machines; that, on the 24th day of October last, the factory in which said machines were used was inspected by the officer authorized and directed by law to make such inspection, and on or about the 28th day of said month said defendant was directed by said officer to provide guards for rip-saws, joiners, and frizzers; that said defendant neglected, failed, and refused to perform its said duty, and also to place or provide guards for said frizzer or to properly guard the same; that on the 13th day of January, 1902, the plaintiff was employed by the defendant in said factory; that under the direction of the defendant it was his duty to work at said machine known as a 'frizzer'; that while he was engaged at said work it was his duty to place pieces of wood on the table on said machine and to run them over the same; that portions of such wood were cut by such revolving bits; that on said day no guard of any kind was provided by the defendant to be used by him while he was working at and operating said machine on said work, nor did he have a guard which he could use on said frizzer while he was doing the work he was then

doing, and said machine was then wholly unguarded, and of which the defendant knew." The objection made to the complaint is that it "does not travel on any definite theory." It is claimed that it is uncertain. "It is uncertain from the allegations whether the plaintiff attempted to allege that no guard was furnished, or that the machine was guarded by a defective guard. If the purpose was to allege the furnishing of a defective guard, it was plaintiff's duty to allege specifically in what particular the guard was defective, so as to give notice to appellant of the exact theory upon which the appellee relied for recovery. The allegation that the machine was not properly guarded is pleading a conclusion, and not an averment of fact."

Uncertainty in a complaint is reached by a motion to make more specific. *R. R. v. Wynant*, 119 Ind. 539, 20 N. E. 730. If more than one cause of action is stated, the remedy is by motion to separate or by demurrer for misjoinder. If the complaint alleges the failure of a duty imposed by statute, it is sufficient to allege such failure in the language of the statute imposing the duty. *R. R. Co. v. Brown*, 44 Ind. 411; *Buehner v. Feulner* (Ind. App.) 63 N. E. 240; *Monteith v. Kokomo, etc., Co.* (Ind. Sup.) 64 N. E. 610, 58 L. R. A. 944. The statute required the appellant to "properly guard" the machine. This is the statement of a fact. The allegation that it was not properly guarded is not the statement of a conclusion. The leading allegations of a pleading determine its theory. An appellate court will look to the whole record to determine the theory of a case. *Gas Co. v. Small*, 150 Ind. 435, 47 N. E. 11, 50 N. E. 476; *Carter v. Lacy*, 3 Ind. App. 57, 29 N. E. 168; *Shew v. Hews*, 128 Ind. 476, 26 N. E. 483.

It is averred in the complaint "that no guard of any kind was provided by the defendant to be used by him while he was working at and operating said machine on said work, nor did he have a guard which he could use on said frizzer while he was doing the work he was then doing, and said machine was then wholly unguarded, all of which the defendant knew"; that the injury was sustained without any fault or negligence on the part of the appellee, and was due wholly to the fault of the defendant. In the second paragraph of the answer the appellant says that it "had provided for use on said machine, at and before the time of his alleged injury, a guard to be placed upon said machine, and which before the time of said injury had been placed thereon, and which guard was the best known for use upon said machine, so as to be full and ample protection to plaintiff while working with said machine; * * * that said plaintiff would not have been injured if he had obeyed the instructions of this defendant in the use of said guard." In the third paragraph of the answer the appellant says that the ap-

pellee was "fully aware of the dangers and hazards of operating the same [the frizzer] without 'a proper guard adjusted to and attached to said machines'; and that it 'provided him with a proper and sufficient guard,' that could be adjusted and placed on the machine, and if he had used said guard, which was the best known for the protection of persons using said machine, he would not have been injured."

The court gave instruction 16, in which it said, "If you further find that at the time such inspector or deputy gave such order, or at any time before such injury, there was provided by defendant or its employees at its instance a suitable guard for such machine, which would protect the plaintiff from such injury while doing the work at which he was engaged when injured," etc. Also instruction 7, in which it said, "You may consider whether or not there was at hand a suitable guard which he had a right to use, by the use of which he might have avoided the injury." And in instruction 8 the following language is used: "Notwithstanding it was the duty of the defendant, at the time plaintiff received the injury complained of, to provide a suitable guard for plaintiff's use and protection while operating the machine by which he was injured." In instruction 7 the court told the jury, "If you find from the evidence that a guard, and which was a proper kind of a guard," etc.; also, "If such a guard was made in the manner and under the circumstances as set out in this instruction, and if it could have been used by the plaintiff with safety at the time he received the injury," etc. All said instructions were given at appellant's request.

In the admission of evidence the counsel for appellant said, with reference to the guard furnished, "We want to show that the guard could have been used, and it was his duty to use it for the purpose of making application to that work." The court then said to counsel, "Your object is to prove that the particular guard in question could have been used safely in the work?" to which the counsel responded, "Yes, sir; in doing this particular work."

These extracts from the record show that the case was tried upon the theory, not that no guard was furnished, but that it was the duty of the appellant to properly guard the frizzer. When the facts pleaded may be construed as proceeding upon different theories in the statement of a cause of action, the construction placed upon them by the trial court will be the theory upon which they will be considered by this court upon appeal. *Calloway v. Mellett*, 15 Ind. App. 369, 44 N. E. 198, 57 Am. St. Rep. 238. The complaint states a good cause of action upon the theory that no proper guard was furnished or that no guard was furnished, and is therefore sufficient to withstand a demurrer. *Kreag v. Anthus*, 2 Ind. App. 482, 28 N. E. 773.

Appellant discusses the following reasons

set out in the motion for a new trial, viz.: The verdict of the jury is not sustained by sufficient evidence; it is contrary to law (under these specifications appellant contends that the evidence of the appellee shows that his own conduct contributed to his injury); that the court erred in refusing to give as the law of the case instructions 2, 3, 10, and 11, and each of them, requested by appellant, and in giving to the jury instructions numbered 5, 9, 10, 12, and 14, and each of them.

Said instructions 2, 3, 10, and 11 were each of them addressed to the question of appellee's contributory negligence. In so far as they correctly stated the law, the substance of them was covered by others given. The instructions to the jury upon this question were fair and full.

Said instruction 5 given to the jury is as follows: "Before the plaintiff can recover in this cause, the evidence must have shown, by a fair preponderance thereof, that before the commencement of this action the defendant used in its factory a machine known as a 'frizzer,' as described in the complaint; that plaintiff was employed by defendant to operate said frizzer; that, while so operating said machine, his left hand was caught therein, and one or more of his fingers on said hand were cut and injured; that the proximate cause of such injury was the failure of the defendant to provide a proper guard for said machine, for plaintiff to use while engaged in the work he was doing at the time of the injury." The following portion of said instruction is claimed to be objectionable: "that the proximate cause of such injury was the failure of the defendant to provide the proper guard for such machine for plaintiff to use while engaged in the work he was doing at the time of the injury." Appellant contends that the action was upon the theory that no guard was furnished, and that appellee was not entitled to recover upon the theory that no proper guard was furnished, and that he was not, therefore, entitled to the foregoing instruction, which recognized his right of recovery in a case in which a guard had been furnished which was not a proper one. The action was upon the theory that no guard had been furnished to be used on the work then being done by appellee; in other words, no proper guard. We cannot admit appellant's premise as to the theory of the complaint.

Instruction 9 is as follows: "It was the duty of the defendant to properly guard the machine on which the plaintiff was injured, for every kind of work he was required to do on it, if it could have been guarded. If the defendant did not properly guard said machine for every kind of work the plaintiff was required to do upon it, if it could have been so guarded, and if it was not properly guarded by some one for the defendant for every kind of work the plaintiff was required

to do upon it, if it could have been properly guarded, his use of such machine without a guard must not be regarded as negligence by him." The objection urged to this instruction is that, if the jury found that no proper guard was furnished, then the appellee was not guilty of contributory negligence, no difference what the circumstances were at the time appellee received his injuries. It is claimed that the right of the jury to determine, under the existing circumstances, the negligence of appellee in attempting to use the machine without guard, is invaded. The instruction recites the statutory duty of the employer to properly guard the machine upon which the employe is assigned to work, and, if it was not properly guarded by some one for the defendant, the use of it must not be regarded as negligence. The instruction does not refer to the manner in which the appellee used the machine. There is no evidence that the mere use without guard was negligence.

We bear in mind the difference between the assumption of risk and negligence. The former is the subject of contract; the latter is not. They are separate and distinct. *Coal Co. v. Pollard* (Ind. Sup.) 62 N. E. 495; *Chair Co. v. Fuelnor* (Ind. App.) 63 N. E. 239. A machine being one well known and in common use, in good repair, without defect, the danger necessarily incident to its use is included in the assumption of risk, and not in negligence. The danger necessarily incident to the use of the machine in question without a guard is an assumption of risk. If in so using it appellee used care reasonably commensurate with the risk assumed to avoid injury, he cannot be charged with negligence. *Narramore v. Ry. Co.*, 96 Fed. 298, 37 O. C. A. 499, 48 L. R. A. 68; A. & E. Ency. of Law (2d Ed.) vol. 20, pp. 112, 116.

Instructions must be considered as a whole. Instructions 6, 7, and 8, given, informed the jury that the appellee could not recover if his negligence contributed to his injury. The instructions as a whole could not have misled the jury.

Instruction 10, given, reads: "It was not the duty of the plaintiff to furnish a guard or any part of the same to be used on the machine on which he was injured, nor was it his duty to ask the defendant to properly guard said machine for the various kinds of work he was required to do, nor to complain to it because it was not so guarded." There was no error in giving this instruction. It was the duty of the appellant to properly guard this machine. This duty is not dependent upon appellee's request. *Burns' Rev. St. 1901*, § 70871; *Coal Co. v. Pollard*, supra; *Coal Co. v. Estievenard* (Ohio) 40 N. E. 726.

Instruction 12 tells the jury, in substance, that if the appellant had instructed the appellee as to the adjustment of the guard and the operation of the machine in doing other work than that which he was doing when

hurt, and if he discovered, when he understood how to do said work last mentioned, that the guard should be readjusted, then he was not required to do anything in the way of readjustment of the guard or in connection with the work he intended to do until or unless he was further instructed by the appellant. Against the twelfth instruction it is urged that it proceeds upon the theory that appellee was an inexperienced employé and entitled to be instructed as to the particular work he was required to do, whereas the theory of the complaint is that he was an experienced employé of mature years. This being the case, appellant did not aver it had no duty in the way of instructions, and therefore the instructions were not pertinent to the use. This objection is fairly met in the fact that appellant, in both its second and third paragraphs of answer, alleged that it had instructed the appellee in the use of the guard, and he was injured because he refused to use it. In addition, the court, at the request of the appellant, gave instruction 13, in which it is said: "If you find that the defendant, by its proper employés, gave to the plaintiff full instructions as to the proper use of the machine mentioned in the complaint, . . . then I instruct you that it was his duty, at and before the time he received the injury, to obey such instructions, . . . and if he failed to do so, and such failure contributed to the injury sustained by the plaintiff, he cannot recover in this action." Appellant had the right to instruct appellee as its servant, and to require him to obey the instructions, without reference to his experience or inexperience.

The same criticism is made of instruction 14 as of the twelfth. It is contended that it was appellee's duty to adjust the guard, and, when he discovered that it must be readjusted before he could do the work he desired to do, it was his duty to undertake to readjust it without further instructions from appellant. At least, if he could not readjust the guard, he could have called upon appellant's servants to do so for him, and that his proceeding to do the work without attempting to readjust the guard and without calling for assistance in the matter was negligent conduct on his part. It appears that the guard was not suitable for the work in hand, but appellant contends that it could have been readjusted with material on hand, and made to answer the requirement. The statute makes it the duty of the employer, and not the employé, to properly guard dangerous machinery.

To appellee, while a witness in his own behalf, the following question, over the objection of appellant's counsel, was propounded: "What class of work was the guard made to be used upon, if you made it to be used upon any certain kind of work?" to which appellee answered: "Made it to use on china closets, tops and bottoms and shelves—

china-closet work." It is insisted that the question called for a conclusion, and not for a statement of a fact; that it was not material what use he intended to be made of it, but it was material upon what use could have been made of it. We may concede that the question was improper, yet as the construction of the guard and its attachment to the frizzer was particularly described to the jury, it was for them to determine, under the evidence, whether it was a proper guard, and the ruling was harmless.

Appellant insists that the court erred in permitting the introduction in evidence of a letter written by D. A. McAbee, chief inspector of the state of Indiana, to the Blanchard Novelty Works, of Shelbyville, Ind. The said letter, in substance, notified the Blanchard Novelty Works to comply with sections 2, 7, and 9 of chapter 142, p. 234, of the Laws of 1899, by requiring of the novelty works that it should provide guards for all rip-saws, joiners, and frizzers, and also stating that if such requirements should not be complied with within 20 days of the date of the letter, which bore date of October 28, 1901, legal proceedings would be commenced against said firm. The first objection urged against the introduction of the letter is that it was not addressed to the appellant, and did not purport to be a notice to the appellant, and was therefore inadmissible as against the appellant. The second objection to its introduction was that the statements and declarations of the state factory inspector are not competent evidence in any way against the appellant, it not being bound by the ex parte declarations of the state inspector. In support of the first objection, the letter shows for itself that it was not intended as a communication to the appellant. In support of the second objection, even if addressed to the appellant, the notice was not such a notice as the law authorized the state inspector to give, and therefore it was his mere ex parte declaration, and not binding upon the appellant. The duties of the state inspector are set out in Acts 1899, p. 234, c. 142, § 9. This section provides that all vats, pans, saws, and machinery of every description shall be properly guarded, and no person shall remove or make ineffective any safeguard around or attached to any such machinery while the same is in use, unless for the purpose of making repairs, and in such case safeguards shall be immediately replaced. The section further provides that the use of the machinery may be prohibited by the chief inspector by attaching a notice to that effect to the machine itself, should he regard it dangerous. Such notice must be signed by the chief inspector, and cannot be removed until the required safeguards have been furnished, and such machine shall not be used in the meantime. The above are the only provisions of the statutes as to any kind of writing or

notice being furnished by the chief inspector; and no such notice as that contained in the letter is authorized by law to be given by the chief inspector. They allege, therefore, that the letter was an ex parte unofficial act on the part of the chief inspector, and did not bind or affect the appellant in any way. It is pointed out that the complaint charges, and the undisputed evidence proves, that the injury of which the appellee complained was received by him on the 13th day of January, 1902; that appellee states in his testimony that the guard furnished for the machine on which he was hurt was furnished in July or August of the year before the injury; the letter bore date of October 28, 1901; that it is seen that more than two months after the guard had been furnished, and while the same was in use on the particular machine referred to, the chief inspector wrote the letter in question, which inferentially ignores the existence of the guard, and gives notice that one must be furnished within 20 days from the date of the letter. By the introduction of the letter the jury by it are led to infer that the guard then on the machine was not a guard, and he had ordered the machine guarded. The evidence shows that the particular guard was exhibited to and examined by the inspector. The notice in question was received by the president of appellant before appellee's injury, and filed in the letter book of appellant. When the inspection of the factory was made, it was called "The Blanchard Novelty Works," to which address said letter was mailed. It was received by the party for whom it was intended, and its admission was proper, as showing notice to the appellant that the machine was not properly guarded, although the notice given was not the one contemplated by the statute.

The court refused to permit one Knipper, a witness for appellant, to answer the following question: "I will ask you if at any time you heard any complaint from the plaintiff that that bolt was too short, or anything of that kind, or that this guard could not be properly adjusted to the machine to do any kind of work that he had to do," and refused to permit the witness to state in response thereto that appellee had made no such statement or complaints. This action of the court could not have prejudiced the rights of appellant, for appellee himself testified that he never informed anybody that the bolt of the guard was not long enough, and "never said anything to them about finding me a guard."

It is claimed that it was error to permit appellee to ask said witness Knipper the following question, "Do you remember the circumstance of agent of an insurance company that had the defendant insured against accidents, together with a shorthand reporter, coming to the factory last January after the accident?" and in permitting the witness to answer, "I do." It is insisted that

the question assumes, without the warrant of any testimony, that appellant was insured against accidents. Appellee justifies the introduction of this evidence upon the ground that the description of the agent was for the purpose of identifying the time and person; that the question was asked for the sole purpose of laying the foundation for impeachment of the witness by showing that he made statements to such agent contrary to statements he made while testifying as a witness, and that such statements were taken down by such reporter. The record shows that the witness did, upon the occasion named, make statements in reference to the guard. While proper to lay the foundation to contradict the witness in reference to insurance, it was improper. For this error we do not feel justified in reversing the judgment.

It is claimed that error was committed in refusing to permit said witness Knipper to answer, "What was the duty of a man who operates a frizzer?" and in refusing appellant's offer to prove, in answer thereto, "that the duty of a frizzer was to oil the machine, keep it clean, and, if the work to be done required the use of a guard, that it was the operator's duty to adjust the guard and take it off and put it on as the work which he was to do requires." Ultimately the duty of appellee was to be determined by the jury under all the facts of the case. There may have been rules of appellant which it would have been the duty of appellee to obey. Whether he had obeyed such rules would be determined by his conduct, and not by expert testimony. What was said to appellee by way of instruction was the proper subject of inquiry. Ordinarily an expert cannot testify upon a matter capable of being explained, concerning which men in the ordinary walks of life would usually be capable of forming a correct opinion if they were informed as to the facts upon which the opinion would have to be based. All the facts connected with the operating of the frizzer were detailed to the jury, and the conduct of the appellee and the appellant, as master and servant, with reference thereto. The opinion sought could not have informed the jury of anything which they did not know from the evidence. The reciprocal duties of employer and employe are matters of contract, either express or implied. The execution of the contract is to be determined by the jury, and is not the subject of proof by opinion evidence.

Appellant urges that the verdict is not sustained by sufficient evidence. We find that there is evidence fully supporting the verdict. Nor can we concur in the claim of appellant that the evidence shows that appellee was guilty of contributory negligence. That question was submitted to the jury under proper instructions, and decided adversely to appellant. In short, the jury have found the appellant negligently failed to per-

form its statutory duty, to the injury of appellee, and that appellee's negligence did not contribute to his injury.

Judgment affirmed.

HENLEY, C. J., and ROBINSON, BLACK, and ROBY, JJ., concur. WILEY, P. J., absent.

(32 Ind. App. 364)

FRY et al. v. LAWSON et al.

(Appellate Court of Indiana, Division No. 1.
Feb. 2, 1904.)

DOWER—CHILDLESS SECOND WIFE—INTEREST OF CHILDREN—PETITION FOR SALE OF LANDS—SUFFICIENCY—ESTOPPEL.

1. 2 Rev. St. 1852, § 89, p. 269, c. 10, provided that the court might order a sale of any real estate of a decedent for the payment of purchase money. Section 17 (1 Rev. St. 1852, pp. 250, 251, c. 27) provided that on the death of a husband one-third of his real estate should descend to the widow, free from demands of creditors. *Held*, that it was the duty of an administrator to apply all the personal assets to pay liens on the land, to the exclusion of the general creditors, and to apply the proceeds of the sale of two-thirds of the husband's real estate, if necessary, to that purpose.

2. 2 Rev. St. 1852, § 89, p. 269, c. 10, provided that the court might order the sale of any lands of a decedent for the payment of purchase money. Section 17 (1 Rev. St. 1852, p. 250, c. 27) gave the widow one-third of her deceased husband's real estate in fee simple, free from all demands of creditors, and section 24 (Id. p. 251, c. 27) provided that if a man marry a subsequent wife and has no children by her, but has children alive by a previous wife, the land which at his death descends to such wife shall at her death descend to his children. At the time a petition for a sale of lands was presented, there was a second childless wife of a deceased husband living, and children by a former wife, and the statute had been construed as meaning that when a man left a second childless wife, but children by a previous one, the widow, as against creditors, took the same share as the first wife. The petition stated that at his death deceased "owed nearly all the purchase money"; that the administrator had paid \$900 of the purchase money and paid \$3,000 of debts, and that the real estate was appraised at \$1,300. *Held*, that the petition was insufficient to warrant an order for the sale of all the real estate, including the widow's third interest, inasmuch as the petition did not show what amount was owing on the purchase money, and did show that more than sufficient assets had come into the hands of the administrator to pay the purchase money.

3. A finding on such petition that the allegations were true, and that the lands were liable as assets for the payment of debts of the estate, could not be construed as a finding that the lands were liable for the payment of purchase money.

4. All the land of a decedent having been unwarrantably sold, because such sale was not necessary to raise funds to pay the purchase price, the receipt by the children of deceased's first wife of money derived from the sale would not estop them from claiming one-third of the land on the death of the second wife, they having no estate when the sale was made, and being in no position to object to the petition and order.

Appeal from Circuit Court, Hamilton County; John P. Kemp, Special Judge.

Suit by Albert Fry and others against John

Lawson and others for partition and to quiet title. From a decree in favor of defendants, plaintiffs appeal. Reversed.

Gavin, Davis & Gentry and William Booth, for appellants. Roberts & Vestal, for appellees.

ROBINSON, J. Suit by appellants for partition and to quiet title.

Error is assigned upon the conclusions of law, upon a finding of facts substantially as follows: John Stern died intestate in the year 1852, the owner in fee of the northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter of section 35, township 19 north, range 5 east, and other lands, in all 115 acres, leaving, as his only heirs, his widow, Elizabeth Stern, and four children, William H. Stern, Elizabeth Wood, John Stern, Jr., and Eli Stern. Sixty acres, being 30 acres off of each 40 acres, were awarded to the widow Elizabeth as her dower interest in the whole 115 acres. Elizabeth Stern afterward, in the year 1864, married Charles O. Fry, who afterwards purchased the interest of the four children, entered into possession, and so continued until his death, claiming to be the sole owner, subject to the dower interest of Elizabeth. Charles O. Fry died intestate in 1868, leaving surviving him his widow, Elizabeth, she being a childless second wife, and Albert Fry, William Fry, Isaac Fry, Abraham L. Fry, Oliver Fry, Melissa Shaffer, and Arena Wolf, his children by a former wife. Arena Wolf died intestate in 1894, leaving William Wolf as her only heir. On January 23, 1873, Andrew J. McKenzie, the duly appointed administrator of the estate of Charles O. Fry, deceased, filed in the court of common pleas his petition to sell the two 40-acre tracts above described, making defendants thereto the seven children of the decedent. Elizabeth Fry was not made a party. Afterwards, in the same month, the administrator filed an amended petition, alleging, among other things, that Fry died the owner in fee of the real estate, and that the two 40-acre tracts were "liable to be made assets for the payment of debts"; that decedent owed "nearly all the purchase money" for this land at his death, that he left surviving him his widow, Elizabeth Fry, and his children; that since his death the administrator had paid about \$900 on the purchase money on such real estate; that prior thereto there had come into his hands about \$1,300 personal property, and also that he had received from the sale of other real estate, sold prior thereto, the sum of \$1,800, and that he had paid over \$3,000 of the debts which had been reported to and confirmed by the court; that it was alleged in the amended petition that Charles O. Fry died the owner of the real estate; "wherefore, he says, the widow, 'Melinda Shaffer,' is not entitled to any interest in the real estate so purchased by Fry in his lifetime," but that

she is the owner of a life estate in 60 acres thereof which she inherited from her former husband, Stern; that the amended petition also averred that there were \$4,000 of outstanding debts against the estate at the time of the death of Fry, and that the debts at the time of the filing of the amended petition amounted to \$800 or \$900; that the real estate was appraised at \$1,300, subject to the life estate of the widow, Elizabeth, in the 60 acres; that there were no averments in the petition, or amended petition, in relation to unpaid purchase money or the payment of the purchase money by the administrator, except the averment before alleged. The adult defendants defaulted, and the infant defendants, Abraham L. Fry, Oliver Fry, and Albert Fry, answered by guardian ad litem; that the court found that the "material allegations in said amended petition were true, as therein alleged"; that the decedent Fry, in his lifetime, purchased the two 40-acre tracts, and "that the administrator had paid about the sum of \$900 on the purchase price" thereof; that the "lands were liable as assets for the payment of the debts of said decedent's estate; and that it was necessary to sell said lands, as in the petition prayed for, for the payment of the debts against said decedent's estate." Afterwards, in May, 1873, the administrator sold at private sale, pursuant to the decree, the two 40-acre tracts to Jesse Wood and Elizabeth J. Wood for \$1,500, which sale was approved and deed made; that the purchasers in good faith believed that the fee in such lands was being conveyed to them by such deed; that there was no finding by the court in relation to the unpaid purchase money or the payment of unpaid purchase money by the administrator, other than above set out. In April, 1872, the administrator filed his current report, showing that assets had come into his hands in the sum of \$3,537.87, which sum included rents of real estate in the sum of \$75.75, and that he paid out on debts of the estate \$3,176.84, leaving a balance in his hands of \$361.02, which report was approved. In April, 1875, the administrator filed his final report, which was afterwards approved, showing that he had collected the purchase price of the real estate sold, in the sum of \$1,500, with interest in the sum of \$60; that he had collected rent of real estate in the sum of \$131.27, making a total amount, including the balance of \$361.02 on hand, of \$2,052.29; that he had paid out, on debts and expenses of administration, \$1,596.77, leaving a balance of \$456.02, which was paid into court for distribution, and the administrator discharged. This amount was paid by the clerk to the heirs of Charles O. Fry, deceased, the appellants herein, in shares of \$65.15 each, and the same was received and receipted for by Isaac Fry, administrator of the estate of Arena Wolf, deceased, William and Isaac Fry in person, by Melissa Shaffer, by her attorney in fact, and by William

Hare, guardian of Abraham L. Fry, Albert Fry, and Oliver Fry, which money the appellants have ever since retained. No part of such money has been returned, or offered to be returned, before or since the bringing of this suit. There never was any order of court authorizing the administrator to collect rents of the real estate. Of the \$361.02 in the administrator's hands when he made his current report in April, 1872, the sum of \$321 was expended by him before the time of making the sale of the real estate, leaving in his hands at that time \$40.02. In 1874, Elizabeth Fry executed her quitclaim deed, conveying to Elizabeth Wood and Jesse Wood all her interest in the two 40-acre tracts. In May, 1896, Elizabeth Wood and Jesse Wood executed their warranty deed conveying the northwest quarter of the southeast quarter of the land to Evaline Lawson, one of the appellees herein, who at once took possession thereof, and has since continued in open, notorious, continued, and exclusive possession thereof, claiming to be the sole and absolute owner by virtue of such conveyance. Elizabeth Wood and Jesse Wood, until the time of their conveyance, have, since the date of the deed in 1873 to them from the administrator, held the open, notorious, continued, and exclusive possession of the real estate, claiming to be the sole and absolute owners thereof by virtue of the deed of the administrator, subject only to the dower of Elizabeth, and ever since her conveyance to them they have held the real estate, claiming to be the sole owners thereof. The real estate, unincumbered by the life estate of Elizabeth Fry, was worth at the time of the sale by the administrator \$30 per acre, and that, subject to such life estate, each of the tracts was then worth \$750. Jesse Wood and Elizabeth Wood were husband and wife, and Elizabeth Wood was the daughter of Elizabeth Fry and John Stern, her first husband, and at the time of the administrator's sale Elizabeth Wood and Jesse Wood were residing on the real estate with Elizabeth Fry. Elizabeth Fry died November 24, 1895.

As conclusions of law, the court stated that appellants have no interest in the real estate, and that the appellees are the owners thereof.

Appellants' counsel argue that the court of common pleas had no jurisdiction to order the sale of more than two-thirds of the land of Charles O. Fry; that upon his death, intestate, in 1868, one-third of the land went to his widow in fee, and at her death, in 1896, this one-third went to appellants; and that this case is governed by the ruling in *Bell v. Shaffer*, 154 Ind. 413, 56 N. E. 217. At the time the sale of the real estate was made, the court might, upon a proper application, have authorized the administrator to sell any of the real estate of his decedent for the payment of the purchase money, or for the payment of any valid lien thereon. 2

Rev. St. 1852, § 89, p. 269, c. 10. And at that time the court of common pleas had no jurisdiction to order the sale of more than two-thirds of the lands of the decedent Fry for the payment of the claims of the general creditors. The statute in force at that time was as follows:

"Sec. 17. If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors. * * *

"Sec. 24. * * * Provided, that if a man marry a second or other subsequent wife, and has, by her, no children, but has children alive, by a previous wife, the land which, at his death, descends to such wife, shall, at her death, descend to his children." 1 Rev. St. 1852, pp. 250, 251, c. 27.

Counsel for appellees argue that, as the sale by the administrator was made while the courts were construing this statute as giving to the childless second wife only a life estate, and as appellants, as Fry's children, received on distribution a part of the proceeds of such sale, the sale was a valid sale of the fee, and appellants are estopped from claiming any interest in the land. What the different holdings of the courts have been as to the interest of a childless second wife, it is unnecessary to inquire at this time, in view of the ruling announced in *Bell v. Shaffer*, supra, which says: "A construction was given to these provisions of the statute in *Louden v. James*, 31 Ind. 69, in which it was held that when a man dies, leaving surviving him a widow, who is a second or subsequent wife, by whom he has no children, but leaving children by a previous wife, the widow, as against creditors, takes the same share of his real estate in fee simple as if a first wife, and at her death that this fee simple descends to the children of the husband free from the demands of his creditors. This decision was made May 27, 1869, while the sale in question took place October 22, 1869, so that the purchaser at that sale had before him the latest interpretation of the statute, declaring that the one-third taken by the widow was held by her in fee as against creditors, and that, at her death, it would descend to the children of the decedent. This ruling was followed in *Caywood v. Medsker*, 84 Ind. 520, and was there declared to have been 'the law and rule of property' from the time it was made." So that when the sale in question, in the case at bar, was made in 1873, the interpretation of the statute gave to Elizabeth Fry, as against creditors, one-third of the land in fee, and at her death this fee would descend to the children of Charles O. Fry, free from the demands of his creditors.

In *Bell v. Shaffer*, supra, the petition was filed "for the sale of said real estate, to make assets for the payment of the general debts of said decedent." The widow and children were made parties. The court's order authorizing the sale was: "And the court finds

that it is necessary to sell said real estate of said decedent to pay the outstanding debts against said real estate. And the court does now order and direct said administrator to sell the undivided two-thirds part in value of said real estate (being exclusive of the widow's interest), viz., lot number forty-four," etc. In that case John D. Evans purchased the lot at the administrator's sale, and, upon receiving a deed, took possession, which he held until his death, when his son, Frederick Evans, inherited the same, and he afterwards conveyed it to appellant, Bell, who bought it under the belief that he was obtaining title to the whole of the lot. The Evanses and Bell had possession of the whole of the lot. In denying the right of appellant Bell to the one-third of the lot, the court said, page 422, 154 Ind., page 220, 56 N. E.: "But, for another and distinct reason, the claim of the appellant to the one-third of the lot must fail. The court of common pleas of Hamilton county had not jurisdiction to order the sale of more than two-thirds of the lot to make assets for the payment of the claims of general creditors." It is further held in that case that, upon proper application, the court might have authorized the administrator to sell any of the real estate of the decedent for the payment of the purchase money or any valid lien thereon, but that it was not asked to make such order, nor did it do so. So that, in the case at bar, as the court had authority, upon a proper showing, to order the sale of all the real estate to pay a claim for purchase money, and had no jurisdiction to order the sale of more than two-thirds of the land to pay the claim of general creditors, it is necessary to determine whether the petition and order to sell, as disclosed by the special findings, were for the purpose of paying a claim for purchase money, or for the purpose of making assets generally.

It was the duty of the administrator to apply all the personal assets in his hands, if necessary, to pay liens on the land, "even to the exclusion of all general creditors." And it was also his duty to apply the proceeds of the sale of two-thirds of the deceased husband's land, if necessary, to that purpose. *Hunsucker v. Smith*, 49 Ind. 114; *Morgan v. Sackett*, 57 Ind. 580; *Sparrow v. Kelso*, 92 Ind. 514; *Bowen v. Lingle*, 119 Ind. 560, 20 N. E. 534; *Shobe v. Brinson*, 148 Ind. 285, 47 N. E. 625; *Lewis v. Watkins*, 150 Ind. 108, 49 N. E. 944; *Denton v. Arnold*, 151 Ind. 188, 51 N. E. 240. In *Morgan v. Sackett*, supra, the above doctrine was held to apply where a mortgage, in which the wife had not joined, was given for purchase money; that a mortgage given for purchase money is superior to any rights of the widow, in favor of the mortgagee, "but in so far as the mortgage has been paid, or there are assets out of which it should be paid, either in whole or in part, the widow has to that extent a right therein." The amended peti-

tion does not ask that the land be sold to make assets to pay the purchase money. It states that at his death Fry owed "nearly all the purchase money" for the land, and that since his death the administrator had paid about \$900 on the purchase money, and that the land "was liable to be made assets for the payment of said debts," that the administrator had paid about \$900 on the purchase money, and that the debts at the time of filing the amended petition amounted to \$800 or \$900. We cannot presume that the debts at the time of filing the petition were for purchase money. It does not appear what amount of purchase money the decedent owed at the time of his death, and, as the administrator has paid about \$900 on this purchase money, we cannot presume, in aid of the petition, that anything was due for purchase money when the petition was filed. The amended petition shows that more than sufficient assets had come into the administrator's hands to pay the purchase money. He had the right, under certain conditions, to pay the purchase money out of these assets. It must be presumed that he exercised this right legally. As against the widow's right to her one-third of the land, it was his duty to pay the purchase money out of assets that came into his hands, to the exclusion of general creditors. It was not directly averred in the amended petition, nor is it necessarily to be inferred from the facts stated, that any part of the purchase money remained unpaid at the time of the filing of the petition. The statement in the petition that the decedent died seised of the land, leaving a widow, "was equivalent to a statement that only two-thirds of it was liable to be made assets." *Compton v. Pruitt*, 88 Ind. 171. If there was a reason for converting the widow's interest into assets, it should have been stated. It is true it is averred generally that she had no interest, but no facts are averred showing that she did not have the interest of a surviving widow. The findings show she was not a party to the proceedings. The law gave her one-third of the land in fee. The court had no jurisdiction to order the sale of more than two-thirds of the land, except for certain purposes, and for such purposes the petition does not disclose that the land was sought to be sold.

Neither did the court find that it was necessary to sell the land to pay unpaid purchase money, nor did it order it sold for that purpose. The court found that the material allegations of the amended petition were true, that the administrator had paid purchase money as the petition alleged, that the lands "were liable as assets for the payment of the debts" of the estate, that "it was necessary to sell the land as in the petition prayed for for the payment of the debts against said decedent's estate." This cannot be construed to be a finding that the lands "are liable as assets" for the payment

of purchase money, but we think it must be construed as a finding that the land should be sold to make assets for the payment of claims of general creditors. It is true the whole of the land was ordered sold, and in this the case differs from *Bell v. Shaffer*, supra, where the order was for the sale of two-thirds only. But in that case it is expressly held that the court of common pleas "had no jurisdiction to order the sale of more than two-thirds of the lot to make assets for the payment of claims of general creditors." We think the petition and order to sell must be treated as an application to sell lands to pay debts generally. For such purpose the court has power to order the sale of two-thirds of the land only. As to the widow's interest, she having no notice, the findings show that the court did not have jurisdiction either of the person or of the subject-matter.

Counsel for appellees cite the case of *Myers v. Boyd*, 144 Ind. 496, 43 N. E. 567, to the effect that the interpretation of this statute, from the decision in *Martindale v. Martindale*, 10 Ind. 566 (decided at the May term, 1858), down to the decision in *Utterback v. Terhune*, 75 Ind. 363 (decided in 1881), was that the childless second wife took a life estate only in an undivided third of her deceased husband's lands, where he left children by a former wife. That case does so hold. And in that case the title in question was derived through an administrator's sale. But in the quotation which we have set out, in another part of this opinion, from the later case of *Bell v. Shaffer*, 154 Ind. 413, 56 N. E. 217, where the title in question was derived through an administrator's sale, it is declared that it has been the rule in this state, since the decision in *Louden v. James*, 31 Ind. 69, that such childless widow, by the terms of this statute, took a fee in an undivided third of her husband's lands. While the later case of *Bell v. Shaffer* does not overrule nor cite the former case of *Myers v. Boyd*, it must be held that the earlier case is overruled by the later case, and that the rule announced in *Bell v. Shaffer*, supra, is controlling.

Counsel for appellees also cite the cases of *Byrum v. Henderson*, 151 Ind. 102, 51 N. E. 94; *Helt v. Helt*, 152 Ind. 142, 52 N. E. 699; *Thompson v. Henry*, 153 Ind. 56, 54 N. E. 100; and *Burget v. Merritt*, 155 Ind. 143, 57 N. E. 714—each of which cases hold, as was held in *Myers v. Boyd*, supra, that prior to the decision in *Utterback v. Terhune*, 75 Ind. 363, and back to *Martindale v. Martindale*, 10 Ind. 566, the court interpreted this statute as giving the childless second wife a life estate only. As we have concluded this case is controlled upon this point by the case of *Bell v. Shaffer*, supra, it being a later case than *Myers v. Boyd*, supra, we would deem it unnecessary to further notice this apparent uncertainty as to the former interpretation of the statute, were it not for the

fact that the opinion in *Burget v. Merritt*, supra, was written since the case of *Bell v. Shaffer*, supra, was decided. The *Burget Case* does not cite, nor does it distinguish, the *Bell Case*.

In *Martindale v. Martindale*, 10 Ind. 566, the question arose in a suit for partition brought by a childless widow against the children of her husband by a former wife. In *Louden v. James*, 31 Ind. 69, partition of the decedent's real estate had been made between a childless widow and the husband's children by a former marriage, and an administrator de bonis non applied for an order to sell the land set apart to the widow to make assets to pay debts. In the former case it was a question between the widow and children, and it was held that, as against the children, the widow took an estate in one-third for life only; and in the latter case it was a question between the widow and the husband's creditors, and it was held that, as against creditors of the husband, the widow took one-third in fee. The two cases are not in conflict. Section 17, above set out, gives to the widow one-third in fee, "free from all demands of creditors," and section 24 directs that this interest which the widow takes free from demands of creditors shall, if she is a childless widow and there are children of her husband by a former marriage, descend to such children. In *Louden v. James*, supra, it is said that the case of *Martindale v. Martindale*, supra, is "simply deemed to settle the very question before the court, and nothing beyond."

These two cases have been frequently cited, and sometimes, perhaps, without regard to the essential difference between them. In the cases of *Haskett v. Maxey*, 134 Ind. 182, 83 N. E. 358, 19 L. R. A. 379; *Stephenson v. Boody*, 139 Ind. 60, 38 N. E. 331; *Byrum v. Henderson*, 151 Ind. 102, 51 N. E. 94; *Thompson v. Henry*, 153 Ind. 58, 54 N. E. 109; *Helt v. Helt*, 152 Ind. 142, 52 N. E. 699; and *Burget v. Merritt*, 155 Ind. 143, 57 N. E. 714—each holds that the interpretation given this statute from the time of the decision in *Martindale v. Martindale*, supra, in 1858, until the decision in *Utterback v. Terhune*, supra, in 1881, was that the childless widow took the one-third for life only. But in none of these cases did the question of the widow's interest arise through an administrator's sale of the husband's lands to pay debts, nor was there any question as to the interest taken by the childless widow as "against creditors." This accounts, perhaps, for the fact that in none of the above cases is *Louden v. James*, supra, cited or in any way referred to. So that, keeping in view the precise questions decided in *Martindale v. Martindale*, supra, and *Louden v. James*, supra, the later case of *Burget v. Merritt*, supra, is not in conflict with the case of *Bell v. Shaffer*, supra. That is, at the time the administrator's sale in question, in the case at bar, was made, the courts interpreted the statute

as giving to the childless widow, "as against creditors," an undivided one-third in fee; but where the question arose between the widow and children, the widow took an undivided one-third for life only.

Upon the question of estoppel: If we are right in the conclusion that the court had no jurisdiction to sell the widow's one-third, the order of the court directing the sale of the whole tract was inoperative and void as against the widow's interest, and the money that was distributed to appellants was money derived from the estate of their father. If the receipt of the money now estops them from claiming this one-third, it must be because that act ratified the sale by the administrator. But it was not possible for appellants to object to the petition and order. They had no present estate when the sale was made, and had no estate until the widow's death, long after this money was distributed to them by the administrator of their father's estate. As it was not their land when the sale was made, they could neither sell it nor ratify its sale. We think this same question is decided in appellants' favor in *Bell v. Shaffer*, supra, and cases there cited. See, also, *Bryan v. Uland*, 101 Ind. 477, 1 N. E. 52.

As disclosed by the petition and order of sale, all the court of common pleas could authorize the administrator to sell was the interest of Charles O. Fry and the interest inherited from him by his children. The interest which accrued to the children on the death of Elizabeth Fry was a distinct and different interest. The administrator's petition to sell presented no issue as to the children's interest in this one-third, because at that time they had no interest. As against the children, she held, practically, only a life estate; but as against creditors, she held the fee, which, the statute directs, shall at her death descend to his children.

Judgment reversed, with instructions to restate the conclusions of law.

(185 Mass. 82)

CHISHOLM v. NEW ENGLAND TELEPHONE & TELEGRAPH CO.

(Supreme Judicial Court of Massachusetts. Middlesex. Feb. 28, 1904.)

DEATH OF EMPLOYE—SAFE PLACE TO WORK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—EVIDENCE—SUFFICIENCY.

1. Liability for neglect to provide a safe place to work cannot be avoided by delegating the duty to others, or imposing it on employees, unless the circumstances constitute an assumption of the risk or contributory negligence.

2. Evidence in an action for the death of a lineman, who was killed as the result of a fall when ascending a telegraph pole, considered, and held sufficient to warrant a finding that there was a defect in the original placing of the pins in the pole, for which defendant was responsible, and that the injuries received by decedent were due thereto.

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 178.

3. Evidence that a lineman was required by the rules of a telephone company to test the poles and pins if he thought there was danger, where there was nothing to show that he so thought, or that, in the exercise of reasonable care, he ought to have discovered the defective condition of a pin, or was negligent in trusting himself to it, was insufficient to show him negligent, as a matter of law, in climbing the pole.

4. The fact that linemen were required to drive steps in, after telegraph poles were set up and the holes bored, would not relieve the master from liability for an accidental death caused by defect therein, in the absence of proof that decedent himself drove in the step which came out, thereby contributing by his own negligence to the injuries which he received.

Exceptions from Superior Court, Middlesex County; Henry N. Sheldon, Judge.

Action by one Chisholm, as executor, against the New England Telegraph & Telephone Company, to recover for the death of plaintiff's testator. There was a judgment for defendant, and plaintiff brings exceptions. **Exceptions sustained.**

Thos. J. Gargan and Pratt & Devine, for plaintiff. John & Jas. A. Lowell, for defendant.

MORTON, J. It was the duty of the defendant to exercise reasonable care and diligence in seeing that the structures and appliances which it provided were free from defects, so that the plaintiff's testator and others in its employ, being themselves in the exercise of due care, could safely perform the work which they were employed to do. The defendant could not avoid liability for injuries caused by its negligence in this regard by delegating this duty to others, or by imposing it, within the sphere of their respective duties, upon those in its employ, unless the circumstances were such as to constitute an assumption of the risk or want of due care on the part of the person or persons so injured. There was testimony tending to show that the fall of the plaintiff's testator, and the injuries which he sustained, were caused by the pulling out of a pin which he had taken hold of in the course of his ascent, and which came out while he had hold of it with one hand, and was looking over the wires to see which one should be removed. There was also testimony tending to show that the hole into which the pin had been driven was bored so that it slanted downwards, instead of being on a level or slanting upwards, and that the pin was only driven in $2\frac{1}{2}$ inches, instead of 4, as there was testimony tending to show that it ought to have been. This testimony would have warranted a finding that there was a defect in its original construction, for which the defendant was responsible, and that the injuries received by the plaintiff's testator were due to it.

It cannot be said, as matter of law, that the plaintiff's testator was not in the exercise of due care, or that he assumed the risk. Those were both questions for the jury, as

the case was left by the evidence that was introduced. The testator was engaged in the performance of his duty, and it would have been for the jury to say whether, under the circumstances, he ought to have examined the pin, and was negligent in not doing so, or in trusting his weight to it without such examination. The linemen were required by the rules to test the poles and steps if they thought there was danger, and, if they found any loose steps, to pull them out, and report to the foreman. There is nothing to show that this step was loose, and it may be doubtful whether the rule that they should test the poles and steps, if they thought there was danger, added anything to what would be required in the exercise of due care. But further, there is nothing to show that he thought that there was danger; and whether, in the exercise of reasonable care, he ought to have discovered the condition of the step, or was negligent in trusting himself to it, was, as already observed, a question for the jury. The fact that the linemen were required to drive the steps in after the poles had been set up and the holes bored would not relieve the defendant, in the absence of proof that the plaintiff's testator himself drove in the step which came out, and thereby contributed by his own negligence to the injuries which he received. In driving in the steps, the linemen acted as agents for the defendant, and it would be liable for their negligence. It cannot be said that the chance of an accident like that which occurred under the circumstances under which this accident occurred was one of the risks of the business which the deceased assumed.

Exceptions sustained. Case to stand for trial, as agreed, on the question of damages only.

(185 Mass. 153)

DORMAN et al. v. DORMAN et al.
(Supreme Judicial Court of Massachusetts.
Essex. Feb. 28, 1904.)

ESTATES—RIGHTS OF HEIRS—RELEASE—NEWLY DISCOVERED ASSETS—PARTICIPATION.

1. After the death of a widow's son, whose estate was only able to pay 25 per cent. of a claim due the widow, a settlement was made, by which a certain amount was paid to the widow, who voluntarily deducted \$1,000 from the indebtedness, the heirs of the son also releasing a further sum of \$1,802.50, which was estimated to be the share of the widow's estate to which the son's next of kin would have been entitled if the widow had died intestate. At the time of such settlement certain assets belonging to the widow were omitted from consideration by mistake of all the parties, and were not discovered until long after the widow's death. *Held* that, in the absence of evidence justifying a finding that, if such assets had been considered at the time of the settlement, the widow would have made a larger deduction from the son's indebtedness, his next of kin were barred by the settlement from participating in such assets.

Appeal from Superior Court, Essex County; Wm. Schofield, Judge.

Action by E. Dorman and others against

Alice H. Dorman and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Guy Newhall, Wm. E. Dorman, and Hale & Grinnell, for appellants. H. P. Moulton, for appellees.

MORTON, J. The defendants are the children and widow of Benjamin H. Dorman, a son of Sarah R. Dorman, deceased. The plaintiffs are the surviving children of said Sarah. At the time of his death Benjamin was owing his mother upwards of \$6,500, of which his estate could pay only 25 per cent. The widow was appointed administratrix of her husband's estate, and in settlement of the claim of the mother paid her \$3,507.50 in cash and agreed to pay a bill of \$200 which the mother was owing; making \$3,707.50 in all. This sum was arrived at by deducting from the amount due from the son's estate \$1,000 given by the mother as a gratuity, and the further sum of \$1,802.50, which was estimated to be the share of her estate to which the respondents would be entitled if the mother were deceased intestate. Thereupon the mother assigned her claim against the estate of the son to Alice H. Dorman, one of the defendants, and in consideration thereof the defendants executed an instrument under seal binding themselves not to make any claim to any part of the estate of which the mother should die possessed. This was in 1892. The mother died in 1895, and an administrator was duly appointed, and filed what was supposed to be a final account in 1897. Afterwards, in 1901, new assets were discovered, consisting of a deposit in the Lynn Institution for Savings, belonging at the time of her death to the mother. Thereupon the defendants filed a petition in the probate court seeking to have a portion of the newly discovered assets distributed to them as heirs at law of the said Sarah R. Dorman, and the plaintiffs brought this bill, setting up the release aforesaid to enjoin them from making any claim to said newly discovered assets. The case was heard by a justice of the superior court, who made certain findings of fact and rulings of law, and ordered a decree to be entered for the plaintiffs, which was done, and the defendants appealed. The court found, amongst other things, that in making the settlement which was made all parties acted in ignorance of the deposit in the Lynn Institution for Savings, and under a mistake as to the amount of the estate of Sarah R. Dorman. The court also found that the deposit amounted at the time when the settlement was made to about \$1,100, and that, if it had been added to Sarah R. Dorman's estate, it would have increased by about \$275 the amount which was estimated in the settlement to be the share of Sarah R. Dorman's estate to which the respondents would be entitled. But the court declared itself unable to find as a fact that, if

the existence of the deposit had been known, one-fourth of it would have been credited in the settlement, or that any different settlement would have been made from what was made. That is, as we understand the effect of what is stated, the court was unable to find upon the evidence before it that, if the deposit in the Lynn Institution for Savings had been known to the parties, and had been included in the estimate of the mother's estate, she would still have remitted \$1,000 of the debt due her, as she did in the settlement that was made.

The defendants, relying on *Turner v. Turner* (1878) 14 Ch. D. 829, and similar cases, contend that the release is to be construed as applying to what was within the contemplation of the parties when it was executed, and that, having been executed in ignorance of the deposit in the Lynn Institution for Savings, it does not operate to deprive them of their distributive shares of that deposit. But this contention necessarily assumes, it seems to us, what the court was unable to find as a fact, namely, that the \$1,000 which was remitted by the mother as a part of the settlement would have been likewise remitted if the deposit in the Lynn Institution for Savings had been known and included. In order to establish their right to distributive shares in that deposit, the defendants must assume that, if that deposit had been included, the settlement would have been carried out on the same basis and in the same way on and in which it was carried out. Very likely it would have been. Indeed, it would seem that the more reasonable view would be that it would have increased the willingness of the mother to make that deduction, since her estate would have been larger, and the additional amount which would have been allowed the defendants would have been small. But the evidence is not before us, and, in view of the finding, or rather of the statement, by the court that it was unable to find that as a fact, it does not seem to us that such an assumption would be warranted. The case is not, therefore, altogether one of mutual mistake, or of a release executed by the parties in ignorance of certain material facts, and is distinguishable on that ground from the case of *Turner v. Turner*, supra, relied on by the defendants.

No objection has been made that the plaintiffs are not proper parties to bring suit, or that they would not be entitled to specific performance.

Decree affirmed.

(186 Mass. 1073)

In re BUTTRICK et al.

(Supreme Judicial Court of Massachusetts.
Essex. Feb. 26, 1904.)

PARTITION—STATUTES—INTEREST OF DEFENDANT—HEARING—DEEDS—ADMISSIBILITY IN EVIDENCE—RES ADJUDICATA.

1. Rev. Laws, c. 184, § 8, relative to partition, declares that any one interested in the

land may appear and plead any matter tending to show that petitioner ought not to have partition. Section 9 declares that if a person not named in the petition appears and pleads the petitioner may reply that respondent has no title in the land, and, if he has not, his plea or answer shall not be further considered. Section 19 declares that if petitioner recover judgment, and respondent denied his right and title, but it is found that respondent held under a title which he believed to be good, he shall be entitled to compensation for improvements, and liable for petitioner's share of the rents and profits. *Held*, that where, in partition, respondents appeared under section 8, and claimed ownership of the land, and petitioner filed a replication under section 9, and it appeared on the hearing that respondents had been in possession for more than 20 years before the trial, and that petitioner had no title, it was proper to deny petitioner's motion for a ruling that respondents had no interest in the premises within sections 8 and 9, since they had been in possession under a title believed by them to be good within section 19, and under the circumstances it would be an injustice to give petitioner a decree, and compel respondents to have the value of their improvements estimated, and to pay petitioner their share of the rents and profits.

2. Where a deed made in 1778 was found in the possession of an heir of one of the grantees, and the records from the probate court tended to show that the possession and claim of title of the parties to it was for a long time in conformity with it, it was admissible without formal proof of its execution.

3. Pub. St. 1882, c. 120, § 4, provides that an unrecorded deed passes no title except as against the grantor and his heirs and devisees and persons having actual notice of it. In partition petitioner contended that the premises had belonged to A. at the time of his death, and that they had been conveyed by the heirs of A. to one under whom petitioner claimed, but such deed recited that there was conveyed "all the right we have in any estate of A., late of H., deceased." *Held*, that a deed made by the guardian of A. before his death, though it had not been recorded, was admissible on behalf of defendants as a material fact tending to explain the language in the deed by the heirs of A., and as tending to show that it was a mere release.

4. The deed by the heirs of A. showed that the property referred to therein was only that which would pass to the heirs, and not that which A. had conveyed, even though his deed of conveyance was not recorded.

5. Rev. Laws, c. 184, § 8, relative to partition, declares that any one interested in the land may appear and plead any matter tending to show that petitioner ought not to have partition. Section 9 declares that if a person not named in the petition appears and pleads the petitioner may reply that respondent has no title to the land, and if he has not his plea or answer shall not be further considered. *Held*, that where, in partition, respondents appeared under section 8, setting up title in themselves, and petitioner denied such title under section 9, and reference was made to an auditor to determine the question of respondents' interest, it was not proper for the auditor to make all the evidence a part of his report.

6. The fact that an auditor in partition concluded his report with a statement to the effect that the testimony was in four volumes, and that all of it was referred to, did not raise a presumption that he made the four volumes a part of his report.

7. A judgment in an action by writ of entry does not establish title to any other land than that described in the writ.

8. As between the parties to it, a judgment in an action by writ of entry is conclusive as to

the land demanded, not only in reference to matters actually put in issue, but as to all that might have been put in issue.

9. A judgment in an action by writ of entry in reference to collateral matters not included in the suit is conclusive only as to matters which were in issue and adjudicated.

10. Where, in partition, it appeared that one of the petitioners had not been a party to a former judgment concerning title to the land, but that the other petitioners and defendant were the opposing parties, the judgment in the former action was conclusive as against the defendant in favor of the other petitioners, but not in favor of the petitioner who had not been a party to the action.

Exceptions from Superior Court, Essex County.

Petition by Mary E. Buttrick and others for partition. From the judgment, petitioner brings exceptions. Exceptions overruled.

Henry N. Merrill and Boyd B. Jones, for petitioners. Henry P. Moulton, Robert D. Trask, and Joseph H. Pearl, for respondents.

KNOWLTON, O. J. This is a petition for partition of two parcels of land in Haverhill, between the Merrimac river and Washington and River streets. They are parts of a larger lot, which formerly belonged to Jacob Ayer, of Haverhill, who died intestate in 1790. The petitioners contend that the premises belonged to Jacob Ayer at the time of his death, and were conveyed at that time by his heirs to one Nathan Ayer, and that they are some of the heirs at law of Nathan. This is their only claim of title. None of the petitioners nor any of their ancestors, so far as appears, was ever in possession of any part of the property. Until within the last 30 years the land had been used as a fishing place, extending for a considerable distance along the shore of the river.

The respondents appeared under Pub. St. 1882, c. 178, § 14 (Rev. Laws, c. 184, § 8), as persons interested in different portions of the premises described in the petition, and severally averred that they were in possession of the portions described in their several answers, and were the sole owners thereof in fee simple, and denied that the petitioners or any of them were seized of the premises or of any part thereof, or entitled to possession, or to maintain their petition. To each of the answers a replication was filed by the petitioners, under Pub. St. 1882, c. 178, § 15 (Rev. Laws, c. 184, § 9), averring that the respondent has no estate or interest in the premises, and praying judgment if he shall be admitted to object. The case was referred to an auditor, who filed an elaborate report, and it was then heard before a justice of the superior court without a jury. It was found by the auditor that the lands are now nearly all occupied with buildings, and that they had been in the possession of the several respondents and those under whom they claim for nearly 20 years before the bringing of this petition, and more than 20 years before the trial, subject to a question as to the effect of a writ of entry now pend-

¶ 2. See Evidence, vol. 20, Cent. Dig. §§ 1614, 1616.

ing, brought December 24, 1889, by all but one of the petitioners against one of the respondents, to recover one of the parcels. In addition to their claim of a title by adverse possession, the respondents set up a deed made by the guardian of Jacob Ayer, dated December 25, 1776, whereby he conveyed the premises under authority of the court to John Mulliken, Nathaniel Marsh, and Bailey Bartlett, all of Haverhill. Jacob Ayer was then insane, and afterwards remained so as long as he lived. This deed was introduced, not as showing title in the respondents, but to show that Jacob Ayer did not own the property at the time of his death, and that therefore the petitioners acquired no title under the deed from his heirs to their ancestor, Nathan Ayer. The auditor and the judge found in accordance with the contention of the respondents in this particular.

At the trial, after the evidence had all been heard, the petitioners, under their replications, asked the court to rule that the respondents have no interest in the premises within the meaning of Pub. St. 1882, c. 178, §§ 14, 15 (Rev. Laws, c. 184, §§ 8, 9), and that they are not entitled to object to the partition. This request raises the first question for our consideration.

1. The interest of the respondents, as disclosed by the evidence, was that of persons in possession who had erected buildings and made other valuable improvements, and who had been in possession nearly 20 years when the petition was brought, and more than 20 years at the time of the trial. The auditor's report indicates that each of the later occupants held the property "under a title which he believed to be good," and that he therefore comes within Pub. St. 1882, c. 178, § 31 (Rev. Laws, c. 184, § 19).

The purpose of section 15 seems to be to relieve petitioners from the necessity of a trial upon objections made by persons not named in the petition as respondents, if it appears that they have no estate or interest in the lands. For that purpose there may be a preliminary hearing to determine whether the person appearing has an interest. If the whole case is heard, and the evidence concluded upon all questions affecting the rights of the petitioners and the respondents, the reasons for this provision are no longer applicable. Whether one holding a mere possessory title of recent origin should be deemed to have an interest under this section is a question not free from difficulty, and which it is not necessary in this case to decide. As was said by Chief Justice Shaw in *Marshall v. Crehore*, 13 Metc. 462, 467, a petition for partition is made by our statutes "to a much greater extent than formerly an adversary proceeding to try and decide controverted questions of title." The case of *Cook v. Allen*, 2 Mass. 462, which was decided under the statutes of March 11, 1784, and February 14, 1787, holds that one claiming a title by disseisin is a proper party to such a proceed-

ing. See, also, *Munroe v. Luke*, 19 Pick. 39. There are peculiar reasons why one who has made improvements, holding under a title which he believes to be good, ought not to be refused an opportunity to be heard. Under section 31, above referred to, he is not only entitled to receive compensation for his improvements, but he is liable for the petitioner's share of the rents and profits, and these are to be ascertained in the suit. The proceedings in the present case would make this section applicable if the petitioners' evidence entitled them to a decree for partition.

The case of *Tilton v. Palmer*, 31 Me. 486, relied on by the petitioners as tending to show that the respondents ought not to be heard, is an adjudication in a different form of proceeding. It is under a statute which makes a different kind of provision as to compensation for improvements and liability for rents and profits, and it is materially modified by the later cases of *Saco Water Power Company v. Goldthwaite*, 35 Me. 456; *Brackett v. Persons Unknown*, 53 Me. 238, 87 Am. Dec. 548; and *Richardson v. Watts*, 94 Me. 476, 48 Atl. 180.

The general rule is that a person having title by disseisin cannot be disturbed in his possession except by one who shows a better title. In a case like the present, when upon a full trial of the case it appears that the petitioners have no title, nor any right to possession, it would be a gross injustice to give them a decree for partition, and compel the respondents to have the value of their improvements estimated, and to pay the petitioners their share of the rents and profits. Even under the decisions in Maine relied on by the petitioners, it is plain that all of the respondents but one are entitled to be heard, and to rely upon the petitioners' want of title as a defense; for it is held in those cases that if the possession is continued more than 20 years before the trial it ripens into a perfect title, even though the petition was brought before the expiration of the 20 years. This doctrine is plainly applicable to all the respondents but one. As to that one, it is said that the bringing of a writ of entry before the 20 years interrupts his possession and defeats his title. This would be true if the writ had been prosecuted to a judgment in favor of the demandants. But when it appears, as it does upon the proof in this case, that the suit cannot be maintained, and that the tenant must ultimately prevail, no such effect can be given to the bringing of a writ of entry. We are of opinion that there was no error in the refusal of this ruling.

2. The deed from the guardian of Jacob Ayer to John Mulliken and others was a very ancient deed, and it was found in the possession of an heir of one of the grantees. Moreover, the various records from the probate court tend to show that the possession and claim of title of the parties to it was for a long time in conformity with it. Under such circumstances, an ancient deed may be

admitted in evidence without formal proof of its execution. *Phillips v. Watuppa Reservoir Company* (Mass.) 68 N. E. 848, and cases there cited; *Stockbridge v. West Stockbridge*, 14 Mass. 257; *Green v. Chelsea*, 24 Pick. 71. In the year 1896 this deed was proved before the probate court in accordance with Pub. St. 1882, c. 120, §§ 7, 8, 13, and was recorded in the registry of deeds. Whether this mode of proof as a preliminary to registration was applicable to a deed executed in 1776 it is unnecessary to decide, as the original was rightly admitted in evidence.

3. It is contended that the instrument was not competent, because an unrecorded deed passes no title except as against the grantor and his heirs and devisees and persons having actual notice of it. Pub. St. 1882, c. 120, § 4 (Rev. Laws, c. 127, § 4). But this deed was not admitted as a deed which should be effectual to deprive a grantee of land actually conveyed to him under a later deed. It was admitted as a material fact bearing upon the construction of the language of description in the deeds to Nathan Ayer, under which the petitioners claim. These later deeds did not purport to convey any particular land in Massachusetts. They are merely releases and transfers of the interest of the grantors, if they then had any, in the estate of Jacob Ayer, real and personal. The language of description is, "All the right we have in any estate, real or personal, of Jacob Ayer, late of Haverhill aforesaid, deceased." These deeds were made in 1810 and 1811, and were not recorded until 1884 and 1889. Under a deed containing such a description, with no designation, either general or special, of any property, the grantee takes nothing unless it is shown that there is property to which the language applies. The prior deed to Mulliken and others shows that the language of these later deeds does not include the lands in question. *Adams v. Cuddy*, 13 Pick. 460, 25 Am. Dec. 330; *Jamaica Pond Aqueduct Company v. Chandler*, 9 Allen, 159; *Woodward v. Sartwell*, 129 Mass. 210; *Fitzgerald v. Libby*, 142 Mass. 235, 7 N. E. 917; *Dow v. Whitney*, 147 Mass. 1, 16 N. E. 722. The doctrine as stated in *Adams v. Cuddy*, *ubi supra*, has been explained and limited in some of the later cases above cited, but its application to cases like the present has not been questioned. These deeds were made by some of Jacob Ayer's heirs more than 20 years after his decease. In terms they referred to the estate of a deceased person, and they implied a possibility that the several grantors have some interest in his estate, and they convey these interests, if there are any. We think it plain that the property referred to is only that which would pass to his heirs or distributees upon the settlement of his estate, and not that which he had conveyed away, even if the deed of conveyance had not been recorded.

4. The judge rightly refused to consider the evidence heard before the auditor which

was returned with his report. The auditor was not directed to report the evidence, and it was not his duty to report it. For special reasons, as to present a question of law, it is often the duty of an auditor to report certain evidence; but in a case like the present it would be an impropriety to make all the evidence a part of the report. After referring to exhibits and plans enumerated in a list, the auditor's report concludes as follows: "The testimony is in four volumes, marked H. W., (B), (C), (D), and (E), January 9, 1900. All said exhibits and testimony is hereby referred to for full particulars as to all matters therein contained and shown." It is said that the hearing before the auditor was very long. It is not to be presumed that he made four volumes of testimony a part of his report to be read at the trial without a clear statement to that effect. The reference to it in the last sentence does not purport to make it a part of the report. We do not understand the reason for the reference. Very likely it was for the satisfaction of the parties, and for the auditor's justification, if questions should ever arise as to the correctness of his conclusions. The evidence was not a part of the report. The findings of the auditor and the facts stated in his report well warranted a finding by the judge that the deed from the guardian to Mulliken and others included all the land described in the petition.

5. The judgment in the writ of entry does not establish the title of the petitioners to any other land than that described in the writ. As between the parties to it, the judgment is conclusive as to the land demanded in the writ, not only in reference to the matters actually put in issue, but as to all that might have been put in issue. But in reference to collateral rights not included in the suit, it is conclusive only as to matters which were in issue and adjudicated. *Foye v. Patch*, 132 Mass. 105; *Watts v. Watts*, 160 Mass. 404, 86 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509. The title to other lands was not in issue, and could not be included in the judgment. At the trial of the present case no evidence was introduced beyond the record in the real action to show what matters were actually put in issue. In the absence of such evidence, it cannot be held that any matters affecting this case were collaterally determined. The petitioners' exceptions must therefore be overruled.

The respondent Tilton excepted to the ruling of the court that the judgment in the real action was binding upon him in this proceeding, and that the petitioners "are entitled to partition in the lot called 'City Landing No. 14,' solely on account of the judgment in said real action." The only ground on which this ruling can be attacked is that one of the petitioners was not a party to that judgment. The doctrine of estoppel by a former judgment rests upon the mutuality of the relation of the parties to it; but it has often been

held that the lack of absolute identity of the parties in the former suit and in the later one does not necessarily deprive the judgment of its conclusiveness between those who were parties to it. *Green v. Bogue*, 158 U. S. 478-503, 15 Sup. Ct. 975, 30 L. Ed. 1061; *Thompson v. Roberts*, 24 How. 233-241, 16 L. Ed. 648; *Lawrence v. Hunt*, 10 Wend. 80, 25 Am. Dec. 539; *Davenport v. Barnett*, 51 Ind. 329; *Marshall v. Pinkham*, 73 Wis. 401, 41 N. W. 529.

In the present case the petitioner Lucy C. Kimball was not a party to the former judgment, but the other petitioners and the respondent Tilton were the opposing parties. The other petitioners ought not to be precluded from relying upon it because the petitioner Kimball is joined with them in this suit. On the other hand, the petitioner Kimball cannot avail herself of it, for her rights were not involved in the former trial, and neither she nor Tilton could be bound as to her rights. The judge ought to have ruled that the judgment was conclusive against the respondent Tilton in favor of the other petitioners, but that it was not competent in favor of the petitioner Kimball. *Dyett v. Hyman*, 129 N. Y. 351-358, 29 N. E. 261, 26 Am. St. Rep. 533; *Whitcomb v. Hardy*, 68 Minn. 265, 71 N. W. 263. The finding was therefore erroneous so far as it pertains to the share of the petitioner Kimball, but was correct in other particulars. For this reason there must be a new trial as to this lot, unless the petitioner Kimball elects to become nonsuit, in which case the entry may be:

Exceptions overruled.

(185 Mass. 85)

ATTORNEY GENERAL v. HUTCHINSON
et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. Feb. 26, 1904.)

TOWNS—OFFICERS—TENURE OF SELECTMEN—STATUTES.

1. St. 1878, p. 208, c. 255 (substantially re-enacted in Rev. Laws, c. 11, § 339), provides that any town which accepts its provisions may at any annual meeting choose its board of selectmen, so that the tenure of office of each member of the board will be three years, instead of one year, pursuant to previous enactments. In January, 1900, a town voted "that at the annual meeting in March of the current year, the town shall elect one selectman for the term of one year, one for the term of two years, and one for the term of three years, and at each annual meeting thereafter, it shall elect one selectman for the term of three years." *Held*, that the town thereby legally decided to abandon the old system of tenure of such officers, and adopt the new.

2. St. 1890, p. 346, c. 836, extended the provisions of the law as to voting at state and city elections to town elections, provided any town desiring to accept the act should adopt its provisions, and that, after the system was accepted, no return to the former system could be made "unless the meeting at which the change was decided on was held at least 30 days before any town election at which town officers were to be elected." A certain town, which

had accepted the provisions of the act, voted on January 28, 1901, that at the annual town meeting in March, 1901, the town should elect one selectman for one year, and in March, 1902, two selectmen for two years, and in March, 1903, three selectmen for one year, and thereafter should annually elect three selectmen for the term of one year, in the manner in which selectmen have been elected prior to the election of March 5, 1900. *Held*, that by the vote of the town its board of selectmen were thereafter elected for the term of one year, and a subsequent election of selectmen for the term of three years, without the town having voted to change back to the old system, gives the persons elected for three years no title to the office.

Report from Supreme Judicial Court, Middlesex County; James M. Morton, Judge.

Proceedings in the nature of quo warranto by the Attorney General against J. F. Hutchinson and others to oust them from office. Judgment of ouster.

Homer Albers, for plaintiff. Horace G. Allen, for defendants.

BRALEY, J. Prior to the enactment of St. 1878, p. 208, c. 255, towns at their annual meeting elected a board of selectmen, whose term of office was for the period of one year. By that act, any town which accepted its provisions might at any annual meeting choose them, so that the tenure of office of each member of the board would be for a term of three years. If, for any reason, a town adopting this method desired to return to the old system, it might do so at any annual meeting. Pub. St. 1882, c. 27, §§ 64-69. Subsequent legislation revising and codifying the laws relating to elections substantially re-enacted this provision. St. 1893, p. 1250, c. 417, § 267; St. 1898, p. 645, c. 548, § 335, now Rev. Laws, c. 11, § 339. When the town of Lexington, at the meeting held in January, 1900, voted to exercise the choice given by these statutes of electing selectmen, and voted "that at the annual meeting in March of the current year, the town shall elect one selectman for the term of one year, one for the term of two years, and one for the term of three years, and that at each annual meeting thereafter, it shall elect one selectman for the term of three years," it legally decided to abandon the old system of tenure of such officers, and adopted the new. Between the time when towns were given this option, within certain limits, of regulating the term of office of selectmen, and the date of the vote making the change, the General Court had entered upon a course of legislation by which the method of preparing for and conducting state, city, and town elections was radically changed. St. 1888, p. 490, c. 486; St. 1889, p. 1109, c. 413; St. 1893, p. 1152, c. 417; St. 1898, p. 541, c. 548; Rev. Laws, c. 11. Ballots to be used in voting at state and city elections were to be printed and distributed at the public expense; and nomination of candidates for office, the preparation, form, and delivery of ballots, and the manner of voting, were worked out in

great detail. No provision, however, was made in the first two acts, which referred solely to state and city elections, for regulating the election of town officers, and the method of conducting such an election remained the same as before. The next year the Legislature, by a separate act, extended the provisions of the law as to voting at state and city elections to town elections, provided any town desired to accept the act, and make its choice manifest by adopting its provisions; otherwise the method was left unchanged. St. 1890, p. 346, c. 386. By this statute a change was made in the manner of conducting the election of town officers only in those towns which duly accepted it. Under this act, it follows that towns must be divided into two classes—those that accept, and, having accepted, must use, the ballot therein prescribed, and towns which did not accept, and remained under the original system.

The town of Lexington, by its vote at the town meeting held February 21, 1891, had accepted the provisions of St. 1890, p. 346, c. 386, and thereby placed itself in the class of towns to prepare for and conduct the election of town officers in the manner therein provided. And when it voted to make the term of office of its selectmen three years, it exercised this privilege as a town which had used the official ballot in voting for such officers for nearly nine years. By the act, after it was accepted, and "the system and manner of electing any town officers" had been determined, no return to the former system could be made, unless the meeting at which the change was decided upon was held at least 30 days before any annual town election at which town officers were to be elected, though, in towns which still continued under the former system of voting, this change as to their office could be made at the annual meeting at which they were to be elected. St. 1890, p. 347, c. 386, § 2; St. 1898, pp. 645, 646, 652, c. 548, §§ 335, 336, 361. If the various sections which embrace previous legislation, in whole or in part, and which make up the codification of former acts in St. 1898, p. 541, c. 548, are examined and compared, so far as they relate to the election of town officers, nothing appears that is so inconsistent or repugnant but that full effect can be given to each provision. The intention of the Legislature is plain. It is important that the voters should know whether a candidate for the office of selectman is to be elected for one or three years; and, in towns which use ballots prepared at the public expense, and where the election is conducted in the same manner as state and city elections, some time is necessary to prepare and distribute the ballots before the election takes place. For this reason, a limit of 30 days before the next annual election was fixed as the time after which the length of the term of officers to be then elected could not be changed, but there is no such requirement in

towns that do not use the official ballot. The town meeting of January 28, 1901, was held more than 30 days before the next annual meeting, and when the town voted, under article 2 of the warrant, "that at the annual town meeting in March, 1901, the town shall elect one selectman for the term of one year, and in March, 1902, shall elect two selectmen for the term of two years, and in March, 1903, shall elect three selectmen for the term of one year, and thereafter shall annually elect three selectmen for the term of one year in the manner in which selectmen have been elected prior to the election of March 5, 1900," it had thereby legally voted to choose its board of selectmen, so that the tenure of each member should be only for one year. And the three selectmen thereafter elected would each serve for that period. At the annual meeting following this action by the town, the respondent John F. Hutchinson was elected, accordingly, a selectman for the term of one year. For reasons not necessary to be stated, he afterwards resigned; and on May 20, 1901, at a meeting duly called to fill the vacancy, and under an article in the warrant, "to choose by ballot one selectman to fill the vacancy for the term ending March, 1904," he was declared elected a selectman for the term ending March, 1904, and since that time has filled, and now claims to hold, the office. The other respondents now in office were each chosen as selectmen for the term of three years. By the vote of January 28, 1901, which remained unchanged, the town had decided thereafter to elect these officers for the term of one year, and it must be held that the several respondents have no title to the office, and there must be judgment of ouster.

So ordered.

(185 Mass. 108)

KING v. CRAM et al.

(Supreme Judicial Court of Massachusetts.

Essex. Feb. 28, 1904.)

INSURANCE—LIFE POLICY—ASSIGNMENT—VALIDITY—INSURABLE INTEREST—FRAUD—APPEAL.

1. On report of a cause from the superior court, where the evidence was not taken by a commissioner and is not fully reported, the court's conclusions of fact therefrom must be taken as true.

2. Where one was solvent when he assigned a policy of insurance on his life, and there was no intention on his part to defraud his creditors, there was no conveyance in fraud of creditors, whether it was for a valuable consideration or as a gift.

3. Where insured has no ground for the cancellation of his assignment in good faith of a policy on his life, his trustee in bankruptcy cannot have it canceled.

4. Where a life policy is payable to the insured or his assigns, and the premiums are paid by insured, his insurable interest in his own life is sufficient to support the policy, though it be assigned to one not having such an interest.

5. A sister-in-law of the insured, who was a member of his household, and to whom he owed

¶ 4. See Insurance, vol. 28, Cent. Dig. § 168.

quite a sum for services, was a proper assignee of the policy, though she had no insurable interest.

Report from Superior Court, Essex County; Chas. U. Ball, Judge.

Bill in equity by Alfred F. King, Jr., against Milan C. Cram and others. On report from the superior court. Decree dismissing the bill affirmed.

Mellen A. Pingree and John J. Ryan, for plaintiff. Joseph H. Pearl and Otis J. Carlton, for defendant Lizzie R. Perham.

BRALEY, J. This bill in equity was brought by the plaintiff, as trustee in bankruptcy of the defendant Cram, who was adjudged a bankrupt August 8, 1901, to have a policy of insurance on his life declared to be the property of the bankrupt's estate. The policy was issued by the State Mutual Life Assurance Company, August 16, 1888, and on the 26th day of October, 1888, it was transferred by him to his sister-in-law, Lizzie R. Perham, one of the defendants, by an assignment duly received, and recorded by the company. In the superior court the bill was taken for confessed against the State Mutual Life Assurance Company, joined as a party defendant; and, after a decree had been entered dismissing the bill, the case was reported to this court on findings of fact and rulings of law made at the trial. For the purposes of our decision, as the evidence was not taken by a commissioner, and is not fully reported, the conclusions drawn therefrom and facts set out in the report must be taken to be true. *Wentworth v. Woods Machine Co.*, 163 Mass. 28, 39 N. E. 414.

It is found, and stated, that when the assignment was made by the bankrupt he was not insolvent, and there was no intention on his part to hinder, delay, or defraud his creditors, and the transaction could not be treated as colorable, but was intended to pass his title in the policy to the assignee. Under this finding of fact, there was no conveyance of property in fraud of his creditors, whether the assignment of the policy be considered as founded on a sufficient consideration, or treated as purely voluntary on his part, and a gift by him to his sister-in-law. It does not appear that the assured, when he assigned the policy, was under the disability of infancy or of unsound mind, or executed and delivered the instrument under the influence of fraud or coercion practiced on him by the defendant Perham; and on the facts reported he could not successfully maintain a bill in equity to have his free and voluntary act declared to be of no legal effect, and for a cancellation of the assignment. *Fairbanks v. Snow*, 145 Mass. 153, 154, 18 N. E. 596, 1 Am. St. Rep. 446; *Adams et al. v. Collier*, 122 U. S. 382-391, 7 Sup. Ct. 1208, 30 L. Ed. 1207.

The trustee stands in no better position than the bankrupt and assignor. Whatever rights, if any, the latter had which would en-

able him to avoid the transfer are now possessed by the plaintiff, but he is not clothed with any further or larger powers to set it aside. Bankr. Act July 1, 1898, c. 541, § 70a, subd. 5, and section 70e, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]; *Pratt v. Wheeler*, 6 Gray, 520; *Holmes v. Winchester*, 133 Mass. 140-142; *Sibly v. Quinsigamond Nat. Bank*, Id. 515; *Munroe et al. v. Dewey et al.*, 176 Mass. 184, 57 N. E. 340; *Emery v. Boston Terminal Co.*, 178 Mass. 172-184, 59 N. E. 763; *Warren v. Moody et al.*, 122 U. S. 138, 7 Sup. Ct. 1063, 30 L. Ed. 1108; *Adams et al. v. Collier*, ubi supra.

If, however, it be assumed that it is open to the trustee to contend that no title to any property of the bankrupt passed by the assignment, because the person to whom it was made did not have at the time an insurable interest in the life insured, and the assignment therefore is void as a matter of public policy, and will not be enforced by the courts, he does not state a case that entitles him to equitable relief. Whatever the negotiations may have been between Milan C. Cram and the defendant company concerning the terms of the policy, and who should be made the beneficiary, or the form of the application made by him, the policy that was issued constituted the contract of insurance, and was made payable at maturity "to the assured or his assigns," and in case of his death "to his executors, administrators or assigns," and not to Lizzie R. Perham, as he had requested.

But if the assignment be treated as a means of transferring the policy to her, and so carried out his primary intention, she is not placed in a worse legal position than if she had been named originally as the person to whom the amount of the policy was to be paid. The contract of insurance was obtained and made by him; the life insured was his life. Independently of the source from which the money was derived, whether a loan by her, or she advanced it in expectation of receiving at some time the value of the policy, or coming in part from his own funds, the premiums in each instance were paid by him to the company, and by reason of his membership as a policy holder he was entitled to vote in the management of its corporate affairs. And by St. 1894, p. 718, c. 522, § 73, now Rev. Laws, c. 118, § 73, any suit for the recovery of the amount of the policy at the period of maturity must have been brought in his name, or, in the case of his death, in the name of his executor or administrator. *Wright v. Vermont Life Insurance Co.*, 164 Mass. 302, 41 N. E. 303. He had an insurable interest in his own life, and this was enough to support the policy, and prevent it from being considered a mere wagering contract, in which he had no interest whatever in the amount to be paid under it, but only in the life insured, and where the beneficiary becomes a mere gambler, whose object is purely speculative, depending on the death of the insured, rather than on a

continuance of his life. A contract in this form is not on its face a mere gaming risk, and hence is not void as against public policy. *Forbes v. American Life Ins. Co.*, 15 Gray, 249-255, 77 Am. Dec. 360; *Campbell v. New England Ins. Co.*, 98 Mass. 381. This would be enough to dispose of the plaintiff's contention, but he cannot prevail, for another reason:

At the date of the assignment, as between the company and the bankrupt, the original policy had not been surrendered, and was still in force as a valid existing contract. The assignee was a sister of his wife, a member of his household, and his house was her home; apparently, he was owing her quite a sum of money for services, and it can fairly be inferred, not only from motives of affection for her sister and for him, but from those of pecuniary advantage and gain, she would desire the continuance of his life in preference to his death. Under these conditions, the assignment appears to have been taken by her in good faith, and not for the purpose of gambling on the hazard of the duration of a life in which her brother-in-law, after the assignment, had no monetary, but only a vital, interest. There were no limitations in the policy preventing him from a free disposition of all his title to and benefits under the contract, and he might sell it, or he could dispose of it by gift to a relative by marriage. In either case, in the absence of evidence to show that, notwithstanding its form, it was intended as a gaming transaction, the purchaser or the donee takes a good title, free from any immoral taint; and it would not be necessary, in order to sustain it, that they should have an insurable interest in the life of the assignor and donor. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24-32, 52 Am. Rep. 245; *Shea v. Massachusetts Benefit Association*, 160 Mass. 289-291, 35 N. E. 855, 39 Am. St. Rep. 475; *Fairchild v. North Eastern Mutual Life Ins. Co.*, 51 Vt. 625; *Conn. Mutual Life Ins. Co. v. Schaefer*, 94 U. S. 457-463, 24 L. Ed. 251.

The findings and rulings made at the trial, that the transaction between the parties was not fraudulent as against the creditors of the bankrupt, and that the assignee acquired a good title under the assignment of the policy which could not be avoided by the plaintiff, were right.

Decree affirmed.

(185 Mass. 190)

GARDNER WATER CO. v. INHABITANTS OF TOWN OF GARDNER.

(Supreme Judicial Court of Massachusetts. Worcester. Feb. 26, 1904.)

WATER SUPPLY PLANT—PURCHASE BY TOWN—COMPENSATION—WATER RIGHTS.

1. Under St. 1882, p. 107, c. 145, incorporating a company to supply water to a town, and giving the town the right to purchase its property and privileges, on such purchase the company is entitled to compensation for the rights

which it has acquired through the incorporation act and by condemnation to the use of water from a great pond in the town; they being property rights.

Case reserved from Supreme Judicial Court, Worcester County; Henry K. Braley, Judge.

Petition by the Gardner Water Company against the inhabitants of the town of Gardner. Case reserved on the report of commissioners to award the petitioner compensation for a water plant taken by the town. Award accepted, and judgment for the petitioner.

E. C. Bumpus, T. B. Dunn, and J. B. Sullivan, Jr., for petitioner. Jas. A. Stiles and Walter P. Hall, for respondent.

KNOWLTON, C. J. The questions before us arise on the report of commissioners appointed to determine and award the compensation to be paid by the town of Gardner for the corporate property, rights, and privileges of the Gardner Water Company, acquired by purchase by vote of the town under the authority of St. 1882, p. 107, c. 145, § 9. This statute is the charter under which this corporation was duly organized for the purpose of furnishing the inhabitants of Gardner with water. By section 2 of the statute (page 105), the corporation was authorized to "take, hold and convey into and through the town of Gardner, or any part thereof, the water, so far as may be necessary for the purpose, of any spring or springs, or the Crystal Lake, so called, within said town, and the waters which flow into and from the same, together with any water rights connected therewith," etc. Section 3 (page 105) directs that it shall, "within sixty days after taking any land or water rights under the provisions of this act, file and cause to be recorded in the registry of deeds for the county of Worcester, a description thereof, * * *" and the "title of the land and water rights so taken shall vest in the said corporation." On July 24, 1882, it filed in the registry of deeds a taking of "the waters, so far as may be necessary for the purposes hereinafter mentioned, of Crystal Lake, so called, a great pond * * * and the waters which flow into and from the same, together with any water rights connected therewith, * * * for the purpose of supplying the inhabitants of Gardner with pure water," etc. It then constructed waterworks, which were in operation when the town of Gardner, under section 9 of this statute, voted to purchase "the corporate property, and all the rights and privileges of said Gardner Water Company," the price to be paid for which these commissioners were appointed to determine.

The commissioners, in that part of the report which deals with the water rights of the petitioner, ruled as follows: That the corporation "was entitled, whenever the town of Gardner should take advantage of the op-

tion of purchase granted to it by section 9, to the fair value at that time of the right to use and sell the waters of Crystal Lake [and any other waters that may have been acquired by the company under the provisions of sections 2 and 3] for the purpose of furnishing the inhabitants of the town of Gardner with water for the purposes enumerated in section 1, subject to the rights of the state to regulate the rates charged by the company [but not to establish rates so low as to be obnoxious to the provisions of the state or federal Constitutions]; to authorize competition [either public or private] from water sources other than those held by the company, and to revoke the company's right to use the public ways of Gardner for its pipes and hydrants [thus leaving the company with the right only to sell its waters wholesale to a distributing company or the town, or to distribute through pipes laid exclusively on private land]; to revoke the company's charter to dispose of any part of the waters of the lake not required for the supply of the inhabitants of Gardner; to control, lease, or sell the use of the lake for fishing, boating, ice cutting, and other purposes not interfering with its use for a water supply in Gardner; to control the operations of the company, and its use of the water of the lake, to the extent reasonably necessary to protect the purity of the water, and otherwise to exercise over the company the police power of the state, within the limits set by the state and federal Constitutions.

* * * In adopting this basis of valuation, we assume that the Legislature contemplated that the town, in purchasing the property, rights, and privileges of the company, would act in its private or proprietary capacity as a business corporation, and that the price shall be fixed as if the purchase authorized by section 9 was to be made by a private corporation. We include in the expression 'water rights,' as used in this ruling, all the rights, privileges, and franchises obtained by the company under its charter to sell and distribute the waters of Crystal Lake in the town of Gardner, except the right to lay and maintain pipes, etc., in the public streets, and to take property by eminent domain, and the other rights considered below in No. 7. In valuing the company's water sources as defined above, the control and rights of the state in or over the same as therein set forth are to be borne in mind, as also the probability or improbability that these powers will in fact be exercised." The respondent town objects to this part of the report, and the ground of its objection is stated in a motion to recommit, in part as follows: "That the sole source from which the company obtained water to supply the town of Gardner was a source that was publici juris. That the title which the state had in this lake and its waters was held in trust by the state for the public. That the public owned, or was entitled to the entire beneficial

use of, the waters of the lake. That the power of the state was limited to regulating the public uses to which the lake might be put, and in deciding between two inconsistent uses. That the provisions of chapter 145, p. 105, St. 1882, so far as these provisions have reference to Crystal Lake, did not operate to confer upon the company (a) any proprietary rights whatsoever; (b) any rights in or to the lake, or the waters thereof, for which it was entitled to receive any sum of money whatever. That a grant by the state of rights in or to the lake, or the waters thereof, which entitle the company to a valuation on the basis set forth in the report, would deprive the public of that beneficial use to which it is entitled. That the grant or authority contained in said chapter 145, p. 105, St. 1882, was conferred with an implied reservation of the public right, and that such implied reservation is inconsistent with any right on the part of the company to have the lake or its waters, or any rights therein, valued as a part of the corporate property, or as one of its rights and privileges. That said chapter 145 was, in effect, a regulation and determination as to different and inconsistent rights and uses to which the company was entitled. That the provisions of said chapter 145 conferred upon the company (a) merely a loan of the waters; (b) a permission to perform the service of delivering the water to a part of the public entitled to it, which the Legislature did not intend should be included in the valuation, in case the town voted to purchase, as authorized by section 9 of said chapter 145. That the rights, if any, in and to the waters of Crystal Lake, of whatsoever nature, passed to the town under the vote taken April 26, 1902, as provided in said section 9. That the said rights were and are public rights, for which nothing can be recovered in money by the company from the town," etc.

By the statute, the price to be paid is the fair value of the corporate property, and all the rights and privileges of the corporation, without the limitation in reference to rights under the franchise which has been imposed in some recent statutes providing for similar purchases. See St. 1894, p. 550, c. 474, § 1; St. 1895, p. 513, c. 451, § 16; Newburyport Water Company v. Newburyport, 168 Mass. 541, 47 N. E. 533; Gloucester Water Supply Company v. Gloucester, 179 Mass. 365, 60 N. E. 977. In the last part of section 9 the transaction is called a "purchase of said franchise and property."

The respondent in his argument relies chiefly upon the fact that the water rights granted are to use the waters of a great pond. It is true that such ponds are held by the commonwealth for the benefit of the public, and it is not to be presumed that the Legislature would attempt to make any disposition of their waters inconsistent with the interests of the public. In this case we have no nice question as to the power of the Leg-

Isiature to grant such property to an individual solely for a private use, for the grant to the petitioner was for an important public use. Of the power of the Legislature to give to a private corporation, as well as to a city or town, water rights in a great pond, to be used in supplying inhabitants with water, there can be no doubt. This power has been exercised many times in Massachusetts. The rights and privileges of this corporation in the water, under the charter, are similar to the rights of a railroad company in the land taken for its roadbed. Such land can be taken and held only for a public use, but the corporation has a valuable right of property in it. While the primary object in taking and holding it is the public benefit, which alone justifies a taking without the consent of the owner, an incidental object is the hope of profit to be derived by the corporation from the use of it. In this respect the title of the present petitioner in the use of the water does not differ materially from the title to a railroad acquired under the right of eminent domain. The act of the Legislature in granting these water rights is simply a regulation of the public rights in a great pond. It makes subordinate all other public rights which are inconsistent with the exercise of this one. *West Roxbury v. Stoddard*, 7 Allen, 158; *Rockport v. Webster*, 174 Mass. 385, 54 N. E. 352; *Watuppa Reservoir Company v. Fall River*, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 466; *Fay v. Salem & Danvers Aqueduct Company*, 111 Mass. 27; *Attorney General v. Revere Copper Company*, 152 Mass. 444, 25 N. E. 605, 9 L. R. A. 510. It allows the corporation to hold and exercise these rights as a trustee for the public, and at the same time permits it to obtain income in its private capacity from the sale of the water. It makes no difference that there was no private ownership in the waters of the pond before the enactment of the statute. Land which is taken for a railroad under the right of eminent domain is not acquired and held by virtue of a transfer of the title of the former owner as private property, but by virtue of the public interest which it is taken to subserve. The valuable private interest which the railroad company afterwards has in it is incidental to the public use, but it is none the less a right of property, secured by the franchise. That the right of the petitioner to use this water was a valuable right is further shown by the fact that the petitioner was compelled to make compensation to riparian proprietors on the stream flowing out from the pond, whose property was damaged by the taking of the water. To say nothing of other expenses in the construction of the waterworks, all of which were incurred to render valuable these water rights, the payments to mill owners on the outlet stream were made directly for the water itself, to be used for an indefinitely long time in the future. The petitioner's franchise included the use of valuable water rights, which should

be paid for by the respondent town. See *Oom. v. Proprietors, etc.*, 2 Gray, 339-347; *Central Bridge Company v. Lowell*, 4 Gray, 474-480.

We are of opinion that there was no error in this part of the report of the commissioners. *Braintree Water Supply Company v. Braintree*, 146 Mass. 482, 16 N. E. 420; *Inhabitants of West Springfield v. Aqueduct Company*, 167 Mass. 128, 44 N. E. 1063. The respondent makes no objection to any other part of the report, but moves that the rest of it be confirmed.

The petitioner presented numerous objections to the action of the commissioners, and moved that their award be recommitted. In the argument, however, it waived these objections and its motion if the court should determine that the objection of the respondent was not well founded. On the determination which we have made, there is no occasion to consider other questions.

The entry will therefore be: Award accepted, and judgment for the petitioner on the award

(185 Mass. 80)

GOODRUM v. GRIMES.

(Supreme Judicial Court of Massachusetts.
Bristol. Feb. 24, 1904.)

TRIAL—RULINGS AFTER JURY RETIRES—EXCEPTIONS TO ERRORS—NEW TRIAL—TIME OF MOTION.

1. After retirement the jury returned into court with the written verdicts, and passed them to the judge, who retained that in favor of defendant, and returned that in favor of plaintiff with further instructions. The jury retired, and again returned and asked for further instructions as to certain notes. The court instructed that they were not to consider the notes. They then asked if they had not agreed; the court said he thought they had, and passed the verdict for defendant to the clerk, and the jury was polled. Neither plaintiff nor his counsel were in court when the jury first returned, but plaintiff's counsel was in court the second time, and did not object or except. *Held*, that the proceedings were matters of exception, and exception should have been taken at the time as to matters transpiring when counsel was present, or within the 24 hours allowed by rule 48 as to these taking place when counsel was absent.

2. The action of the trial judge in instructing the jury, on returning to the courtroom after retirement, that in arriving at a verdict they should not consider certain notes, was an opinion given during the course of trial, within rule 44, and a motion for a new trial, not filed within the three days allowed by that rule, could not be sustained.

3. The fact that plaintiff's counsel did not know, until after the expiration of the time within which he might have excepted, that the court had retained a paper verdict for defendant, and had returned that for plaintiff to the jury with further instructions, gave him no right to except to the overruling of a motion for a new trial made after the three days limited by rule 44, when he did not except to that retention.

Exceptions from Superior Court, Bristol County; Wm. B. Stevens, Judge.

Replevin by one Goodrum against one Grimes. There was verdict for defendant.

The court overruled a motion for a new trial, and plaintiff excepted. Exceptions overruled.

L. Elmer Wood, for plaintiff. James M. Swift and John A. Kerns, for defendant.

BARKER, J. The action is replevin for goods which had been mortgaged to the plaintiff by the defendant's intestate. It was committed to a jury, who, after retiring, returned into court with the written verdicts, one for the plaintiff in the sum of \$500, the other for the defendant in the sum of \$638. The verdicts were in the usual way passed to the presiding judge, who, after examining them, returned to them the verdict in favor of the plaintiff, gave the jury further instructions, and again sent them out to consider further, he retaining the verdict in favor of the defendant. After some time the jury again returned and asked for further instructions, the foreman stating that from the evidence they were not able to find what was due the plaintiff on his notes. The judge instructed them that they were not to consider the notes. The foreman then asked if the amount of the notes would be deducted from their finding for the defendant. The judge replied that they were not to consider that. The foreman then said, "Then we have agreed upon our verdict, haven't we?" and the judge said, "I think you have;" and thereupon the verdict for the defendant which the court had retained was passed to the clerk, and he asked the foreman and the jurors in the usual manner if that was their verdict, to which, without further proceedings, they assented, and the verdict was recorded. When the jury first returned, neither the plaintiff nor his counsel were in court. His counsel was in court when the jury returned the second time, and did not object to the proceedings, nor except. Some two months or more afterwards the plaintiff moved for a new trial because the proceedings in returning the verdict were irregular and illegal, and upon the overruling of this motion the plaintiff excepted.

All the things now complained of were done in the course of the trial and before the verdict was returned, and all of them were matters for exception if the plaintiff thought there was error. So far as they occurred after the jury had first retired, and in the absence of counsel, the plaintiff had 24 hours under rule 48, to ascertain them and except. So far as they took place in the presence of counsel, his remedy was to except to them at the time, which was not done. The action of the presiding judge was an opinion or decision of the judge given in the course of the trial, within the meaning of rule 44. As the motion for a new trial was not filed within three days, it could not be sustained because of the prohibition contained in Rule 44.

The fact that the plaintiff's counsel did not know, until after the expiration of the time

in which he might have excepted, that the paper verdict for the defendant was returned by the judge, if that course was error, which we do not intimate, gave him no right of exception to the overruling of his motion for a new trial made after the expiration of the time limited by Rule 44, because he had had an opportunity of excepting to that retention, and did not except. *Commonwealth v. Morrison*, 134 Mass. 189. The 24 hours allowed in case counsel are absent when a jury returns after the case has been committed to them are to enable counsel to ascertain what has passed in their absence, and give full opportunity to except. *McCoy v. Jordan* (Mass.) 69 N. E. 358.

Exceptions overruled.

(185 Mass. 151)

SILVA v. NEW ENGLAND BRICK CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Feb. 25, 1904.)

EMPLOYER'S LIABILITY ACT — ACTION FOR WRONGFUL DEATH — DECLARATION — NATURE OF CAUSE OF ACTION — PARTIES ENTITLED TO SUE — AMENDMENT OF WRIT.

1. In an action by an administrator under the employer's liability act for a wrongful death the declaration alleged that deceased left no widow, but three children, for whom the action was brought. It also alleged that he was instantly killed, and it so appeared on the trial, when defendant moved for a verdict on the ground that the administrator could not sue. *Held*, that the allegations showed that the cause of action relied on was the right of recovery given by the statute to the next of kin in cases of instant death, and, as the mistake therefore appeared to be not as to the nature of the cause of action, but in supposing that the administrator could sue, the court should have then allowed an amendment of the writ to bring in the proper parties.

Report from Superior Court, Bristol County; W. C. Wait, Judge.

Action by William D. Silva, administrator of Linnel Da Cunha, deceased, against the New England Brick Company. A verdict was ordered for defendant, and the case reported to determine whether the court had power to allow an amendment of the writ inserting as plaintiffs the widow and children of deceased. Amendments to be made, and case to stand for trial.

Chas. C. Hagerty and Fredk. S. Hall, for plaintiff. Walter I. Badger and Wm. H. Hitchcock, for defendant.

MORTON, J. This is an action of tort under the employer's liability act, so called, brought by the plaintiff, as administrator of the estate of Linnel Da Cunha, who was killed by the caving in of a bank of clay in the brickyard of the defendant, where he was employed. Due notice of the time, place, and cause of injury were given as required by statute. The declaration alleges that the deceased was instantly killed, and at the trial it appeared that such was the case. Thereupon the defendant moved that a verdict be

directed for it on the ground that the action could not be maintained by the administrator. The plaintiff moved to amend his writ by inserting as plaintiffs the names of the widow and children, and alleging that they were dependent on his wages for support, and that the action was brought for their benefit. This motion was denied on the ground that it introduced a new cause of action, and the court had no power to allow it, and a verdict was ordered for the defendant. The plaintiff duly excepted to these rulings. The case is here on a report made by the presiding justice at the request of the parties. If the court had the power "to allow the amendment, then appropriate amendment is to be made, and the case stand for trial. If not, judgment is to be entered on the verdict."

We think that the court had power to allow the amendment. The declaration alleges in so many words "that said deceased left no widow, but three children, for whose use and benefit this action is brought." This, taken in connection with the further allegation that the deceased was instantly killed, shows, it seems to us, that the cause of action intended to be relied on was the right of recovery given by the statute to the next of kin in cases of instant death. The fact that the death is alleged to have been instantaneous shows that the cause of action intended to be relied on could not have been the right that is given to the administrator to recover for death in cases where the death is not instantaneous, or where it is preceded by a period of conscious suffering. The mistake arose not in regard to the nature of the cause of action, but in supposing that the administrator was the party in whose name the action should be brought. And in such a case it is plain that the court has power to allow an amendment bringing the proper parties. *Adams v. Weeks*, 174 Mass. 45, 54 N. E. 350; *Lewis v. Austin*, 144 Mass. 383, 11 N. E. 538; *Hutchinson v. Tucker*, 124 Mass. 240.

Appropriate amendments to be made, and case to stand for trial.

(185 Mass. 78)

GAVIN v. FALL RIVER AUTOMATIC TELEPHONE CO.

(Supreme Judicial Court of Massachusetts.
Bristol, Feb. 24, 1904.)

MASTER AND SERVANT—INJURY TO SERVANT—OBVIOUS DANGER—DUTY TO WARN—CONTRIBUTORY NEGLIGENCE.

1. Plaintiff, a man 40 years of age, was employed by defendant telephone company in line construction, and while raising a pole plaintiff and a co-employee were stationed near a snatch block to pull a rope which led from the pole toward the block. The power was applied by horses, and plaintiff, who stood with his hands on the rope when the order was given

for the horses to move, continued to hold onto the rope, when the man in front of him was pulled against plaintiff, and plaintiff's hand was drawn into the block. *Held* that, since the whole apparatus was open to view, and its operation plain, plaintiff could not recover on the ground that he did not know of the danger if he continued to hold the rope, and that it was defendant's duty to warn him.

2. Plaintiff was guilty of contributory negligence either in not seeing the block or in not appreciating the danger, or, if he did appreciate it, in continuing to clasp the rope after the giving of the order to move the horses, which precluded a recovery.

Exceptions from Superior Court, Bristol County; Frederick Lawton, Judge.

Action by one Gavin against the Fall River Automatic Telephone Company. From a judgment in favor of plaintiff, defendant brings exceptions. Sustained.

J. W. Cummings and E. Higginson, for plaintiff. Richard P. Borden and Robert C. Davis, for defendant.

BARKER, J. The plaintiff was stationed near a snatch block, and his duty was to help pull towards the block a rope which led from it to a telephone pole about to be raised. The power to be applied to raise the pole was that of a pair of horses, which were at one end of a low wagon on which was a derrick. The snatch block was at the other end of the wagon. The plaintiff stood with his hands on the rope two feet or more from the block. When an order was given for the horses to go ahead, the rope was drawn through the block toward the wagon, thus tending to bring the hands which were grasping the rope toward the block. When the horses started, the plaintiff and the man who was next him, and also grasping the rope, but farther from the block than the plaintiff, held to the rope, the man next the plaintiff was pulled against him, and his hand was drawn into the block. The plaintiff was 40 years of age, and, although he had not handled ropes before that occasion, the whole apparatus was open to view, and its arrangement and operation were so plain that he cannot be allowed to recover on the ground that he did not know that, if he continued to grasp the rope after the horses started, there was danger that his hand would be drawn into the block, or on the ground that it was the defendant's duty to explain to him that obvious danger, and to warn him against it. The plaintiff himself was negligent either in not seeing the block, or, if he saw it, in not appreciating the danger, or, if he appreciated it, in incurring it by continuing to grasp the rope after the giving of the order for the horses to go ahead. If that order was too quickly given, it nevertheless was an understood signal, and due care required the plaintiff, upon hearing it, at once should let go of the rope.

Exceptions sustained.

(185 Mass. 97)

UNITED SHOE MACHINERY CO. v. HOLT
et al.(Supreme Judicial Court of Massachusetts.
Suffolk. Feb. 25, 1904.)EQUITABLE REPLEVIN—TROVER—CONVERSION
BY LESSEE OF GOODS—MEASURE OF DAM-
AGES—JOINDER OF DEFENDANTS.

1. Where a lessee of lasting machines converted them by selling them to another, who shipped them to a foreign market, the measure of damages is the local market value, not the value on the foreign market less a sum representing the expense and risk of sending them.

2. Where plaintiff sought by bill in equity to obtain possession of machines which a lessee had converted by selling, and in an interlocutory decree the court found that the machines had been shipped out of the state, and directed the defendant to file his answer before it was due, the defendant waived any objection to the equity jurisdiction of the court by going to a hearing before a master for assessment of damages on an answer which did not set up the objection.

3. Where the lessee of property for a term sells it absolutely, the owner has the immediate right of possession, and may maintain trover, though the term has not expired.

4. Where, in equitable replevin, after it appeared of record that the goods sought to be recovered had been shipped out of the state, and the bill was retained for the assessment of damages, the defendant consented to making other persons parties defendant, it is too late, after the conclusion of the taking of evidence before a master, for him to object that they cannot be held jointly.

Appeal from Superior Court, Suffolk County; Edw. P. Pierce, Judge.

Bill in equity by the United Shoe Machinery Company against J. S. Holt and others. From a decree in favor of plaintiff, defendant Holt appeals. Affirmed.

John E. Crowley and Walter A. Bute, for appellant. Brandeis, Dunbar & Nutter, Edw. F. McClennen, and Walter Hellborn, for appellee.

LORING, J. By the bill in this suit, when it was filed, the plaintiff sought to obtain possession of 26 lasting machines which had been leased to J. H. Winchell & Co., and sold outright by them to the defendant Holt for \$300. By what is entitled an "interlocutory decree," but which apparently was made on a motion for a temporary injunction, it was found that the machines had been shipped out of the commonwealth, and the defendant was directed to file his answer before it was due. This was, in effect, an order that the bill be retained for the assessment of damages, which was the only relief which could be given. The case was sent to a master by an order which is not included in the record. From the master's report, it appeared that the 26 machines in question were made by the Boston Lasting Machine Company and leased to J. H. Winchell & Co. in 1891-93. The lessor sold its interest in all Boston lasting machines to the plaintiff in October, 1900, and the sale to the defendant Holt was in

March, 1901. It appeared that at some time between 1893 and 1901 the plaintiff had come into control of the Hand Method lasting machine, and that the plaintiff found it to be for its interest to sell the Hand Method machine in preference to the Boston machine. As showing that there was a market for the Boston machine in Boston after the plaintiff had taken up the Hand Method machine, evidence was admitted "that some manufacturers had refused to surrender their leased machines," and "there were also occasional orders for it from abroad." It was also found by the master that "these machines were sold by the Boston Lasting Company, and the complainant as its successor in Boston, in quantity, for resale abroad, with the collateral agreement that they were to go out of the country, and that, if any should afterwards be returned to the United States, the title to such machines so returned should revert in the Boston Lasting Machine Company, or in the complainant, its successor." The master also found that, "under the above conditions, sales of the Boston lasting machines in quantity have been made within the last three years in Boston by the Boston Lasting Machine Company, or by the complainant as its successor, at two hundred and fifty dollars a machine, and that said machines were subsequently resold abroad for five hundred dollars each; and this I find as a fact. The purchasers of these machines in quantity to be sent abroad were corporations distinct from, but controlled by, the Boston Lasting Machine Company, or the complainant as its successor. The sales of the machines to such corporations were outright sales, and the jobbing corporation received the profit on a resale of the machine abroad for five hundred dollars," and that "Boston lasting machines to be used in the United States were not sold, but were leased, for the life of the patents thereon, to boot and shoe manufacturers throughout the country, by a written lease." Officers of the Boston Lasting Company and of the plaintiff company testified that "the fair market value of a Boston lasting machine was five hundred dollars, or from five hundred to one thousand dollars," and one of the partners of J. H. Winchell & Co. testified "that the market value of the twenty-six machines was three hundred dollars"; but he also testified that "he had never known of the sale of a Boston lasting machine, and his only knowledge of the market value of shoe machinery was derived from his purchase of various kinds of shoe machinery for his own use at different times." The master found "that in 1901 there was still some demand for the Boston lasting machine, principally from abroad, and that, when one was sold, it was still sold in the United States to go abroad, for two hundred and fifty dollars"; reported all the facts bearing upon the market value of Boston lasting machines in March, 1901; and ruled "that the market value of a new

¶ 2. See Ballment, vol. 6, Cent. Dig. § 62.

Boston lasting machine in March, 1901, was the price at which it was sold in quantity in Boston to jobbers for resale abroad, to wit, two hundred and fifty dollars, and not the price for which it was sold by the jobbers abroad, to wit, five hundred dollars"; and, "assuming this ruling to be correct," he found "that the market value of these twenty-six secondhand machines in March, 1901," was \$195 each.

1. The plaintiff has raised the question of the correctness of this ruling and finding by the third, fourth, fifth, seventh, and eighth exceptions taken by him to the master's report. Where a defendant is liable for converting an article of personal property which has a market value in Massachusetts, the measure of damages is to be ascertained by its market value here, and not by the value which it may be found to have here by deducting from its market value in a foreign market a sum which would fairly represent the expense and risk of sending it to the foreign market. This was assumed to be the law in *Glaspy v. Cabot*, 135 Mass. 435. There may be cases in which the evidence warrants the ruling that the damages are to be measured by the market value in the domestic or in the foreign market. See *Coolidge v. Choate*, 11 Metc. 79. This is not such a case. On the facts found by the master, the only market for these machines in Massachusetts was to jobbers for export. The defendant Holt sent the machines abroad, and sold them there; that is to say, he did what a jobber for export would have done, had he bought the machines. We are of opinion that the ruling was right.

2. By his eighteenth request for a ruling to be made by the master, the defendant undertook to object to the jurisdiction of the court by reason of the fact that on the facts existing, or supposed by the plaintiff to exist, when the bill was brought, there was no jurisdiction in equity, and for that reason the bill could not be retained for the assessment of damages. But, as we have already said, the fact that the machines had been shipped out of the commonwealth was found as a fact in the "interlocutory decree" made December 9, 1901, directing the answer to be filed before it was due under the rules. After this the suit was retained for the assessment of damages. The defendants waived this objection, if the objection was a good one, by going to a hearing before a master on an answer in which this objection was not set up.

3. By his exception to the master's report in not giving the first, second, third, fourth, fifth, and sixth rulings of law requested by him, the defendant has raised the objection that, until the lease had been terminated by the plaintiffs, J. H. Winchell & Co. had the right of possession, and therefore that neither equitable replevin would lie, on which ju-

risdiction this bill, as originally brought, was founded, nor would an action of trover lie, for which, in effect, the bill was retained. Possession, or an immediate right to possession, is necessary, to maintain equitable replevin, as well as an action of trover or a writ of replevin; but where a bailee misuses the subject of the bailment, as he does in case of an absolute sale transferring the whole property, the bailment is ended, and the general owner has immediate right of possession, on which he can maintain trover. The point is concluded by the decision in *Carter v. Kingman*, 103 Mass. 517, although not discussed in terms in the opinion. But it is a matter which is well settled. See *Putnam, J.*, in *Ayer v. Bartlett*, 9 Pick. 156, 160; *Fenn v. Bittleston*, 7 Ex. 152; *Cooper v. Willomatt*, 1 C. B. 672; *Bryant v. Wardell*, 2 Ex. 479; *Tarrant v. Thompson*, 5 B. & Ald. 826; *Johnston v. Whittemore*, 27 Mich. 463; *Grant v. King*, 14 Vt. 367; *Sanborn v. Colman*, 6 N. H. 14, 23 Am. Dec. 703. The reason why the action failed in *Newhall v. Kingsbury*, 131 Mass. 445, and in *Raymond Syndicate v. Guttentag*, 177 Mass. 562, 59 N. E. 446, was because, when the writ was taken out, nothing beyond an assignment of the bailee's interest, or what was tantamount to that, had taken place; and ordinarily a lessee or conditional vendee has a right to transfer his interest. See *Glaspy v. Cabot*, 135 Mass. 435, 440.

4. By an exception to the master's report for not giving the ninth ruling requested by him, the defendant Holt objects that he and J. H. Winchell & Co. cannot be jointly held in this suit. It is true that, in an action of replevin, two persons cannot be made parties defendant merely because they are jointly liable in trover. *Richardson v. Reed*, 4 Gray, 441, 64 Am. Dec. 77. And it may be assumed that the same rule applies in equitable replevin. But it appears that the defendants J. H. Winchell & Co. were made parties defendant by an amendment to the bill, consented to by the defendant Holt, after it had appeared of record that the goods had been shipped out of the commonwealth, and the bill had been retained for the assessment of damages. In an action of trover the seller and the purchaser can be jointly held liable. *Smith v. Briggs*, 64 Wis. 497, 25 N. W. 558; *Grant v. King*, 14 Vt. 367. See *McAvoy v. Wright*, 137 Mass. 207, 210. It is not necessary to point out that, on the conclusion of the taking of evidence before the master, it is too late to take an objection of this kind.

5. We find no error of law in the finding of the master as to the damages due.

6. The other questions have not been argued. If, under these circumstances, the defendant could be treated as not waiving them by stating that he does not do so, it is enough to say that we see no error of law in them.

Decree affirmed.

(185 Mass. 49)

FRANKS v. EDINBERG.(Supreme Judicial Court of Massachusetts.
Worcester, Feb. 24, 1904.)**JUDGMENT—ENFORCEMENT—SET-OFF OF JUDGMENTS—STATUTORY PROVISIONS—ASSIGNMENT OF DEMAND—EFFECT ON RIGHT OF SET-OFF.**

1. The clause in Rev. Laws, c. 170, § 2, providing that, if an action is brought by a person who is not an inhabitant of the commonwealth, he shall be held to answer to any action brought against him in the commonwealth by the defendant, if the demands are such that the judgments may be set off one against the other, gives the absolute right to set off judgments in the cases specified, while the clause in the section declaring that, if there are several defendants in the original action, each of them may bring such cross-action against the original plaintiff, and may be allowed to set off his judgment against that recovered against himself and codefendants as if the latter judgment had been against himself alone, places the right to set off judgments in the cases specified in the discretion of the court.

2. The assignment of a demand of a nonresident of the state to a third person after the bringing of an action on the demand in the courts of Massachusetts does not destroy defendant's statutory right to bring an action against the original plaintiff with a view of setting off the judgments obtained one against the other.

Appeal from Superior Court, Worcester County; F. A. Gaskill, Judge.

Action by Isaac H. Franks against Elias Edinberg. From an order, entered on the motion of defendant, that the judgments recovered by the parties against each other may be set off one against the other, he appeals. Modified.

Rockwood Hoar and Simon G. Friedman, for appellant. Geo. S. Taft, Ernest I. Morgan, and Ralph A. Stewart, for appellee.

HAMMOND, J. Courts have the power at common law to set off judgments. This power is said to be vested in them "by virtue of their superintendence of all legal proceedings before them," and its exercise is at the discretion of the court. *Makepeace v. Coates*, 8 Mass. 451; *Ames v. Bates*, 119 Mass. 397. But there are certain statutory provisions with reference to suits between a nonresident plaintiff and a resident defendant, and the question is whether the resident defendant is entitled to a set-off of judgments in a case like the one now before us.

By the original act giving to a resident citizen a special right to bring a cross-action when sued by a nonresident, it is provided that, when each of the parties "shall have obtained judgment against the other, upon the application of either party to the court which rendered such judgment against him or them, the said court is authorized and directed to offset the said judgments (excepting the taxable costs) against each other, and to cancel them so far as to leave only the balance of the largest judgment to be executed." The right given by this statute was absolute. The commissioners upon the Revised Stat-

utes found this law still existing, and they dealt with the subject by reporting in chapter 90 of the revision three sections, as follows:

"Sec. 44. When an action is brought in this state by any person who is not an inhabitant thereof, or who cannot be found therein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the first action: provided that the demand in the two cases be of such a nature that the judgment or execution in the one case can be lawfully set off against the judgment or execution in the other.

"Sec. 45. If there are several defendants in the original action, each of them shall be authorized to bring such cross action against the original plaintiff, and upon recovering judgment therein, he may, in the discretion of the court, be allowed to set off his judgment against that which may be recovered against himself and his co-defendants, in like manner as if the latter judgment had been against himself alone."

Section 47, which is new, provides for continuances of the cases so as to enable the absent party to defend the action against him, and to enable either party to set off his judgment or execution against that which shall be recovered against him.

The legislative committee to whom the report of the commissioners was referred suggested no amendment to these sections, but the second section was amended by the Legislature by striking out the words "in the discretion of the court," and, as thus amended, the sections were enacted as Rev. St. 1836, c. 90, §§ 49, 50, 52, and ever since have been in force. Gen. St. 1860, c. 126, §§ 2, 3, 5; Pub. St. 1882, c. 164, §§ 2, 3, 5; Rev. Laws, c. 170, §§ 2, 4. It is plain from the remarks of the commissioners concerning these sections that they did not intend to change the law then existing by virtue of St. 1823, c. 118, or that the contrast in sections 49 and 50 should be between two different cases of permissive set-off, at the discretion of the court, but, on the contrary, they intended the contrast in those sections to be between the case where the defendant in the original action is the plaintiff in the cross-action, on the one hand, and, on the other hand, the case where there are several defendants in the original action, and one or more cross-actions are brought by them, and that in the first case the right to set-off should be absolute, and in the second it should be at the discretion of the court. While it is true that in the interpretation of a statute the question is not what was the meaning or intention of the commissioners who reported it, but what was the intention of the Legislature which passed it, and that, when the construction of the statute is clear and consistent, it cannot be controlled by the suggestions of the commissioners (*Baker v. Atlas Bank*, 9 Metc. 182, 197; *Holbrook v. Bliss*, 9

Allen, 69, 76), still, where there is a substantial doubt as to the meaning of the language used in a compilation of statutes, the statutes as they previously existed, especially when taken with a note by the commissioners indicating an intention to make no change, furnish a valuable guide to their construction. *Bent v. Hubbardston*, 138 Mass. 99, 100.

Considering the history of the provisions now found in Rev. Laws, c. 170, § 2, the evident intent of the commissioners by whom they were originally framed to make no change in the then existing law, the difference in the language of the two clauses when contrasted with each other, and the reasons for the contrast, we are of opinion that, as to the cases named in the first clause of the section, the right to set off of judgments is absolute, except that taxable costs cannot be set off, while, as to those named in the second clause, the right is within the discretion of the court.

It is contended by the plaintiff that, even if this be the true construction of the statute, there should be no set-off in this case, because of the assignment by himself of the foreign judgment on April 18, 1902, after this suit was brought. Without inquiring or deciding whether this contention is open to him on this appeal (see *Vinal v. Spofford*, 139 Mass. 126, 129, 29 N. E. 288; *Shepard v. Lawrence*, 141 Mass. 479, 480, 5 N. E. 854), we think this position untenable. The demand upon which the judgment in the cross-action was rendered accrued to the defendant more than two years before the assignment of the foreign judgment. His right to bring his cross-action and have the two domestic judgments set off against each other accrued when the plaintiff sued out the writ in this present action. We cannot say, as matter of law, that the mere fact of an assignment of the demand of the original plaintiff to a third person after the bringing of a suit, which gave the defendant a statutory right to bring a cross-action with a view of setting off a demand coeval with that on which he had been sued, would prevent the allowance of a set-off of the judgments. In the absence of anything but the mere fact of an assignment, it seems equitable to say that the assignee took subject to the defendant's right to bring his cross-action under the statute, and have the judgments set off.

The result is that Edinberg was entitled to have the judgments exclusive of the costs upon the suits here set off against each other, and that the order of June 4, 1903, was erroneous in so far as it directed that out of the funds in the hands of the trustee there should be retained for the attorney of the plaintiff in this action the item of \$92.42, the amount of the costs forming part of the foreign judgment. The sum to be retained should be only \$47.12, the costs in this present action; the balance to be set off as prayed for. So ordered.

(185 Mass. 74)

SMITH v. AETNA LIFE INS. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Feb. 24, 1904.)

ACCIDENT INSURANCE — POLICY — CONSTRUCTION—INJURY IN RIDING A STEEPLE CHASE.

1. The application for an accident insurance policy required the insured to "fully" state his "occupations," and he answered that he was a cotton manufacturer. The policy also provided that it should not cover injuries caused by "voluntary exposure to unnecessary danger." *Held*, that he could not recover for an accident while riding a steeple chase, even though the race was for amateurs.

2. Steeple-chase riding being excluded from the risks of an accident policy, the fact that the agent of the insurer was aware that the insured occasionally rode such races would not affect the policy in that respect.

Appeal from Supreme Judicial Court, Worcester County.

Action by Harry W. Smith against the Aetna Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Frank B. Smith, T. H. Gage, Jr., and Frank H. Dresser, for appellant. Herbert Parker and Henry H. Fuller, for appellee.

MORTON, J. This is an action to recover indemnity under an accident insurance policy for injuries received by the plaintiff while engaged in riding a steeple chase. The case was heard by the court upon agreed facts, and the court found and entered judgment for the defendant, and the plaintiff appealed.

The policy in suit is a renewal policy, and expired June 6, 1901. The accident occurred June 1, 1901. The original policy was issued in 1895, and ran for one year. There have been successive renewals from year to year as each expired. In the application on which the original policy was issued, the plaintiff's occupation was stated to be that of a cotton manufacturer. The application required that the "occupations" of the applicant "should be fully stated." In the policy the plaintiff was described as "a cotton manufacturer by occupation." Amongst the conditions on which the policy was issued was one that the policy should not cover injuries caused by "voluntary exposure to unnecessary danger." On May 28, 1901, the defendant learned that the plaintiff engaged in steeple-chase riding, and directed its agent in Worcester to cancel the plaintiff's policy, on the ground that it could not assume that hazard or take the chance of a claim. Thereupon the defendant's agent sent a check for the unearned premium to the agents through whom the plaintiff had procured the policy, and to whom he had paid the premiums, with a request to notify the plaintiff that the policy had been canceled, and to return it. The plaintiff was absent from the city, and his bookkeeper opened the letter containing the notice and check, and, after communicating

¶ 2. See Insurance, vol. 22, Cent. Dig. § 395.

with the agents through whom the plaintiff had obtained the policy, and being assured by them that it would be all right to do so, delivered up the policy. There was a provision in the policy giving the defendant the right to cancel it upon returning the unearned premium. Upon being informed as to what had taken place in his absence, the plaintiff repudiated what had been done, and notified the defendant he held the check subject to their order.

There are two questions before us: (1) Whether the plaintiff's injuries were received in consequence of a voluntary exposure to an unnecessary danger, within the meaning of the policy; and (2) whether the policy had been duly canceled before the accident.

We do not find it necessary to consider whether the policy had been duly canceled, as we are of opinion that there was a voluntary exposure to unnecessary danger. Steeple-chase riding, as commonly understood, differs from ordinary riding and driving, and involves elements of unusual hazard and danger. There can be no question that the danger was unnecessary, and that the exposure to it was voluntary. There was nothing in the description of the occupation of the plaintiff which included steeple-chase riding. It cannot be said to be an incident to the occupation of a cotton manufacturer. We do not mean to say that an accident policy containing a provision like that contained in the policy in this case against voluntary exposure to unnecessary danger debar the insured from recovery if injured while engaged in the common sports and amusements. But in steeple-chase riding the liability to accident is much greater than in the ordinary sports and amusements. The fact that the race in which the plaintiff was injured was for amateurs makes no difference. Neither does the circumstance that the defendant's agent was aware that the plaintiff occasionally rode steeple-chase races make any difference. The liability of the defendant depends on the terms of the policy, and whether an accident sustained in steeple-chase riding comes within them. For reasons already given, we do not think that it does.

Judgment affirmed.

(186 Mass. 71)

BURNS v. DONOGHUE

(Supreme Judicial Court of Massachusetts. Hampden. Feb. 25, 1904.)

BASTARDY—CONSTANCY OF ACCUSATION—EVIDENCE—INSTRUCTIONS—ILLUSTRATIONS.

1. Where, in a prosecution for bastardy, there was evidence that complainant accused defendant at the time of her travail, evidence that complainant had accused defendant of being the father of her child "from the first," and that her mother had not "heard plaintiff accuse any person other than defendant," was admissible, as tending to show complainant's con-

stancy of accusation from the time her complaint was made before the child was born, under Rev. Laws, c. 82, § 16, to corroborate her evidence.

2. In a prosecution for bastardy, an illustration by the court, in an instruction on the weight of complainant's evidence, to the effect that it was a common thing for the complainant to cling to her story that the connection by which the child was begotten was in fact a rape, but that the fact that such part of complainant's story was untrue did not necessarily show that complainant's accusation that defendant was the father of the child was untrue, was not error.

Exceptions from Superior Court, Hampden County; Albert Mason, Judge.

James Donoghue was convicted of bastardy on complaint of Margaret Burns, and he brings exceptions. Exceptions overruled.

At the trial complainant testified to an intimacy between herself and defendant, of his attentions to her, and their frequent meetings in a public park, but that on July 10, 1901, he visited her home, and on that day, when the child was begotten, defendant came to the kitchen of the tenement where complainant lived with her parents, who were absent at the time; and that immediately on entering the room he turned and locked the door and came toward her; that she ran into an adjoining room, and sought to escape through a door into a hallway used in common by the tenants of the building; that before she could unlock the door last mentioned the defendant seized her, and, while she struggled and resisted, carried her into a bedroom adjoining, threw her upon a bed, and forced her to submit. On cross-examination the complainant testified that the tenement in question was one of several in a building on the principal business street of Holyoke; that it was a warm day, and that the windows were open; that the defendant had never been in the tenement before. At the time of the trial complainant was 21 years of age, and she stated that, so far as she knew, defendant had no reason to know whether she was at home or absent; that when the child was born she accused the defendant of being its father. Complainant's mother also testified that her daughter, during her travail, accused defendant of being the father of the child. The court charged the jury, at defendant's request, that the burden of proof was on the complainant; that she must establish by a fair preponderance of the evidence that defendant did the act which caused her pregnancy; and the jury, in passing judgment on her testimony, were entitled to take into consideration the credibility of her statements as to the circumstances under which she alleged the act was done, and the incidents attending it. The court also charged: "The law requires the magistrate who receives her original complaint to examine the complainant with reference to the person alleged to have been the father of the child and as to the time and place when the child was begotten. It does not make her answers to these questions

¶ 1. See *Bastardy*, vol. 6, Cent. Dig. § 159.

conclusive. The answers do not bind her in the sense that she may not afterwards tell the truth, though the time and place differ from her statement to the magistrate; but to aid the tribunal which may finally determine the question, and to give such protection to all parties as may be, she is required to make the original statement under oath, and if it show willful misstatement of the facts it has, of course, very direct bearing upon her credibility as a witness. If she make statements which are not accurate, but which the circumstances explain without applying willful misrepresentation, then, of course, the misstatements may have much less weight, but at the same time be worthy of some consideration in determining the accuracy of her story. Now, it is not true that, because a witness is inaccurate as to some of the circumstances and incidents connected with the story, the story is necessarily false as to the main fact." "Now, in further illustration, any one having experience in this kind of a case knows that it is a very common thing for the complainant to cling to the story that she was forced; that the connection by which the child was begotten was in fact a rape. Now, jurors, in finding the defendant guilty, do not always accept that portion of the story. The obvious explanation of the reluctance of a complainant to admit that the connection was voluntary furnishes ordinarily all the explanation that would be required with reference to a statement of that kind, and the jury might well, and in many instances undoubtedly have, accepted the truth of the main statement without accepting as perfectly accurate the recital of how it took place; but this is a matter of fact for you to weigh as men of common experience in the world. You are to test the stories, and determine what is true."

John R. Callahan, for plaintiff. C. T. Callahan, for defendant.

MORTON, J. This is a bastardy complaint. There was a verdict of guilty, and the case is here on exceptions to the admission of testimony and to the charge.

1. The first exception was to the admission of the question put to the complainant, "Now, from the first have you accused Donoghue of being the father of the child?" to which the witness answered, "Yes, sir; I have." The question and the answer were admitted subject to the defendant's exception to show constancy of accusation. The next exception was of a like nature. Complainant's mother was asked if she had ever heard her daughter accuse any other person than the defendant of being the father of the child, and she said that she had not. This question and answer were also admitted as tending to show constancy. It appeared that a complaint was made in the lower court before the child was born, and that a supple-

mental complaint was filed in the superior court after the birth of the child. The statute provides that: "If upon examination under the provisions of section one and also in the time of her travail she accused the same man of being the father of the child of which she was about to be delivered, and continues constant in such accusation, her accusation in time of travail may be put in evidence upon the trial to corroborate her testimony." Rev. Laws, c. 82, § 16. That is, as we construe the statute, if the complainant has in the time of her travail accused the same man of being the father of her child whom she accused in the examination before the magistrate, and has continued constant in such accusation from the time of such examination, her accusation in time of travail may be put in evidence. In the present case it is plain that the testimony that was objected to was introduced for the purpose of laying a foundation under the statute for the introduction of the accusation in time of travail by the complainant which was subsequently testified to by herself and her mother. There was nothing to show that the complainant had made any accusation prior to that contained in the complaint to the magistrate, and the words, "from the first," in the question that was put to her and objected to, must be taken to refer to the accusation thus made. For the same reason—namely, that there was nothing to show that the daughter had ever made any accusation against anybody before that contained in the complaint—it cannot be said that the question to and answer of the mother were wrongly admitted.

2. The remaining exception relates to an illustration that was used in the charge, and the objection is that what was said constituted a charge upon the facts. The illustration was used for the purpose of directing the attention of the jury to considerations which, as men of the world, they might properly take into account as bearing on the credibility of the story told by the complainant of the circumstances under which, as she claimed, the child was begotten. There was nothing which could fairly be construed as manifesting an intention on the part of the chief justice to throw into the scale on one side or the other the weight of his opinion on the question of credibility, which is what the statute was designed to prevent. See *Cook v. Bartlett*, 179 Mass. 576, 580, 61 N. E. 266; *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485, 488, 59 N. E. 1113; *McKean v. Salem*, 148 Mass. 109, 114, 19 N. E. 21; *Com. v. Clifford*, 145 Mass. 97, 13 N. E. 345; *Com. v. Hayes*, 114 Mass. 282; *Morrissey v. Ingham*, 111 Mass. 63; *Harrington v. Harrington*, 107 Mass. 329; *Durant v. Burt*, 98 Mass. 161, 168. A majority of the court think that the exceptions on this branch, also, of the case, should be overruled.

Exceptions overruled.

(185 Mass. 181)

JORDAN v. CARBERRY.(Supreme Judicial Court of Massachusetts.
Norfolk. Feb. 26, 1904.)**EVIDENCE—OWNERSHIP OF DOG—ISSUANCE OF
LICENSE—NOTICE.**

1. The issuing of a dog license to one as owner has no effect as evidence of his ownership, when he has no knowledge of its issuance.

Exceptions from Superior Court, Norfolk County; Wm. Schofield, Judge.

Action by one Jordan, by his next friend, against one Carberry. Judgment for plaintiff, and exceptions by defendant. Exceptions overruled.

Barton & Barton, for plaintiff. John P. Leahy and John D. Drum, for defendant.

KNOWLTON, C. J. This suit was brought to recover damages for the bite of a dog of which the defendant was alleged to be the owner and keeper. The plaintiff introduced evidence tending to show that the defendant was the keeper of the dog, and he did not attempt to prove that she was the owner of it. The defense was that one Clifton B. Carberry was the owner and keeper, and, to prove this, a license issued by the town clerk to him as owner was offered in evidence. This was excluded, subject to the defendant's exception. No evidence was introduced to show by whom the license fee was paid, except that the fee for one year was paid by the defendant. There was no evidence to show at whose request the license was issued, or that Clifton B. Carberry had anything to do with the issuing of it. It was admitted that Clifton B. Carberry would testify, if present, that he was not the owner or keeper of the dog, and that he never paid a license fee for the dog, and knew nothing about the license fee.

This exception presents the only question before us. The issuing of a dog license has effect, as evidence of ownership in the licensee, only when knowledge is brought home to him in such a way as to connect him with it. The independent act of the town clerk, or the action of the clerk at the request of another party, is not evidence against the person named as licensee. The fact that one's name is on the voting list of a city or town is no evidence of his residence there, unless it is shown that it was put on the list with his knowledge and consent. *Sewall v. Sewall*, 122 Mass. 156-162, 23 Am. Rep. 299. The act of assessors in taxing property of a person as owner is no evidence of ownership, unless he pays the tax, or is otherwise connected with the assessment. *Mead v. Foxboro*, 11 Cush. 362; *Com. v. Heffron*, 102 Mass. 148-152. In the present case the act of the town clerk lacks all the elements necessary to give it effect as evidence against the licensee, or in favor of third persons. See *Burns v. Stuart*, 168 Mass. 19, 46 N. E. 899.

Exceptions overruled.

(185 Mass. 139)

GILGAN v. NEW YORK, N. H. & H. R. CO.(Supreme Judicial Court of Massachusetts.
Worcester. Feb. 26, 1904.)**INJURY TO SWITCHMAN—NEGLIGENCE OF EN-
GINEER—EVIDENCE—DECLARATIONS.**

1. Evidence in an action for death of a switchman, killed by a train while he was turning the second of two switches, to let the train cross from one track to another, held insufficient to show negligence of the engineer.

2. Declaration of a switchman, killed while turning a switch for a train, that he was run down, does not tend to show that the risk was not an obvious one, or that the engineer was negligent.

Exceptions from Superior Court, Worcester County; Chas. A. De Courcy, Judge.

Action by James E. Gilgan, administrator of John F. Gilgan, deceased, against the New York, New Haven & Hartford Railroad Company. Verdict was directed for defendant, and plaintiff brings exceptions. Exceptions overruled.

George S. Taft, Ernest I. Morgan, and Ralph A. Stewart, for plaintiff. Arthur P. Rugg, for defendant.

MORTON, J. This is an action of tort, under Rev. Laws, c. 106, §§ 71, 72, by an administrator, to recover damages for the conscious suffering and death of his intestate, one John Gilgan, caused, it is alleged, by injuries received in the defendant's service through the negligence of one Haskell, an engineer in control of a locomotive engine in the defendant's employment.

The intestate was a flagman, and also tended certain switches. Whether or not he was required to tend the switches, as part of the work for which he was originally hired, is immaterial. He had done it, as there was testimony tending to show, for about a year, under circumstances which would have warranted a finding that it had become a part of his duty, and we assume that when injured he was acting within the scope of his employment. The accident happened on the morning of January 16, 1902. An engine, with a long train of cars attached to it, and operated by the defendant, was backing down from one freightyard in the city to another. It was backing slowly, from four or five to eight miles an hour, and in obedience to a motion to that effect given to the engineer by Gilgan. On the track on which the train was backing down, another train was approaching. Gilgan gave the engineer of that train a motion to stop, and he did so. Between the two trains was a cross-over, which enabled the train that was backing down to pass from the east main or outward bound track on which it was, and on which the approaching train stood, to the west main or inward-bound track. In order to use the cross-over, it was necessary to throw two switches. Gilgan had been in the habit of throwing them for the purpose of allowing

trains to make the cross-over almost daily, as the testimony tended to show, and sometimes several times a day, for a year or more. As the train backed down, Gilgan threw the first switch, and then continued along ahead of the train "at a good trot," as one of the witnesses testified, for the purpose of throwing the second one. He reached the switch a short distance ahead of the train, and while in the act of throwing the switch was struck by the tender, and received the injuries from which he subsequently died. The distance between the handle or lever operating the switch and a beam projecting from the rear end of the tender was between 15 and 18 inches when the handle was down, and was 2 inches less when the handle was in position for operating the switch.

We assume that the plaintiff's intestate was injured while in the act of throwing the switch, and not while attempting to get upon the footboard of the tender, as there was some testimony tending to show might have been the case. But we think that there was nothing tending to show negligence on the part of the engineer of the engine that was backing down. He was backing down as motioned to do by plaintiff's intestate. The speed—from five to eight miles an hour—was not excessive, and the attention of the engineer was rightly directed to the care of his engine, and the train which he was backing. He knew that plaintiff's intestate was a man of experience, and he may well have supposed that he was competent to look out for himself, and that he would do so. No doubt, he was bound to exercise a reasonable regard to the safety of Gilgan; but there is nothing, it seems to us, that shows that he was at fault for the accident. In making the cross-over, his movements were subject to Gilgan's direction and control; and, in the absence of any direction or warning from Gilgan that he was going too fast, or to slow up still more, he may well have supposed that he was proceeding in a proper manner. He himself, as we understand the situation, was on the side of the engine opposite to the switch where Gilgan was; but there is no contention that the fireman, who was on the side next to Gilgan, was not looking out for the signals, if any, that might be given. It would seem that Gilgan miscalculated the speed at which the train was moving that was backing down, and his ability to throw the switch in the time that he had to do it in, and get out of the way safely. For this no one was to blame except himself. He was not required to throw the switch in the face of a manifest danger, and, if he attempted to do it and was injured, the defendant cannot be held liable. His declarations that he was run down have no tendency to show that the risk was not an obvious one, or, in view of what clearly appears from the plaintiff's testimony, to show that the engineer was careless. See *Goodes v. B. & A. Railroad*, 162 Mass. 287,

38 N. E. 500; *Coombs v. Fitchburg Railroad Co.*, 156 Mass. 200, 30 N. E. 1140.

Exceptions overruled.

(185 Mass. 76)

GAUGES v. FITCHBURG R. CO.

(Supreme Judicial Court of Massachusetts.
Franklin. Feb. 24, 1904.)

INJURY TO RAILROAD SECTION HAND—NEGLIGENCE OF COMPANY—USE OF IMPROPER TOOLS AND MATERIALS—EVIDENCE—SUFFICIENCY.

1. For any negligence on the part of a section foreman in using an old railroad spike and an old hammer in laying steel, whereby a laborer was injured, the railroad company is not liable, when the uncontradicted testimony shows that it furnished plenty of good spikes and hammers; the negligence, therefore, being that of the foreman, and not of the company.

2. The use of old railroad spikes cannot be said to constitute, of itself, negligence on the part of a railroad company sought to be charged with liability for an injury to a section hand by reason of their use.

3. Evidence considered, and held not to show that a hammer used by a section foreman in driving a spike, by which a laborer was injured, was not proper for use by a person of his skill and experience.

Exceptions from Superior Court, Franklin County; F. G. Fessenden, Judge.

Action by John Gauges against the Fitchburg Railroad Company. There was a judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

The following are plaintiff's exceptions:

"This is an action of tort for personal injuries. The writ is dated October 14, 1900. The pleadings may be referred to.

"At the trial with a jury at the July sitting, 1901, Robert D. Brooks, witness for the plaintiff, testified as follows: 'I am a section foreman. Have been such for twenty-two years in all. In May, 1899, was employed at Millers Falls. Was a second hand or second foreman under one McCullough on the Fitchburg Railroad. Was laying steel the day the accident happened on the section between Orange and Wendell on the line side. Was using old spikes and new spikes—the best of the old and some new ones. It was customary to use old spikes. Nobody ordered us to use them, that I know of. We always used the best of the old spikes in laying new steel. I didn't hear whether there was an order given for the use of the old spikes. Both the plaintiff and I were working on the same rail. I was behind him. He was ahead of me, and I was spiking behind. I was west from him, probably fifteen or twenty feet. We were both on the same rail. I was using old spikes at that time, and I struck the spike which flew and hit Gauges. It was an old spike. I didn't notice anything peculiar about that old spike, different from any other. I drove it with a hammer. It was usual to hold the spike in the hand, and strike one or two blows to start the spike in the tie. I

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 232.

simply started the spike in the tie, and then struck it, and it flew. I started it as I always do. Held my spike and struck it with the hammer—gave it two little light taps, so it was straight and then struck it—and my hammer slipped on it, and the spike flew. I started it straight, struck just a natural blow, not a hard one, I think, straight down on the head of the spike. That was what I was intending to do, and I think I did. The spike flew from under my hammer and struck Gauges. I didn't straighten the spike before putting it on, because it was straight. We wasn't using crooked spikes. We were using the best of the old spikes, as we always do. It was a straight spike. The old spikes we pull out from the inside of the rail are good, always, but on the outside of the rail, where the press comes, it cuts them, and we don't usually use the spikes on the outside, especially on a curve; but on the inside where the pressure doesn't come, we always use them—always have ever since I was railroad-ing. Q. What is the condition of the head of these spikes, ordinarily? A. Sometimes, of course, crooked; and sometimes, when a head is crooked, and you strike it with a hammer, the head will fly off, but this didn't. Q. They become jammed or out of shape? A. Of course, some are. Some of them get bent when we are pulling them out. We pull them out with a bar. There are lots of them get bent, but we don't intend to use bent spikes, without we straighten them. The old spikes are oily, some of them. The oil drops from locomotives. But the point is generally all right—just about as sharp as a new spike. Of course, some are not. And, as a general thing, the spike is all right. It is driven in the tie, and remains there until it is pulled out, as a rule. The point is all right, but the head is oily, and the hammer will slip on it sometimes. But new spikes fly sometimes. I can't say that I saw the spike after it flew. I saw it fly, but I didn't see it hit Gauges, but I heard him make a noise after it. There were five men working there at the time. McCullough was between us at that time. He was pushing a rail out with a bar. The spike flew just high enough to strike Gauges in the face. I think it was about half past eleven when it happened—just before we went to dinner. I have been at the business of driving spikes all my life, since I was seventeen. I am positive we had our three hammers with us, and didn't use any others. Think there were four spiking. It was a good hammer—not different from the ordinary hammers used on section. It was on the section when I went there, and I do not know how long before. I had been there about a year and a half at that time. It was flat. It was just a new hammer, you might say. It had been used more than a year and a half. These hammers are a little rounding, always. It might possibly have been more rounding than when new. It was a good hammer. A new hammer is not per-

fectly flat. It wasn't any more rounding than a new hammer would be. It was just as good—just the same—as a new one.' On cross-examination he testified as follows: 'It is customary to use the old spikes. We always use the best of the old spikes. There were plenty of old and new spikes furnished on the work, scattered all along the line. We always do that before we lay the steel. No one selected whether the old or the new should be used. We always did that. We were sent to spike the rails, and used new and old ones as we went along. We could use either the old or the new. If we had a bad old spike, we could use a new one, if we wished, and we did so. The spikes were spread all along the track, new and old—old that had been pulled out, and the new ones spread along. The spike I struck was all right in every way. It was a good spike, only it was an old spike. I gave it a couple of taps, and then gave it one more, and it flew and hit Gauges. Spikes often fly when we are striking them—quite often fly when we are spiking them. That has been my experience in a good many years' work and I expect that they will fly, and they do fly. There were about twenty-five or thirty hammers, probably, on the work train; and, if that hammer hadn't been all right, I could have got another. All the hammers that were necessary were furnished us for the job. I used the hammer afterwards. It was in as good condition as when I struck the blow. I used it all the time I was on the section, until I left, nearly a year after. It was a hammer that I was accustomed to use in the work. We had three hammers with us, but there were other hammers lying along the road that belonged to the work train. If we had needed another hammer, we could have got it. I am not positive whether it was four or three working with hammers. There were twenty-five or thirty hammers, perhaps fifty, on the work train, and I could have got one of those hammers, if we wanted, and any of the other men could. That is what they were there for.'

"John Gauges, the plaintiff, testified as follows: 'We were working on the Fitchburg Railroad on the 21st of May, 1899, laying new steel. That on the night before we had our directions to take our tools, and just what we wanted to work, and to go to work for McCullough. We went to work about six o'clock in the morning. When we got off at Wendell Depot, the gravel train stopped, and we took out our tools and got ready to work. McCullough gave directions. He told me to get the hammers and go to spiking. Mosseau and Campbell each got a hammer, and I got one. When I came to strike, Mr. Brooks came along, and said that hammer belonged to him; he always used that hammer. He said: "You can go to the gravel train, and get you a hammer from the gang." I said: "I don't know that I can get any. Why can't I use that hammer?" He said: "Be-

cause you ain't used to that hammer. Because that hammer has a pretty small head, and has been used a great deal." And he went and got me one from the gravel train—a great deal larger hammer than the other. So I went to work. McCullough asked if I could make it go, and I told him I would try the best I can. The head of the hammer Brooks gave me was a great deal bigger and a great deal flatter than the other. The other had been rounded. Brooks told me that: "That hammer you can't use, because you ain't used to spiking." There were four men to drive spikes—Brooks, Campbell, Mosseau, and I. I worked generally at whatever the boss told me to do—shoveling or digging or anything. I didn't spike before very much. I was driving a spike when I got struck. I just had the hammer in one hand, and the spike in the other, and just bent down and got started to strike the spike, and I hit twice and when I got up I got motion to strike again, and then I got motion to hit down, and that spike from the other fellow flew and knocked me down. I didn't know anything after that for some little time. That Shanks, the roadmaster, went by us as we were working, and said not to use the spikes on the inside of the track.' On cross-examination he testified: 'I had been to work on the railroad six weeks at anything the boss ordered me to do. Had been driving spikes, but not very much, before. They went to the gravel train to get a hammer for me. There were plenty of hammers on the gravel train. I couldn't say how many, but lots of them, and there were plenty of spikes around there, new and old. They ordered us to use old spikes. We used the best of the old spikes. Our orders were to use the good ones, and that was all we used. I don't know anything about the spike. It may have been perfectly good, so far as I know.' On redirect examination the plaintiff testified that he looked at the hammer. Brooks told him: 'It has a pretty small head, and it is rounding. You can't use it. You ain't used to it. It has been used too much—that hammer.'

"Frank Campbell, witness for the plaintiff, testified, in part, as follows: 'On May 21, 1899, was employed on the Fitchburg Railroad, was working with Gauges. I stood the second man from him. I saw the spike fly from Mr. Brooks' hammer and hit Gauges in the eye.' On cross-examination he testified: 'I was driving spikes myself. There were plenty of spikes there. There were plenty of old spikes and good spikes, and plenty of new, and the hammers were those usually used in that kind of work—were good hammers. I saw the hammer that Brooks had, and it was all right—the usual kind of hammer used about that kind of work.'

"Evidence was introduced tending to show that the plaintiff was injured. There was no evidence that notice of the time, place, and cause of the injury was given to the defendant.

"At the close of the plaintiff's evidence, the defendant requested the court to rule that, on all the evidence, the plaintiff was not entitled to recover. The court ruled as requested, and directed a verdict for the defendant, and the plaintiff duly excepted thereto; and, the plaintiff being aggrieved by said ruling, now prays that his exceptions may be allowed."

Cornelius A. Parker and H. C. Attwill, for plaintiff. Dana Malone, for defendant.

MORTON, J. If it was negligence on the part of Brooks to use an old spike and an old hammer, and the plaintiff's injury was caused thereby, nevertheless the defendant is not liable. The uncontradicted testimony shows that it furnished plenty of good spikes and good hammers. The negligence, therefore, if there was any, in the use of an old spike and an old hammer, was the negligence of Brooks, and not of the defendant. But there is nothing to show that the spike was not a good spike, or that it was negligent to use it. It cannot be said that the use of old spikes constituted, of itself, negligence on the part of the defendant. An old spike might be as good for certain kinds of work as a new one. And according to the plaintiff's own testimony, the orders were to use only the good ones. So as to the hammer. Notwithstanding the declarations of Brooks, testified to by the plaintiff, there is nothing to show that the hammer was not a proper hammer for a person of the skill and experience of Brooks to use. The testimony tended to show that it was a good hammer, and that Brooks continued to use it until he left, nearly a year after.

Exceptions overruled.

(185 Mass. 96)

COMMONWEALTH v. CRONIN.

(Supreme Judicial Court of Massachusetts. Essex. Feb. 24, 1904.)

ASSAULT WITH INTENT TO MURDER—DEFENSE OF INSANITY—EVIDENCE—WIFE—COMPETENCY AS WITNESS.

1. In a prosecution for assault with intent to murder, defended on the ground of insanity induced by epilepsy, defendant offered testimony of his wife that, on coming out of what was claimed to have been an attack of the disease, two days before the assault, he declared that he would drown himself. *Held* incompetent, under Rev. Laws, c. 175, § 20, cl. 1, providing that neither husband nor wife shall testify to private conversations with each other, except as to abusive language addressed to a wife in private to show abusive treatment.

Exceptions from Superior Court, Essex County; Robert O. Harris, Judge.

John Cronin was convicted of assault with intent to murder, and he brings exceptions. Exceptions overruled.

The following are defendant's exceptions:

"This was an indictment charging that the defendant assaulted one Mary Gillispee, at a time and place therein named, with intent

to murder. The defense was insanity induced by epilepsy, and that at the time of the assault the defendant was insane as a result of prior epileptic conditions. It appeared in evidence that at the time of the assault the defendant rushed from his house and seized the woman Gillispie while she was walking upon the street, threw her to the ground, and cut her in the neck with a knife; that, while assaulting the woman with the knife, he was pushed away from her by her sister, and, other people coming up, defendant ran away, and, being pursued, ran to a pond, and threw himself in, from which pond he was rescued in an unconscious condition and taken to the station. There was also evidence tending to show that defendant had entertained feelings of ill will towards the woman for some time prior to the assault. The defendant introduced evidence as to his history, and showed, among other things, that he had received an injury in the head in early life; that he was subject to frequent headaches, and that for a period just preceding the assault he had suffered from sleeplessness, was morose, and failed to recognize acquaintances; and, among others, the defendant called his wife as a witness, and she testified that on Wednesday, before the alleged assault on Friday, the defendant, while alone with her in a room of the house wherein they resided, and while lying upon a lounge, had an attack, the nature of which was in dispute, but which the defendant offered evidence of an expert, based upon the testimony of the wife, to show was an epileptic fit, manifested by twitchings of the body and arms, glaring eyes, loud breathing, protruding lips, and unconscious and incoherent sounds and mutterings. This attack lasted about ten minutes. The wife was allowed to testify, without objection, as to the condition of the defendant, manifested by his symptoms. The defendant offered further to show by the wife that immediately upon coming out of this attack the defendant declared that he would drown himself, but made no effort to do so, and performed his usual duties until the time of the assault, two days later. The defendant offered evidence of an expert that the assault was committed while the defendant was insane as a result of epilepsy; the expert basing his opinion upon the testimony of the wife and others as to the previous condition and history of the defendant, and the facts and circumstances of the assault itself. The defendant claimed that the evidence offered of his declaration upon coming out of the attack aforesaid, together with other evidence, supported the theory of insanity on the ground of epilepsy, and tended to show the condition of his mind, taken together with what was claimed upon the part of the defendant to be the attempt to commit suicide on the day of the alleged assault, and immediately following the assault. There was no evidence that the defendant had attempted to commit suicide at

any time previous to the assault. The presiding judge excluded the evidence offered solely upon the ground that it was a private conversation between husband and wife. The jury returned a verdict of guilty, and the defendant, being aggrieved by said ruling, tenders this bill of exceptions, and prays that it may be allowed."

W. Scott Peters, for the Commonwealth.
Knox & Coulson, for defendant.

BARKER, J. The defendant's statement that he would drown himself was made in private to his wife. It was relevant to his condition of mind, but was made incompetent and inadmissible as evidence in his favor by the prohibition of the statute. "Neither husband nor wife shall testify as to private conversations with each other." Rev. Laws, c. 175, § 20, cl. 1; *Fuller v. Fuller*, 177 Mass. 184, 58 N. E. 588, 83 Am. St. Rep. 273, and cases cited. It did not come within the reason of the exception which allows abusive language addressed by a husband in private to his wife to be given in evidence to show abusive treatment. See *French v. French*, 14 Gray, 186.

Exceptions overruled.

(185 Mass. 89)

COMMONWEALTH v. SHEA.

(Supreme Judicial Court of Massachusetts.
Middlesex. Feb. 24, 1904.)

INTOXICATING LIQUORS—NO LICENSE CITIES—DUTIES OF EXPRESSMEN—VIOLATION.

1. Rev. Laws, c. 100, § 50, requiring expressmen to keep a book open for the inspection of officers, and to plainly enter therein the date of reception of each package of liquor received for transportation into a no-license town, and also a correct transcript of the marks as well as the date of delivery, is violated where an expressman brings liquors into a no-license city or town, and transports them to the place of delivery without first having made in the book the entries showing the consignor and consignee.

Exceptions from Superior Court, Middlesex County; John A. Aiken, Judge.

One Shea was convicted of delivering intoxicating liquors in a no-license city without having made the entries required by Rev. Laws, c. 100, § 50, and excepts. Exceptions overruled.

George A. Sanderson, for the Commonwealth.
Dana B. Gove & Sons, for defendant.

BARKER, J. The question for decision is whether an expressman who has brought intoxicating liquors into a town or city which grants no licenses violates the provisions of Rev. Laws, c. 100, § 50, by carrying the liquors to the actual place of delivery without having first made an entry concerning them in the book which he is required by that section to keep. The section is a continuation of the provisions of St. 1897, c. 271, § 2, which was an act to further regulate the transportation of such liquors into no-license

cities and towns. That statute was considered in the case of *Commonwealth v. Intoxicating Liquors*, 172 Mass. 311, 52 N. E. 389, where it is said that the act was "only one of the many statutes which indicate that the policy of the commonwealth is to require the traffic in liquors in this state shall be open, so that every step shall be exposed to the scrutiny of the authorities, and that the violation of the law may be the more easily detected." The book is to be at all times open to the inspection of the proper authorities. The expressman is not only to keep the book, but is to "plainly enter therein the date of the reception * * * of each vessel or package * * * received for transportation, and a correct transcript of the marks" as well as the date of delivery. Considering the purpose of the provision—to expose every step of the transaction to the scrutiny of the authorities—we are of opinion that it is a violation of the section for an expressman who brings liquors into such a city or town to transport them therein to the place for actual delivery without first having entered in the book the date of the reception of the liquors by him, and the marks showing the names and addresses both of the seller or consignor and of the purchaser or consignee.

Exceptions overruled.

(185 Mass. 61)

COMMONWEALTH v. PACKARD.

(Supreme Judicial Court of Massachusetts.
Plymouth. Feb. 24, 1904.)

NUISANCE—LICENSE—INDICTMENT—MOTION TO QUASH.

1. An indictment describing and pleading the offense with technical precision, and sufficient in form, is not subject to motion to quash.

2. Under St. 1894, p. 446, c. 899, making it a misdemeanor to use a building for storing petroleum or any of its products, without a license therefor first obtained, a license obtained during the period that defendant is charged with maintaining a nuisance by storing naphtha on premises, while no protection against anything he had done before, is a defense to things done in accordance with the license after it was obtained.

Exceptions from Superior Court, Plymouth County; Chas. U. Bell, Judge.

Packard was indicted for keeping and maintaining a common nuisance, consisting of the storing of naphtha in large quantities. There was a verdict of guilty, and defendant brings exceptions. Exceptions sustained.

Asa P. French, for the Commonwealth.
C. C. King, for defendant.

BRALEY, J. A motion to quash the indictment was denied, and, after a verdict of guilty, the defendant brings his case to this court on exceptions to the order overruling his motion; to the refusal to admit the license in evidence, offered by him at the trial; to give certain rulings requested; and to the instructions under which the case was submitted to the jury. These questions, so far

as they become material to our decision, may be considered in their order.

The motion to quash was rightly overruled, as the offense is described and pleaded with technical precision, and the indictment was sufficient in form. *Com. v. Perry*, 139 Mass. 198, 29 N. E. 656.

A more important question is presented by the exclusion of the license. By St. 1894, p. 446, c. 399, it was made a misdemeanor for any person to erect, occupy, or use a building for the "storage, keeping, manufacture, or refining, of crude petroleum, or any of its products," in any city, or town, without a license therefor being first obtained from the mayor and aldermen, or the selectmen. In the exercise of the police power, the Legislature may pass such laws as are reasonable, for the regulation of the internal affairs of the state; and it is now well settled that by such enactments it can prohibit acts which at common law were not classed as noxious in themselves, because their existence did not constitute a nuisance. *Rideout v. Knox*, 148 Mass. 368-372, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; *Quincy v. Kennard et al.*, 151 Mass. 563, 24 N. E. 860. It can also declare that acts which might be unlawful if carried to excess, by reason of their general tendency to annoy and injure others, may be lawfully done upon such conditions as it may prescribe. *Sawyer v. Davis*, 136 Mass. 239-244, 49 Am. Rep. 27; *Com. v. Parks*, 155 Mass. 531, 30 N. E. 174; *Northern Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336. "A nuisance at common law may consist in the keeping or manufacturing of gunpowder, naphtha, or other explosive or inflammable substances, in such quantities and places, or in such manner, as to be dangerous to the persons and property of the neighborhood. * * * It may also consist in the carrying on of any trade or business in such a manner as to emit offensive odors and stenches, either injurious to the health of the public, or making the occupation of neighboring dwelling houses uncomfortable and disagreeable." *Com. v. Kilder*, 107 Mass. 188-192. But if the legislative sanction is given to such acts, that otherwise would be deemed a nuisance, they cease to be such when properly exercised within the terms of the license which authorizes and permits them. *Com. v. Boston*, 97 Mass. 555; *Badger v. Boston*, 130 Mass. 170; *Aldworth v. Lynn*, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608; *Bacon v. Boston*, 154 Mass. 100, 28 N. E. 9; *White v. Kenney*, 157 Mass. 12, 13, 31 N. E. 654; *Taft v. Com.*, 158 Mass. 526-547, 548, 33 N. E. 1046.

Where a nuisance of the kind described in the indictment affects the enjoyment of property or the health of an individual, or of comparatively a few persons in the community, it is said to be private in its nature, and the remedy of those injured is by an action for damages, or a bill in equity to enjoin its

continuance. If, however, it is so general in its character, and the number of persons annoyed and injured are so large that the public generally are affected, an indictment lies against those by whom it is caused and maintained. *President and Fellows of Harvard College v. Stearns*, 15 Bray, 1-5, and cases cited. In either case the act complained of is a nuisance, and whether it shall be deemed public or private may depend on the extent of the annoyance caused; and, if a license to carry it on is shown, a civil suit for damages or for an injunction cannot be maintained unless it appears that the licensee has not conducted the business within the conditions of his license, or has managed it in an improper or negligent manner. *Call v. Allen*, 1 Allen, 137-143; *Murtha v. Lovewell*, 166 Mass. 391, 44 N. E. 347, 55 Am. St. Rep. 410.

The mayor and board of aldermen were given full authority by the statute to act upon the application of the defendant. In order that all persons should be protected who might be interested, either as owners of property, or residents in the vicinity where the business to be licensed was to be located, no license could be issued to him until after ample notice had been given to them, and they had an opportunity to be fully heard in remonstrance to its being granted, or to suggest limitations under which he might be permitted to use his premises for this purpose. It was within the power of the tribunal designated, after having heard all parties interested, to pass upon and determine whether a license should be issued, and it could either grant or refuse the application. No appeal lay from their decision, and the intention of the Legislature is plain, that, after giving due consideration to those who might be inconvenienced and annoyed, and also having a proper regard for the general good order and welfare of the community, their judgment, to the extent of the authority conferred, is to be treated as a final determination of the rights of the parties interested.

Legislation of the class to which this act belongs has been upheld too often for it to be open to the objection that it is unconstitutional, by reason of an improper or unreasonable exercise of legislative power; and there is nothing to prevent giving full legal effect to its purpose that persons duly licensed can store and keep on their premises naphtha, or any other product of crude petroleum, even if the keeping of them without such permission would create a nuisance at common law. *Com. v. Plaisted*, 148 Mass. 375, 382, 383, 385, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; *Com. v. Boston*, ubi supra.

Though the storage of the quantity disclosed by the evidence might cause noisome smells, that became obnoxious to the community, if the amount kept and the method of storing were reasonable and proper, and

in accordance with the defendant's license, he is not either civilly or criminally liable therefor. *White v. Kenney*, ubi supra.

To so much of the indictment that charged the offense from October 1, 1901, to November 25, 1901, his license would not be a protection, if otherwise his acts were sufficient to prove the commission of any crime. But during the remainder of the time it was competent for him to prove that he had been duly authorized to use his premises for this purpose, and the license granted to him was admissible in evidence.

It becomes unnecessary to consider the other questions presented, as they may become immaterial at another trial.

Exceptions sustained.

(186 Mass. 142)

DRAPER et al. v. GRIME et al.

(Supreme Judicial Court of Massachusetts, Bristol. Feb. 25, 1904.)

MUNICIPAL CORPORATIONS—SEWERS—STREET IMPROVEMENTS—POWERS OF ALDERMEN—DUTY OF MAYOR—VIOLATION—REMEDY—STATUTE.

1. Under Fall River Revised Charter (St. 1902, p. 807, c. 393, § 15, subd. 3), granting the board of aldermen the powers of towns and of the boards of aldermen and of the mayor and aldermen and city councils of cities under the general law, and Rev. Laws, c. 49, § 1, providing that the mayor and board of aldermen may lay, make, repair, and maintain all such drains or common sewers as they judge necessary for the public convenience or the public health, the power, after a general appropriation has been made for those purposes, to say what sewers shall be built and how they should be constructed, is vested in the board of aldermen.

2. The provision of the revised charter of the city of Fall River (St. 1902, p. 364, c. 393) forbidding any member of the board of aldermen to take any part in the expenditure of public money, the employment of public labor, or the purchase of public supplies or materials, or the making of public contracts, or in the construction, alteration, or repair of any public property, or the care, custody, or management of the same, or generally in the conduct of the administrative or executive business of the city, has no tendency to show that it is not for the board to decide in regard to the laying and making of sewers.

3. Under Rev. Laws, c. 49, § 43, providing that if a city council accepts the provisions of the section, or has accepted the corresponding provisions of earlier laws, the mayor and aldermen may, if in their judgment public convenience so requires, grade and construct sidewalks in any street with or without edge stones, and may cover the same with brick, the laying of curbing is included in and is part of the construction of sidewalks.

4. The revised charter of the city of Fall River (St. 1902, p. 807, c. 393), in section 15, subd. 3, grants the board of aldermen powers of towns and of the boards of aldermen and of the mayor and aldermen and city councils of cities under the general laws. Rev. Laws, c. 49, § 43, provides that if a city council accepts its provisions, or the corresponding provisions of the earlier laws, the mayor and aldermen may, if in their judgment public convenience so requires, grade and construct sidewalks in any street, either with or without edge stones, and may cover the same with brick. *Held* that, where it appears that the provisions of the earlier laws have been accepted, the power, after a general appropriation has been made for this purpose, to say what curbing and sidewalks

shall be laid, and what sidewalks and repairs, so far as they are specific and involve changes in established grades, shall be made, is in the board of aldermen, except that if the board omit or neglect in any particular instance to order curbing or sidewalks to be laid, and it is necessary, in order to render the streets safe and convenient for travel, that curbing or sidewalks should be laid, then the mayor, acting under the authority given to him as an executive officer of the city, and the obligation imposed on all cities to keep their streets and highways in a reasonably safe and convenient condition for travel, may direct the superintendent of streets to do such work.

5. Under Fall River Revised Charter (St. 1902, p. 307, c. 393) § 15, subd. 8, granting the board of aldermen exclusive power to lay out, locate anew, alter, widen, and discontinue townways, streets, and highways, and to order specific repairs or a change of grade therein, it is for the board of aldermen to decide, after a general appropriation has been made for these purposes, what paying and repairs, so far as they are specific or involve changes in established grades, shall be made, except that ordinary repairs which are required to keep the streets and highways in a safe condition to travel are matters of an administrative nature, and may be ordered by the mayor.

6. Putting granite block paving down on a street that is macadamized, or substituting a brick pavement on a street that is paved with cobblestones, are specific rather than ordinary repairs, though no change of grade is contemplated in making such repairs.

7. Where it appears that the mayor of a city is about to expend money or incur obligations purporting to bind the city in a manner in which the city has no legal right to expend money or incur obligations, the remedy is by injunction, under the express provision of Rev. Laws, c. 25, § 100, providing that, if any of the officers of the city are about to expend money for any purposes other than those for which the city has the legal power, the courts may restrain the abuse of such power.

Case Reserved from Supreme Judicial Court, Bristol County.

Suit by Orlando Draper and others against George Grime, mayor of the city of Fall River, and others, for injunction. Case reserved for the full court. Injunction issued.

Arthur S. Phillips and William E. Fuller, Jr., for petitioners. Hugo A. Dubuque, City Sol., for defendants.

MORTON, J. This is a petition by more than 10 taxable inhabitants of the city of Fall River, including a majority of the board of aldermen, against the mayor, the superintendent of streets, and the city treasurer to restrain the mayor from ordering the construction of certain sewers, sidewalks, curbing, paving, and highway repairs, except as authorized by the board of aldermen, and the superintendent of streets from proceeding with the work as ordered by the mayor, and the city treasurer from making any payments on account of the matters complained of. The mayor demurred, and answered generally. The other two defendants answered generally, without demurring. The case was sent to a master to hear the parties and report the facts, and so much of the evidence as might be required to raise any question of law as either party requested. Upon the coming in of the master's report the defend-

ants filed exceptions thereto, which were overruled so far as they related to questions of fact. The demurrer was also overruled, and the case was reserved for the full court upon the bill, answers, master's report, and the evidence annexed thereto, and the defendants' exceptions, so far as they raised questions of law; such disposition to be made of the case as the full court should deem best.

The questions raised relate to the respective powers of the mayor and the board of aldermen, under the revised charter of the city of Fall River (St. 1902, p. 304, c. 393), in regard to the repair and paving of streets and highways, the construction and curbing of sidewalks, and the building of sewers. The scheme of the charter is that the administration of all the fiscal, prudential, and municipal affairs of the city, except as otherwise provided, shall be vested in an executive department, consisting of the mayor, and a legislative department, consisting of the board of aldermen. Neither shall exercise any powers belonging to the other. The executive powers of the city are vested solely in the mayor, and are to be exercised by him through various departments and officers, who are subject to his supervision and control. Amongst these departments is the street department, under the charge of the surveyor of highways, who is also the superintendent of streets. No contract in excess of \$200 can be made by any of these departments or officers unless it is in writing and accompanied by a bond, and both the contract and bond are approved in writing by the mayor. The legislative powers are vested in the board of aldermen, who, it is also provided, shall have: "First. The powers of towns, the powers of boards of aldermen and of the mayor and aldermen and city councils of cities under the general law. Second. The powers now held by the city of Fall River or by the city council, the aldermen, or the mayor and aldermen of Fall River by special laws. Third. The exclusive power to lay out, locate anew, alter, widen, and discontinue town ways, streets and highways and to order specific repairs or a change of grade therein, in the manner provided by law." Damages are to be assessed by the board, and any person aggrieved shall have the remedy provided by law in such cases. No member or committee is to take any part in the expenditure of public money, the employment of public labor, or the purchase of public supplies or materials, or the making of public contracts, or in the construction, alteration, or repair of any public property, or the care, custody, or management of the same, or, generally, in the conduct of the administrative or executive business of the city. There is also a general provision that no expenditure shall be made or liability incurred by any officer or board on account of the city, beyond the amount appropriated therefor in the annual appropriation order,

or in a subsequent appropriation. Pursuant to the power vested in them, the board of aldermen passed an annual appropriation order in February, 1903, appropriating certain sums for highways, paving, curbing, and sewer construction, and also adopted the following vote: "Ordered that the several boards and officers under the general supervision and control of the mayor be and they are hereby authorized to expend the appropriations as hereinafter designated. Superintendent of Streets. Appropriation for highways. Appropriation for highways curbing. Appropriation for paving. Appropriation for sewer construction. Appropriation for street lights." No question arises over the street lights. Nor, as we understand it, does any question arise over the unexpended balance of appropriations made by the previous government for the construction of sewers ordered by them and not completed. The mayor proceeded, without any further action on the part of the board of aldermen, to order the superintendent of streets to construct certain sewers and to lay certain curbing and to do certain paving, and admits his purpose to order other sewers to be built and more curbing and paving to be laid, claiming the right to do so as the executive officer of the city. Some of the work thus ordered has been done and paid for, and contracts have been made for materials and supplies, and the superintendent of streets, in his answer, admits that he feels bound to obey the orders and directions of the mayor. The city treasurer, as the master finds, intends to pay for the work ordered by the mayor, so far as the bills come to him properly audited, unless restrained by the order of the court. The mayor contends that, after the appropriations were made and the vote referred to above had been passed, all that remained to be done was of an administrative or executive nature, and that it came within the scope of his authority, under the charter, to direct the superintendent of streets what sewers to build, and what curbing and paving to lay, and what highway repairs to make. In regard to the matter of sewers, he makes the further contention that Mr. Phineas Ball, of Worcester, was employed by the city authorities many years ago to devise a system of sewerage for the city, and made a report, which was accepted by the city, and in accordance with which sewers have since been built, and that an appropriation for the construction of sewers is for sewers to be built in accordance with this plan, and that for this reason, also, the work of constructing sewers is purely administrative or executive. But this contention is disposed of, we think, by the finding of the master—which was warranted by the evidence—that the plan had not been so adopted by the city that "the building of sewers from time to time in accordance with the plan has become a purely executive or ministerial function, to be performed by the executive officers of the city

of Fall River after a general appropriation has been made for sewer construction, without the previous action of the proper body having the determination under the law of what sewers, public safety, and convenience require, and when and how they shall be built."

The petitioners contend that it is for the board of aldermen to decide where and what sewers shall be built, and how they shall be constructed, and what curbing and paving shall be laid, and what sidewalks and repairs, so far as they are specific or involve changes in established grades, shall be made. They do not contend, as we understand them, that the surveyor of highways and the superintendent of streets would not have authority, either under the supervision and control of the mayor or of their own motion, to make such ordinary repairs, including in some cases the laying of curbing and paving, as might be necessary to render the streets reasonably safe and convenient for travel, and keep them in a proper condition of repair. If such is their contention, then we are of opinion that it cannot be sustained. The ordinary repairs which are required to keep streets and highways in a safe condition for travel are plainly matters of an administrative nature. By the express language of the charter, authority in regard to specific repairs and changes of grade is vested exclusively in the board of aldermen. St. 1902, p. 307, c. 393, § 15, subd. 3.

As already observed, the charter provides that the powers of towns and of boards of aldermen, and of the mayor and aldermen and of city councils, under general laws, shall be vested in the board of aldermen. Authority to construct sewers and to take land, if necessary, is derived from general laws. The Revised Laws, which were in force when the present charter was adopted, provide that, "the mayor and aldermen of a city and the sewer commissioners, selectmen, or road commissioners of a town may lay, make, repair and maintain all such main drains or common sewers as they adjudge necessary for the public convenience or the public health," etc. Rev. Laws, c. 49, § 1. Under former charters granted to the city, this power was expressly conferred upon the mayor and aldermen. St. 1854, p. 179, c. 257, § 15; St. 1885, p. 711, c. 269, § 20. The authority thus conferred by general laws is given, so far as cities are concerned, to the mayor and aldermen, and, as we have seen, the revised charter expressly gives to the board of aldermen the powers given to the mayor and aldermen under general laws. It follows that the power to say what sewers shall be built and how they shall be constructed is vested in the board of aldermen and not in the mayor. The fact that an appropriation has been made in general terms for sewer construction, and that the superintendent of streets has been authorized to expend it under the general supervision and

control of the mayor, does not convert the laying and building of sewers from an administrative into an executive matter. Before or as a part of the order requiring a sewer to be laid and constructed, the board of aldermen is required in some form, expressly or impliedly, to adjudge that it is necessary for the public health or convenience. They cannot, if they would, depute this power to the mayor and the superintendent of streets. *Collins v. Holyoke*, 146 Mass. 298, 307, 15 N. E. 908. It is given to them, and to no one else, and is a legislative or judicial, rather than an administrative or executive, power. The fact that the charter forbids members of the board of aldermen to take part in any public contract, or in the conduct of any executive or administrative business, has no more tendency to show that it is not for them to decide in regard to the laying and making of sewers than it has to show that it is not for them to locate and lay out streets. The two things are entirely separate and distinct. Neither does it help the matter that the sewers which the mayor has ordered to be built are in fact (if it is a fact) necessary for, and will tend to promote, the public health or convenience. That, as already observed, is a matter for the board of aldermen, and not for him, to pass upon. The bill alleges, and the answer admits, that the mayor has ordered the superintendent of streets to build certain sewers, which are specifically described, without any adjudication by the board of aldermen that they are necessary for the public health or convenience. It follows, from what has been said, that the orders thus given were unauthorized and invalid, and that action under them should be restrained, if the remedy chosen is the proper one, which will be considered later.

We come next to the questions relating to curbing and paving. It is provided by section 43, c. 49, Rev. Laws, that "if the city council of the city accepts the provisions of this section or has accepted the corresponding provisions of earlier laws, the mayor and aldermen * * * may if in their judgment public convenience so requires grade and construct sidewalks and complete partially constructed sidewalks in any street with or without edge stones, and may cover the same with brick," etc. This, in the case of cities, puts the construction of sidewalks into the hands of the mayor and aldermen (*Atty. General v. Boston*, 142 Mass. 200, 7 N. E. 722), and we do not see how the question of curbing can be separated from that of construction. The laying of curbing is included in, and is part of, the construction of sidewalks. The statute expressly recognizes it by giving to the mayor and aldermen the power to construct sidewalks, and to complete partially constructed sidewalks with or without edge stones. The answer denies that section 43 has been accepted by the city council, but admits that the corresponding

provisions of the earlier laws were accepted. The result is, therefore, that, under the section of the revised charter referred to in connection with sewers (section 15, subd. 1), the matter of curbing is in the hands of the board of aldermen, and not in those of the mayor. If, however, the board of aldermen omit or neglect in any particular instance to order curbing to be laid, and it is necessary that, in order to render the streets safe and convenient for travel, curbing should be laid, then the mayor, acting under the authority given to him as the executive officer of the city, and the obligation imposed on all cities and towns to keep their streets and highways in a reasonably safe and convenient condition for travel, may direct the superintendent of streets to lay it, or the surveyor of highways may lay it of his own motion, on the same ground on which, if the authorities having the right to order specific repairs neglect to do so in a case requiring a change of grade, those charged with the duty of repair may do what is necessary to make the way reasonably safe and convenient. *Sullivan v. Fall River*, 144 Mass. 579, 12 N. E. 553. The master has found that in one of the two instances—Warren street—in which it is specifically charged that the mayor has ordered curbing to be laid by the superintendent of streets, curbing was necessary to render the sidewalk, which was there, safe, and to keep it in proper repair. In regard to the other—Beach street—he finds that it was reasonably proper, but was not necessary to make the street safe. We think that it was within the scope of the mayor's authority, under the general obligations imposed on cities and towns to keep their streets and highways reasonably safe and convenient for travel, to order the curbing to be laid down in the first case, but not in the second. It is immaterial whether, in obeying the order, the defendant Thurston acts as surveyor of highways or superintendent of streets, or in both capacities.

We think that the repairs which have been ordered in Durfee and Granite streets must be regarded as specific rather than ordinary repairs. What will constitute ordinary repair, and what specific, must to some extent be a matter of degree. No clear rule can be laid down for all cases. No change of grade is contemplated by the orders that have been given in regard to these two streets. But in each case the entire surface of that portion of the street used for vehicles, for the specified distance, will be removed to a greater or less depth, and another surface of different material, and at, no doubt, considerable cost, substituted. Durfee street is a macadamized street, and a granite block paving is to be put down. Granite street is paved with cobblestones, and a brick pavement is to be substituted. A material alteration is thus to be made in the construction of each street. All changes in the surfaces of streets, or of the materials of which they are composed, de

not come under the head of "specific repairs." Much latitude in the choice of materials must necessarily be allowed to those charged with the duty of repair. But we think that substantial and important changes, like those in these instances, which are not merely incidental to a reconstruction rendered necessary by increased use or other causes, but constitute a radical difference of treatment, must be so regarded. *Bigelow v. Worcester*, 169 Mass. 390, 48 N. E. 1. Otherwise it would be within the power of the surveyor of highways, or of the mayor and the superintendent of streets, to make over the streets as they saw fit, without any limit except that of the appropriation. We cannot think that the Legislature intended that the board of aldermen should have no voice in such matters beyond the making of the appropriations.

If the effects of the construction thus given to the charter shall be, as the respondents contend it will be, to take away from the mayor powers which the Legislature intended that he should have, it will be for the Legislature to apply the remedy, and not for us to do so by a forced and unnatural construction of the language used. It is to be presumed that the board of aldermen will be governed by a regard for the public interests, and will order the making of such changes and improvements from time to time as may be required, and as they deem warranted by the state of the city's finances. Provisions almost identical with those contained in the charter before us in reference to the powers of the mayor and the board of aldermen are to be found in several charters recently granted to other cities, though in one or two the legislative body is called a "council" or "city council," instead of a "board of aldermen." St. 1903, p. 304, c. 345 (Medford); St. 1900, p. 241, c. 323 (Gloucester); St. 1900, p. 366, c. 427 (Northampton); St. 1899, p. 112, c. 162 (Melrose); St. 1899, p. 201, c. 240 (Somerville). We do not discover in these and other charters any intention on the part of the Legislature to increase the executive powers at the expense of the legislative, but a purpose to separate the two, and to place upon the mayor the responsibility for the proper discharge of duties pertaining to executive matters, and to confine members of the legislative body to the performance of duties connected with that branch of the government.

The respondents contend, lastly, that the remedy is by petition for a writ of certiorari, and not by a petition under Rev. Laws, c. 25, § 100, which this is. But the case presented is one in which an officer of the city—the mayor—is about to expend money or incur obligations purporting to bind the city in a manner in which the city has no legal right to expend money or incur obligations, and therefore comes within the express language of the statute.

Injunction to issue. Decree to be settled by a single justice.

(185 Mass. 119)

HAWKS v. DAVIS.

(Supreme Judicial Court of Massachusetts. Essex. Feb. 26, 1904.)

MORTGAGES—TAXES—REDEMPTION BY MORTGAGEE—REDEMPTION BY ASSIGNEE—AMOUNT OF PAYMENT—NOTICE OF SALE—SUFFICIENCY—RENTS AND PROFITS—WRIT OF ENTRY—INSTRUCTIONS.

1. By the express provision of St. 1888, c. 890, § 57 (Rev. Laws, c. 13, § 58), a mortgagee of record may redeem from a tax sale of the mortgaged land at any time within two years after actual notice of the sale.

2. The assignee of a mortgage is a mortgagee of record, within the meaning of the statute.

3. The assignee of a mortgage, whose assignment was made previously, but not recorded at the time of the tax sale, was a mortgagee of record, entitled to redeem, on subsequently recording the assignment.

4. On an issue as to when a mortgagee had notice of a tax sale of the lands, the question whether one who acted as the mortgagee's agent in holding the notes and mortgage for the purpose of collecting the interest had an authority broad enough to include receiving notice for the mortgagee was one for the jury.

5. St. 1888, c. 890, § 57 (Rev. Laws, c. 13, § 58), gives a mortgagee the right to redeem from a tax sale at any time within two years after actual notice of the sale. *Held*, that a letter written by the purchaser at tax sale to the mortgagee, stating that the writer held a deed from the city to the property, did not amount to a notice, within the statute.

6. St. 1888, c. 890, § 57 (Rev. Laws, c. 13, § 58), provides that, on redemption from tax sale, the redemptioner shall pay the amount of the tax, with 10 per cent. interest, and all intervening taxes, charges, and fees, and that in each case he shall pay not more than \$3 for examination of the title, a deed of release, and the cost of recording the tax deed, etc. *Held*, that a redemptioner is not required to pay 10 per cent. interest on the cost of recording the tax deed, the \$3 for examination of title and deed of conveyance or release, and other necessary intervening charges.

7. Rev. Laws, c. 179, § 12, relative to writs of entry, provides that, if demandant recover judgment, he shall recover damages for the rents and profits from the time when his title accrued, and for any waste; section 14 provides that the rents and profits for which the tenant is liable shall be the clear annual value of the lands for the time during which the tenant was in possession, after deducting all lawful taxes and assessments paid by him, and the expense of cultivating the land, or otherwise collecting the profits; and section 15 enacts that the value of the use by the tenant of any improvements made by him shall not be included. In an action by a writ of entry, the court instructed that, if demandant was entitled to recover, he was entitled to recover, also, the clear annual value of the land from the time that he had been improperly kept out of possession, but that the tenant was entitled to take out the ordinary and necessary expenses of collecting the rents, profits, and income, and that the "clear annual" value did not mean what the tenant actually received, but what was the proper annual rental under all the circumstances, and that there should be deducted from that necessary and reasonable amounts for collecting, repairs, and such other things as naturally go with the ownership of land. *Held*, that the instruction was proper, under the statute.

Report from Superior Court, Essex County; Wm. Cushing Wall, Judge.

Action by writ of entry by Esther H.

¶ 2 See Taxation, vol. 45, Cent. Dig. § 1393.

Hawks against Alice H. Davis. Verdict for demandant, and case reported. Judgment on the verdict.

The notice spoken of in the opinion as having been given by the purchaser at tax sale to the mortgagee was a letter stating that the purchaser held a deed from the city of Lynn on certain property on which the addressee held a mortgage, and requested that, if the latter had any interest in the property, the writer might be informed at once. On the question as to rents and profits, the court instructed that, if demandant was entitled to recover, he was entitled to recover, also, the clear annual value of the land from the time that he had been improperly kept out of possession, but that the tenant was entitled to take out the ordinary and necessary expenses of collecting the rents, profits, and income, and that the "clear annual value" did not mean what the tenant actually received, but what was the proper annual rental under all the circumstances, and that there should be deducted from that necessary and reasonable amounts for collecting, repairs, and such other things as naturally go with the ownership of land. The tenant requested the court to instruct the jury as follows: "(1) That, upon all the evidence submitted, and the agreed facts, the plaintiff is not entitled to recover. (2) The plaintiff, Hawks, did not become mortgagee of record, within provisions of the statutes relating to the redemption of the estates from tax sales, until the recording of the assignment of Neal to her. (3) That if she took an assignment of the mortgage from Neal, and omitted to record the same in any way until more than two years after the sale properly made for taxes, her rights to redeem were foreclosed, and she cannot maintain this action. (4) That if the mortgage to Neal was duly recorded, and the assignment of the same to the plaintiff was in no way recorded until more than two years after the sale for taxes, the record of such assignment after such lapse of time will not constitute her a mortgagee of record, within the meaning of the statutes in such cases made and provided; said estate having passed to an innocent purchaser for value, without actual notice thereof; said Neal having had knowledge of said tax sale. (5) That actual knowledge of Breed, who had charge of the same for the plaintiff, in collecting the interest thereon and managing the same for the plaintiff, is actual knowledge by the plaintiff; (6) that a mortgagee is not entitled to rents and profits after making peaceable entry to foreclose, and before the expiration of the three years for redemption, as against a tenant for redemption, or against a tenant in possession claiming under a tax sale. (7) If Breed acted as the agent of the plaintiff, and while so acting had knowledge of the tax sale, that his knowledge is imputed to the demandant, in his agreement to apply funds in his hands in

settlement of tax title, she is bound by such agreement, and cannot maintain this action. (8) That the payment made to the treasurer of the city of Lynn was not sufficient, as interest was not computed or paid upon the intervening charges." These instructions, except the second, were refused.

Joseph Bennett and George M. Stearns, for tenant. R. D. Weston-Smith and Edward N. Chase, for demandant.

KNOWLTON, C. J. This is a real action, in which the demandant shows a good title as mortgagee, with an entry to foreclose, which perfects her rights as against the mortgagor and all persons claiming under the mortgagor. The tenant shows a good title acquired under a sale for taxes assessed to the mortgagor after this mortgage was made, which title, unless redeemed, takes precedence of the title of the mortgagee. The demandant undertook to redeem from this tax sale, and the principal question is whether her attempt at redemption was effectual. This question may be divided into two parts: First. Had she then a right to redeem? Secondly. Was her payment sufficient in amount?

The taxes on account of which the sale was made were assessed to the mortgagor for the year 1891. All other taxes, since as well as before that date, have been paid by the mortgagor. The mortgage was made in 1887, and was assigned by the original mortgagee to the demandant in May, 1888. This assignment was not recorded until July 12, 1899. Under St. 1888, c. 390, § 57 (Rev. Laws, c. 13, § 58), a mortgagee of record has a right to redeem from a tax sale at any time within two years after he has actual notice of the sale. The demandant, after having recorded her mortgage, made a payment to the treasurer of the city of Lynn on April 28, 1900, for the purpose of redeeming the premises. An assignee of a mortgage is a mortgagee of record, within the meaning of this section. *Faxon v. Wallace*, 98 Mass. 44. An assignee of a mortgage, whose assignment was made previously, but was unrecorded at the time of a tax sale, becomes the mortgagee of record, entitled to redeem, under this section, upon subsequently recording the assignment. *Hawes v. Howland*, 136 Mass. 267. The demandant was therefore entitled to redeem at the time of making this payment, if it was made within two years after she had actual notice of the sale. The question as to the time of her receiving notice was submitted to the jury under proper instructions.

It was contended that actual knowledge of the sale a long time previously by one Breed, who acted as the demandant's agent in holding the notes and mortgage for the purpose of collecting interest thereon, was notice to the demandant. But the judge rightly left to the jury the question whether Breed's

agency was broad enough to include receiving such a notice for her, or whether it was more limited.

The judge rightly ruled that the writing sent by the purchaser at the tax sale to Neal, the original mortgagee, who was then the mortgagee of record, was not a good notice of the tax sale. It contained no statement or suggestion that the property had been sold for taxes. *Keith v. Wheeler*, 159 Mass. 161, 84 N. E. 174. It therefore is unnecessary to consider whether the demandant would have lost her rights by the expiration of two years after the giving of actual notice to the person who was then the mortgagee of record, while she was holding an unrecorded assignment of the mortgage.

The only remaining question is whether the amount paid by the demandant to the city treasurer for redemption was sufficient. It is conceded that it was, unless she was required by law to pay interest at 10 per cent., not only on the original sum and intervening taxes paid by the holder of the tax title, but also on the cost of recording the tax deed, and the \$3 for the examination of title and deed of conveyance or release, and other necessary intervening charges. We think the section already cited makes it plain that interest is not to be paid on these latter sums expended incidentally.

The instructions as to the right of the demandant to rents and profits were in accordance with the statutes. Pub. St. c. 173, §§ 12-15 (Rev. Laws, c. 179, §§ 12-15).

There was no error in the instructions given, or in the refusal to give the instructions requested.

Judgment on the verdict.

(185 Mass. 68)

THAYER et al. v. DEWEY et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Feb. 24, 1904.)

TRUSTS—MANAGEMENT—POWER OF TRUSTEES
—INVESTMENT OF FUNDS.

1. Trustees, in making investments of trust funds, are bound to act in good faith and to exercise a sound discretion.

2. There is in Massachusetts no arbitrary, universal rule that an investment of trust funds by trustees will not be approved, if it consists of fixed property in another state.

3. An investment of a small portion of a trust fund by the trustees in fixed property in another state is properly allowed in their account, in view of an express finding that the investment will not cause any loss to the estate, and that the trustees acted in good faith and with sound discretion.

Appeal from Probate Court, Worcester County; Henry K. Braley, Judge.

In the matter of the accounting of Thayer and others, trustees under the will of Nathaniel Thayer. From an order allowing the accounts, Dewey and others appeal. Affirmed.

Francis H. Dewey, for appellants. Richard Olney and John R. Thayer, for appellees.

KNOWLTON, C. J. The trustees in this case invested more than \$200,000 in the purchase of real estate in Chicago, and the question is whether this investment shall be allowed in their account.

The rule in this commonwealth governing trustees in making investments has often been stated, and is well established. They are bound to act in good faith and to exercise a sound discretion. *Harvard College v. Amory*, 9 Pick. 446; *Amory v. Green*, 13 Allen, 413; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Bowker v. Pierce*, 130 Mass. 262; *Hunt, Appellant*, 141 Mass. 515, 6 N. E. 554; *Dickinson, Appellant*, 152 Mass. 184, 25 N. E. 99, 9 L. R. A. 279; *Pine v. White*, 175 Mass. 585, 56 N. E. 967; *Green v. Crapo*, 181 Mass. 55, 62 N. E. 956.

The appellant contends that an investment in real estate outside of the commonwealth should not be sustained, unless, first, the trust funds are so invested when they come into the custody of the trustee, in which case he may be justified in retaining the investment; second, the will authorizes or instructs the trustee to make such an investment; third, in certain rare and exceptional cases, when such an investment may be necessary, or required to protect or secure other investments or interests involved in the trust fund. The rule in some other states is substantially in accordance with this contention. *Ormiston v. Olcott*, 84 N. Y. 839; *In re Rush's Estate*, 12 Pa. 375-378; *Ex parte Copeland, Rice's Eq.* (S. C.) 69; *McCullough's Ex'rs v. McCullough*, 44 N. J. Eq. 313, 14 Atl. 123. But in these states trustees are limited more strictly in their power to make investments than they are limited by our rule in Massachusetts. In *Amory v. Green*, 13 Allen, 413, trustees were authorized to invest in real estate for a homestead for the cestui que trust in another state, because the authority given by the will was broad enough to justify it. In many other cases investments in stock and bonds of great corporations organized and doing business in other states have been approved where it appeared that the investment was made in good faith and in the exercise of a sound discretion, according to the standard of other men of prudence, discretion, and intelligence in the management of their own affairs in regard to the permanent disposition of their funds, with a view to probable income, as well as the probable safety of the capital to be invested. In these cases the stocks and bonds were such as are often sold, and have a recognized market value, away from the place where the corporation is established or where its property is located.

There is a grave objection to the investment of a trust fund in the purchase of real estate in a foreign state, where the property is beyond the jurisdiction of our courts, and is subject to laws different from our own. On this account it would not be within the

exercise of a sound discretion to make such an investment without some good reason to justify the choice of it. Ordinarily it is very desirable that investments which have a local character, like the ownership of real estate, should be within the jurisdiction of the court that controls the trust. But in this commonwealth there is no arbitrary, universal rule that an investment will not be approved if it consists of fixed property in another state. In the present case it is said that the trust fund is very large, and that this is but a very small part of the whole, and it is expressly found that the investment "will not cause any loss to the estate, and that the trustees acted in good faith and with sound discretion." The only objection made at the hearing was that the trustees had no legal right to make an investment in real estate located outside of the commonwealth. The appellants' contention, if sustained, would call for the establishment of an arbitrary rule which is inconsistent with the general rule as to trustees' investments heretofore existing in this commonwealth.

Decree of probate court affirmed.

(186 Mass. 54)

CHESTER v. McDONALD.

(Supreme Judicial Court of Massachusetts.
Suffolk. Feb. 24, 1904.)

TRUSTEE PROCESS—FUTURE EARNINGS.

1. A maker of monuments, who bought the rough material and then fashioned it into the required form, no part of the work of cutting the stone being either done by him or especially under his direction, but by his workmen, over whom he when present, and in his absence his working foreman, exercised general superintendence, contracted to furnish, and did furnish, a monument, his skill and personal services not being engaged, and not entering into the contract. *Held*, that the price to be paid therefor was not his "future earnings," an assignment of which Rev. Laws, c. 189, § 34, requires to be recorded, to be valid against attachment by trustee process.

Exceptions from Superior Court, Suffolk County; Dan'l W. Bond, Judge.

Action by one Chester against one McDonald, with trustee process. The court rules that the assignment by defendant to claimant, William Reynolds, was of the future earnings, and, being unrecorded, was invalid. Claimant brings exceptions. Exceptions sustained.

James T. Keen, for plaintiff. W. W. Jenness, for claimant.

BRALEY, J. It appears that the defendant was a maker of granite monuments for mortuary uses, buying the rough material from quarrymen, and then fashioning the stone into the required form at his yard. No part of the work required to cut the stone into the finished monument was either done by him or especially under his direction, but the labor was performed by his workmen, over whom, when present, he exercised a

general superintendence, while in his absence they were under a "working foreman." It was understood by the buyer that the monument for which he contracted, and which was actually furnished, was such as the defendant, in the ordinary course of his business, procured and made for the general market. The vendee was indifferent as to the person by whom the stone should be worked into the finished design, and the skill and personal services of the defendant were not engaged, and did not enter into the contract. The bargain was for the monument itself, and not specifically for the work that was necessary to prepare the stone and put on the designated letters. *Bacon v. Parker*, 137 Mass. 309-312.

While the word "earnings," used in St. 1865, c. 43, § 2, subsequently Pub. St. c. 183, § 39, now Rev. Laws, c. 189, § 34, is generally held to embrace wages, it is not to be limited to so narrow a restriction, but is broad enough to include money expended and material furnished, as well as work to be done or services rendered, under a contract which calls for both. No personal services on the part of the defendant were required of or given by him, or, as a matter of legal right, could be demanded from him, and this essential element is wanting. *Kendall v. Kingsley*, 120 Mass. 94. The plaintiff relies on the cases of *Jenks v. Dyer*, 102 Mass. 235, *Somers v. Keliber*, 115 Mass. 165, and *Jason v. Antone*, 131 Mass. 534. In the first case, the evidence apparently was sufficient to show that the defendant, who kept boarders, did so in the usual way, and that her labor would form a part of the consideration of the contract between her and the trustees, and the case may well rest on this ground. *Jason v. Antone* followed *Jenks v. Dyer*, and is somewhat similar as to its facts, and does not require further comment. The second case is fully reported, and an examination of the original papers does not disclose further details. But it is significant that the briefs of counsel rest the claim of the plaintiff on the ground of personal services, and the work under the contract might have been found, in part at least, to be the personal labor of Shaughnessey, the assignor. If, however, these cases are to be considered as supporting the doctrine, put forward by the plaintiff, that "future earnings" may be treated as including the price to be paid under any form of contract that calls for the making or furnishing of a chattel, or erection of a building that becomes annexed to and is a part of the land on which it is built, and into the making or construction of either no service, by way of manual labor or of personal supervision, direction, and control, of the assignor enters, neither can be sustained. In such a construction, the indispensable requirement of the statute found within the phrase "future earnings," which means payment for what the assignor himself is to earn, whether put as wages, for manual labor, or

for personal services actually rendered, is absent. To bring an assignment within its provisions, it must be shown that under a contract silent as to such details the consideration to be paid to a contractor includes wages earned, and such as would be due to him if employed to do the necessary work by the buyer of the finished article of merchandise, or of the owner of land on which the building is to be erected, and by whom in each instance the materials would be furnished, though it might also appear that, in addition to his own labor, he had expended money for materials, and the work of others necessary to be supplied to carry out his agreement. If the contention of the plaintiff is adopted, then labor and services not contracted for as such, but which are performed by others than the vendor or contractor, as a means of making the chattel to be furnished or constructing the building, would become, as to him, personal wages or earnings, an assignment of which, in order to be valid, must be recorded, and the primary object of the statute is defeated.

We are of opinion that the price to be paid for the monument furnished by the defendant to the trustee is not "future earnings," an assignment of which must be recorded in order to be valid against attachment by trustee process, and that the first and second rulings requested by the claimant should have been given.

Exceptions sustained.

(184 Mass. 452)

MCKENZIE v. GLEASON.

(Supreme Judicial Court of Massachusetts.
Plymouth. Jan. 5, 1904.)

DEEDS—DESCRIPTION—INCLUSION OF WAYS—
PRESUMPTION—EASEMENTS—ESTOPPEL ON
GRANTOR—IMPLIED COVENANTS—TRESPASS—
OBSTRUCTION OF WAYS—ACTIONS—PLEADING
—RESTRICTION OF PROOF.

1. A grantee whose land is bounded by a way owned at the time by his grantor may acquire the right to use the way, not only because he gains a fee in half of it, but also because the grantor would be estopped to deny its existence.

2. A boundary on a way, public or private, includes the soil to the center of the way if owned by the grantor, and the way thus referred to is a monument which controls courses and distances, unless the deed, by explicit statement or necessary implication, requires a different construction.

3. There is a strong presumption that a grantor, in conveying land with reference to a way, intended to include the way, when otherwise the grantees could not obtain access to his land without becoming a trespasser, or by relying on a way by necessity over the grantor's remaining land.

4. A deed describing the property as running "to a stake and stones near an old road * * * thence by said road * * * to a stake by a pair of bars," conveyed to the grantee the fee to the center of the road, with a right of way over the other half, his own half being subject to a like easement on the part of others having a right to use the way.

5. A deed describing the property as bounded by the "northerly side of said private road" gives the grantee no title to any part of the road, but it is referred to solely for description.

6. Where, by the description of a deed, the road by which the property was bounded was excluded, the grantor was not estopped to deny the road's existence.

7. There is an implied covenant that a road by which the land conveyed is described as bounded is in existence, and it passes as appurtenant to the estate granted.

8. Where plaintiff had a right to use a way in connection with one lot conveyed to him, any obstruction of the way by defendant which prevented such use was a trespass, so that defendant was not injured by any error in an instruction assuming that plaintiff had such right in connection with another lot conveyed to him.

9. An agreement that, if plaintiff had a right of way over a road, the fence (built by defendant) constituted such an obstruction thereof as to support a certain count, was broad enough to cover any obstruction of the way caused by the erecting of the fence in any part of it, so that plaintiff was not limited in his proof to an obstruction erected within the description of the way as set forth in said count.

Exceptions from Superior Court, Plymouth County; Chas. W. Bell, Judge.

Tort for obstruction of a way and for trespass by John McKenzie against Charles S. Gleason. There was a verdict for plaintiff, and defendant excepted. Exceptions overruled.

The descriptions in the deeds referred to in the opinion are as follows:

(1) "A certain piece or parcel of land situated in that part of Wareham called Long Neck and adjoining a house lot of Thaddeus C. Baker, and bounded as follows: Beginning at the easterly corner of said Baker's lot, and running South 40° West, fourteen rods to a cedar post; thence North 35¼° West sixteen rods to a stake and stones near an old road leading to the shore; thence by said road North 88¾° East thirteen rods to a stake by a pair of bars; thence South 60½° East seven rods to bound first mentioned; containing one hundred and fifteen rods more or less."

(2) "A certain lot of land situated in that part of said Wareham called Long Neck and on the southerly side of the state highway, and is bounded as follows: Beginning at a stake at the northeast corner of said lot and the northwest corner of a private road used by Thaddeus C. Baker and on the southerly line of the state highway: thence running south 69° West by the southerly side line of the state highway two hundred and twenty feet to a stake at the easterly side of a private road; thence South 11° 45' East by said private road six feet; thence South 81° 30' East by the northerly side of said private road forty six feet; thence due east also by the northerly side of said private road one hundred and seventy-three and 5-10 feet to the westerly side of the private road first mentioned used by Thaddeus C. Baker aforesaid; thence North 9° West by the westerly side of said private road ninety-two and 5-10 feet to the first mentioned bound. Containing forty-one square rods more or less."

¶ 1. See Easements, vol. 17, Cent. Dig. § 44.

H. H. Baker and Charles F. Chamberlayne, for plaintiff. George W. Stetson and Harry Le Baron Sampson, for defendant.

BRALEY, J. The question presented for decision is whether the plaintiff, under the boundaries in his first deed, acquired title to the southerly half of the way; and, unless some imperative principle of law requires that the plaintiff cannot have any relief, a construction ought to be given to the deed which will not compel him to use his farm in parts, or exclude him from access to the county road.

The way is either included or excluded by the description in the deed. It cannot reasonably be held, under the language used, to be in part a monument, and in part merely descriptive for the purpose of identifying the line that runs "by the road" from stake to stake. If we exclude the road, the language used runs the line from stake to stake, following the general course of the road as shown on the plan, but in no instance extending beyond the original line so drawn; or, in other words, the land of the plaintiff does not reach to or abut on the road. *Motley v. Sargent*, 119 Mass. 231, 235. The word "abuttal" means the same as "boundary," unless there are words that limit its meaning; and, if the plaintiff abuts on the road, then he is bounded by the road which is included. "The road is an abuttal, not a monument; and, if the deed does not say on which side, it should be taken to mean the center." *Shaw, C. J.*, in *Smith v. Slocum*, 9 Gray, 38, 37, 69 Am. Dec. 274. And the words "on the county road" and "by said road" have been so construed by this court. *O'Connell v. Bryant et al.*, 121 Mass. 557; *Dean v. Lowell*, 135 Mass. 55, 60.

A grantee whose land is bounded by a way owned at the time by his grantor may acquire the right to use that way, not only because he gains a fee in half of it, but also, being so bounded, his grantor would be estopped to deny the existence of the way. *Stark v. Coffin*, 105 Mass. 328, 330. In the description in the deed, if it were not for the use of the terms "stake and stones near an old road" and "stake by a pair of bars," no question could arise but that the way was included; and the true test is, what was the intention of the grantor under all the circumstances? It was said in *Clark v. Parker*, 106 Mass. 554, 556, "in the construction of deeds where lands are bounded on or by a way, either public or private, the law presumes it to be the intention of the grantor to convey the fee of the land to the center of the way if his title extended so far. This presumption is, of course, controlled whenever there are words used in the description showing a different intention. But it has been held that giving measurement in the deed of side lines which reach only to the outer line of the way are not alone sufficient to overcome it." The earlier decisions are apparently in conflict with such a rule of construction.

"In some opinions of this court it has indeed been implied or asserted that a boundary upon a road or street passed no title to the land under it. But in the more recent decisions the general rule has been repeatedly declared, and must now be regarded as the settled law of the commonwealth, overruling whatever is irreconcilable in the earlier cases, that a deed bounding land generally by a highway, with no restrictive or controlling words, conveys the grantor's title to the middle of the highway"—*Gray, C. J.*, in *City of Boston v. Richardson*, 13 Allen, 146, 152. *Phillips v. Bowers*, 7 Gray, 21, 24; *Orocker v. Cotting*, 166 Mass. 183, 187, 44 N. E. 214, 33 L. R. A. 245. And it is now too late to doubt the general rule as to boundaries by or on a street or way, either public or private, which may be stated in the language used in *Peck v. Denniston*, 121 Mass. 17, 18, as follows: "The general rule is well settled that a boundary on a way, public or private, includes the soil to the center of the way, if owned by the grantor; and that the way, thus referred to and understood, is a monument which controls courses and distances, unless the deed, by explicit statement or necessary implication, requires a different construction." Any argument that may be advanced by the defendant founded upon the fact that the side lines run in the first instance to a stake and stones near the way, and in the second from a stake near a pair of bars, and therefore the intention of the grantor was to exclude the way, must be considered with the further facts that, after leaving the bars, the boundary as shown on the plan still continues for an appreciable distance by the road to the starting point, which was a corner of land that bounded on the road; and that, if it was not the intention of *Eliza J. Dana* to grant to the plaintiff the use of the way, then she had sold a tract of land to the plaintiff to which he could not obtain access without becoming a trespasser, or else be forced to rely on a way by necessity over her remaining land. "The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right to access to the remainder over the part sold, if he can reach it in no other way." *New York & New England Railroad v. Railroad Commissioners*, 162 Mass. 81, 84, 38 N. E. 27. It is true that this language was used in considering a right of way arising from necessity, but it is equally applicable to the facts disclosed by this case. In the light of these circumstances the presumption is strong that the grantor did not intend such a result, and the operation of the rule is not to be controlled by a possible, but not reasonable, construction that the length of the side lines of the lot might exclude any part of the road. Under somewhat similar conditions a like conclusion was

reached in principle in the following cases: *White v. Godfrey*, 97 Mass. 472, 474; *Motley v. Sargent*, ubi supra; *O'Connell v. Bryant*, ubi supra; *Dean v. Lowell*, ubi supra; *Dodd v. Witt*, 139 Mass. 63, 65, 29 N. E. 475, 52 Am. Rep. 700, and cases cited; *Gould v. Eastern Railroad Co.*, 142 Mass. 85, 89, 7 N. E. 543; *Ohadwick v. Davis*, 143 Mass. 7, 9, 8 N. E. 601; *Kelley v. Saltmarsh*, 146 Mass. 585, 16 N. E. 460; *Lemay v. Furtado*, 182 Mass. 280, 65 N. E. 395. A majority of the court is of opinion that by his deed the plaintiff took in fee to the center of the road, with a right of way over the north half, while the half belonging to him was subject to a like easement on the part of others having a right to enter upon and use the way. *Boland v. St. John's School*, 163 Mass. 229, 236, 39 N. E. 1035, and cases cited.

For reasons already stated, the description in the deed of the second lot, which is bounded in part by the county road and on its southerly side by the northerly line of the private road, gives the plaintiff no title to any part of the way, as the boundary is expressly limited to its side line. The road evidently was referred to for the purpose of description only, and the deed cannot fairly be held to import a grant of anything beyond the boundary named. It was clearly the intention of the grantor that the way was to be excluded. The plaintiff, however, does not rest his case solely upon the ground discussed, but also claims that by the description in each deed, whether bounded by the side of the road or by the way itself, he gained an easement in the road, as it then was, for the purpose of travel, either on foot or by carriage, throughout its entire length and width, as it existed at the date of his deeds. And the instructions of the presiding judge at the trial adopted this view. By the description of the second lot the road was excluded, and the defendant was not estopped to deny its existence. But as to the first lot this position is well taken on the evidence, and is amply supported by our decisions. There was an implied covenant that the road was in existence, and it must be held to have passed as appurtenant to the plaintiff's estate. *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157; *Stark v. Coffin*, ubi supra; *Tobey v. Taunton*, 119 Mass. 404, 410; *Lemay v. Furtado*, ubi supra, and cases cited. If the plaintiff had a right to use the way in connection with this lot, any obstruction of it by the defendant which prevented or obstructed such use was a trespass, and he is not harmed by the error in the instructions.

There remains to be considered the question of pleading. The third and fourth counts described the plaintiff's close as an entire estate, without reference to the way, and the alleged acts of trespass by the defendant are its obstruction by the fence, the cutting down of a shade tree, and disturbance of the soil by digging post holes for the setting of

the fence, which was all within the south half of the way that passed to the plaintiff under his deed. The third count describes the way as leading from the county road to the plaintiff's land, and it is now claimed by the defendant that under this allegation the plaintiff is limited in his proof of the alleged tortious acts to this description, and that the building of the fence across the way at the point where it first enters upon the defendant's homestead is not within the allegation. But the allegation is to be treated as a description of the way for the purpose of identification, and must have been so understood, as it is immediately followed by the words, "and the defendant erected a fence at two places on the same, so that the plaintiff could not use the same." The answer to this contention, however, is that it appears from the bill of exceptions that "it is agreed that, if the plaintiff does own the south half of the way, the tree was on his land, and the removal of it constituted a trespass, and that, if the plaintiff has a right of way over said road, the fence constituted such an obstruction of it as to support the third count." The instructions of the presiding judge were undoubtedly predicated upon this agreement, which was broad enough to cover any obstruction of the way caused by the erection of the fence in any part of it, and they are not open to this criticism or exception of the defendant.

Exceptions overruled.

(185 Mass. 126)

DELOREY v. BLODGETT et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Feb. 23, 1904.)

MASTER AND SERVANT—FELLOW SERVANTS— WHAT CONSTITUTES NEGLIGENCE IN HIRING SERVANT.

1. A millwright in the general employ of a machine company, whose duty it was to go wherever sent and work until the work was done, was directed to go to a mill to do a certain work. While there, and after having finished such work, he was directed by the mill superintendent to do certain other work, the superintendent accompanying him, and while so occupied was injured through the negligence of the engineer of the mill. The machine company rendered bills to the mill for labor and machinery furnished, the laborer being charged for at a price per hour. *Held*, that the millwright was a fellow servant of the engineer.

2. Where two witnesses testified that at some times an engineer had been known to drink intoxicating liquor, but there was no evidence that he was ever intoxicated or that his employer had knowledge that he drank, and it appeared that he was not in the habit of drinking, the evidence was insufficient to show negligence in the employer towards his other servants in hiring the engineer.

Exceptions from Superior Court, Suffolk County; Daniel W. Bond, Judge.

Action by one Delorey against one Blodgett and others. Judgment for defendants, and plaintiff excepts. Exceptions overruled.

Walter A. Bule and William J. Miller, for plaintiff. Carver & Blodgett, for defendants.

KNOWLTON, C. J. The plaintiff, while repairing machinery in the defendants' shop, was injured through the negligence of one Whippen, the defendants' engineer, in starting the machinery. The plaintiff rests his claim for damages on two propositions: First, that he was not a servant of the defendants, and therefore that Whippen was not his fellow servant; and, secondly, that, if Whippen was his fellow servant, the defendants were negligent in employing him, because he was an unfit person to be intrusted with the management of an engine.

The plaintiff's relations to the defendants appear from his testimony, as follows: He said he was a millwright and carpenter in the general employment of the American Tool & Machine Company as a jobber; that jobbers were sent to do any kind of work, and were supposed to go wherever they were sent, and work until the work was done; that he and another man were directed by telephone to go to the defendants' place; that he had been there two or three times before; "that what he was sent to do, first, was to tighten up the pulley;" that afterwards, while he was in the engine room washing his hands, the defendants' superintendent, Alden, came down and said to him, "Hurry upstairs; there is something wrong with the belt;" that he went upstairs with the superintendent, and started to work and adjusted the tightener; that when he got through that the superintendent said to him, "Come over and see if the wire is leading in the center of the shieve;" that when he first came upstairs it was at the request of Mr. Alden, the superintendent; that when he went up to go to work on the tightener Mr. Alden went with him; that after he got through with the tightener he asked Mr. Alden if there was anything else to do, and that Mr. Alden called his attention to the rope that ran over the shieve. The plaintiff's undisputed evidence shows that he was an expert workman lent to the defendants by his general employer to make repairs upon their machinery. It appears that the American Tool & Machinery Company were accustomed to render bills to the defendants for labor and materials furnished, the labor being charged and paid for at a price per hour.

The law in regard to persons working in this way has often been considered by this court. In *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267, Mr. Justice Barker quoted, as a true statement of the principle, this language from Cockburn, C. J., in *Rourke v. White Moss Colliery Company*, 2 C. P. D. 205-209: "But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." In *Coughlan v. Cambridge*, 166 Mass. 238-277, 44 N.

E. 218, 219, Mr. Justice Morton says: "The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired." In *Ward v. New England Fibre Company*, 154 Mass. 419, 28 N. E. 299, it was held that on the question whether work was done by the general master of the servant under a contract which gave him the right to control the business as it was going on, and to complete it without any right of interference or control by the person for whom it was being done, the fact that the payment was to be made at the usual prices for labor and materials, instead of by giving a round sum, was not conclusive. The mode of payment in such a case is usually very significant; but it is possible for a proprietor to contract for the performance of certain work on his property in a way which will give the contractor a legal right to furnish the whole work, and to direct all details, without interference by the proprietor, and to receive at the end a price to be determined by the current rates for labor and materials. In such a case, if the proprietor should prevent the performance of the contract by the contractor, he would be liable in damages; and, so long as the work was going on, the workmen would be servants of the contractor, under his direction and control. This fact was also referred to in *Morgan v. Sears*, 159 Mass. 570, 35 N. E. 101, but in each of the cases the true principle was recognized, as stated by Mr. Justice Lathrop in the latter case, as follows: "There is no doubt that the general servant of one person may become the servant of another by submitting himself to the control and direction of the other. In such a case the servant, becomes the fellow servant of the servants of the person under whose control he comes, and neither his general master nor his special master is liable if he is injured by the negligence of one of the other servants." It makes no difference whether the proprietor to whom a servant is lent actually exercises his right of control and direction as to the details of the work, or simply sets the servant to do what is necessary, trusting to his expert skill for the result. This was decided in *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287. As was said in *Samuelian v. American Tool & Machine Company*, 168 Mass. 12, 46 N. E. 98: "The fact that they relied largely upon his skill and experience did not affect their right to control him in everything he did upon their machinery." The question in every case is whether the proprietor for whom the work is being done has given up his proprietorship of the particular business to an independent contractor, and has thus divested himself of the right of control, so that he has no longer a legal right to terminate the work or direct it. If he has done nothing to limit his rights in

regard to the business which is being done for his benefit, but retains his proprietorship of it, each man who works in it is legally subject to his control while so engaged, and, in reference to the rights of third persons who are affected by the work, is his servant. The rule applied when one furnishes for hire or lends to another a team of horses, with a driver, is simply an application of this principle. The circumstances are often such that, while the driver is the servant of the person to whom the team is furnished in reference to the question what he shall do or where he shall go, there is an implication that, as to the particulars of the management of the horses, he is the servant of his general employer, in whose interest and as whose representative he will manage and direct, within reasonable limits, such matters as pertain to the health and safety of the horses and the safety of the vehicle. In these particulars, for the preservation of his property, it will be presumed that the owner of the team retains in his driver a right of control. This is the ground of the decisions in *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645; *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58; and *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922. In the present case the plaintiff's testimony shows that he was not only legally subject to the direction and control of the defendants, but that the control was exercised by the defendants' superintendent by a series of directions. The plaintiff was a servant of the defendants, and a fellow servant of Whippen, the engineer.

There was no evidence that the defendants were negligent in employing an unfit or incompetent servant. There was testimony from two witnesses that at some times Whippen had been known to drink intoxicating liquor, but there was no evidence that he was ever intoxicated or that the defendants had knowledge that he drank intoxicating liquor, much less that he drank to excess. The testimony of other witnesses indicated that he was not in the habit of drinking liquor. The jury would not have been warranted in finding the defendants negligent in employing him.

Exceptions overruled.

(185 Mass. 114)

HAMILTON MFG. CO. v. CITY OF LOWELL.

APPLETON CO. v. SAME.

(Supreme Judicial Court of Massachusetts.
Middlesex. Feb. 26, 1904.)

TAXATION—MANUFACTURING PLANT—LIABILITY—ASSESSMENT—PROCEEDINGS FOR ABATEMENT.

1. In proceedings to abate an assessment of a manufacturing plant, the machinery is to be treated as a separate class from the land and the buildings thereon, and though each should properly be valued in connection with the other, if the land or the buildings be overvalued, an abatement may be ordered, whether the machinery be rightly valued or not.

2. The owners of the fee leased to a railroad company a strip of land so long as it was occupied for a railroad, and to a manufacturing company for its purposes an adjoining strip, and, it being claimed that a part of this was encroached on by the railroad location filed pursuant to the statute, the controversy was settled by indentures between the parties, by which the railroad location was limited to a certain width, a part of which, outside of the road, five rods in width, the manufacturing company was authorized to use for its walls and buildings, with the consent of the owners of the fee, who stipulated that the company's interest therein should not extend beyond the term of the lease to the railroad. *Held*, that the manufacturing company was not taxable for the land so used, because its right was a mere easement terminable on the happening of a contingency.

Exceptions from Superior Court, Middlesex County; Albert Mason, Judge.

Petitions by the Hamilton Manufacturing Company and Appleton Company, respectively, against the city of Lowell, to review assessments of taxes against the petitioners. An abatement of the taxes assessed was ordered, and respondent brings exceptions. Exceptions overruled.

The following is the agreed statement of facts referred to in the opinion:

"The tract of land in question was formerly owned by the proprietors of the locks and canals on Merrimack river. In 1826 and 1828 said proprietors conveyed to the Hamilton Manufacturing Company several tracts of land, reserving all of the land lying northerly of Jackson street and southerly of the Hamilton Canal. On July 14, 1843, said proprietors leased to the Boston & Lowell Railroad Corporation a strip of land thirteen (13) feet wide on the northerly side of Jackson street, now included within the limits of the tract of land in question, to be held so long as they should continue to occupy the same for a railroad for the transportation of merchandise, and no longer. Said proprietors still retained a strip of land between said 13-foot strip and the Hamilton Canal. By indentures dated October 1, 1853, and July 1, 1873, said proprietors leased to the Hamilton Manufacturing Company, for a term of 999 years, all that strip of land situated between the aforesaid land leased to the Boston & Lowell Railroad Corporation and the Hamilton Canal. In the meantime said railroad corporation had filed with the county commissioners under the statute a location of its railroad along the northerly side of Jackson Street, including the above-mentioned 13-foot strip; but the location so filed, like many of the railroad locations filed under the earlier statutes of the commonwealth relating to railroads, was somewhat indefinite, and in 1883, pursuant to the provisions of chapter 149 of the Acts of 1882, said corporation filed a new location with the county commissioners, which covered said 13-foot strip, and also a further width of about 7 feet, making the whole location, as filed, 20 feet in width along the northerly side of Jackson street, and thereby, as was claimed by the Hamilton Manufac

turing Company, encroaching upon land included within the lease of July 1, 1873. On February 12, 1879, the Boston & Lowell Railroad Corporation had by indenture authorized and empowered the Hamilton Manufacturing Company to maintain its buildings over said railroad location as it had been doing prior to that time, and to erect walls and buildings over that portion of the strip of land included in the location not built upon, so far as the railroad corporation had the right to so authorize.

"Inasmuch as a controversy had arisen between the Boston & Lowell Railroad Corporation, on the one side, and the Hamilton Manufacturing Company and the proprietors of the locks and canals, on the other, on account of the filing of the new location by the railroad in 1883, said parties to this controversy, together with the Boston & Maine Railroad Corporation, the lessee of the Boston & Lowell Railroad Corporation, joined in indentures dated June 29, 1888, and August 31, 1888, copies of which have been introduced in evidence as 'Exhibit No. 4,' by the terms of the former of which indentures the railroad corporation limited its location to a strip of land eight hundred and sixty-two and four one-hundredths (862.04) feet in length and fourteen and forty-five one-hundredths (14.45) feet in width at its westerly end, and fifteen and fifty one-hundredths (15.50) feet in width at its easterly end, which included the original 13-foot strip. By the same indentures the railroad corporation authorized the Hamilton Manufacturing Company 'to maintain and keep the walls and buildings and arch already existing over a portion of said strip and over the track of said Lowell Railroad thereon as the same are now built and constructed, and further authorize and empower the said manufacturing company to extend walls and buildings of substantially the same construction with an arch not less than eighteen (18) feet in height above said railroad tracks over the remainder of said strip, the said walls on the Jackson street side to be not over two (2) feet in thickness and the southerly line thereof to be on the line of said street, and said walls and buildings as now erected and constructed, or as hereafter erected and constructed pursuant to this indenture, or any others erected in their stead, to be maintained on said strip so long only as the same shall be used by said manufacturing company, its successors or assigns, for purposes substantially similar to those for which the said manufacturing company now uses them.'

"The proprietors of the locks and canals in said indenture of August 31, 1888, assented to said indenture of June 29, 1888, subject to the proviso that nothing therein 'shall give or convey unto or vest in said Hamilton Manufacturing Company any estate, easement, or right in said strip of land for or during any other or longer time or term than the term for which said land was leased to

said railroad corporation in or by the lease of said proprietors above-named' (the aforesaid lease of July 14, 1843). By deed dated April 1, 1893, said proprietors conveyed the fee in the tract of land included between the northerly line of the railroad location, as thus fixed, and the Hamilton Canal, to the Hamilton Manufacturing Company.

"It is agreed, further, that the railroad over said tract of land in question is maintained for the exclusive purpose of carrying goods and merchandise to and from the mills of said Hamilton Manufacturing Company."

F. E. Dunbar, for petitioner. William A. Hogan, City Sol., for respondent.

KNOWLTON, C. J. These are petitions to the superior court in the nature of appeals from decisions of the assessors denying to each of the petitioners an abatement of its taxes upon real estate. The petitioners are manufacturing corporations, and the respondent contended, as to each petitioner, that its land, buildings, and machinery in the mill-yard were all parts of one parcel, constituting a single unit for taxation, and that the petitioner is not entitled to an abatement unless the parcel, taken as a whole, was overvalued, even though there was an overvaluation of the land or buildings, or both.

Under our statutes and decisions, real estate and personal estate are two distinct classes of property for the purpose of taxation. *Preston v. Boston*, 12 Pick. 7; *Howe v. Boston*, 7 Cush. 273; *Lowell v. County Commissioners*, 8 Allen, 548. Taxes upon real estate are a lien upon the property, and may be collected by a sale of it, while taxes upon personal property cannot be collected in this way. This in itself is a sufficient reason for assessing them separately. Different parcels of real estate belonging to the same owner cannot properly be assessed together upon a single valuation. *Hayden v. Foster*, 13 Pick. 492; *Jennings v. Collins*, 90 Mass. 29, 96 Am. Dec. 687. Land and the buildings upon it are ordinarily parts of the same real estate, and they cannot be separated for the purpose of collecting taxes. Although for statistical purposes they are at first valued separately, their aggregate, limited by their value in use together, constitutes the valuation of the entire real estate for the purpose of taxation. But this principle does not apply to machinery in a mill used, with land and buildings, for manufacturing purposes. The requirement of Pub. St. 1882, c. 11, §§ 52, 53 (Rev. Laws, c. 12, §§ 58, 59), that machinery shall be valued separately, is partly for statistical purposes, and partly because it has to some extent a local character which well may make it a subject of local taxation. Its worth is deducted from the whole value of the corporate property in determining the value of the franchise. See Rev. Laws, c. 14, §§ 37-42. Such machinery is not taxed as real estate, but as personal property. The land and the

buildings and the water power are real estate, and are taxed accordingly.

Except for the purpose of enforcing a lien in the collection of the tax on real estate, it is ordinarily of no practical consequence to any one, in drawing a line between machinery which is personal property and fixtures in a building which are real estate as between grantor and grantee, whether the division is made precisely as the law makes it in connection with conveyances of such property. It is often a matter of great difficulty to determine as between mortgagor and mortgagee, or grantor and grantee, whether certain kinds of machinery do or do not pass as a part of the real estate. In all doubtful cases it is better that the rule as to taxation should be such as to give a lien for the collection of the tax only when the tax is upon that which is plainly real estate. Perhaps for this reason the statute authorizes taxation of machinery as personal property in terms broad enough to include that which otherwise properly might be taxed as a part of the building. But all that is taxed as machinery, and not as a part of the building, is taxed as personal property. It is not a part of the same unit of taxation as the land and the buildings. The fact that, when the land, buildings, and machinery are of more value if kept together and used for mill purposes than if separated, each of them should be valued for taxation at its worth as used in connection with the others (see *Troy Cotton & Woollen Manufactory v. Fall River*, 187 Mass. 517, 48 N. E. 99), does not affect the principle. In proceedings for an abatement the machinery is to be treated as belonging to a separate class, and, if the land or the building is overvalued, an abatement may be ordered whether the machinery is rightly valued or not.

The court rightly ruled that, upon the agreed facts, the Hamilton Manufacturing Company is not taxable for the land within the railroad location. The right of the petitioner is a mere easement in the land, terminable on the happening of a contingency. The fee is in the proprietors of the locks and canals, and the title of the railroad company under its location, inasmuch as the land is outside of its road, five rods in width, is not exempt from taxation under the statute. *Rev. Laws, c. 111, § 96*. It is unnecessary further to consider the effect of the indentures, or to determine anything more than the questions raised by the exceptions.

Exceptions overruled.

(185 Mass. 171)

LAWSON v. ROWLEY, Justice of the Peace.
(Supreme Judicial Court of Massachusetts.
Suffolk. Feb. 26, 1904.)

WITNESSES—DEPOSITIONS—PROCESS OF MAGISTRATE—COMMITMENT FOR CONTEMPT.

1. Gen. St. 1860, c. 120, § 50, giving justices of the peace power to punish, by fine or im-

prisonment, disorderly conduct interrupting judicial proceedings before them, if originally applicable to proceedings before such justices to take depositions, should not be so held since its re-enactment by Pub. St. 1882, c. 155, § 68, in a form applicable only to trial justices.

2. The ancient jurisdiction of justices of the peace has been curtailed by St. 1858, p. 101, c. 138, depriving them of criminal jurisdiction, and by St. 1877, p. 595, c. 211, denying to them the right to try civil cases; but by *Rev. Laws, c. 175, § 27*, they still have power to take depositions; and by section 5 of the same chapter a failure of a witness to attend is a contempt, punishable by fine. St. 1826, c. 86, § 4, giving a justice authority to commit for contempt for refusal to answer interrogatories, was repealed by *Rev. St. 1836, c. 85, § 33*, and *Rev. Laws, c. 175, § 11*, has been enacted and provides that a justice of the Supreme Judicial or superior court, on application of a magistrate authorized to summon witnesses, may compel the giving of testimony by the witnesses before such magistrate in the same manner and to the same extent as before said courts. *Held*, that the term "magistrates" in the last-mentioned statute includes justices of the peace, and they are left without power to commit a witness for contempt for refusal to answer questions put to him.

Case Reserved from Supreme Judicial Court, Suffolk County; Henry K. Braley, Judge.

Petition for writ of partition by one Lawson against one Rowley, justice of the peace. Writ issued.

Walter I. Badger and Wm. Harold Hitchcock, for petitioner. G. Phillip Wardner and Henry D. Yeaton, for respondent.

KNOWLTON, C. J. The respondent, as a justice of the peace, was applied to under *Rev. Laws, c. 175, § 26*, to take the deposition of the petitioner in a pending case on the ground that the witness was about "to go out of the commonwealth, and not return in time for the trial." The petitioner refused to answer certain questions propounded to him, and this petition is brought to obtain a writ of prohibition to prevent the magistrate from issuing a process of commitment to jail for contempt in refusing to answer. If, following the opinion of Chief Justice Shaw in *Livesey v. Bennett*, 14 Gray, 130, we assume, without deciding, that under this statute all that is necessary legally to justify the taking of a deposition is that the party taking it "fears, apprehends, believes that the witness is going to be absent, and this appears to the magistrate to be reasonable," and if we assume that the magistrate would have found for the plaintiff in the original action upon this point, we come to the question whether a justice of the peace taking a deposition may punish a witness by commitment to jail for contempt if he refuses to answer a proper question. The power of justices of the peace has been greatly diminished by the legislation of the last 50 years. By St. 1858, p. 101, c. 138, they were deprived of their jurisdiction to try criminal cases. See, also, St. 1859, p. 338, c. 193; Gen. St. 1860, c. 120, § 36. St. 1877, p. 595, c. 211, provided that

they should no longer have "any power, authority or jurisdiction to try civil cases, or receive complaints or issue warrants." See Pub. St. 1882, c. 155, § 6. But justices of the peace are still conservators of the peace (Rev. Laws, c. 166, § 2), and they still have power to take depositions (Id. c. 175, § 27), and under section 40 of this chapter "a person may be summoned and compelled to give his deposition at a place within twenty miles of his place of abode, in like manner and under the same penalties as are provided for a witness before a court," in addition to the liability in an action of tort for damages created by section 4 of this chapter, when a person summoned as a witness at a trial in court fails to attend without a sufficient excuse. Section 5 provides that such failure "shall also be a contempt of the court, and may be punished by a fine of not more than twenty dollars." This provision, under the section referred to above, gives a justice of the peace power to punish by fine, as for a contempt, the failure of a witness to attend on being summoned to give his deposition. There is no express provision that authorizes him to punish for a contempt in any other way. Gen. St. 1860, c. 120, § 50, following Rev. St. 1836, c. 85, § 33, gives justices of the peace power to punish either by fine not exceeding \$10, or by imprisonment not exceeding 15 days, "such disorderly conduct as interrupts any judicial proceeding before them, or is a contempt of their authority or persons." Probably willful disobedience of an order to answer a question would be such disorderly conduct, and would justify imprisonment for contempt committed in the trial of a case; but this provision now applies only to trial justices. Pub. St. 1882, c. 155, § 68. It has never been decided that it was applicable to a proceeding for taking a deposition, and, if it could have been held so applicable when justices of the peace had large judicial authority, we are of opinion that it ought not so to be held since the repeal of the original provision and its re-enactment in a form which applies only to trial justices. St. 1828, c. 86, § 4, which gave justices of the peace express authority to commit witnesses to jail for a contempt if they unreasonably refused to answer interrogatories in giving a deposition, was repealed by the Revised Statutes of 1836, and was not re-enacted in the Revision. Rev. Laws, c. 175, § 11, is very broad and general, and we are of opinion that it was intended to apply to cases like the present. It is as follows: "A justice of the Supreme Judicial court, or of the superior court, upon an application of a magistrate or tribunal which is authorized to summon and compel the attendance of witnesses may, in his discretion, compel the giving of testimony by them before such magistrate or tribunal, in the same manner and to the same extent as before said courts." In terms it includes magistrates as well as tribunals, and there is no good reason why it should not apply to

a justice of the peace acting as a magistrate in taking the deposition of a witness whom he has summoned and whose attendance he has compelled. Under this statute the judge can act only upon the application of the magistrate or tribunal (National Bank v. Graham, 175 Mass. 179, 55 N. E. 991), and then he may exercise his discretion according to the justice of the case. In this way a witness who might be justified in refusing to answer irrelevant questions calling for an injurious disclosure of the secrets of his business or his family would be likely to be protected by the judge, while a magistrate taking a deposition, if he had the power to commit for contempt, might think it his duty to compel answers to all questions of doubtful competency. We think our existing laws should be so construed as to leave justices of the peace taking depositions with no power to commit a witness for contempt for his refusal to answer the questions put to him.

Writ to issue.

(185 Mass. 174)

GRAVES v. BROUGHTON.

BROUGHTON v. GRAVES.

(Supreme Judicial Court of Massachusetts.
Essex. Feb. 27, 1904.)

DEEDS—INTERPRETATION—PAROL EVIDENCE—
QUESTIONS FOR JURY—EASEMENTS—TITLE
BY PRESCRIPTION—PRESUMPTION OF GRANT
—HUSBAND AND WIFE.

1. Where an indenture of partition, after designating the rooms of a house on the estate partitioned, read, "together with one half of the small piece of land in front of the house, viz. that part which is below the bank or break in said land," and further provided that the other tenant should "have the upper half of said piece of land in front of the house," parol evidence would be resorted to to ascertain what was meant by the words used, and the actual occupation and use of the premises by different owners became admissible in evidence to determine the boundaries and the extent of the ownership of each tenant.

2. The question as to where the boundary line ran between partitioned estates was for the jury, where the indenture of partition was so ambiguous as to require parol evidence to explain the description, and such evidence was introduced on behalf of both parties.

3. An owner of premises is entitled to damages for the unlawful construction and maintenance of a wall on his premises by the adjoining owner.

4. In order to establish a title by prescription to an easement it must appear that the owner of the estate which is to be subjected to the servitude, and who has the right to interrupt an acquisition of the easement, could have asserted his title against the owner of the dominant estate.

5. Where a husband and wife owned adjoining premises, the husband could not acquire an easement in her premises by adverse use, for, as she could not have made a valid grant to him of such an easement, the presumption of a grant, which is the foundation of title by prescription, fails.

Exceptions from Superior Court, Essex County; Wm. Cushing Wait, Judge.

¶ 1. See Adjoining Landowners, vol. 1, Cent. Dig. § 67.

Separate actions were brought by one Graves against one Broughton and by Broughton against Graves. There was a verdict for Graves in both actions, and Broughton brings exceptions. Exceptions sustained in the first case, and overruled in the second case.

- Francis V. McCarthy and Arthur G. Wadleigh, for James E. Graves. James H. Sisk and John H. Appleton, for Wm. G. Broughton.

BRALEY, J. These are actions of tort in the nature of trespass, brought, respectively, June 30 and July 20, 1900, to determine the title of the parties, who are owners of contiguous estates, to a small strip of land in the immediate vicinity of their houses, and also the right of Graves to a way across the premises of Broughton to Harding's lane, in the town of Marblehead. At the trial in the superior court, verdicts were rendered in favor of Graves, and the cases are here on the exceptions of Broughton to a refusal to make certain rulings requested by him, and to the instructions given to the jury.

The acts of trespass were the erection of a stone wall by Broughton on the strip of land in controversy, by which the use of the way was cut off, and the alleged tortious act of Graves in tearing down a part of the wall, in order to obtain access to the way. Neither of the litigants was able to establish his title, either to the land or to the easement, claimed, by the terms of any express grant, and, as the facts relied on to prove title by possession to the land do not necessarily tend to establish the right of way, it becomes advisable to consider the questions presented for decision separately. The estate now owned by Broughton was formerly held in common by William Hammond, Nancy Maservey, and Joseph W. Hammond. In 1831, by an indenture of partition, they made a division of the property, so that William and Nancy "should be seised and possessed of one undivided moiety," and Joseph of the "other moiety." These parts were respectively treated in subsequent conveyances by the tenants as held in severalty, and are referred to as the "lower half" and "upper half" of the premises. *Sparhawk v. Bullard*, 1 Metc. 95-99; *De Witt v. Harvey*, 4 Gray, 486-491. At the date of the partition the estate consisted of a small parcel of land, on which stood a dwelling house and outbuildings, but no description is given of its boundaries; the language used, after designating the rooms of the house that formed the lower half, being, "together with one half of the small piece of land in front of the house, viz. that part which is below the bank or break in said land," and with the remainder of the house the other tenant "shall have the upper half of said piece of land in front of the house." This description has never been changed in later deeds passing title to the land.

Under such general terms, resort must be had to parol evidence to ascertain what was meant by the words used, and its actual occupation and use by different owners became admissible in evidence to determine the boundaries and the extent of the ownership of each tenant. *Stone v. Clark*, 1 Metc. 378, 35 Am. Dec. 370. The title of James E. Graves to his homestead, which, as he claimed, included the land in dispute, came from his father, Eleazer T. Graves, who owned and used it at least from September 24, 1849, to September 24, 1886, when he conveyed it to his son, who has since been in possession. During this period he lived with his wife, Olive Graves, who owned the upper half of what is now the property of Broughton. For a portion of the same time John B. Graves, father of Eleazer T. Graves, owned and occupied the lower half of the same estate, and there was evidence at the trial that an iron stake set in the ground about 15½ feet from the westerly side of the house of James E. Graves was the boundary of his land on the west side, and, if so bounded, his premises would include the strip in issue, and that it was placed as marking the line of division by Eleazer T. Graves and John B. Graves, not later than May 14, 1869. There was other evidence introduced by both parties not necessary to be recited, bearing upon the issue as to where the boundary line ran between the two estates, and which became a question of fact for the jury. If the iron stake marked the dividing line, the wall was on the land of Graves, who was entitled to have his damages assessed for its unlawful construction and maintenance by Broughton. *Wishart v. McKnight*, 178 Mass. 356, 59 N. E. 1023, 86 Am. St. Rep. 486.

The instructions given on this branch of the case directed the attention of the jury to the uncertain character of the words of description used in the various deeds, and that evidence had been admitted solely to show what was intended to be included or described by the words "in front of the house," when applied to the land conveyed, and to fix the boundary line between the different portions; and they carefully pointed out the application of the evidence to the issue to be decided, and no error of law appears. There was sufficient evidence in the case to sustain the finding of the jury that, at the time the wall was built, James E. Graves was "the owner or in possession of the strip of land where the wall in question stands."

It was conceded at the trial that, if a right of way across the land of Broughton was appurtenant to the estate of Graves, the easement had been acquired by prescription under an adverse user of the servient estate by Eleazer T. Graves. A title by prescription rests upon the fiction of a lost grant, and it must appear that the owner of the estate which is to be subjected to the servitude, and who has the right to interrupt an acqui-

sition of the easement, could have asserted his title against the owner of the dominant estate. *Barnes et al. v. Haynes et al.*, 13 Gray, 188, 74 Am. Dec. 629; *Melvin v. Whiting*, 13 Pick. 184-188; *Powell v. Bagg*, 8 Gray, 441-443, 69 Am. Dec. 262.

For a period of 37 years, during which Eleazer T. Graves owned and occupied the dominant estate, the lower half of the land in front of the house, and now owned by Broughton was held in fee by his wife, Olive Graves, and though the easterly line of the "land in front of the house" may have been uncertain until apparently defined by the iron stake, yet in any use made by him of the way he would have to pass over her land in going to and from his lot to Harding's lane, and in order to establish the right now claimed to have been acquired as appurtenant to his land it would have to be held, not only that this use of the estate belonging to his wife was open and uninterrupted, but also adverse to her title.

Putting to one side the obvious situation that, where husband and wife are separately seised of lands so situated that it is convenient to use and enjoy the two estates in common, an easement by such user does not become appurtenant to either, a graver difficulty to overcome is the legal situation of Olive Graves at the time when it is said that a continuous use of her land by her husband had ripened into a prescriptive right annexed to his estate. She was a married woman, and, being under the disability of coverture, could not make a valid grant to her husband of such an easement. If legal capacity to make the grant is shown to be absent, the presumption falls. It has accordingly been held that the presumption of a lost grant of an easement acquired by adverse use during a period sufficient to bar an action for a recovery of land in a case of disseisin cannot arise where, at the time when the period begins to run, the estate to be subjected to the easement is owned by an infant, an insane person, or a married woman. While the use may be open and uninterrupted, it cannot be said that those who are unable, by reason of legal incapacity, to assert their right to interrupt, are to be held to have acquiesced therein, or that as to them it is adverse. *Melvin v. Whiting*, *ubi supra*; *Lowell v. Daniels*, 2 Gray, 161-169, 61 Am. Dec. 448; *McGregor v. Wait et al.*, 10 Gray, 72-74, 69 Am. Dec. 805; *Powell v. Bagg*, *ubi supra*; *Edson v. Munsell*, 10 Allen, 557-568; *Brayden v. New York, New Haven & Hartford Railroad Co.*, 172 Mass. 225, 51 N. E. 1081. The ruling requested, that Eleazer T. Graves could not during coverture gain by prescription a right of way over land belonging to his wife, should have been given, and the instructions to the jury that he could acquire such way "under a claim of right in opposition to the owner of the premises, where his wife was the owner," were erroneous. It therefore becomes necessary to sustain the

exceptions in the first case. But as no further error appears, the new trial will be confined to this issue alone, and the exceptions in the second case must be overruled.

So ordered.

(185 Mass. 255)

MARTELL v. WHITE et al.

(Supreme Judicial Court of Massachusetts.
Norfolk. March 1, 1904.)

INJURY TO BUSINESS—CONSPIRACY—COERCION
—FINES.

1. Defendants, granite manufacturers of a city, formed an association, a by-law of which provided that any member having business transactions with any other such manufacturer of the city in relation to granite should, for each such transaction, contribute to the association's expenses from \$1 to \$500; the amount to be determined by the association. By means of fines from \$10 to \$100 on members for dealings with plaintiff, his business was ruined. Held, that though the association's object was competition, which is not illegal, the means—coercion by fines—were illegal, so that defendants were liable for the injury.

Exceptions from Superior Court, Norfolk County; Robt. R. Bishop, Judge.

Action of tort by one Martell against one White and others for conspiracy to injure plaintiff's business. Verdict was ordered for defendants, and plaintiff excepted. Exceptions sustained.

Charles W. Bartlett and Elbridge R. Anderson, for plaintiff. James E. Cotter and John W. McAnarney, for defendants.

HAMMOND, J. The evidence warranted the finding of the following facts, many of which were not in dispute: The plaintiff was engaged in a profitable business in quarrying granite and selling the same to granite workers in Quincy and vicinity. About January, 1899, his customers left him, and his business was ruined, through the action of the defendants and their associates. The defendants were all members of a voluntary association known as the Granite Manufacturers' Association of Quincy, Mass., and some of them were on the executive committee. The association was composed of "such individuals, firms, or corporations as are, or are about to become manufacturers, quarriers, or polishers of granite." There was no constitution, and, while there were by-laws, still, except as hereinafter stated, there was in them no statement of the objects for which the association was formed. The by-laws provided, among other things, for the admission, suspension, and expulsion of members, the election of officers, including an executive committee, and defined the respective powers and duties of the officers. One of the by-laws read as follows: "For the purpose of defraying in part the expense of the maintenance of this organization, any member thereof having business transactions with any party or concern in Quincy or its vicinity, not members hereof, and in

any way relating to the cutting, quarrying, polishing, buying or selling of granite (hand polishers excepted) shall for each of said transactions contribute at least \$1 and not more than \$500. The amount to be fixed by the association upon its determining the amount and nature of said transaction." Acting under the by-laws, the association investigated charges which were made against several of its members that they had purchased granite from a party "not a member" of the association. The charges were proved, and, under the section above quoted, it was voted that the offending parties "should respectively contribute to the funds of the association" the sums named in the votes. These sums ranged from \$10 to \$100. Only the contribution of \$100 has been paid, but it is a fair inference that the proceedings to collect the others have been delayed only by reason of this suit. The party "not a member" was the present plaintiff, and the members of the association knew it. Most of the customers of the plaintiff were members of the association, and after these proceedings they declined to deal with him. This action on their part was due to the course of the association in compelling them to contribute as above stated, and to their fear that a similar vote for contribution would be passed, should they continue to trade with the plaintiff. The jury might properly have found, also, that the euphemistic expression, "shall contribute to the funds of the association," contained an idea which could be more tersely and accurately expressed by the phrase "shall pay a fine," or, in other words, that the plain intent of the section was to provide for the imposition upon those who came within its provisions of a penalty in the nature of a substantial fine. The bill of exceptions recites that "there was no evidence of threats or intimidation practiced upon the plaintiff himself, and the acts complained of were confined to the action of the society upon its own members." We understand this statement to mean simply that the acts of the association concerned only such of the plaintiff's customers as were members, and that no pressure was brought to bear upon the plaintiff, except such as fairly resulted from action upon his customers. While it is true that the by-law was not directed expressly against the plaintiff by name, still he belonged to the class whose business it was intended to affect, and the proceedings actually taken were based upon transactions with him alone, and in that way were directed against his business alone. It was the intention of the defendants to withdraw his customers from him, if possible, by the imposition of fines upon them, with the knowledge that the result would be a great loss to the plaintiff. The defendants must be presumed to have intended the natural result of their acts. Here, then, is a clear and deliberate interference with the business of a person, with the intention of causing damage to him,

and ending in that result. The defendants combined and conspired together to ruin the plaintiff in his business, and they accomplished their purpose. In all this, have they kept within lawful bounds? It is elemental that the unlawfulness of a conspiracy may be found either in the end sought, or the means to be used. If either is unlawful, within the meaning of the term as applied to the subject, then the conspiracy is unlawful. It becomes necessary, therefore, to examine into the nature of the conspiracy in this case, both as to the object sought and the means used.

The case presents one phase of a general subject which gravely concerns the interests of the business world, and, indeed, those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere, but some things, at least, appear to have been settled; and certainly at this stage of the judicial inquiry it cannot be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that, while a person must submit to competition, he has the right to be protected from malicious interference with his business. The rule is well stated in *Walker v. Cronin*, 107 Mass. 555, 564, in the following language: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing." In a case like this, where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. If the injury be inflicted without just cause or excuse, then it is actionable. *Bowen, L. J., in Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 613; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 359, 79 Am. St. Rep. 330. The justification must be as broad as the act, and must cover not only the motive and the purpose, or, in other words, the object sought, but also the means used.

The defendants contend that, both as to object and means, they are justified by the law applicable to business competition. In considering this defense, it is to be remembered, as was said by *Bowen, L. J., in Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. D. 598, 611, that there is presented "an apparent conflict or antinomy between two rights that are equally regarded by the law

—the right of the plaintiff to be protected in the legitimate exercise of his trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others." Here, as in most cases where there is a conflict between two important principles, either of which is sound, and to be sustained within proper bounds, but each of which must finally yield, to some extent, to the other, it frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and, bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through which, at least, the line must run, and beyond which the party charged with trespass shall not be allowed to go.

While the purpose to injure the plaintiff appears clearly enough, the object or motive is left somewhat obscure, upon the evidence. The association had no written constitution, and the by-laws do not expressly set forth its objects. It is true that from the by-laws it appears that none but persons engaged in the granite business can be members, and that a member transacting any business of this kind with a person not a member is liable to a fine, from which it may be inferred that it is the idea of the members that, for the protection of their business, it would be well to confine it to transactions among themselves, and that one, at least, of the objects of the association is to advance the interests of the members in that way. The oral testimony tends to show that one object of the association is to see that agreements made between its members and their employes, and between this association and similar associations in the same line of business, be kept and "lived up to." Whether this failure to set out fully in writing the objects, is due to any reluctance to have them clearly appear, or to some other cause, is, of course, not material to this case. The result, however, is that its objects do not so clearly appear as might be desired; but, in view of the conclusion to which we have come as to the means used, it is not necessary to inquire more closely as to the objects. It may be assumed that one of the objects was to enable the members to compete more successfully with others in the same business, and that the acts of which the plaintiff complains were done for the ultimate protection and advancement of their own business interests, with no intention or desire to injure the plaintiff, except so far as such injury was the necessary result of measures taken for their own interests. If that was true, then, so far as respects the end sought, the conspiracy does not seem to have been illegal.

The next question is whether there is any-

thing unlawful or wrongful in the means used, as applied to the acts in question. Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that, in a more advanced stage of the discussion, the day may come when it will be more clearly seen, and will more distinctly appear in the adjudication of the courts, than as yet has been the case, that the proposition that, what one man lawfully can do, any number of men, acting together by combined agreement, lawfully may do, is to be received with newly disclosed qualifications, arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals, acting each according to his own preference, and that of an organized and extensive combination, may be so great in its effect upon public and private interests as to cease to be simply one of degree, and to reach the dignity of a difference in kind. Indeed, in the language of Bowen, L. J., in the *Mogul Steamship Case*, *ubi supra* (page 616): "Of the general proposition that certain kinds of conduct not criminal in one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise; and the very fact, of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." See, also, opinion of Stirling, L. J., in *Giblan v. National Amalgamated Labourers' Union* [1903] 2 K. B. 600, 621. Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly. Conspicuous illustrations of the destructive extent to which it may be carried are to be found in the *Mogul Steamship Case*, above cited, and in *Bowen v. Matheson*, 14 Allen, 499. The fact, therefore, that the plaintiff was vanquished, is not enough, provided that the contest was carried on within the rules allowable in such warfare. It is a right, however, which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. He may fight, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed, in his business, to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or in the words of Bowen, L. J.,

in the *Mogul Steamship Case*, *ubi supra*, may adopt "the expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to realize a fuller harvest of profit in the future." In these and many other obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others; and, so long as he keeps within the operation of the laws of trade, his justification is complete. But from the very nature of the case, it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction, or molestation. In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but, if he stays in it, he is subjected to the coercive effect of a fine, to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal. *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287.

Nor is the nature of the coercion changed by the fact that the persons fined were members of the association. The words of *Munson, J.*, in *Boutwell v. Marr*, 71 Vt. 1, 9, 42 Atl. 607, 609, 43 L. R. A. 803, 76 Am. St. Rep. 746, are applicable here: "The law cannot be compelled, by any initial agreement of an associate member, to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system

and the victim of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association."

In view of the considerations upon which the right of competition is based, we are of opinion that, as against the plaintiff, the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful. We do not mean to be understood as saying that a fine is of itself necessarily, or even generally, an illegal implement. In many cases it is so slight as not to be coercive in its nature; in many, it serves a useful purpose to call the attention of a member of an organization to the fact of the infraction of some innocent regulation; and, in many, it serves as an extra incentive to the performance of some absolute duty or the assertion of some absolute right. But where, as in the case before us, the fine is so large as to amount to moral intimidation or coercion, and is used as a means to enforce a right not absolute in its nature, but conditional, and is inconsistent with those conditions upon which the right rests, then the coercion becomes unjustifiable, and taints with illegality the act.

The defendants strongly rely upon *Bowen v. Matheson*, 14 Allen, 499; *Mogul Steamship Co. v. McGregor* [1892] A. C. 25; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; and *Cote v. Murphy*, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686. In none of these cases was there any coercion by means of fines upon those who traded with the plaintiff. Inducements were held out, but they were such as are naturally incident to competition—for instance, more advantageous terms in the way of discounts, increased trade, and otherwise. In the *Minnesota* case there was among the rules of the association a clause requiring the plaintiff to pay 10 per cent., but the propriety or the legality of that provision was not involved. In *Bowen v. Matheson*, it is true that the by-laws provided for a fine, but the declaration did not charge that any coercion by means of a fine had been used. A demurrer to the declaration was sustained upon the ground that there was no sufficient allegation of an illegal act. The only allegation which need be noticed here was that the defendants "did prevent men from shipping with" the plaintiff, and as to this the court said: "This might be done in many ways which are legal and proper, and, as no illegal methods are stated, the allegation is bad." This comes far short of sustaining the defendants in their course of

coercion by means of fines. As to the other cases cited by the defendants, it may be said that, while bearing upon the general subject of which the present case presents one phase, they are not inconsistent with the conclusion to which we have come. Among the authorities bearing upon the general subject, and having some relation to the questions involved in this case, see, in addition to those hereinbefore cited, *Slaughterhouse Cases*, 16 Wall. 116, 21 L. Ed. 394; *Adyston v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; *Inter-Ocean Publishing Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Jackson v. Stanfield*, 187 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *Bailey v. Master Plumbers*, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561; *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 126; *Mogul Steamship Co. v. McGregor*, 15 Q. B. D. 476; *Id.* 21 Q. B. D. 544; *Id.* 23 Q. B. D. 598; *Id.* [1892] A. C. 25.

For the reasons above stated, a majority of the court are of opinion that the case should have been submitted to the jury. Exceptions sustained.

(185 Mass. 58)

SNYDER v. SMITH et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Feb. 24, 1904.)

BANKRUPTCY—CREDITORS' SUIT—EQUITABLE LIEN—VACATION—TRUSTEE—INTERVENTION—APPEAL.

1. In a suit to enforce an equitable lien against a bankrupt, the bankrupt's trustee was entitled to intervene and claim property covered by the decree, and appeal from an order denying the petition.

2. Pub. St. 1882, c. 151, § 2, cl. 11 (Rev. Laws, c. 159, § 3, cl. 7), provides for suits in equity by creditors to reach any property of a debtor, within the commonwealth, which cannot be reached by attachment or taken on execution, etc. Plaintiff brought suit under such section to reach certain equitable assets of defendant S. in the possession of B. and D., trustees. A temporary injunction was issued May 15, 1901, restraining defendants from disposing of the property, and on March 27, 1903, a decree was entered in favor of plaintiff. On May 7, 1903, S. was adjudged a bankrupt on his voluntary petition, and, on the 21st following, his trustee was appointed. *Held*, that under such statute plaintiff by his suit acquired an equitable lien on the property in question, which was not dissolved by the bankruptcy proceedings under Bankr. Act July 1, 1898, c. 541, §§ 67e, 67f, 30 Stat. 535 [U. S. Comp. St. 1901, p. 3449], recognizing liens created by or obtained in any proceedings at law or in equity commenced more than four months before the adjudication of bankruptcy.

Appeal from Superior Court, Suffolk County; D. Frank Kimball, Judge.

69 N.E.—69

Action by one Snyder against one Smith and others. From a judgment in favor of plaintiff, defendant Smith appeals, and from an order denying the petition of defendant Kimball, as trustee in bankruptcy of defendant Smith, to intervene, except so far as to claim a surplus of proceeds of the property seized remaining after payment of various parties, he appeals. Smith's appeal dismissed, and affirmed on Kimball's appeal.

G. M. Palmer and H. T. Richardson, for appellant Kimball. Charles T. Gallagher, Hollis R. Bailey, and Frederick Manley Ives, for appellee.

KNOWLTON, C. J. The motion to dismiss the appeal of the defendant James M. Smith for want of prosecution, and the petition of Kimball, the trustee in bankruptcy, to be allowed to intervene in the suit, were heard together. The motion was allowed, and the petition was denied, except so far as it related to any surplus that might remain after the debts of the various parties had been paid. At the hearing the plaintiff filed requests for rulings, all of which were given by the judge. One of these was that under the bankruptcy act of 1898 the creditors who were parties to this suit "obtained good equitable liens, valid as against the trustee in bankruptcy" of the defendant Smith. We infer that the decision of the judge both upon the motion and the petition was founded largely, if not entirely, upon his ruling made in accordance with this request, and was not made merely as a matter of discretion. The trustee in bankruptcy legally represented the bankrupt as the assignee of his property, and was entitled to be heard, upon proper proceedings in court, on his claim to the property referred to in the decree. We shall therefore assume in his favor, against the plaintiff's contention, that he is rightly before us on his exception to the order denying his petition, and upon his appeal from that order.

The important question in the case is whether the proceedings gave the plaintiff an equitable lien upon the assets mentioned in the bill, which was good against the trustee in bankruptcy. The suit was brought under Pub. St. 1882, c. 151, § 2, cl. 11 (Rev. Laws, c. 159, § 3, cl. 7), to reach and apply certain equitable assets of the defendant Smith in the possession of the defendants Batt and Dickinson, trustees. A temporary injunction was issued on May 15, 1901, soon after the commencement of the suit, restraining the defendant Smith and the defendants who held the property from disposing of it. On March 27, 1903, a decree was entered settling the rights of the parties in favor of the plaintiff. The defendant Smith appealed, but failed seasonably to prosecute his appeal, and on May 7, 1903, he was adjudicated a bankrupt on his voluntary petition, and on May 21st Kimball was duly appointed his trustee.

Bankr. Act July 1, 1898, c. 541, §§ 67e, 67f, 80 Stat. 565 [U. S. Comp. St. 1901, p. 3449], in differing language recognizes liens "created by or obtained in or pursuant to any suit or proceeding at law or in equity," and liens "obtained through legal proceedings." The provisions of these sections are somewhat broader than those of the bankruptcy act of 1867. They are unlike the insolvency law of Massachusetts. This law, as it is found in Gen. St. 1860, c. 118, § 44, discharged all liens obtained in legal proceedings unless the suit had gone to judgment and the lien by attachment had been perfected by a levy. It is expressly said that the assignment shall be effectual to discharge any attachment on mesne process, subject to a special exception permitting the attachment to be preserved in certain cases for the benefit of the general creditors. By St. 1890, p. 204, c. 246, § 7, this statute was amended by adding a provision as follows: "The assignment named in section forty-four of said chapter one hundred and eighteen shall not dissolve an attachment on mesne process, made more than four months prior to the time of the first publication of the notice of issuing the warrant, in case of voluntary petitions; and in case of involuntary petitions such assignment shall not dissolve such an attachment made more than four months prior to the time of the first publication of the notice of the filing of the petition." This provision has been embodied without material change in Pub. St. 1882, c. 157, § 46, and in Rev. Laws, c. 163, § 54. Until this amendment was made, the statute not only in express terms provided that the lien created by an attachment on mesne process should be ineffectual against the rights of the assignee, but declared by implication that equitable liens of a similar character, obtained through legal proceedings in the nature of an attachment, would not be enforceable in proceedings in insolvency. By the amendment an exception was made in favor of attachments on mesne process made more than four months before the commencement of insolvency proceedings, but there is no exception of equitable liens obtained in proceedings to collect a debt, and in respect to this the statute stands as originally enacted.

The first question under section 67 of the bankruptcy act is, what is meant by the word "lien"? It is plain that a lien created by a suit in equity stands as well as any other kind of lien. Such a lien that has been in existence more than four months is good against the assignment to the trustee. An attachment on mesne process under our statute creates a lien. *Davenport v. Tilton*, 10 Metc. 320; *Taylor v. Mixter*, 11 Pick. 341, 348; *Denny v. Willard*, 11 Pick. 519, 524, et seq., 22 Am. Dec. 389. In the first of these cases it is held that such a lien is preserved by the bankruptcy act of 1841. This lien does not depend upon possession; it is created by operation of law, sometimes

by a record of the doings of the officer, as in the case of attachments of real estate (see Rev. Laws, c. 167, § 59), and of personal property that cannot easily be removed (see Rev. Laws, c. 167, § 45). Undoubtedly, an attachment by trustee process gives a lien upon property which will be good against bankruptcy if more than four months old. *Kimball v. Morris*, 2 Metc. 573, 578, 579.

Proceedings in cases like the present are often called in the books an "equitable attachment." If the facts warrant it, it is the practice to issue a temporary injunction, whereby the property, by judicial order, is charged with an equity for the security of the plaintiff, and is taken directly into the control of the court. In this respect the control of it and its appropriation for security are in all particulars as effectual as in an attachment at law by trustee process. A bill brought under our statute is like a creditors' bill under general equity practice, though it may be brought by a single creditor for his own benefit without having obtained a judgment, and without making other creditors parties. That equitable liens upon property can be enforced when there is no other control of the property than by the process of a court of equity has been decided repeatedly in this commonwealth. *Wiggin v. Heywood*, 118 Mass. 514; *Western Union Telegraph Co. v. Caldwell*, 141 Mass. 489, 6 N. E. 737; *Desmond v. Fisher*, 152 Mass. 521, 25 N. E. 968. The power of the court to appropriate property under this statute has been maintained effectually in a variety of cases. *McCann v. Randall*, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.*, 151 Mass. 515, 24 N. E. 784, 8 L. R. A. 309; *Pettibone v. Toledo, Cincinnati & St. Louis Railroad*, 148 Mass. 411, 417, 19 N. E. 337, 1 L. R. A. 787; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.*, 149 Mass. 24, 27, 20 N. E. 318.

The trustee in bankruptcy relies upon *Trow v. Lovett*, 122 Mass. 571; *Squire v. Lincoln*, 137 Mass. 399; *Powers v. Raymond*, Id. 483; *Fish v. Fiske*, 154 Mass. 302, 28 N. E. 278; and *Titcomb v. Bradlee*, 159 Mass. 190, 34 N. E. 189—as tending to show that in this case there is no equitable lien which can be recognized under the bankruptcy act of 1898. The first of these cases was brought under St. 1875, p. 852, c. 235, which confers jurisdiction in equity to reach and apply, in payment of a debt, property fraudulently conveyed by a debtor with intent to defeat, delay, or defraud his creditors. The question arose under the bankruptcy act of 1867. The bill was filed in February, 1876, and in March, 1876, the debtor was adjudicated a bankrupt. The property might have been attached by the plaintiff in an action at law. No injunction was issued. If an attachment at law had been made, it would have been dissolved, because it would have been less than four months old. The statute gave no

(185 Mass. 178)

McINTIRE, Judge, v. COTTRELL

(Supreme Judicial Court of Massachusetts.
Middlesex. Feb. 26, 1904.)

ADMINISTRATORS—BONDS—BREACH—LIABILITY.

1. The liability of a surety on a probate bond does not constitute a debt until after there has been a breach of the bond.

2. The stipulation of a probate bond that the administrator shall administer, according to law, implies the payment of debts if he has assets.

3. Under Pub. St. 1882, c. 143, § 10, there is no cause of action on an administrator's bond until the debt has been established by judgment, and the administrator has failed to pay on demand.

4. The administrator and sureties may defend a suit on the bond for failure to pay judgment debts on demand by showing that the assets have been used according to law.

5. Under Pub. St. 1882, c. 157, § 26, defining claims provable in insolvency, a claim against a surety on an administrator's bond under Pub. St. 1882, c. 143, § 10, on account of a judgment recovered against the administrator for a debt due from the estate, was not a provable debt, when, at the time of the first publication of the warrant, the demand recovered by the section had not been made on the administrator.

Appeal from Superior Court, Middlesex County.

Action by Charles J. McIntyre, to use, etc., against Millard F. Cottrell. Judgment for defendant, and plaintiff appeals. Reversed.

Hutchins & Wheeler, for appellant. Vere Goldthwaite, for appellee.

KNOWLTON, C. J. The plaintiff is a creditor of the estate of William M. Phillips, deceased, and he sues the defendant as a surety upon the probate bond of the administrator. There has been a breach of the bond, and the only defense which we need to consider is the proof of a discharge in insolvency which was duly granted to the defendant by the court of insolvency in Norfolk county. The plaintiff's claim was not mentioned or referred to in the proceedings in insolvency, and the question is whether it was provable in those proceedings. If it was, it is barred by the discharge, and judgment should be entered for the defendant. If it was not, judgment should be entered for the plaintiff.

By Pub. St. 1882, c. 157, § 26, which was in force when the proceedings in insolvency were commenced, claims provable in insolvency are defined. The definition, so far as it is material to the present case, includes "debts due and payable from the debtor at the time of the first publication of the notice of issuing the warrant," and "debts at that time absolutely due, although not payable." The provisions of the section in regard to certain contingent claims are not applicable to this one. The question is whether the plaintiff had a debt against the defendant, absolutely due at the time of the publica-

greater effect to an equitable attachment than to an attachment at law. While some of the language of the opinion is not in accord with that of some other courts, the decision was plainly right, and the case is not an authority against the plaintiff under the bankruptcy act of 1898. The decision in each of the next two cases was simply that the right acquired by a plaintiff in equity under this statute was not an attachment that could be kept in force by the assignee for the benefit of general creditors, under Pub. St. 1882, c. 157, § 47. The last two cases arose under the insolvency law of this commonwealth, and, as we have already pointed out, this law defeated liens, legal and equitable, obtained through legal proceedings to collect a debt, except attachments on mesne process, which means attachments at law, that were made more than four months before the commencement of insolvency proceedings. These cases do not decide that the lien referred to is not an equitable lien in the general sense, but that it is not a lien which will be given effect against an assignee in insolvency under the insolvency law of Massachusetts.

The cases of *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; and *Pickens v. Roy*, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, fully cover the question now before us, unless the fact that the bill in each case was brought by a judgment creditor made a decisive difference in regard to the result reached. *Doyle v. Heath*, 22 R. I. 213, 219, 47 Atl. 213, and *Taylor v. Taylor*, 59 N. J. Eq. 86, 89, 45 Atl. 440, are to the same effect. We are of opinion that there is no such difference in principle between the rights secured by a creditors' bill brought under our statute with an injunction in favor of the plaintiff, and a bill brought by a judgment creditor, as should require us to hold that one plaintiff acquires no lien, while the other acquires a lien that is protected under the bankruptcy act. In either case the lien acquired is not like a lien at law, which must be maintained by possession, but it is an equitable right, to be held as security and protected by the order of the court.

The St. 1892, p. 182, c. 209 (Rev. Laws, c. 177, § 24), enacted since the decision in the latest of the Massachusetts cases above cited, expressly gives a lien that will be enforced against an assignee or trustee in proceedings in insolvency or bankruptcy in cases like the present. This statute seems to make the matter clear.

We are of opinion that the ruling was right. The form of the decree is not before us for consideration.

Exceptions overruled. Order affirmed.

tion of the warrant. His only claim against him was as a surety upon the contract contained in the administrator's bond. At that time the plaintiff had recovered a judgment against the administrator for a debt due from the estate, but the administrator had not been asked to pay the judgment, although subsequently a demand was made upon him.

The liability of a surety upon such a bond does not constitute a debt until after there has been a breach of the bond. *Loring, Judge, v. Kendall*, 1 Gray, 305-314; *Sleeper v. Miller*, 7 Cush. 594, note; *Mann v. Houghton*, 7 Cush. 592. The stipulation in the bond which applies to this case is that the administrator shall administer, according to law, all the personal estate of the deceased which shall come to his possession, etc. This implies that he shall pay the debts if he has assets. But there is no violation of this stipulation as to any debt until it has been established by a judgment, and the administrator has failed to pay the judgment on demand. *Pub. St. 1882, c. 143, § 10; Rev. Laws, c. 149, § 20*. Not until after this does the cause of action upon the bond arise. Even then the administrator and the sureties may defend successfully by showing that the assets have been used according to law. *Fulmer, Judge, v. Connelly*, 142 Mass. 227, 7 N. E. 853. The demand upon the administrator after judgment is not merely a preliminary, which stands instead of an authorization by the probate court to bring a suit upon a previously existing debt, but it is an essential to the creation of the debt itself upon the bond. Until the demand is made, it cannot be known that the administrator will not pay the judgment. The liability on the bond is contingent upon his failure to pay on demand. In *Heard v. Lodge*, 20 Pick. 53-57, 32 Am. Dec. 197, this was assumed by Chief Justice Shaw, before whom the case was tried at nisi prius, and by the full court afterwards, in the opinion. See, also, to the same effect, *Newcomb v. Goss*, 1 Metc. 333-335; *Newcomb v. Williams*, 9 Metc. 525-536. We are of opinion, therefore, that there was no debt on the bond due absolutely from the defendant at the time of the first publication of the notice, and that therefore the claim was not provable against his estate. Cases dealing with other subjects, but somewhat analogous in principle, are *French v. Morse*, 2 Gray, 111; *Thayer v. Daniels*, 110 Mass. 345; *McDermott v. Hall*, 177 Mass. 224, 58 N. E. 695; and *Murray v. Wood*, 144 Mass. 195, 10 N. E. 822.

Judgment for the plaintiff.

(177 N. Y. 494)

PEOPLE ex rel. MURPHY v. MAXWELL,
Superintendent of Schools.

(Court of Appeals of New York. Feb. 23,
1904.)

SCHOOLS—MARRIAGE OF FEMALE TEACHERS.

1. Greater New York charter (Laws 1897, c. 378, §§ 1114, 1117, re-enacted in Laws 1901,

c. 406, §§ 1093, 1101) provides that teachers in public schools shall hold their positions subject only to the limitations of the act, and to reassignment or removal for cause after trial on charges of gross misconduct, insubordination, neglect of duty, or general inefficiency. *Held*, that such provisions are necessarily exclusive, and a by-law of the board of education, adopted by the school board of the borough of Brooklyn, providing that, should a female teacher marry, her place shall become vacant, is void, as in conflict with the charter.

O'Brien, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Application by the people, on the relation of Kate M. Murphy, for mandamus to William H. Maxwell, city superintendent of schools to compel defendant to recognize the relator as a teacher. From an order of the Appellate Division (83 N. Y. Supp. 1098) which reversed an order granting a peremptory writ, relator appeals. Reversed.

Conrad Saxe Keyes, for appellant. John J. Delany, Corp. Counsel (James D. Bell, of counsel), for respondent.

CULLEN, J. In February, 1891, the relator was appointed a teacher in one of the public schools of the then city of Brooklyn. At that time there was a by-law of the board of education of the city which provided: "Should a female principal, head of department or teacher marry, her place shall thereupon become vacant, but her marriage shall not operate as a bar to her reappointment, should it be deemed to the best interests of the school to retain her services." After the consolidation of the city with the city of New York, the borough school board adopted or continued that by-law. On January 21, 1902, the relator married. Thereupon she notified the local committee of the school in which she taught, and applied for reappointment or continuance in her position. She asserts that she was reappointed by the borough board, but this fact was put in issue by the affidavits submitted on behalf of the respondent. Still, as she alleged, and the allegation was not denied, no one was appointed in her place, and she continued to discharge all the duties of her position as teacher, and no action has been taken by the board of education to dismiss her from her employment. Under the by-laws of the city board of education, it was the duty of the respondent to certify to the auditor the names and salaries of the teachers; and, without such certification, teachers were unable to draw their pay. On an affidavit stating those facts, the relator applied to the Special Term for a peremptory writ of mandamus, directing the respondent to recognize her as a teacher of the public schools and to certify her name to the auditor, that she might be paid her salary. As already stated, the affidavits on behalf of the respondent controverted none of the facts stated by the relator, except those referring

to her reappointment. The Special Term granted the peremptory writ as asked for by the relator, on the ground that her employment could not be terminated without affirmative action taken by the borough board of education to dismiss her. On appeal the Appellate Division reversed the order of the Special Term, holding that the relator's marriage ipso facto terminated her employment, but directed that an alternative writ issue to determine the controversy as to her reappointment. The Appellate Division thereafter allowed an appeal to this court, and certified three questions for determination: First. Is the by-law of the former borough school board of Brooklyn, above recited, a reasonable regulation? Second. Is the aforesaid by-law in conflict with section 1114 of the charter of 1897 of the city of New York (Laws 1897, c. 378, p. 403), providing for the removal of members of the educational and teaching staff after trial and hearing upon charges, and prescribing the grounds of such removal? Third. Can such by-law operate to vacate the position of women principals and teachers, without the taking of affirmative action by the board of education or the borough school board, as prescribed by the charter of the city of New York, looking to their removal?

It is not necessary, nor would it be profitable, to discuss the question whether a by-law providing that a female teacher shall by marriage vacate her employment is reasonable or not, nor, if it be assumed that such a by-law would be reasonable, to consider whether the particular by-law in this case, which, in effect, provides that by marriage a female teacher's employment shall cease, or not, at the option of the borough board, is reasonable, as we are of opinion that under the charter the board had no power either to pass a by-law on the subject, or to provide for the compulsory termination of the employment of the teacher, except in the manner pointed out by the statute. Prior to the creation of the present city, the public school system of the old city of New York was governed by the provisions of the consolidation act of 1882 (Laws 1882, p. 294, c. 410). Section 1038 of that statute empowered the board of trustees for the ward, by a vote of their whole number, to remove teachers other than principals and vice principals, provided the removal was approved by a majority of the inspectors for the district, subject to a right of appeal to the board of education, which might reinstate the teacher. Section 1042 authorized the board of education, by a three-fourths vote, to remove any teacher on the recommendation of the city superintendent, or of a majority of the ward trustees, or of the inspectors of the district. It is very clear that these provisions of the statute were exclusive, and that a teacher could be removed only in the manner therein prescribed, and so it has been held by the courts. *Steinson*

v. Board of Education of N. Y., 105 N. Y. 431, 59 N. E. 300. In the Greater New York charter the only provisions as to their tenure of employment and the dismissal of teachers from their places, except those relating to compulsory retirement, are found in sections 1114 and 1117. The latter of these sections provides: "All superintendents, assistants or associate superintendents, and all principals, teachers and other members of the educational staff in the public school system of any part of the city of New York as constituted by this act, shall continue to hold their respective positions and to be entitled to such compensation as is now provided or may hereafter be provided by the various school boards, subject to the limitations of this act, and to reassignment or to removal for cause, as may be provided by law." By section 1114 a member of the school board, a borough superintendent, or an associate superintendent is authorized to prefer charges to the school board against any principal or against any teacher in any of the schools under their charge "for gross misconduct, insubordination, neglect of duty or general inefficiency." Provision is made for the suspension of the teacher charged with such delinquency. It is then provided that the school board shall immediately proceed to try and determine the case, either by the full board or by a committee, and fix the fine, penalty, or punishment, if any, that should be imposed, which "shall consist of a fine, in suspension for a fixed time without pay, or in dismissal." Now, bearing in mind the mandate of section 1117, that the teachers shall continue to hold their positions, subject only to the limitations of the statute and removal for cause, and that the only grounds for removal provided by the charter are gross misconduct, insubordination, neglect of duty, or general inefficiency, we think that these statutory provisions are also necessarily exclusive. It is unreasonable to believe that the draftsman of the Greater New York charter, or the legislators who enacted it, having before them as the foundation of that charter the consolidation act of 1882, which prescribed the only method in which a school-teacher could be removed, and having themselves provided in the charter for dismissal for specified causes, should have intended by the grant of any general power to the board of education to authorize the removal of teachers from their employment on any other grounds or in any other manner than those stated in the statute. Nor is the power given by the charter to enact by-laws sufficient to cover the case before us. The statute authorized each borough board subject to the control of the board of education to enact by-laws not in conflict with the provisions of the charter "for the government and management of the schools in the borough, for defining the duties and regulating the exercise of the powers of its members and committees and of

all school officers * * * and for the promotion and welfare and best interests of all matters committed to it concerning the public schools and the public school system of the city in said borough." Under this authority the board might prescribe the manner in which a school-teacher should discharge the duties of the position, and violation of such by-law would constitute insubordination, for which the offender might be proceeded against, but in no other way does it confer any power on the board to deal with the subject of dismissals.

It follows that the order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs; that the first question should remain unanswered; that the second question should be answered in the affirmative, and the third in the negative.

PARKER, O. J., and HAIGHT, MARTIN, and VANN, JJ. (and GRAY, J., in result, on the ground that affirmative action was necessary on the part of the board of education), concur. O'BRIEN, J., dissents.

Order reversed, etc.

(177 N. Y. 434)

PEOPLE v. WEAVER.

(Court of Appeals of New York. Feb. 23, 1904.)

FORGERY—EVIDENCE—CONFESSION—ADMISSIBILITY.

1. Defendant was charged with having forged an indorsement on a note, and having uttered it, so indorsed, with intent to defraud. The defense claimed that she wrote the name upon the note with the express authority of the indorser, and without guilty intent; thinking, from prior transactions, that she had a right so to do. *Held*, that a prior note executed by the defendant as maker, on which she wrote the name of the same indorser, and to which he never authorized her to sign his name, was competent evidence to prove scienter on the part of defendant.

2. Where accused is charged with forging indorsements on certain notes, permitting the indorser to testify to other notes executed by the defendant, and claimed to have been forged, but which did not purport to have been indorsed by him, is error.

3. On trial for forgery, testimony as to transactions relating to certain debts of defendant, to secure which the notes were given, and as to dealings between defendant and her husband, requiring the execution of the note, was inadmissible.

4. On trial for forgery, a paper signed by defendant, admitting forgery of the names of her mother and the indorser to the note in question, is admissible.

5. Where, on trial for forgery of the indorsement of a note, defendant claims that the indorsement was made in good faith, with the belief that she had authority to place the indorser's name on the note, evidence of her hope that the indorser would ratify such use of his name is inadmissible.

Werner, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Alice M. Weaver was convicted of forgery, and from a judgment of the Appellate Division (81 N. Y. Supp. 519) affirming the conviction, she appeals. Reversed.

George Raines, for appellant. Stephen J. Warren, Dist. Atty. (Robert Averill, of counsel), for the People.

O'BRIEN, J. The defendant, a married woman, was indicted by the grand jury of Monroe county for the crime of forgery in the second degree. The case was tried in the county court, and upon the first trial the jury disagreed, but upon the second trial the defendant was found guilty, and sentenced to the penitentiary for the term of one year. The Appellate Division in the Fourth Department (81 N. Y. Supp. 519) affirmed the judgment of conviction, and the defendant has appealed to this court.

The printed record in the case is very confusing. It contains much matter that was irrelevant to the issue on trial. There are incorporated in it extracts from the minutes of the first trial, and frequent references to the evidence then given. This may be unavoidable where there has been two trials of a case, but there would seem to be no reason for incumbering the record by long and extended arguments of counsel every time an objection is made, or with the opinion of the court at length in passing upon the objections.

The issue, primarily, was a very simple one, although in the course of the trial it was involved in much intricacy. The defendant was charged with having forged the name of Martin Davis to a promissory note for \$1,200, which note she procured to be discounted at the Commercial Bank of Rochester. The indictment contains two counts—one for forging the name as indorser, and the other for uttering the note so indorsed to the bank with intent to defraud. The verdict was general, and the import of it is that the defendant not only forged the name of Davis, but uttered the spurious paper to the bank with intent to defraud. Davis was an attorney and counselor at law, and a close, intimate friend of the defendant and her husband. He had practically been a member of the family, and made their house his home while in the city. His close and intimate relations with the defendant and her husband is one of the facts that is admitted in the record. He had frequently indorsed the defendant's paper prior to the occasion in question, and some or all of that paper was unpaid at the time of the trial of this case. The defendant went to the office of Davis and procured him to draw the body of the note in question; that is to say, he used a printed blank, such as is to be found in banks, and filled it out for the defendant, and delivered it to her unexecuted. The note is in the following words:

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 323.

"Traders National Bank, Rochester, N. Y. \$1200.00. Rochester, N. Y., Sept. 17th, 1900. Three months after date I promise to pay to the order of Harriet E. Wells twelve hundred dollars at the Commercial Bank, Rochester, N. Y. For value. [Signed] Alice M. Weaver. [Indorsed] Harriet E. Wells, Martin Davis."

Harriet E. Wells, the other indorser, was the mother of the defendant; and it appeared that the defendant and her mother had been formerly possessed of considerable property, but that their affairs had of late become involved, and considerable of their paper, containing the indorsements of Davis, of Mrs. Wells, the defendant's mother, and of S. J. Weaver, the defendant's husband, had been discounted from time to time in the Rochester banks.

There was no dispute about the fact that the indorsement of Davis on the note in question was not in his handwriting. His name was placed upon the note by the defendant without first obtaining any express authority from him to do so. The defense was that, under all the circumstances connected with the making of the note, and the use to be made and which actually was made of its proceeds, there was an absence of wrongful or guilty intent on the part of the defendant in signing Davis' name. The defendant testified, substantially, that she thought she had the right to use Davis' name upon the paper, and her assertion in that respect had some color of truth from the past intimate relations of the parties. She says that, after Davis drew the note for her, she indorsed her mother's name upon it, supposing she had authority to do so; and in this she is corroborated by the testimony of her mother on the stand. She then took the note to the bank, and one of the bank officers said to her that he wanted the name of Davis upon it, whereupon she went to Davis' office twice, and, not finding him in, she wrote his name upon the back of the paper; supposing it was all right, and she had the authority to do so. The money obtained upon the note, or at least a thousand dollars of it, was paid over by the defendant to her husband to take up another note at the bank upon which his name appeared as indorser. It seems that at or about this time the defendant and her husband became involved in some domestic troubles, and he commenced an action for a separation from her, wherein it was claimed, as one of the grounds of the action to be relieved from his wife, that she had been guilty of forgery. Davis was sworn as a witness, and testified on cross-examination that he had advised her husband not to pay the note. He was questioned at great length by the defendant's counsel in regard to his relations with her husband, and as to his habit of indorsing paper for the defendant, and the purposes for which the money was raised.

The question that was submitted to the

jury was whether the defendant, in placing the name of Davis upon the note in question, acted in good faith, honestly believing that she had the right to do so, and with respect to the intent to defraud. In this respect the case resembles that of *People v. Wiman*, 148 N. Y. 29, 42 N. E. 408. The testimony of the defendant upon direct and cross examination is somewhat conflicting, and different inferences may doubtless be drawn from her statements; but since the jury was required to pass upon the question of her good faith, and of her honest belief in the right to place the name of Davis upon the paper, that issue should have gone to the jury unprejudiced by matters foreign to the issue. In this respect I think the trial was not quite fair to the defendant. Upon the redirect examination of Davis by the district attorney, he was asked if, at the time he advised the husband not to pay the note in question, there were other notes talked of, and which the witness took into consideration in giving that advice. This was objected to by defendant's counsel as incompetent and collateral, and that it tended to prove another and distinct offense. The court stated that it would allow it for the purpose of showing whether the motive of the witness in giving the advice was a proper motive, or whether he was actuated by a sinister or improper motive towards the woman. The defendant's counsel excepted to the witness' answer: "I had in my mind this \$1,200 note of the Commercial Bank, a \$5,000 forged note at the Traders' Bank, a \$1,000 forged note at the Traders' Bank, the notes which I had indorsed generally, and whatever accounts Mrs. Weaver had outstanding." The court then said: "I think I must strike out of the statement the characterization of those notes as forged notes. The jury will disregard the characterization of those other notes as forged notes." This direction of the court was perhaps all that could be done to correct the record with respect to the statement volunteered by the witness, and, if the subject had rested there, no legal error could have been predicated upon it. But after some further examination of the witness the district attorney produced the \$5,000 note referred to, that bore the name of the defendant as maker, and her mother, Harriet E. Wells, Martin Davis, and S. J. Weaver as indorsers. He questioned the witness about having talked with the defendant in regard to this note, and then asked if the name appearing upon the note was his signature. This was objected to as tending to prove a distinct and different charge against the defendant. The objection was overruled, an exception taken, and the witness answered that it was not. He further testified, under objection and exception, that he never authorized the defendant to sign his name to the \$5,000 note.

The note was introduced in evidence, the court remarking in answer to defendant's objection that it was received only on the ques-

tion of the intent with which the defendant put Davis' name on the \$1,200 note. That, of course, was the only issue in the case. From that time forward, during the progress of the trial, the \$5,000 note and the \$1,200 note were referred to as forgeries. Defendant's counsel made some strenuous objections to the characterization, and the court at one stage of the trial stated "that a person guilty of forgery was defined by the statute to be 'a person who forges a note with intent to defraud'; that the statute seems to use the word 'forgery' as a general term, referring to the signing of another's name." He added: "I do not think the use of the term carries with it the implication of the intent to defraud, because the statute uses the word 'forgery,' and inserting thereafter 'with intent to defraud,' thereby implying that there might be a name forged without intent to defraud." It was nowhere admitted by the defendant that she had forged any note, and the genuineness of the indorsements of Davis and defendant's husband and mother upon this note, and upon other notes of the same character, was made an issue at the trial. Of course, if they were claimed to be forged, proof of that claim became necessarily a part of the trial, and the defendant was not only compelled to defend herself against the only charge for which she was tried—that is to say, the \$1,200 note—but also against the charge that she had forged not only the name of Davis upon the \$5,000 note, but the names of her mother and husband as well, and not only upon that note, but upon other notes of like character. The question is whether this method of treating a single charge of forgery against the defendant was legitimate and proper. It is perfectly evident that the case went to the jury for them to pass not only upon the character of Davis' indorsement upon the \$1,200 note, but upon his indorsement and that of the mother and husband of the defendant upon the other notes as well. Whatever the technical or statutory definition of the word "forgery" may be, we must consider the introduction in evidence of these notes, other than the \$5,000 note, and the character of the several indorsements upon them, followed by testimony that the indorsers did not sign, or authorize the defendant to sign, their names, and reference to them throughout the trial as forgeries, with respect to its probable effect upon the minds of the jury.

The defendant was on trial for forging the \$1,200 note, and no other, and that the evidence referred to with respect to the forging of the other notes must have had a very prejudicial effect upon the defendant's case cannot be doubted. Not only the \$5,000 note, which may have been admissible, but other notes, some of which were claimed to be forgeries, went to the jury. The \$5,000 note was so connected with the note charged in the indictment to be forged that it may have been admissible on the question of intent in

uttering the \$1,200 note. *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62. It is clear that upon the single issue raised by the defendant, namely, that there was no intent on her part to defraud; that she acted in good faith, and in the honest belief that she had a right to do what she did—this testimony as to the other indorsements must have greatly embarrassed the defendant upon the trial of the only issue in the case, and must have tended to prejudice and mislead the jury.

In *Coleman v. People*, 55 N. Y. 81, it is said: "The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive, in a moral point of view, such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character, but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one." *People v. Corbin*, 56 N. Y. 363, 15 Am. Rep. 427. In *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851, it was said: "The general rule is that, when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded. This question has been elaborately treated in a recent case in this court in which the same views were expressed." *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

The case was submitted to the jury under instructions from the court that they must pass upon the truth of the defendant's testimony to the effect that she believed she had the right to place Davis' name upon the note as indorser. The language of the court was: "She says she believed she had that right. In determining whether that is a frank, honest statement—whether she did have that belief—it is right for you to take into account the fact that she and Davis had never had any conversation touching, or giving to her, any such liberty. She says she believed she had that right, and, when you come to consider whether she actually did believe that, you have a right to consider whether the circumstances of this case would have given any rational person any such belief. Put your good, common, every day sense on that question, and determine whether it is true that this woman actually and honestly believed that she had the right to use Martin Davis' name as indorser." This question having been submitted to the jury, it should not have been prejudiced in

their minds by proof, under objection, of the commission of other crimes not related to the one charged. The jury might not have believed the testimony in any event, but no one has a right to say that it was impossible for them to attribute good faith and an honest purpose to the defendant. But when the case was prejudiced and loaded down with proof of the forgery of numerous other signatures upon commercial paper, there was no longer any chance for the defendant with the jury; and, in perusing the record, it is quite difficult, when we lay aside the charge in the indictment, to tell whether the defendant was on trial for the forgery of the \$1,200 note, or the other notes referred to.

In another aspect of the case the trial was not entirely fair to the defendant. The situation was exceptional and peculiar. On the face of the record, the conclusion is possible that the debt for which these various notes were given at the bank was for household expenses, and therefore prima facie the debt of the husband, and not of the wife. Under such a state of facts, the wife might very well have had ample authority, or believed she had, to use her husband's name in procuring money for the payment of the obligations. She may not have had any such authority in fact, but the question is whether she honestly believed that she had; and, in view of her relations to the household, and the close and intimate relations of Davis to that household, it is not absolutely inconceivable that she may have acted under a mistaken impression as to her power, and, if that were so, as the learned trial judge ruled and charged, the guilty intent would be absent from the transaction. When proof of other crimes is introduced by the people to prove that the defendant is guilty of the particular crime charged, the multiplication of issues is a necessary consequence; and if it was competent, under any view of the case, for the people to prove that the defendant was guilty of forging other notes than the one described in the indictment, then it was certainly competent for her to give proof to show that they were not forgeries in any legal sense. The origin and consideration of these notes had a bearing upon that question, and she had the right to go into the details and circumstances of each transaction. The mere fact that she was permitted to state in a general way that the consideration was for the expenses of the household, and therefore the debt of the husband, does not answer the objection, since the jury might not have credited such a general statement. She had the right to fortify her testimony by stating the origin and purpose of each particular note, and the relation of the husband to the same as the head of the house, and of Davis as an inmate of the family. This would doubtless involve inquiries that would have but little relation to the particular issue presented by the indictment. But since the people were permitted to give the general

statement that the notes were forged, the defendant was entitled to give all the particulars which culminated in the discount of the notes at the bank. The defendant, I think, was unduly restricted by the rulings of the learned trial judge in this respect, since, while he admitted the defendant's general statement, he rejected proof of the facts which might support her general conclusions. These several rulings are involved in this appeal, since they are presented by numerous objections and exceptions.

There were one or two passages in the charge that I think were erroneous and prejudicial to the defendant. The general question that the court submitted to the jury was whether the defendant honestly believed when she wrote the name of Davis upon the note she had the authority or the right to do so, and whether, in placing his signature upon the note, she acted in good faith and without any criminal intent. After submitting that question to the jury, the learned trial judge proceeded as follows: "Now, gentlemen of the jury, did the defendant honestly believe that she had the right to use Davis' name as indorser? I must say to you, gentlemen, that there is not one particle of evidence in this case, from beginning to end, tending to prove that she did have the right to use Martin Davis' name as indorser." After this statement, there was but little use in saying to the jury that they were at liberty to look for the evidence in the record if they could find it. It was a clear, plain, and strong expression of opinion on the part of the learned trial judge that there was no evidence for the consideration of the jury upon a vital question in the case. That portion of the charge was excepted to by the defendant's counsel, and this exception is one of the grounds alleged for the reversal of the judgment. It is not competent for the trial judge in any case to instruct the jury that there is no evidence in the case that would justify the acquittal of the defendant. If that practice is to be sanctioned, we must go further, and hold that the trial judge in such case may order a verdict of guilty. But the question whether a criminal act has been committed in any case, and whether, if committed, it was accompanied by the indispensable criminal intent, is a question for the jury; and that part of the charge quoted, in effect, took the whole question from the jury, and was equivalent to a direction to find the defendant guilty. The learned trial judge also addressed the jury in these words: "Now, gentlemen, the court cannot direct you to find the defendant guilty. That would be an invasion of your jurisdiction. I cannot even suggest to you that you find her guilty. I must leave the whole matter upon your consciences and upon your intelligence. But I am permitted to say that, in judging whether Mrs. Weaver intended to defraud the bank or not, you have the right to use that presumption which exists that the

person intends the ordinary result and consequences of his act." But after the learned trial judge had told the jury that there was not one particle of evidence to support her defense, there would seem to be no great difficulty in suggesting to the jury in plainer terms that they ought to find the defendant guilty. I think that both of the passages quoted, in effect, took the whole case from the jury, and amounted practically to a suggestion to the jury that they ought to return a verdict of guilty.

The judgment should be reversed, and a new trial granted.

CULLEN, J. (concurring). As the facts in this case are fully stated in the opinion of Judge O'BRIEN, we think it necessary simply to state the various questions presented by this appeal, and our determination of the same, without comment or discussion. We hold:

1. That the \$5,000 note, purporting to bear the indorsement of Davis, was competent evidence to prove scienter on the part of the defendant.

2. That it was error to allow the witness Davis to testify or refer to the other notes alleged to be forged, but which did not purport to be indorsed by Davis.

3. That the admission in evidence of such alleged forged notes was error.

4. If the evidence of the prosecution had been confined, as it should have been, to notes purporting to bear Davis' indorsement, testimony as to the transactions relating to the debt, to secure which the above-mentioned notes were given, and as to the dealings between the defendant and her husband, would have been properly excluded.

5. The confession signed by the defendant was competent evidence against her. Its weight was for the jury.

6. The question to be submitted to the jury was not the defendant's expectation or hope that Davis would ratify the use of his name as indorsed on the note, but whether the defendant had, or believed in good faith that she had, authority to so indorse the note in the name of Davis.

For the errors pointed out, the judgment should be reversed, and a new trial granted.

WERNER, J. (dissenting). The indictment herein charges the defendant with the crime of forgery in the second degree. The specific charge is that the defendant forged the name of one Martin Davis as indorser to a promissory note for \$1,200, dated the 17th day of September, 1900, payable to the order of Harriet E. Wells, three months after date, at the Commercial Bank of Rochester, and procured the said bank to discount the same on the day of its date. At the trial the defendant admitted the signing of Davis' name as indorser upon the note, and the discount thereof at her request by the Commercial Bank, but denied criminal or fraud-

ulent intent in the transaction. Upon the issue thus presented, the defendant was convicted as charged in the indictment, and at the Appellate Division the judgment of conviction entered upon the verdict was affirmed.

The defendant's plea of not guilty put in issue every fact that it was necessary for the prosecution to establish in order to prove the crime charged (*People v. Everhardt*, 104 N. Y. 595, 11 N. E. 62), and intent is one of the essential elements of the crime of forgery (section 511, Pen. Code). Intent is a state of mind, and that is a thing not provable by direct evidence. This is the reason for the rule that in all cases where the scienter or *quo animo* is requisite to and constitutes a necessary and essential part of the crime with which a person is charged, and proof of guilty knowledge is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute, in law, a distinct crime. *Wharton's American Criminal Law* (6th Ed.) § 649; 3 *Greenleaf on Evidence*, § 15; *Stephens' Dig. of Ev.* (May's Ed.) p. 56; *People v. Everhardt*, 104 N. Y. 595, 11 N. E. 62; *Mayer v. People*, 80 N. Y. 373; *Commonwealth v. Russell*, 156 Mass. 196, 30 N. E. 763; *Rex v. Colclough*, 15 Cox, Crim. Cas. 92; *People v. Molineux*, 168 N. Y. 293, 61 N. E. 286, 62 L. R. A. 193.

Since the crime of forgery is one of the exceptions to the general rule that the intent with which an alleged crime has been committed may be inferred from the act, it is also an exception to the other general rule that proof of one crime may not be made to establish guilt of another crime. The specific charge against the defendant was the forgery of the name of Martin Davis as indorser upon the note for \$1,200 above described. The defendant admitted the writing of Davis' name upon the note, and that she had no direct or express authority to do so, but she claimed that she thought she had the right to make such use of Davis' name; and therefore it is now asserted there was neither necessity nor excuse for proving other forgeries said to have been committed by her. By her plea, as well as by her testimony at the trial, the defendant denied guilty intent. Her admission as to the use of Davis' name was coupled with a claim of right to use it. This left the prosecution no alternative but to establish intent by the usual means in such cases, namely, by evidence of other forgeries of the defendant that were so related in time, place, and circumstance to the forgery charged in the indictment as to throw light upon the intent with which it was committed. The authorities above referred to leave no room for doubt as to the propriety of this course of procedure; and we might here safely rest this feature of the case, without further discussion, were it not for

the strenuous contention that, under the peculiar circumstances surrounding this transaction, evidence of other forgeries by the defendant was inadmissible. At this point a few facts from the record, which form a part of the history of the case, will throw light upon the question under consideration.

The defendant is the wife of one Simon J. Weaver, a merchant of Rochester, N. Y. Martin Davis, the man whose name the defendant is charged with having forged, is a lawyer of the same place. During their school years these two men formed a friendship for each other, which was continued after Weaver's marriage, and resulted in an association between Davis and the defendant, which, to use the latter's own words, "was as intimate as it could possibly be, and be honorable in every way." Davis was for a time an inmate of the Weaver household, and at other times frequent visits were exchanged between the Weavers and Davis. In 1898 or 1899 the defendant went to the office of Davis, and asked him if he would help her raise the sum of \$2,500. Davis declined to do so, saying that he should not care to indorse for more than five or six hundred dollars, but, in a subsequent conversation, he stated that the amount must not exceed \$1,000. The result of these interviews was that at different times Davis indorsed several notes for the defendant, aggregating the sum of about \$1,300. This was the condition of affairs on the 17th day of September, 1900, when the forgery charged in the indictment is alleged to have been committed. On the 2d day of October, 1900, Davis made the discovery that his name had been used on the note last mentioned. He testified that the written part of the face of the note was in his handwriting, that he had drawn the note at defendant's request, that nothing was said about his indorsing the note, that he had not indorsed it, and that he had not authorized the defendant to do so in his name. The note upon which the charge of forgery is predicated was then put in evidence. This was the state of the case when Davis was taken in hand for cross-examination by defendant's counsel. After the evidence of the relations of Davis to the Weavers had been somewhat amplified, the cross-examination was suspended for the purpose of taking the testimony of Swanton, the cashier of the bank at which the note in controversy had been discounted. Swanton detailed the conversation between him and the defendant, from which it appeared that, three or four days before the 17th day of September, 1900, the defendant came to the bank and asked him if he would loan her \$1,200 on the indorsement of Davis and her mother. He replied that he would, and on the 18th day of September, 1900, the defendant presented the note in question, bearing two indorsements, purporting to be those of Davis and Harriet E. Wells, the mother of the defendant. Swanton assumed that these signa-

tures were genuine, the note was discounted, and the proceeds thereof credited to the defendant's account.

When the cross-examination of Davis was resumed, it appeared that on the 2d day of October, 1900, after the discovery by him that his name had been used upon the note of September 17th, there was a conference at his office, in which he advised Weaver not to pay any of the notes made by the defendant. Defendant's counsel had several times announced his intention to go into all the family relations and domestic troubles of the Weavers, for the purpose of showing that the notes signed by the defendant represented a household debt, which Weaver was morally, if not legally, obligated to pay. For that purpose he had introduced in evidence several of the notes actually indorsed by Davis. The learned trial court excluded the evidence that seemed to have no relation to the note set forth in the indictment, but expressed a willingness to admit such evidence as tended to show the attitude and animus of Davis in the prosecution of the charge at bar, and for that purpose alone received the evidence of Davis as to the advice which he gave Weaver regarding the payment of the notes. In this behalf Davis testified at considerable length, but finally summarized his evidence by saying that he advised Weaver not to pay any notes that he was not legally liable for. This was the state of the case when the district attorney, upon his redirect examination of Davis, asked him the following question: "At the time you advised Mr. Weaver not to pay the \$1,200 note, were there other notes talked of in that conversation?" This was objected to as incompetent, immaterial, collateral, and proving a distinct offense. The witness was allowed to answer, and he testified: "I told him the amount was so large he could not afford to pay it all, and payment of part of it might possibly involve his liability as to the whole." Being then interrogated, under objection, as to the different notes referred to in the conversation, he further stated, "I had in mind this \$1,200 note at the Commercial Bank, a \$5,000 forged note at the Traders' Bank, a \$1,000 forged note at the Traders' Bank, and the notes I had indorsed genuinely, and whatever accounts Mrs. Weaver had outstanding." The characterization of the notes as "forged" was stricken out on motion of the court, and, as thus modified, the evidence was allowed to stand, against the exception of the defendant's counsel. At subsequent stages of the trial, however, the same characterization was again indulged in by the district attorney as to the \$1,200 and the \$5,000 notes, and the exceptions thereto, as well as to all evidence relating to other notes than the one set forth in the indictment, are vigorously urged upon our attention as sufficient grounds for reversing the judgment herein.

The first thing to arrest attention in this regard is that the \$1,200 note characterized

as a forgery is the note in issue. The indictment stigmatized it as a forgery, and the claim that it was a forgery was the central fact in the case of the prosecution. Whether it was a forgery was the question to be decided by the jury. To hold that under such circumstances the characterization of the note by the district attorney was legally prejudicial to the defendant would be to encourage technicality to the limit of absurdity.

Passing to the \$5,000 note, we find that it purports to have been indorsed by Davis. He says he did not indorse it. The defendant admits that Davis did not indorse it, and says that she signed his name to it under circumstances precisely identical with those that attended her signing of his name to the \$1,200 note. It must have been clearly apparent to the jury that the \$5,000 note was claimed to be a forgery, and, while the district attorney might well have referred to it in some milder form than he did, there was practically no controversy over the fact that this note stood upon precisely the same footing as the note which was charged to have been forged. It is inconceivable that under such circumstances the jury could have been prejudiced or misled by what the district attorney said about the note. That the \$5,000 note was properly received in evidence cannot be doubted. It was received subject to the distinct limitation that it was only competent as bearing upon the intent with which the defendant wrote the name of Davis upon the note in issue. Under the authorities above cited, it would have been admissible in the first instance upon the question of intent, and it is difficult to understand why it was any the less proper for that purpose after the cross-examination of a witness had rendered it admissible in still another aspect of the case. Davis, having been cross-examined as to the advice he gave Weaver about paying the notes made by the defendant, had the right to exculpate himself from the implication of hostility or animosity toward the latter, and therefore it was competent for him to explain what he took into consideration in giving the advice.

It is urged that the introduction in evidence of other notes than the one set forth in the indictment must have been prejudicial to the defendant, because it enabled the jury to make comparison of handwritings, and this was unnecessary, since there was no denial of the fact that the defendant had signed the name of Davis to the note in issue. This argument ignores three important facts: The first is that, notwithstanding defendant's admission, she denied any criminal intent; the second is that the signature, which purported to be that of Davis, was competent evidence upon the question of intent; the third is that there was some evidence upon the subject of attempted simulation. The evidence of Swanton, the cashier, was to the effect that he discounted the note in issue, believing that it bore the genuine indorsement of Da-

vis. The defendant's own signature was before the court as a standard with which the jury had the right to compare the indorsements written by her in the name of others, for the purpose of ascertaining whether they disclosed any evidence of simulation, and hence of criminal intent. *Cobbett v. Kilminster*, 4 Fost. & Fin. 490; *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170; *Merritt v. Campbell*, 79 N. Y. 625; *People v. Molineux*, 168 N. Y. 330, 61 N. E. 288, 62 L. R. A. 193.

It is also claimed that error was committed in allowing the district attorney, upon defendant's cross-examination, to put in evidence certain notes purporting to bear the indorsement of S. J. Weaver and Harriet E. Wells, but in fact written by the defendant. This criticism cannot be intelligently discussed without another brief reference to the record: When the defendant took the witness stand, the prosecution had produced no collateral evidence of defendant's criminal intent in using the name of Davis upon the \$1,200 note, except that relating to the use of the same name upon the \$5,000 note. The defendant had admitted the use of Davis' name upon both of these notes, but denied guilty intent. Then, instead of standing upon some supposed or implied authority to use the name of Davis, arising out of his relations to her family, or out of other circumstances, defendant admitted that from January, 1898, to September, 1900, Davis had never refused to indorse a note for her when she requested it, and that she had asked him to indorse various notes, which in September, 1900, amounted to about \$1,300. She testified: "I presented the note with mother's indorsement on it, and Mr. Swanton told me he would feel safer if he had Martin's [Davis'] name on it, and I went to Mr. Davis' office, and he wasn't in, and I had to have the money that day, so I signed his name to it. I think, if I am not mistaken, I made two trips to Mr. Davis' office to find him after that, but could not find him." She admitted that she had never told Mr. Davis that she had signed his name as indorser on the \$5,000 note, although that note had been made and discounted more than a month before the note in issue. She had been pressed upon her direct examination to state fully why and how she came to use Davis' name, and the court had ruled that the witness might state what her purpose was in making this paper. But, in spite of this ruling and the skillful leading of her counsel, she had refrained from stating a single fact or circumstance upon which a jury could predicate any authority to use the name of Davis upon the note in issue, except her belief that it would be sanctioned and ratified by him. When asked, upon her direct examination, to state her belief as to her authority to use Davis' name, her answer was: "My belief was, I expected these funds I had been talking about, and I would

have means to take care of it, and, if I did not, that my husband would take care of it for me." Then she was asked this leading question: "At the time you made this note and put the name of Davis upon it, did you believe that Mr. Davis would sanction and ratify the writing of his name by you?" to which she answered, "I did." In the same connection she had testified that at the time of making the \$1,200 note she believed she was authorized to use her mother's name upon it. She had reiterated, over and over again, the absence of any intent to defraud Davis or the bank. This was the situation when her cross-examination was taken up, and she was interrogated as to some of the other notes which it is claimed were erroneously received in evidence, and in reference to which it is asserted that explanatory evidence was improperly excluded. It appeared, as above stated, that the \$1,200 note had been drawn by Davis at defendant's request. The theory of the district attorney was that this was a part of defendant's plan to give the note an appearance of genuineness that would disarm suspicion as to the reality of the indorsement. The defendant, on the other hand, claimed that she had Davis draw the note because she was not familiar with that kind of business. For the purpose of showing defendant's knowledge in such matters, the district attorney called her attention to several notes, and among them was one which was admitted to be in defendant's handwriting. It was offered in evidence and objected to on various grounds, whereupon the court asked the defendant if at the time of the transaction in September, 1900, she knew how to draw a promissory note. She answered that she did not. The note was received in evidence, as the court stated, "for the purpose of showing that she had written, in her own handwriting, a complete note, without any printed blank." Thereupon the defendant was permitted to explain that she had copied the note from an old renewal note. This ruling calls for but little comment. If the introduction of this note tended to show that defendant had some ulterior motive in procuring the note in issue to be drawn by Davis, it was competent. If it did not serve to establish that, it was quite immaterial and harmless. In either event, it presents no error that requires reversal of this judgment. After further cross-examination of the defendant at great length as to her alleged admissions upon the former trial, and in a conversation with one Fenn, the cashier of the Alliance Bank, the district attorney took up the notes for \$5,000 and \$1,200. When asked whether she intended to make Davis liable upon either of these, the defendant testified: "I intended to take care of them. I did not intend Martin Davis should be called upon to pay these notes, and did not intend the bank should hold him legally liable on these notes. I did not intend he should be liable for them." It was

at this juncture that the district attorney asked the defendant if she had placed her mother's name upon the \$5,000 note, and also upon a \$1,500 note made in July, 1900. She admitted signing her mother's name to the \$5,000 note, but declined to answer as to the \$1,500 note, on the ground that it was not the issue being tried. By direction of her counsel, she answered the question, and answered in the affirmative. Then she was asked if she had placed the name of S. J. Weaver upon the back of that note, and, without objection, she answered that she did. The note was then offered in evidence, and objected to as immaterial, incompetent, and collateral. It was received, and defendant's counsel excepted. Another note, for \$1,000, dated August 9, 1900, was shown the defendant, and she was asked if she had written the names of her mother and S. J. Weaver on the back of that note, and, without objection, she replied in the affirmative. This note was also offered and received in evidence over the objection of defendant's counsel, the court remarking that "it will necessitate the trial of the incidents concerning each of these notes to put them in evidence."

The prevailing opinion asserts that it was error for the court to receive in evidence the two notes, for \$1,500 and \$1,000, respectively, purporting to bear the indorsements of S. J. Weaver and Harriet E. Wells. The case of *People v. Corbin*, 56 N. Y. 365, 15 Am. Rep. 427, is relied upon as authority for the broad proposition that evidence of other offenses than that charged in the indictment is never admissible on the question of guilty knowledge or intent, but a mere glance at the opinion will suffice to show that it lays down no such startling doctrine. On the contrary, all that is held in that case is that an admission by a defendant of the forgery of one name is not competent evidence to prove the intent with which a different and entirely disconnected name has been used by one accused of forging the latter. But that is not this case. Here the other notes were not only made at about the same time, by the same person, and in pursuance of a single purpose, but the names used were those of persons who were associated with each other and with the defendant, and had all figured on some of these notes together, and on others separately, in such a way as to create that combination of time, place, and circumstance which is essential to make such proof competent, under the authorities above cited. There was such a connection between the transactions and the persons involved in the various notes now under discussion that they were all competent, as bearing upon the intent with which the defendant signed the name of Davis to the note set forth in the indictment.

It is further contended that, since the court admitted these last-mentioned notes in evidence, the defendant should have been al-

lowed to go fully into all the details of her household economy, for the purpose of explaining why she thought she had authority to use the names of her husband and mother. A complete answer to that contention is to be found in the record. She was given all the opportunity that was legitimate and proper. The court could not well have gone further in that direction than it did, without utterly disregarding all rules of evidence and all waste of time in the conduct of the trial. One of the first questions addressed to the defendant upon her redirect examination was as follows: "State why you put the name of Simon J. Weaver on the back of the \$5,000 note, and state it fully?" The defendant answered: "Because I thought he was good for it and would pay it." When pressed for a further answer, she said: "I don't know any further why. It went to pay his household bills, and to take up an obligation of his." So, with reference to the use of her mother's name, the defendant was permitted to make the fullest explanation. She stated that she placed this name on the \$5,000 note and the \$1,200 note "because I thought I had a perfect right to use her name, and would keep our family troubles from her, and not worry her with them, and I fully believed when I asked for the money it would come, as I had been promised it for some time." This was followed by an ample statement as to the use made of the proceeds of the \$5,000 note, and the history of the various other notes, and by the mother's own testimony, to the effect that, although the defendant had no express authority to use her name, its use had never been questioned. To quote the mother's own language, "She had no written power of attorney, but she had an authorization, I might say, to sign my name, and open my mail matter, and draw checks, and such things." What more should the court have done? It is said that, since the prosecution was permitted to prove the defendant's alleged forgeries of the names of her husband and mother, the defense should have been allowed to put in evidence a large package of bills and receipts showing the numberless items of household expenditures which it is said went to make up the sum totals for which the various notes were claimed to have been given. Suppose that had been done; what would it have explained? Simply that the defendant had expended a far larger sum of money than the monthly allowance which she received from her husband. Would these household bills have shown the reason or authority for the creation of the indebtedness evidenced by the notes? Would they have proven anything upon the subject of defendant's authority to use the names of her husband and mother upon these notes that was not stated in the defendant's oral testimony? Would a trunk full of tradesmen's bills throw any light upon the intent with which these names were

used? Is it not obvious that such evidence would simply have multiplied collateral issues, until the real question in the case would have been lost sight of altogether? These bills and receipts would have had no probative weight in determining the question whether the defendant was authorized to use the names of her husband and mother as indorsers upon promissory notes—much less, upon the question whether she had authority to use the name of Davis for that purpose. Their reception in evidence would have opened the door to endless and useless cross-examination as to their correctness and reasonableness; as to their payment out of the proceeds of notes purporting to bear the indorsement of the husband and mother; as to the husband's knowledge of, and legal liability for, the indebtedness; and, at the end of it all, the real question would have been buried beneath a mass of collateral, irrelevant, and inconclusive matter.

Another prominent fact in this case needs to be considered, in the effort to get a fair perspective of the trial. On the 4th day of October, 1900, the defendant signed a paper in which she confessed that she had forged the names of Harriet E. Wells and Martin Davis as indorsers to the note in issue. It was received in evidence without objection. We are not concerned with the academic or moral considerations suggested by the husband's participation in the interview that led to the signing of this confession. We are dealing with law and fact, instead of sentimentality. The explanation of the defendant that she signed the confession at the request of her husband, and upon the representation of Swanton that he simply wanted it for his own use, and to save loss to the bank in case of a trial, is in the record. If there was any other explanation of this unfortunate episode, it was not offered at the trial. The confession was in the case, and the court was bound to submit it to the jury. It was not conclusive, but clearly competent and strongly evidentiary.

We now come to the criticisms upon the charge to the jury. It goes without saying that the charge is to be considered, not in sections or hypercritically, as a thing separate from the rest of the trial, but fairly as a whole, and in the light of all the proofs, facts, and circumstances in the case. When the charge is so considered, it will be perceived that the learned trial judge had a most difficult and delicate duty to perform. Under the criminal law, he was compelled to submit to the jury, as an issue of fact, a question that in a civil case, and upon the same proofs, would have presented only an issue of law. In other words, the trial judge was called upon to deliver an impartial charge in a criminal case so essentially one-sided on its merits that the same evidence in a civil case would have required a decision against the defendant as matter of law. The only semblance of a question of fact on the

merits was whether the defendant believed that she had the right to use the name of Davis as indorser upon the note of September 17, 1900. The defendant's expressed belief in that regard was of no legal consequence, and constituted no defense to the charge of forgery, unless there was some colorable ground for that belief, based upon then existing facts. *People v. Stevens*, 109 N. Y. 159, 16 N. E. 53. This does not mean a mere belief in, or hope of, subsequent sanction or ratification of a wholly unauthorized act, but a belief founded upon facts in existence, and known to the defendant at the time of the commission of the act which is challenged as a forgery. When the evidence of the defendant upon this point is carefully scanned, not even the subtle and ingenious arguments of her able counsel can find anything of genuine substance to lay hold of. As we have seen, the defendant admitted that Davis had never refused her requests for indorsement, and yet she had used his name upon the \$5,000 note without calling his attention to the fact. The defendant asked Davis to write the face of the note in issue for her, without any intention of using his name thereon as indorser; but, when the cashier of the bank suggested that he would like the name of Davis as an indorser, she straightway went to the latter's office to obtain the very authority which she now claims to have then had. Failing to find Davis, the defendant sought him a second time, and, being again unsuccessful, she then, for the first time, concluded that he would sanction and ratify her act, although there was no reference to the subject in any of their subsequent interviews. It is in the light of these circumstances that the charge of the trial court is to be judicially considered. Since no isolated extract from the charge can be regarded as a fair index of its tenor as a whole, we shall content ourselves with the observation that, taken in its entirety, and read in the light of the evidence, it was a reasonably fair and impartial presentation to the jury of an exceedingly delicate and troublesome case. It is no argument to say that the parts selected for criticism are faulty and vulnerable. If that is to be the test, few charges will survive the ordeal of appellate scrutiny. The question is not whether the charge is perfect, but whether under it the case was fairly submitted to the jury. Measured by this standard, we think there is no such error in the charge as to call for a reversal of the judgment herein.

The judgment should be affirmed.

BARTLETT, J., concurs with O'BRIEN, J. PARKER, C. J., and HAIGHT, VANN, and CULLEN, JJ., concur in result, in memoranda. WERNER, J., reads dissenting opinion.

Judgment reversed, etc.

(177 N. Y. 461)

PEOPLE ex rel. BANK FOR SAVINGS IN
CITY OF NEW YORK v. MILLER,
Comptroller.

(Court of Appeals of New York. Feb. 23,
1904.)

FRANCHISE TAX—SAVINGS BANKS—RULES FOR
APPRAISAL.

1. Laws 1896, p. 859, c. 908, as amended by Laws 1901, p. 296, c. 117, requires every savings bank to pay to the state an annual tax of 1 per cent. on the par value of its surplus and undivided earnings. Held that, in ascertaining the value of the surplus and undivided earnings for such purpose, the Comptroller must appraise the bonds and securities on which the surplus is invested at their market value, whenever such value is less than the par value, in accordance with the provisions of Laws 1892, pp. 1900, 1901, c. 689, §§ 123, 124, authorizing savings banks to accumulate a surplus not to exceed 15 per cent. of their deposits, and providing that, in determining the per cent. of surplus held by any savings bank, its interest-paying stocks and bonds shall not be estimated above their par value, or above their market value if below par.

Parker, C. J., and Martin and Vann, JJ., dissenting in part.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by the people, on the relation of the Bank for Savings in the City of New York, against Nathan L. Miller, Comptroller of the state of New York. From an order of the Appellate Division (82 N. Y. Supp. 621) which modified, and affirmed as modified, a determination of defendant on an application for revision of taxes assessed against the relator, the relator appeals. Modified.

George W. Wickersham, for appellant. John Cunneen, Atty. Gen. (William H. Wood, on the brief), for respondent.

HAIGHT, J. We are satisfied with the determination of the Appellate Division as to all of the items and questions in controversy, with one exception. The comptroller, in ascertaining the value of the relator's surplus and undivided earnings, appraised the bonds belonging to the relator at their face value, notwithstanding the fact that it appeared that the market value of some of the bonds was less than their face value, and that the difference between such valuations amounted to the sum of \$296,500. The action of the Comptroller in so valuing the relator's securities was based upon his construction of the statute, to the effect that all of the securities of the relator were required to be assessed by him at their face value.

The Legislature, by chapter 117, p. 296, of the Laws of 1901, added a new section, known as 187b, to the tax law (Laws 1896, p. 859, c. 908), which provides as follows: "Franchise Tax on Savings Banks. Every savings bank incorporated, organized or formed under, by or pursuant to a law of this state, shall pay to the state annually

for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity, an annual tax which shall be equal to one per centum on the par value of its surplus, and undivided earnings." It will be observed that the statute contains no provision for the valuation of the securities held by the bank at their "face value," but instead thereof the provision is "the par value of its surplus and undivided earnings." The surplus may consist of property which has no face value. It may consist of real estate. Savings banks are authorized to invest the money of its depositors in mortgages upon real estate, and it is matter of common knowledge that many savings banks throughout the state have had to bid in upon foreclosure sale many parcels of real estate upon which loans had been made. So that, while it may be conceded that the words "par value" ordinarily are to be given the same meaning as "face value," when applied to bonds and stocks having a face value, yet, when used as applying to the surplus and undivided earnings, and not limited to bonds and stocks, the meaning may be very different. In determining the legislative intent, it becomes important to consider what was meant by "surplus and undivided earnings." By referring to the banking law (chapter 689, p. 1842, of the Laws of 1892), we find provisions authorizing the trustees of savings banks to accumulate a surplus fund for the security of depositors—not, however, to exceed 15 per cent. of the deposits. They are also to regulate the rate of interest or dividends—not, however, to exceed five per centum per annum upon the deposits—and, in case the surplus amounts to more than 15 per cent. of the deposits, the trustees are required at least once in three years to divide such accumulation by an extra dividend equitably among the depositors. Section 123. It will thus be seen that the surplus in savings banks is the 15 per cent. accumulated over and above the amount due depositors, and the undivided earnings in excess of such accumulation, and that, as to the undivided earnings, they are required to be divided among the depositors as often as once in three years. It is upon this surplus and undivided earnings that the Legislature has authorized the imposition of a franchise tax equal to 1 per cent. thereof, and, in ascertaining the value thereof, the statute expressly provides that "in determining the per cent. of surplus held by any savings bank its interest-paying stocks and bonds shall not be estimated above their par value or above their market value if below par." Section 124. It appears to us that these statutes are in pari materia; that in enacting the tax law of 1901, providing for a franchise tax upon the surplus and undivided earnings of a savings bank, the Legislature had in mind and intended to impose the tax upon the surplus and undivided earnings provided for by the

banking law, and therefore the provisions of that law control the manner of determining the value of the surplus to be taxed. The provisions of the statute that interest-paying stocks and bonds shall not be estimated "above their market value, if below par," is just and reasonable. It may be that this bank is possessed of other bonds whose market value is above par, and that the amount thereof would equal or exceed the amount of the loss by reason of those whose value is below par. But this fact, if such it be, cannot affect the question. The next bank assessed may be possessed of securities, none of which may have a value above par, and many of which may have a value very greatly below par. It has never been the legislative purpose to require property valued for assessment to be appraised above its actual and true value, even if it had the power to do so, and we do not think that such was the legislative intent in enacting the statute in question.

The order of the Appellate Division and the determination of the Comptroller should be further modified by deducting from the valuation of the surplus and undivided earnings the sum of \$296,500, and the tax should be computed upon the balance remaining, and the assessment, as so modified, should be affirmed, without costs of this appeal to either party.

GRAY, O'BRIEN, and CULLEN, JJ., concur. PARKER, C. J., and MARTIN and VANN, JJ., dissent as to modification only.

Ordered accordingly.

(177 N. Y. 465)

In re SLY.

(Court of Appeals of New York. Feb. 23, 1904.)

HIGHWAYS—ALTERATION—MODIFICATION OF DECISION.

1. Where, on appeal from a decision of commissioners appointed in proceedings under Laws 1890, p. 1177, c. 568, and the amendments thereto, for the alteration of a highway, a county court modified the decision of the commissioners of its own motion, and affirmed the modified decision, the modification should be stricken out.

Appeal from Supreme Court, Appellate Division, Fourth Department.

In the matter of the petition of William P. Sly for the appointment of commissioners in proceedings for the alteration of a highway in the town of Woodhull. From an order of the Appellate Division (79 N. Y. Supp. 1146) affirming an order of the county court modifying a decision of commissioners, Horace D. Baldwin appeals. Modified.

Horace D. Baldwin, in pro. per. Elbert M. Worth, for respondent.

WERNER, J. In all essential particulars, except one, this proceeding for the alteration

of a highway seems to have been conducted in substantial conformity with the provisions of the highway law (Laws 1890, p. 1177, c. 568). The exception referred to is the modification by the county court of the decision of the commissioners in respect to the construction and maintenance of a "cattle pass" across the proposed highway. The decision of the commissioners directed that the town of Woodhull should build a suitable and sufficient cattle pass across the highway, as altered, between the parts of appellant Baldwin's farm to be separated by the altered highway. Upon the appellant's motion to vacate in toto the decision of the commissioners, the county court modified the same by directing that the damages awarded to the appellant should be increased by adding thereto the sum of \$50, that the town of Woodhull be relieved from building the cattle pass, and that the appellant Baldwin should be allowed to build the same at his own expense. This modification not only increased the money award to the appellant, but it also added to the burdens to be assumed and borne by him, and, as it was not asked for by either party, it should not have been ordered by the county court, even if it had the power—a question which we do not now assume to decide.

The ruling of the county court in this regard is not, however, of sufficient importance to require a reversal of the final order herein, and we therefore modify the same by striking out the modification of the county court as above set forth; and, as thus modified, the order appealed from is affirmed, without costs to either party.

PARKER, C. J., and GRAY, HAIGHT, MARTIN, VANN, and CULLEN, JJ., concur.

Ordered accordingly.

(177 N. Y. 467)

PEOPLE v. AMERICAN LOAN & TRUST CO.

In re SIMMONS.

(Court of Appeals of New York. Feb. 23, 1904.)

CORPORATIONS—DISSOLUTION—DISTRIBUTION AMONG CREDITORS—COSTS.

1. Rule 80 of the Supreme Court, relating to the filing of exceptions to referees' reports, being a general rule of practice, and providing that the report shall become absolute unless exceptions are filed within eight days after service of notice of the filing of the same, in so far as it conflicts with Code Civ. Proc. § 1793, directing the final judgment in an action to dissolve a corporation to provide for a fair distribution of the property of the corporation, and of the proceeds thereof, in the proportions prescribed by law, must yield to the provisions of the special statute; and unpreferred creditors whose claims have been duly admitted are entitled to a reasonable distribution, though some of them failed to file exceptions to the ref-

eree's report allowing interest to the preferred creditors, and were not represented on appeals from the judgment entered thereon, which is reversed, and by which the fund is created.

2. Where creditors of a corporation in involuntary dissolution appear in the Court of Appeals by attorneys, and take an active part in obtaining the fund which is thereafter distributed among the unpreferred creditors, and in determining the basis of distribution, they are entitled to costs of the appeal, payable out of the fund.

Motion by the receiver of defendant for a recall of the remittitur and a reargument, or an amendment of the remittitur; also motion by Bauer, Koester & O'Connor for a reargument. Reargument denied. Motion to amend remittitur granted.

For former opinion, see 69 N. E. 429.

William S. Opdyke, Alfred Opdyke, Charles W. Dayton, James Dunne, and John M. Harrington, for the motion. O. P. Metcalf, Clarence E. Thornall, Barclay E. V. McCarty, and James Anderson Hawes, opposed.

WERNER, J. It will be remembered that the appeals herein were taken from an order of the Appellate Division, First Department, providing for distribution among the unpreferred creditors of the American Loan & Trust Company, an insolvent corporation whose affairs are in process of liquidation in an action for dissolution brought under the statute. By the terms of the charter of this trust company, loans to it by savings banks were made preferred debts. In allowing the claims of certain savings banks under this statutory preference, the referee to whom the matter was referred added interest up to the time of making his report; and this was held to be an error, upon the theory that, unless the assets were sufficient to pay all claims in full, with interest, no interest accruing after the date of the appointment of the receiver could be allowed to preferred creditors as against unpreferred creditors. *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200. That decision resulted in a net fund of \$76,864.12, which was applicable to the claims of unpreferred creditors. Out of this fund the referee awarded the sum of \$59,987.95 to Bauer, Koester & O'Connor, unpreferred creditors, and the balance of \$16,876.17 was directed to be distributed among the other unpreferred creditors as a whole. With modifications not material here, the Appellate Division affirmed the order confirming that report. From that order cross-appeals were taken to this court, which resulted in a modification to the effect that Bauer, Koester & O'Connor were not entitled to preference over other unpreferred creditors, and that the whole fund must be distributed ratably among all of the unpreferred creditors who were before this court. *People v. American Loan & Trust Co.*, 177 N. Y. 231, 69 N. E. 429.

Upon these motions for reargument and amendment of remittitur, we have before us

not only all the parties who participated in the argument of the cross-appeals, but also a large number of unpreferred creditors who were not before this court by their own attorneys either as appellants or respondents, although their claims were duly admitted or proved before the referee. These latter creditors now appear by their attorney, and ask to intervene on the ground that they are entitled to share in the distribution of the fund. The ground for these motions for reargument is that the court overlooked or misapprehended the question before it. That question was whether Bauer, Koester & O'Connor, as unpreferred creditors who had promptly filed exceptions to the referee's report allowing interest to preferred creditors, were entitled to a preference over other unpreferred creditors, who had either filed no exceptions, or had tardily filed them *nunc pro tunc*, pursuant to leave of the court.

We did not overlook or misapprehend the question involved, for we held that rule 30 of the Supreme Court, relating to the filing of exceptions to referees' reports, being a general rule of practice, must give way to a positive statute directly applicable to this special proceeding. The rule of practice referred to (30) provides that in references other than for the trial of issues in an action, or for computing the amount due in foreclosure cases, the report "shall become absolute and stand in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of filing of the same." This is the rule relied upon by Bauer, Koester & O'Connor. The statute (section 1793, Code Civ. Proc.) directs that the final judgment in an action to dissolve a corporation "must provide for a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors, in the order and in the proportions prescribed by law, in case of the voluntary dissolution of a corporation." This is the statute which we invoked on behalf of all the unpreferred creditors before the court. This rule and statute are irreconcilable. It is obvious at a glance that there can be no just and fair distribution of the assets of a corporation among its fair and honest creditors, if a proceeding like this is simply a race of diligence in conforming to a rule of practice. It seems too clear for lengthy discussion that, when there is a conflict between a general rule of practice and a special statute directly applicable to a proceeding, the special statute must control, and the general rule of practice must yield. There is nothing new in the statute referred to. Rev. St. (2d Ed.) pt. 3, c. 8, tit. 4, § 79, provides for the order of payment of debts of corporations in case of voluntary dissolutions; and Code Civ. Proc. § 1793, directs that distribution in a case like the one at bar shall be the same as "in case of the voluntary dissolution of a corporation." In cas-

es of voluntary dissolution of a corporation, a receiver is to make payments of debts to those whose claims have been exhibited and ascertained in the following order: "(1) All debts entitled to a preference under the Laws of the United States. (2) Judgments actually obtained against such corporation, to the extent of the value of the real estate on which they shall respectively be liens. (3) All other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties."

As early as 1837 our court of chancery held that "the provisions of the Revised Statutes relative to proceedings against corporations in equity contemplate an equal distribution among all the creditors, without reference to the time in which their respective debts accrued, although the creditor upon whose application a receiver is appointed has actually proceeded to judgment and execution against the company." *Lowne v. American Fire Ins. Co.*, 6 Paige, 485. And in 1843 the same court decided that a creditor of a corporation who files a bill to obtain satisfaction of his debt does not, by his initiative, obtain a preference, but the whole of the property and effects of the corporation must be sequestered for the benefit of all its creditors ratably, except as to preferences created by the federal laws, or by virtue of liens upon real estate under judgments or decrees. *Morgan v. N. Y. & A. R. Co.*, 10 Paige, 290, 40 Am. Dec. 244. The policy of the law in the distribution of corporate assets, as indicated by these statutes and decisions, is that "equality is equity," and by that rule our decision herein seems to be correct. Our decision was that "all the unpreferred creditors before the court on this appeal stand upon an equal footing, and are entitled to a ratable division among them of the fund in dispute." The receiver now asks to be advised whether "the court considered that all those unpreferred creditors whose claims have been admitted in this proceeding, but who are not represented by their own attorneys upon said appeals, were represented before the court by the receiver." This request by the receiver is, as we have stated, supplemented by the application of a number of unpreferred creditors, whose claims were duly proved or admitted, but who did not appear by their own attorneys upon the argument of these appeals, for leave to now intervene for the purpose of protecting their interests. Our decision was intended to include not only those creditors who were in court by their own counsel, but all those other creditors whose claims were duly proved or admitted, and who were therefore represented by the receiver upon appeal to this court. The receiver of a corporation is the officer of the court appointing him, and his possession of the corporate property is the possession of the court. *Atty. Gen. v.*

Guard. Mut. Life Ins. Co., 77 N. Y. 277. By parity of reasoning it must follow that the distribution of corporate assets by the receiver is distribution by the court. A receiver in such case represents the corporation, its creditors, and its stockholders (Atty. Gen. v. Guard. Mut. Life Ins. Co., supra), and hence the receiver's appearance in all matters relating to the liquidation of the corporate affairs must be deemed an appearance for all concerned, except when there is a conflict between the receiver and those interested, in which event, of course, they appear for themselves. This view seems to be in consonance with the provisions of the statutes above referred to. Section 1798 of the Code of Civil Procedure directs that, in an action for the involuntary dissolution of a corporation, distribution of its assets shall be made as "in case of the voluntary dissolution of a corporation." The statute relating to voluntary dissolution of corporations (Rev. St. pt. 3, c. 8, tit. 4, § 79) provides for a distribution in the manner set forth in the above-quoted portions thereof "among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained."

Upon further reflection, we are inclined to think that those creditors who did appear in this court by their own attorneys, and who have taken an active part in wresting the disputed fund from those not entitled to it, and in settling the basis of distribution, are entitled to costs of this appeal, payable out of the fund.

Motions for reargument denied, without costs. Motion for amendment of remittitur granted so far as it may be necessary to indicate more clearly what creditors are entitled to share in the distribution, and so as to include the foregoing provision for costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, and CULLEN, JJ., concur.

Motion for reargument denied. Motion to amend remittitur granted.

(177 N. Y. 473)

STRAUS et al. v. AMERICAN PUBLISHERS' ASS'N et al.

(Court of Appeals of New York. Feb. 23, 1904.)

MONOPOLIES—SALE OF UNCOPYRIGHTED BOOKS.

1. Publishers representing 95 per cent. of the books published in the United States, and 90 per cent. of the book trade, entered into an agreement that all copyrighted books published by any of them after a specified date should be published and sold at retail at net prices; that such books and all other books, whether published by them or not, or copyrighted or not, should be sold to those booksellers only who would maintain the retail net price of such copyrighted books for one year, and to those only who would sell books at wholesale to no one known

to them to cut such net retail price, or whose names should be given to them by the association as persons who cut such prices; that all that should be required to restrain a bookseller from selling to one who had been blacklisted was that his name should be given to him by the association as one who cuts prices. Held to prevent the sale of any books of any kind or at any price to any dealer who resells copyrighted books at less than the arbitrary net price, whether such dealer be a member of the association or not, and therefore an agreement to interfere with the free pursuit of a lawful business—that of dealing in books which are not protected by copyright—and therefore in violation of Laws 1899, p. 1514, c. 690, enacted to prevent monopolies and prohibit restraint of trade.

Gray and Bartlett, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Isidore Straus and others, composing the firm of R. H. Macy & Co., against the American Publishers' Association and others. From an order of the Appellate Division (83 N. Y. Supp. 271) reversing a judgment sustaining a demurrer to the complaint, defendants appeal. Affirmed.

See 84 N. Y. Supp. 1147.

Stephen H. Olin and Thaddeus D. Kenne-son, for appellants. John G. Carlisle and Edmond E. Wise, for respondents.

PARKER, C. J. Chief Justice Marshall said long ago, in *Grant v. Raymond*, 6 Pet. 218, 241, 8 L. Ed. 376: "To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress. * * * It is the reward stipulated for the advantages derived by the public from the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made, and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery after its enjoyment by the discoverer for fourteen years is preserved, and for his exclusive enjoyment of it during that time the public faith is pledged."

That case and many others were considered recently by the United States Supreme Court in *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, Mr. Justice Peckham writing. After an examina-

tion of the cases which may be said to restrict the exceptions which grow out of a proper exercise of the police power of the state—of which *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115, is an illustration—he says (186 U. S. 91, 22 Sup. Ct. 755, 46 L. Ed. 1058): “Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.”

That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the *Park & Sons Co. Case*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, upon which defendants apparently rest their claim that the judgment of the Appellate Division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out.

While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protection which the federal government permits them to enjoy for the reasons stated by Chief Justice Marshall, *supra*, it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all, if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this state as much as if it related to bluestone (*Cummings v. Union Bluestone Co.*, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655) or to envelopes (*Cohen v. Berlin & Jones Envelope Co.*, 166 N. Y. 292, 59 N. E. 906); and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible, but probable. But it is not of moment whether such a result is probable or not, for the test to be applied is, what may be done under the agreement?

Reference to the complaint makes it clear that the association has undertaken to provide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association. And it appears from the complaint that the practical construction given to this agreement by those operating to-

gether under it is that if a dealer is suspected of selling copyrighted books at less than the arbitrary net price it is quite sufficient to exclude him from selling books altogether. The agreement nowhere suggests that it is the object of the association to control the sale of books not protected by copyright. Indeed, the object of the association seems to be merely to protect the copyrighted books. But while the other part of the scheme is apparently sought to be hidden, it is after all uncovered by the clauses authorizing the exclusion of any members of the association, or those who refuse to be bound by its rules, from selling books of any description.

The fifteenth paragraph of the complaint alleges “that during the year 1900 a number of prominent publishers, including defendants, hereinbefore described as publishers, for the purpose of securing to themselves an unreasonable and extortionate profit and at the same time with intent to prevent competition in the sale of books, and for the purpose of establishing and maintaining the prices of all books published by them, or any of them, and all books dealt in by them, or any of them, and preventing competition in the sale thereof, unlawfully, illegally, and contrary to the public policy and the statutes of the state of New York * * * combined and associated themselves together,” etc. The sixteenth paragraph refers to the method of organization, and the fact of the adoption of a resolution, and an agreement to carry out their object; while the seventeenth states the nature of the agreement as follows: “That as a part of said unlawful scheme and combination the members of said association agreed that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books [the word “copyrighted” is omitted at this point] at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such prices.”

It will be seen that while the leading object of this portion of the agreement apparently is to maintain the retail net price of copyrighted books, it operates in fact so as to prevent the sale of books to dealers who sell books of any kind to one who retails copyrighted books at less than the net retail price. And the agreement further provides that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been blacklisted, but that all that shall be required to govern his action, and to prevent him from selling to such a person, shall be that the name has been given to him by the association as one who

cuts such net prices. It has been admitted, and must be, that the agreement may be so worked out as to deprive a dealer from selling any books whatever, thus breaking up his business.

But it is said that is only intended as a punishment for one who refuses to be bound by the wishes of the owner of the copyrighted book as to its selling price; in other words, that the association inflicts upon him the penalty of a destruction of his business, because of his refusal to abide by the rules of the association. It is, of course, of no consequence how this course of action may be described by those who invented it, for if it be the fact that the combination which agrees to exclude others from an unprotected business violates the statute, then it matters not what excuse may be offered for it. It is the excuse, not the statute, which must give way.

The eighteenth paragraph of the complaint contains what purports to be a practical construction given to this agreement by the members of the association. It states "that in pursuance of said unlawful combination and agreement said American Booksellers' Association and its members have continuously co-operated with and assisted the American Publishers' Association and the members thereof in establishing and maintaining prices of such books, and preventing competition in the supply and sale of the same, and still continues so to do; and plaintiffs say that, in compliance with said agreement, neither said associations nor any of the members thereof will sell or supply books at any price to any dealer, whether a member of said association or not, and whether such books are copyrighted or not, or are not published by said American Book Publishers' Association or its members, who resells, or is suspected of reselling, such copyrighted books at less than the arbitrary net price fixed by said unlawful combination, nor will the said association nor any of their members sell or supply any books whatever to any one who resells, or is suspected of reselling, such copyrighted books to any dealer who thereafter sells the same at less than such arbitrary net price."

Here, then, we have a practical construction of the agreement—one put upon it by the parties to it—and it is such a construction as the language employed calls for. And it discloses that the parties who are acting under the agreement assume it to be their right and their duty by virtue of it not to sell or permit to be sold books of any kind or at any price to any dealer "who resells or is suspected of reselling copyrighted books at less than the arbitrary net price," whether such dealer be a member of the association or not. The intended effect of this is to prevent any dealer who is even suspected of reselling copyrighted books at less than the net price from obtaining books at any price or on any terms, whether copyrighted or not. And it

does not stop there, for the members of the association agree not to supply him any books at any price, whether he resells copyrighted books or not at less than the arbitrary net price, provided he is suspected of selling to any dealer who thereafter sells the same at less than such arbitrary net price. And this means—inasmuch as the members represent 95 per cent. of the publishers and 90 per cent. of the business done in the book trade—that he may be practically driven out of the business if any one chooses to suspect that a dealer to whom he has sold books has resold them at less than the price fixed.

The members of the association, therefore, have entered into an agreement which by its terms—as we read it, and as they have construed it in their everyday working under it—undertakes to interfere with the free pursuit in this state of a lawful business in which any member of the community has a right to engage—a business in which a monopoly is not secured by the federal statutes, namely, that of dealing in books which are not protected by copyrights; and hence it is in violation of chapter 690, p. 1514, § 1, Laws 1899, which provides: "Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void."

The order should be affirmed, with costs.

GRAY, J. (dissenting). This case, as it comes before us, presents a complaint alleging that the plaintiffs have suffered injury and damage as the result of unlawful combinations and associations entered into by the defendants, either in the form of the American Publishers' Association or in the form of the American Booksellers' Association, which were intended to establish and to maintain the retail net prices fixed on copyrighted books by their publishers. A demurrer interposed by the defendants to the complaint was sustained by the court at Special Term, but it has been overruled by the Appellate Division, and that court has certified to us this question: "Are the facts stated in the complaint in this action sufficient to constitute a cause of action?" In determining this question we must regard as admitted all the material facts alleged by the plaintiffs. Though their complaint is stated at considerable length, much of it is matter of descrip-

tion or the statement of legal conclusions. The plaintiffs conduct a department store in the city of New York, under the name of R. H. Macy & Co., and among the departments is one for the sale of books and publications in general. They have a large capital invested in their general business, and their book department is one of the largest in the country, which latter fact is alleged to be due to the cheaper price placed upon the books and publications under a system of sales for cash only. It appears that publishers who sold at retail, and other booksellers, had not adhered to the "list prices" at which books were advertised or offered for sale at retail, but were accustomed to give large and liberal discounts to those familiar with trade customs, and the purchasing public, discovering that fact, was giving its custom to such dealers as the plaintiffs, who had placed fixed prices upon their books. In 1900, to meet a condition from which the publishing business was suffering, about 95 per cent, in number and in extent of business, of the publishers of all kinds of books and magazines, formed the American Publishers' Association, which upon its organization, and in order "to prevent the cutting or reducing of prices on copyright books published by the members of the said association," adopted a resolution, and, with its members, entered into an agreement "by which each of the members of the association agreed that all copyrighted books published by any of them after May 1, 1901, should be published and sold at retail at net prices—that is, the published price thereof—and not be subject to any discounts." They further agreed, as the complaint states it, "that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such net prices." Thereafter the Publishers' Association caused to be organized the American Booksellers' Association, to co-operate, as it is alleged, in the "unlawful purpose of maintaining the price of copyright books and preventing competition in the sale thereof, and in the supply of all books, whether copyrighted or not." In the effectuation of this purpose the two associations have co-operated, and, because of their agreement, neither of them, nor any of their members, it is alleged, "will sell or supply books at any price to any dealer, whether a member of said association or not, and whether such books are copyrighted or not, or are not published by said American Book Publishers' Association or its members, who resells, or is suspected of reselling, such

copyrighted books at less than the arbitrary net price fixed by said unlawful combination, nor will the said associations nor any of their members sell or supply any books whatever to any one who resells, or is suspected of reselling, such copyrighted books to any dealer who thereafter sells the same at less than such arbitrary net price."

In these statements, taken from the complaint, may be found the gist of this suit, and all that is necessary to be considered, in my opinion, in the determination of the question whether, by such combinations and agreements, the defendants have violated the law. Other allegations relate to the refusal of the plaintiffs to join in such combinations; to the methods adopted by the defendants to prevent others from selling books to the plaintiffs, by "blacklisting" them in the book business, and by the use of coercive and intimidating measures; to the establishment by the defendants of a system of espionage, in order to secure information as to the sources of plaintiffs' supplies of books; and that, as the result of these agreements and of the methods adopted to make them effectual, publishers of books and book dealers have refused to sell books at any price to the plaintiffs, to their damage. The relief asked is, in substance, the adjudication of the unlawfulness of the combination and of the nullity of the agreement alleged, and that an injunction issue restraining action by the defendants under their agreement, of any nature which may make it effectual against the plaintiffs, and, as incidental to such equitable relief, an award of damages is asked.

Whatever else is in this complaint is but subsidiary to, and in demonstration of, the real cause of grievance, which is that, in order to maintain the retail net price of a copyrighted book as fixed by its publisher, the defendants had entered into a combination and had agreed with each other that they would only sell to those in the trade who would agree to maintain, and to assist in maintaining, the net retail price, and that they would not deal at all with those who refused strict co-operation in such respect, whether that was shown in the conduct of their own sales, or in the selling to others known by them to be "cutting" the net price. That I regard as the gravamen of this suit.

At the time of the doing of the things alleged in the complaint to have been unlawful, there was upon the statute books of this state an act which had for its object the prevention of monopolies and the prohibition of restraints upon trade and commerce. Chapter 690, p. 1514, Laws 1899. This statute, commonly called the "Anti-Trust Law," contains three sections. The first section has a threefold purpose—in declaring to be against public policy, illegal, and void every contract or combination whereby a monopoly in the manufacture, production, or sale in this state of "any article or commodity of

common use" may be created or "whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented," or whereby the free pursuit of any lawful business may be restricted or prevented. I am unable to see how that any but the second provision of this section can bear upon the present controversy, because the owner of the copyright has a monopoly under federal laws, and because the agreement complained of does not restrict the pursuit of the book business to localities or to persons, or otherwise than for the purpose of preventing the cutting by any one of the price of a copyrighted book, through the threatened withdrawal of all business relations with such person. Section 2 of the act makes it a misdemeanor, punishable by fine and imprisonment, for any person or corporation to enter into any such contract or combination. The third section provides that the Attorney General may bring an action, in behalf of the people, against any person or corporate agency, to restrain the doing in this state of any act in consummation of any contract or combination therein prohibited.

The argument in behalf of the plaintiffs is largely, if not wholly, based upon this statute. I regard its prohibitory provisions, however, as but the declaration of a state policy, which is, to use the language of the opinion in *Matter of Davies*, 168 N. Y. 89, 101, 61 N. E. 118, 120, 56 L. R. A. 855, "little more than a codification of the common law upon the subject." The contracts, agreements, arrangements, and combinations prohibited by this statute were condemned at common law; but they did not, as this statute does, subject those who entered into them to criminal punishment, or make them amenable to restraint at the suit of the people. It might possibly be well said of this statute that, introducing no new rule of law, it now makes the contracts or combinations mentioned, which before were unenforceable, unlawful and criminal offenses, and the subject of preventive judgments, at the instance of the law officer of the state.

If, then, the statute makes the position of the complainants no stronger at law than it was before its passage, it seems to me that the decision of this case should be controlled by our decision in *Park & Sons Co. v. National Druggists' Association*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632. Indeed, the decision of that case was made after the passage of chapter 383, p. 310, of the Laws of 1897, of which the act in question is but the continuation and re-enactment, and the existence of the law upon the statute books was not ignored; for it was expressly referred to by Judge Martin, in his dissenting opinion, as a declaration of the policy of the state with reference to combinations of the nature of those described. It was, in my opinion, quite as authoritative upon the

question of the lawfulness of the existing combination aimed at in the *Park Case*; for, being a continuing arrangement, it could not be exempt from the operation of the act. The action of the plaintiffs in the *Park Case* was to have declared illegal the course adopted for conducting the business of the sale of proprietary medicines, as devised and carried on by the defendants through their association, under the title of the National Druggists' Association. The plaintiff was a corporation engaged in the business of manufacturing proprietary or patent medicines and of dealing in the sale of such goods. The association was composed of wholesale and jobbing druggists, and of proprietors and manufacturers, who manufactured and sold their own proprietary articles, or chemical preparations. Its active membership controlled more than 90 per cent. of the wholesale and jobbing trade. The plan which the association had adopted and was acting under was to require the manufacturers to compel the purchasers of their goods to contract, as selling agents, to maintain fixed selling prices, in consideration of receiving a certain fixed discount or rebate. In order to maintain a uniform jobbing price for fixed quantities, and also a retail selling price by the druggists, which they were to agree to maintain, it was agreed on the part of the manufacturers, at the instance of the wholesale and jobbing druggists, that they would confine their sales to persons named on a list furnished, as being those who would faithfully observe the prices and conditions named by the manufacturers. The plaintiff in that case refused to unite with the defendants, insisted upon its right to sell proprietary goods at such prices as it saw fit and sought, by its action, to restrain the defendants from continuing their efforts to prevent it from purchasing, and the manufacturers from selling to it, their goods, by way of threats and by methods of intimidation not materially unlike those complained of in the present case. In that case the object of the combination was to establish uniform jobbing prices and retail selling prices for proprietary goods, and the plan was to enforce compliance through the threatened refusal of the proprietors and manufacturers to sell to dealers who would not maintain the retail price. Between the two cases there are differences in details of the methods availed of; but while the self-defensive or preventive arrangements may have been more stringent and radical in the one than in the other case, the legal principle is not affected. The effort in each case was to make effective an agreement with respect to the fixing and maintenance of the retail price of an article as much proprietary in the one as in the other case, and the differences in the plan adopted, in sum, are rather of degree; that is, in the present case the defendants have agreed to refuse to have any busi-

ness dealings with those booksellers who would not co-operate to the fullest extent in maintaining sales of copyrighted books at the retail price fixed by their publishers. It was held in the Park Case that the proprietors of the goods there in question had the right to adopt such a plan with respect to the disposal thereof as they saw fit, and that no one could complain. The plan was not in restraint of trade; for while, as it was said by Judge Haight, "it is true that it does away with the competition among dealers as to prices, it creates no restriction upon them as to the quantities that they may be able to sell, or the territory within which they may confine their transactions; and upon the question of prices we must bear in mind that the goods are covered by patent rights and trade-marks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and, following this, the right also to require dealers to maintain the prices specified." This plan was not against public policy, it was held, because public policy "commends the conduct of business in such a way as to serve all consumers alike," and "one of the cardinal and chief principles of the plan adopted is the establishing of a uniform price by proprietors, which necessitates the service of all persons alike throughout the United States." Chief Judge Parker also, speaking for the majority of the court in the Park Case, was of the opinion, with reference to the charge in the complaint that the wholesale dealers could be proceeded against because they compelled some or all of the manufacturers, against their will and inclination, to refuse to sell their goods to plaintiff, by threats, intimidation, and black-listing, as evidenced by the agreements and written plans of the association and the declared purpose of the members to carry them out to the letter, that the defendants were not doing anything except what they had a right to do. In that case the court divided in opinion upon the sole question whether the agreement alleged was vicious, as operating in restraint of trade and in prevention of competition. It is difficult for me to see wherein the decision in the Park Case is not controlling. The logical and consistent application of its doctrine must result in sustaining the demurrer here.

I can discover nothing in the purpose of these defendants which is morally wrong, or which would deserve condemnation at common law. There is no combination to restrain competition among themselves, but simply an agreement among themselves to bring about more healthful conditions in a certain branch of the general bookselling trade by the maintenance of a uniform fixed retail price on a copyrighted book; that is to say, they agree that publishers of copyrighted books shall fix the net price at which such books shall be sold at retail, and that

those prices must be observed by all dealers, at the peril to them, if they undersell, of having business relations wholly severed. That the publisher of a copyrighted book may fix its price cannot very well be denied, and if, by reason of a large number of publishers combining in a plan to compel the net retail price to be universally adhered to in sales, competition may be restrained, that is but an incident of the execution of a lawful plan. How can it be said that the statute in question is operative in such a case, where the copyright constitutes a monopoly which the federal government has granted to the publisher? The subject of these protective agreements—the very kernel, as we may say, of the combination—was the resolve of publishers to maintain throughout the trade, and everywhere, a net retail price for copyrighted books, and that was to be enforced to the extent of refusing to have any business dealings with those sellers of books—whether in treaty with the defendants or not—who refused, or connived at the refusal of others, to sell at the price fixed. How was this unlawful? Doubtless, this resolution was of a stringent and wholesale nature; but is it inharmonious with the exclusive or monopolistic nature of the federal grant of letters of copyright? I do not think so. When, in innovation of the common law, the Congress of the United States exercised its constitutional power to enact copyright and patent laws, it was the purpose that authors and inventors should have monopolies in the ownership and disposition of the subject of the patent or copyright. It does not seem to me, therefore, that any plan, however radical, which is adopted for the protection of the enjoyment of the monopoly, and especially one which simply results in producing absolute uniformity of price rates, can be said to be within the operation of the state law against combinations and agreements for the creation of monopolies or for the prevention of competition.

The United States Supreme Court, in its consideration of the act of Congress known, commonly, as the "Sherman Anti-Trust Act" (passed July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 8200]), which declared that "every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade, or commerce, among the states," etc., was illegal, has interpreted it as aiming only at a contract or combination which has for its direct purpose the restraint of interstate trade or commerce, and as not comprehending a case where the restraint was an incidental result. *Anderson v. U. S.*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. In that case, by the by-laws of an association its members were forbidden to buy or sell cattle from or to traders not members of the exchange, or to buy from commission men who bought from, or sold to, nonmembers. The United States sought to dissolve the asso-

ciation, and to enjoin the members from carrying out their exclusive rules, upon the theory that they were engaged in interstate commerce. But the federal Supreme Court held, if that were so, that nevertheless the combination was not within the purview of the statute, and that the agreement did "not restrict competition among the defendants for the class of cattle dealt in by them."

At common law those combinations were condemned, wherein the persons in combination had agreed between themselves to restrict the production and the supply of some article of prime necessity, for the reason that, as constituting an immediate restraint upon trade and upon competition, it was a detriment to the public, and hence contrary to public policy. They were not condemned by legislation as illegal and criminal, but the courts refused to enforce the agreement. What the law of this state aims at, in undertaking to stamp any of the described combinations and contracts as an unlawful and criminal act, is to prevent an agreement being carried out between persons which looks to the restraint of competition between themselves in, and to the controlling of the production and price of, articles of common use. It was, upon a reasonable reading, intended to operate upon contracts whose direct effect was to restrain trade, or to prevent competition between its parties, within this state, and its operation should not be extended to cases where the effect was an incident of some plan not itself unlawful. And, as I have before suggested, the monopolies aimed at were those which the contract of the combination might create, and clearly not those which were created by the law of the land.

But this contract of the combination, analyze it how you may, had no other reason or purpose than to protect, in as drastic way, as the parties could devise, the trading business of publishers of copyrighted books. There was no "pooling" in the arrangement; nor was there any restraint imposed upon the parties to it as to competition in the production and the sale of some article, which all were engaged in producing and which all were free to supply. The contract did not extend to uncopyrighted books, other than by way of penalty, as the refusal to deal in them might be incidental to the refusal to deal with booksellers who would not live up to, or who would not co-operate in, an agreement to maintain the net retail price of a copyrighted book. It is not unlawful for a person to refuse to deal with others, as his judgment or fancy may impel him. His business is his own, and the only limitation upon his pursuit of it is that he shall not interfere with the legal rights of others. It seems to me that what he may lawfully do himself he may unite with others in doing, if of some common advantage. See *Park & Sons Co. v. National Druggists' Association*, supra; *Anderson v. U. S.*, supra; *Macauley v.*

Tierney, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; *Bohn Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319. Combinations for the prevention of competition have been commonly understood to be made between those who themselves have been competitors in the particular business, and who enter into an agreement with each other to regulate the price of the particular article of necessity traded in. The agreement alleged here is not of that nature. If the law is violated by this agreement, it is not because competition between the parties is to be suppressed, for their object is solely to maintain the net retail prices which they, as publishers, have rightfully fixed on the copyrighted books they are selling. What competition is prevented must be, plainly, that incidentally occurring between booksellers who, for some advantage to be gained in their business, would sell such books under the retail price fixed by their publishers. But if that is the test to be applied to the legality of the combination or of the agreement attacked, it appears to me to be an extraordinarily inaccurate one, and quite beyond the intent of a statute supposed to incorporate the common-law rule.

To summarize, as it has been well done in the argument of the appellants' counsel: The purpose of the parties to this contract, to maintain one price for the same book to all retail buyers, was limited to copyrighted books published by members of the American Publishers' Association, and did not extend to uncopyrighted books, whether published by such members or by others. Nor was any party restrained from selling uncopyrighted books, and uncopyrighted books only, to any person, provided such person does not buy or sell copyrighted books published by the members of that association. It is only to dealers who themselves insist upon selling at retail the copyrighted books of the members of the association at prices less than the net prices fixed by the publishers, or who insist upon reselling at wholesale such copyrighted books to such dealers, that the parties to the combination are restrained from selling.

I am led to the conclusion, after a careful consideration of the question presented, upon principle as upon the authority of the *Park Case*, that the question certified should be answered in the negative, and therefore I think that the order of the Appellate Division should be reversed, and that the order of the Special Term should be affirmed.

BARTLETT, J. (dissenting). I agree with the opinion of Judge GRAY. The agreement attacked has for its sole object the protection of copyrighted books. I consider the construction given to it by Judge GRAY is logical, conducive to the best interests of trade, and consistent with the latest utter-

ance of this court on the subject—*Park & Sons Co. v. National Druggists' Association*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632. It cannot be reasonably said that a publisher of books protected by copyright, and a dealer in books generally, may not say to his customers in the trade that if they cut the prices of his copyrighted books he will sever business relations absolutely. If this be so—and I do not understand it can be successfully questioned—why may not any number of men similarly situated agree to adopt that policy?

There is a phase of this case that has not been specially discussed, but which may be considered by way of argument. The refusal to maintain trade relations with a given individual is an inherent right which every person in business may exercise, for reasons he deems sufficient or for no reason whatever. It is a part of that liberty of action which the Constitutions, state and federal, guaranty to the citizen. This case discloses one of the saddest phases of our modern business life. It is a well-known fact that the great department stores of the country have encroached upon many lines of trade entirely distinct from the main and legitimate business in which they are engaged. As an illustration, a dry goods establishment, engaged in selling a vast number of articles legitimately related to its business, concludes, in order to promote its principal trade, to offer for sale books, furniture, druggists' sundries, and numerous other articles that need not be mentioned, at cut prices, representing only the cost of production, and oftentimes far below it. The inevitable effect of this policy is to draw a large number of people to these establishments, and in the final result the dealer makes good his losses in the outside trade by the prices he obtains in his legitimate business. It may be fairly assumed that the general business is conducted at a profit. The result is that a large number of the retail dealers in the various kinds of articles thus undersold are driven out of business, many of them at a time of life when they are unable to reinstate themselves in some other calling. It also results in great damage to manufacturers, producers, and wholesale dealers in loss of customers who have been driven into insolvency. It is, of course, true that the proprietors of department stores have the legal right to offer to the public goods of any kind at prices below production, or, indeed, may donate them to their customers. It is, however, equally true that the manufacturers, producers, and wholesale dealers may say, to the men whose policy is thus carrying ruin and destruction to their business and that of their customers, that if you persist in this disastrous cutting of rates we will sever all business relations absolutely. These are mutual and inherent rights, in the nature of things, so long as self-defense and the privilege to exist survive among men.

HAIGHT, MARTIN, VANN, and WERNER, JJ., concur with PARKER, C. J. GRAY and BARTLETT, JJ., read dissenting opinions.

Order affirmed.

(177 N. Y. 499)

PEOPLE ex rel. CORSCADDEN v. HOWE,
County Treasurer.

CORSCADDEN v. HASWELL et al.

(Court of Appeals of New York. Feb. 23,
1904.)

CONSTITUTIONAL LAW—LOCAL ACT—SUBJECT
—KEEPER OF PENITENTIARY—RE-
MOVAL—INJUNCTION.

1. Laws 1902, p. 387, c. 127, being "An act to amend chapter 261 of the Laws of 1885, entitled 'An act in relation to the management of the Albany Penitentiary,' relative to the salary of the keeper of said penitentiary," changes the salary of such keeper, and authorizes the commissioners of the penitentiary to discharge the keeper and turn the penitentiary over to the sheriff. *Held*, that the subject of the act was not sufficiently described in the title, and, so far as it authorized the discharge of the keeper, it violates Const. art. 3, § 16, providing that local and private acts shall not embrace more than one subject.

2. An action brought by the keeper of a penitentiary at the time of the passage of Laws 1902, p. 387, c. 127, authorizing his removal, to restrain the commissioners from removing him and transferring the penitentiary to the sheriff, cannot be sustained, though the act may be invalid; the determination of title to office belonging exclusively to courts of law.

Parker, C. J., and O'Brien and Werner, JJ., dissenting.

Appeal and Cross-Appeals from Supreme Court, Appellate Division, Third Department.

Application by the people, on the relation of John E. Corscadden, for a writ of mandamus to John A. Howe, county treasurer of the county of Albany, and action by John E. Corscadden against Isaac M. Haswell and others. From a judgment of the Appellate Division affirming an order of the Special Term granting a peremptory writ (84 N. Y. Supp. 604), defendant appeals, and from a judgment of the Appellate Division modifying a judgment granting an injunction in the second action (84 N. Y. Supp. 597), both parties appeal. Affirmed in the first action, and reversed in the second.

Edwin Countryman, for plaintiff. J. Newton Fiero and J. S. Frost, for defendants.

CULLEN, J. By chapter 261, p. 456, of the Laws of 1885, the management and care of the Albany Penitentiary were vested in a board constituted by that act, and known as the "Albany Penitentiary Commission." By an amendment in 1895 (chapter 761, p. 1638, Laws 1895) it was enacted that said penitentiary commission, the constitution of which was changed by said amended act,

should within fifteen days from June 10, 1895, and each five years thereafter, appoint for a period of five years a superintendent or principal keeper of said penitentiary at an annual salary of \$3,000. Under these statutory provisions, John E. Corscadden, the relator in the mandamus proceeding, and plaintiff in the equity action, the subjects of these appeals, was in November, 1900, appointed superintendent of the penitentiary for the term of five years. In 1902 a statute (chapter 127, p. 387, Laws 1902) was passed entitled "An act to amend chapter two hundred and sixty-one of the laws of eighteen hundred and eighty-five, entitled 'An act in relation to the management of the Albany Penitentiary,' relative to the salary of the keeper of said penitentiary." This statute amended section 4 of the original act of 1885 in several particulars: First, it provided that the salary of the superintendent should be fixed by the commission, instead of being established at the rate of \$3,000 a year. It also authorized the commissioners, whenever, in their discretion, it seemed to be for the best interests of the county of Albany, to dispense with the services of the superintendent and place the penitentiary in the custody and care of the sheriff, and, if deemed advisable, to close and discontinue the same and sell the lands and buildings. Assuming to act under the authority granted by the statute last mentioned, the commissioners, who, with the sheriff, are the defendants in the equity action, notified the relator that on March 1, 1903, they would place the penitentiary in the hands of the sheriff of Albany county, and would remove the relator from his office as superintendent. Thereupon Mr. Corscadden brought an action to restrain the commissioners from removing him from his office and from transferring the penitentiary to the sheriff, and obtained in such action a temporary injunction. The complaint in the action set forth the facts above recited, and charged that the statute of 1902 was unconstitutional and void, for several reasons stated; that it impaired the obligation of the plaintiff's contract; that it deprived him of property without due process of law, and that it abridged his privileges and immunities as a citizen of the United States and a citizen of the state of New York; and that it violated section 16 of article 3 of the Constitution of the state, which prescribes that "no private or local bill which may be passed by the Legislature shall embrace more than one subject and that shall be expressed in the title." The complaint also alleged irreparable injury to the plaintiff's rights, and that the plaintiff was without adequate remedy of law. To this complaint the defendants, the penitentiary commissioners, demurred on the grounds that it did not state facts sufficient to constitute a cause of action. Final judgment was awarded the plaintiff on demurrer, and the defendants were enjoined from removing the plaintiff from his office,

or in any way interfering with him in the exercise of his duty. On appeal the Appellate Division modified the judgment by striking therefrom a provision restraining the defendants from fixing the plaintiff's salary, and as modified the judgment was affirmed. During the pendency of the litigation the county treasurer refused to pay the relator his salary as superintendent. After the decision of the Special Term in the injunction action, Corscadden applied for a writ of peremptory mandamus to compel the payment of such salary. In his moving affidavit he stated at length the facts already given, the decision of the Special Term awarding him an injunction, and that he had remained in possession of the office. In answer to the application, the county treasurer disputed none of the facts stated by the relator, but averred that an appeal had been taken from the judgment. The Special Term awarded the writ as prayed for, and on appeal the order was affirmed by the Appellate Division. In this court the two appeals—one from the judgment in the action, and the other from the final order in the mandamus proceeding—have been argued together.

It will be convenient to dispose of the mandamus proceeding first, as the issue presented by that proceeding is very narrow and sharply defined. The relator has continued in possession of the office, and the salary has not been paid to any other claimant. The relator being thus an officer *de facto*, the appellant, the county treasurer, would have been protected in paying the salary to him. At the same time the relator could not compel such payment unless he established that he held the office *de jure* as well as *de facto*. *Dolan v. Mayor, etc.*, of N. Y., 68 N. Y. 274, 23 Am. Rep. 168. Therefore the sole question presented by the appeal in this proceeding is the validity of the provision of the act of 1902 which authorized the penitentiary commissioners to discharge the relator and turn the penitentiary over to the sheriff. We agree with the learned court below that, so far as relates to that provision, the statute is in conflict with the constitutional mandate that a local or private bill shall not embrace more than one subject, which shall be expressed in the title. The difficulty with the statute is not that it embraces more than one subject, but that that subject is not sufficiently expressed in the title. The whole matter of the regulation, custody, and disposition of the penitentiary, the number and grades, the appointment, terms, tenure, and salaries of its officers, might properly constitute but a single statute. But the divisibility of subjects is very much akin to the divisibility of matter, and most subjects include things which may be treated as mere details of the greater subjects, or as independent subjects in themselves. The object of the constitutional requirement was to "advise the public in general, and members of the Legislature in par-

ticular, by the title of the bill, what interests are likely to be affected by its becoming a law." *People ex rel. Burroughs v. Brinkerhoff*, 68 N. Y. 259. Therefore it is very apparent that the title of a bill may be so limited as to exclude provisions which unquestionably could fairly be enacted in a single statute with a more comprehensive title. In the title of the statute before us it is stated that the purport of the act is not merely to amend "an act in relation to the management of the Albany penitentiary," but to amend it only in one particular and on one subject—the salary of the keeper of the penitentiary. To our minds, such a title not only fails to advise the public and the Legislature that any other details of the penitentiary management than the salary of the keeper are affected by the bill, but is substantially a proclamation to the contrary. We do not deem it profitable to review the many decisions of the courts on the effect of the constitutional inhibition under discussion. The general rule to be deduced from them is that it is not necessary that the title of the bill should be the best that could be selected, nor is it necessary to set forth in the title the various details of the object or purpose to be accomplished by the bill. It is sufficient if the title fairly expresses the general purpose of the bill, but at the same time the title must be such as to reasonably apprise the public of the interests that are or may be affected by the statute. If there be any conflict in the decisions, it is not as to these general rules, but as to their application to particular cases. In the present case we think that the title of the bill, instead of apprising the public that it was intended to bestow powers upon the commissioners to discontinue the penitentiary or turn it over to the sheriff, tended to avert attention from the subject. The order appealed from should therefore be affirmed, with costs.

Having determined that the attempted removal of Mr. Corscadden from his office of superintendent of the penitentiary was illegal, the only question which remains to be decided in the injunction action is whether such an action can be maintained. We are of opinion that it cannot. As early as the case of *Tappan v. Gray*, 9 Paige, 507, it was held by the chancellor that the court of chancery had no jurisdiction to enjoin at the suit of the incumbent of an office the intrusion of a hostile claimant illegally appointed to the office. This decision was unanimously affirmed by the Court of Errors. 7 Hill, 259. In *Matter of Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, the Supreme Court of the United States held that an injunction granted by the Circuit Court of the United States to restrain the mayor and common council of the city of Lincoln from removing a police judge was absolutely void, and discharged on habeas corpus the defendants, who had been committed for violating the injunction. This decision proceeded, as appears by an opinion

of a majority of the court, not on the ground that a federal court could not interfere with the appointment and removal of officers of a municipality created by the state, but on the broader ground that a court of equity had no jurisdiction to restrain the removal of a public officer, and the first authority cited to sustain that position was the decision of the courts of this state in *Tappan v. Gray*. The same principle was again declared in *White v. Berry*, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. Ed. 199, where it was held that a court of equity has no jurisdiction over the appointment and removal of public officers, and that the determination of the title to public office belongs exclusively to the courts of law, to be exercised by mandamus, prohibition, and quo warranto, as the circumstances of the case and the mode of procedure may require. The doctrine declared in *Tappan v. Gray* has been almost invariably followed in this state, there being only one reported case to the contrary. In *People ex rel. Wood v. Draper*, 24 Barb. 265 (the famous Metropolitan Police Case), an application for an injunction restraining the defendants from assuming to act as police commissioners was denied on the ground that the court had no power to grant such relief. In *Mott v. Connolly*, 50 Barb. 516, a similar application brought by the deputy tax commissioners of the city of New York against persons claiming to act as commissioners of taxes and assessments under a statute alleged to be invalid was refused on the ground that the title to office could be determined only in an action at law. To the same effect are *People v. Mattier*, 2 Abb. Prac. (N. S.) 289; *Coulter v. Murray*, 15 Abb. Prac. (N. S.) 129; *Morris v. Whelan*, 11 Abb. N. C. 64; and *Johnston v. Garside*, 65 Hun, 208, 20 N. E. 327. The exception referred to is *Palmer v. Foley*, 45 How. Prac. 110. There an injunction obtained by the chamberlain of the city of New York against the defendant, who claimed to have been appointed deputy chamberlain by the comptroller of the city of New York in hostility to an appointee to the same office by the chamberlain, was upheld by the general term of the superior court of New York, though by a divided court. The majority, while conceding that the title to the office of deputy chamberlain could not be tried in the suit, placed the decision on the theory that the invasion of the plaintiff's office by the defendant would be a trespass, and that there was imposed on the plaintiff the duty of preserving and caring for the public books and records. We are not impressed with the theory on which the superior court upheld the action. If the theory is sound, it would seem to be equally applicable to the cases of all public officers, and the result of the doctrine of the case would be that every official could retain his office until his successor had succeeded in ousting him by a quo warranto. There are two cases that perhaps should be noticed, though in fact they are not applicable to the

point before us. *Mayor v. Flag*, 6 Abb. Prac. 296, was brought by the city of New York against two rival claimants to the office of street commissioner and against the comptroller of the city to prevent the comptroller from paying official salaries to either of the claimants or their subordinates until the title to the office could be decided in quo warranto, and also restraining such claimants from suing for their salary. The Supreme Court at Special Term granted the injunction. The action was really in the nature of one of interpleader, though singular in its form, and probably entirely unnecessary, as payment to the de facto officer would have protected the city from the claim of the officer de jure. *Reis v. Rohde*, 34 Hun, 161, was an action between a church and certain persons claiming to be trustees, whom it was sought to enjoin from acting as such. The jurisdiction of the court to grant the injunction seems to have been upheld on the theory that the church itself had recognized the plaintiffs as trustees, and not the defendants.

Indeed, the principle that a court of equity will not entertain jurisdiction over contests to public office has been so fully recognized in this state that there seems to be no direct authority in this court on the question, though several instructive cases may be found. In *People v. Albany & Susquehanna Railroad Company*, 57 N. Y. 161, it was said: "Elections to office, whether public or corporate, were never in England, nor in this state up to the date of the Code, matters of equitable consideration. They depended only on legal inquiries and legal principles, and no instance can be found in which title to office has been dealt with by the courts on any other basis." A few cases in which this rule has been recognized, rather than expressly decided, may be referred to. In *People ex rel. Wren v. Goetting*, Police Justice, 133 N. Y. 569, 30 N. E. 968, the relator sought a mandamus to compel the defendant to recognize him as clerk of the court; claiming that, because he was a veteran, his removal was illegal. A successor had been appointed. The court below denied the application on the merits, holding that the defendant had power to remove the relator. This court affirmed the decision below, not on the merits, but on the ground that, an incumbent being in the office, the plaintiff's only remedy was by quo warranto. *People ex rel. Lewis v. Brush*, 146 N. Y. 60, 40 N. E. 502, and many other decisions, are to the same effect. In *Matter of Hart*, 159 N. Y. 278, 54 N. E. 44, the relator applied for a mandamus to a canvassing board to compel the board to declare him elected a justice of the Supreme Court in the place of a deceased judge—a vacancy which the people had assumed to fill by choosing another person at an earlier election. The writ was refused, and the refusal was upheld by this court on the ground that the relator should be remitted to a quo warranto. It seems to me

somewhat inconsistent to hold that a person removed from office, though illegally, must resort to a quo warranto against his successor, and yet to permit him to institute in advance an action in equity to restrain his successor from entering into possession or to oust him. It is alleged in the complaint that the injury to the plaintiff will be irreparable, and that he has no adequate remedy at law. But there is no fact stated in the complaint to support these allegations. Nothing appears to show that in any respect he would be worse off than any other public officer illegally or improperly removed. He has always had an ample remedy at law. If the office was filled by another person, his remedy was by quo warranto. If it was not filled, he could resort to mandamus. This was held in *People ex rel. Kelly v. Common Council of Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659. See *McDermott v. Miller*, 45 N. J. Law, 251; *Merrill on Mandamus*, §§ 143, 148; 2 Dillon, § 847.

The authorities on which the learned counsel for the respondent relies for the support of this action are not applicable. *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408, was a taxpayer's action brought under the statute. On a motion to continue a preliminary injunction, the defendants challenged the right of the plaintiff to maintain the suit. The objection was overruled, but the learned judge who heard the application (now the chief judge of this court) placed his decision solely on the ground of the taxpayers' statute (section 1925, Code Civ. Proc.), without which he states that the plaintiff would have no standing. The defendants seem to have acquiesced in the propriety of this ruling, for the point does not appear to have been raised in the subsequent stages of the litigation. The other cases cited are actions brought to restrain the illegal invasion by public officers of private property rights, and have no bearing on the question before us, for it is the settled law of this state, and of all the other states of the Union, with the exception, it is said, of North Carolina, that there is no property right in a public office. *Conner v. Mayor*, etc., of N. Y., 5 N. Y. 285; *Butler v. Pennsylvania*, 10 How. 402, 13 L. Ed. 472; *Mechem on Public Officers*, § 857; *People ex rel. Devary v. Coler*, 173 N. Y. 103, 65 N. E. 956.

A full review of the decisions in the other states on the right of a court of equity to intervene in the contest for public office is found in *Matter of Sawyer*, supra, from which it appears that at least originally there was universal concurrence in the doctrine of the courts of this state. Of late the Pennsylvania courts seem to have departed to some extent from the earlier decisions. This course appears to have been dictated by a consideration of the embarrassment which might occur from a contest over a public office between rival claimants, each asserting that he was in possession thereof. This con-

consideration seems also to have largely influenced the court below in the decision of this case. Whatever force there may be in it, we do not think it justifies an extension of equity jurisdiction on the subject. If ever public convenience would have authorized the intervention of equity in a controversy beyond its cognizance, that controversy was the one passed on by this court in *People v. Albany & Susquehanna Railroad Company*, where "a war of injunctions" had caused in a part of the state no small degree of public disorder. Yet the court there held that no case of equitable cognizance was presented. We appreciate the inconvenience and confusion that may arise from disputes over public office, and we have not been without our fair share of such contests in this state. Yet they all seem to have been settled reasonably satisfactorily by proceedings at law. We are by no means certain that the intervention of a court of equity in such contest might not create as great evils as those sought to be remedied, and might not make "confusion worse confounded." An injunction granted against a public officer towards the close of his official term, restraining him from making appointments to office, if decided to have been erroneously granted, would work a wrong that could not be remedied. The very limitation on the modes of procedure in courts of law that renders it necessary in many cases to appeal to a court of equity seems to render the law courts best fitted to determine a litigation over a public office. The parties to a suit or proceeding at law are certain, the procedure is certain, the issues to be decided simple, and the form of judgment certain. It does not require a very long memory to recall the fact that the greatest usurpation by a court of the right of a state to choose its own officers—a usurpation ultimately condemned by all political parties—was effected by means of an injunction. However this may be, if it is desirable to extend the jurisdiction of equity to contests for public office, that should be done by the action of the Legislature.

The judgment appealed from should be reversed, and the complaint dismissed, without costs.

PARKER, C. J. (dissenting). There is one proposition, the basic one in this controversy, about which we are agreed—every member of this court, every member of the Appellate Division, and the judge at Special Term—and that is that the statute under which the Albany Penitentiary commission have undertaken to remove plaintiff is absolutely void. All agree that it offends against the Constitution of the state, and, some assert, in more than one respect. Hence the Legislature had not any power to pass it, and, although they did, in form, enact it, as the Constitution prohibits it the result is precisely as if the act was not passed. It accomplishes nothing. While pretending to confer authority, it in

fact confers none whatever. It neither authorizes action, nor can it protect one who attempts to act under it.

The majority opinion, which sustains the decisions below, in a mandamus proceeding, in compelling the county treasurer to pay plaintiff his salary as superintendent of the Albany Penitentiary, concedes that the action of the commission in notifying plaintiff that on March 1, 1908, they would remove him from office, and put the sheriff of the county in possession, as the statute was intended to authorize, does not affect plaintiff's right to the salary, so long as he was actually in office after that date. Why? Because the statute purporting to authorize the action of the commission is void, and therefore without support, and the situation is precisely the same as if nothing had been done.

Notwithstanding the invalidity of the statute, the Albany Penitentiary commission proposed to oust plaintiff. This is demonstrated, first, by their attempt to remove plaintiff and put the sheriff in possession; second, by the fact that after an adjudication by both Special Term and Appellate Division that the statute is wholly void, and confers no authority whatever upon the commission, they have appealed to this court, urging that, no matter if they were proceeding under a void statute, equity could not check them; third, by their demurrer to the complaint, by which they necessarily admit the allegations of the complaint that it is their purpose, without authority of law and in violation of law, to deprive Corscadden of the honor of his position, the salary of his office, and a home and support for himself and his family for a fixed term of years.

The question about which we differ is whether a court of equity is powerless to prevent this wrong. No one but the Albany Penitentiary commission and their counsel pretends that it ought not be prevented. Certainly no judge who has heard the case has been willing to make any such assertion. But some of them do say that, although this Albany Penitentiary commission has not any authority whatever to put Corscadden out of office, and the sheriff in, a survey of the authorities seems to indicate that equity is powerless to prevent the wrong, which, if once done, is without adequate remedy at law.

No situation precisely like this has ever before been presented to the courts of this state, and hence it is the first time that equity has had a chance to assert her power. A situation analogous in most respects to the one presented by this record was before the court in *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408. An unconstitutional statute purported to authorize the appointment of officials, and a suit in equity was brought to restrain action by municipal officers under that statute. The suit in that case, however, was brought by a taxpayer, instead of by a person directly interested

Otherwise it will be observed that the situations are in all material respects analogous. It was objected in that case at Special Term that a taxpayer could not maintain such an action, and, while the court conceded that a taxpayer could not have maintained such an action prior to the taxpayers' statute of 1872 (page 467, c. 161), as amended in 1881 (page 709, c. 531), it was held that since the latter amendment a taxpayer could maintain it. And the judgment declared the statute void, and restrained the municipal authorities from acting under it, and the judgment was finally sustained in this court. That case is authority for the proposition that if some Albanian, as taxpayer, had brought this action, he could have maintained it. This plaintiff's interest is even greater than that of a taxpayer, and equity should afford relief to him as it would to a taxpayer. And it should be diligent in discovering the way to do it, inasmuch as the ends of justice would be attained by such a result. Indeed, justice to this plaintiff can only be attained by affirming the judgment in this action. We are commanded to assume from the pleadings that plaintiff has no adequate remedy at law, and such is the fact. In such case equity seeks to lend its aid, and will only be deterred from it when the result either violates some established principle of equity, or will create a bad precedent.

We now come to the point of division in this court, as to which I think the court below took the broader and sounder view. The majority of this court say, and cite a wealth of authority in support of it, that equity will not lend its aid to try the title to office; that election contests and disputes relating to the title to office belong to the courts of law. More authorities might have been cited in the same direction, but none whatever need have been. Such is the law of this state, as all agree. Those cases, however, and the principle established by them, have no application to this case. It is not pretended that any one of them presents a situation like the case before us. They relate to contests between rival claimants for the same office. This case, however, does not involve the title to office in any such sense. Plaintiff is in office, and entitled to draw his salary, as the majority opinion asserts, not only because he is in possession of the office, but also because he has the right to it. There is no claimant contesting the office with him; no man possessed of even a shadow of a claim of right to that office. And so we held in affirming the mandamus proceeding requiring the county treasurer to pay plaintiff's salary. And that being so, how can it be said that the title to office is involved? If there was a claimant to this office, having some semblance of au-

thority for his claim, then these authorities would apply; but, as we have seen, there is no such claimant. Instead, there are certain commissioners of the Albany Penitentiary, who, as we must assume from the demurrer to this complaint, attempted to oust plaintiff from his office without authority of law. That which they have undertaken to do, and, as we must assume, will do, notwithstanding the unanimous agreement of all the judges in all the courts in which this case has been that they have no authority for it, is to oust plaintiff from his residence, deprive his family of support promised him under lawful authority, and take away from him his salary. The situation is precisely as it would be if the board of supervisors should by resolution declare the office vacant, appoint a successor, and then proceed in a body to the penitentiary to eject the incumbent by force and install him whom they had chosen as his successor. The Albany Penitentiary commission have no more authority to do it than would the board of supervisors have, for, as we have seen, their so-called authority is void, and therefore they have no authority whatever; and hence equity should interfere, inasmuch as plaintiff has no adequate remedy at law, as we must assume under this complaint and the demurrer thereto, and as is the fact. Assuming, however, for the purpose of the argument only, that equity will treat this void statute with such respect as to refuse to affirm a judgment of a court of equity founded on the invalidity of the statute until a court of law has declared it void, then we should affirm, because, as a court of law, and in the mandamus proceeding, we have declared this statute to be void. We have decided in a common-law proceeding that this statute is null and void, and hence that under it there can never be developed even the shadow of a claim of title to the office held by this plaintiff. Can we justify a decision handed down on the same day, but on the equity side of the court, holding that plaintiff's title to office is involved by reason of such void statute?

The judgments of the courts below, in the rendition of which they have been unanimous, should be affirmed.

In first case, BARTLETT, MARTIN, and VANN, JJ., concur with CULLEN, J., for affirmance of order, with costs. PARKER, C. J., and O'BRIEN and WERNER, JJ., concur in result.

In second case, BARTLETT, MARTIN, and VANN, JJ., concur with CULLEN, J., for reversal of judgment and dismissal of complaint. PARKER, C. J., with whom O'BRIEN and WERNER, JJ., concur, dissents.

Ordered accordingly.

MEMORANDUM DECISIONS.

ADEE, Respondent, v. NASSAU ELECTRIC R. CO. et al., Appellants. LOTT et al. v. SAME. (Court of Appeals of New York. Jan. 5, 1904.) Appeals from judgments of the Appellate Division of the Supreme Court in the Second Judicial Department (72 App. Div. 404, 76 N. Y. Supp. 589), entered June 19, 1902, modifying, and affirming as modified, judgments in favor of plaintiffs entered upon decisions of the court on trial at Special Term. Augustus Van Wyck and Charles W. Church, Jr., for appellants. William J. Carr, for respondents.

PER CURIAM. Judgment affirmed, with costs, on the authority of *Peck v. Schenectady Ry. Co.*, 170 N. Y. 298, 63 N. E. 357.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. HAIGHT, J., absent.

BAIRD et al., Respondents, v. CAMPBELL, Appellant, et al. SAME v. ALLEN et al. (Court of Appeals of New York. Dec. 18, 1903.) Appeals from judgments of the Appellate Division of the Supreme Court in the First Judicial Department (67 App. Div. 104, 73 N. Y. Supp. 617; 67 App. Div. 615, 73 N. Y. Supp. 1129), entered December 24, 1901, affirming judgments in favor of plaintiffs entered upon verdicts and orders denying motions for new trials. John C. Shaw, for appellants. William R. Wilder and John Ewen, for respondents.

PER CURIAM. Judgments affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. HAIGHT, J., absent.

BECK et al. v. KERR et al. (Court of Appeals of New York. Jan. 19, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (87 App. Div. 1, 83 N. Y. Supp. 1057), entered September 28, 1903, which reversed an order of Special Term denying a motion for an order directing the appellants herein to pay a certain judgment for costs, and granted such motion. Amos Van Etten and Walter N. Gill, for appellants. G. R. Adams, for respondents.

PER CURIAM. Appeal dismissed, with costs.

PARKER, C. J., and BARTLETT, MARTIN, and WERNER, JJ., concur. VANN and CULLEN, JJ., dissent. O'BRIEN, J., absent.

BEYER, Appellant, v. SIGEL, Respondent. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (75 App. Div. 83, 77 N. Y. Supp. 1018), entered July 24, 1902, which affirmed an order of the Cattaraugus County Court setting aside a verdict in favor of plaintiff and granting a new trial. George W. Cole, for appellant. J. H. Waring, for respondent.

PER CURIAM. Order affirmed, with costs.
PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. CULLEN, J., votes for dismissal of appeal.

BISSELL, Appellant, v. STATE, Respondent. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered January 21, 1902, which affirmed a decision of the Court of Claims dismissing the plaintiff's claim. Fletcher C. Peck, for appellant. John Cunneen, Atty. Gen. (S. S. Taylor, of counsel), for the State.

PER CURIAM. Judgment (73 N. Y. Supp. 1105), affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, and WERNER, JJ., concur. HAIGHT and VANN, JJ., absent.

BRANDT, Respondent, v. MORNING JOURNAL ASS'N, Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (81 App. Div. 183, 80 N. Y. Supp. 1002), entered April 30, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Clarence J. Shearn, for appellant. Thomas D. Adams and Arthur C. Palmer, for respondent.

PER CURIAM. Judgment affirmed, with costs, on authority of *Crane v. Bennett*, 177 N. Y. 106, 69 N. E. 274.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. HAIGHT, J., absent.

In re BRAUN. (Court of Appeals of New York. Dec. 18, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (83 App. Div. 642, 82 N. Y. Supp. 1095) entered June 26, 1903, upon an order which affirmed an order of Special Term confirming the report of a referee and directing the distribution of the estate of Isidor Bremer. George Coghill, Hugh A. Bayne, and Francis S. McGrath, for appellant. Cornelius Doremus, Benjamin F. Carpenter, and John H. Greener, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

BRIEFER, Respondent, v. STOLL et al., Appellants. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (80 App. Div. 626, 80 N. Y. Supp. 1131), entered February 27, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. Wilson B. Brice, for appellants. Jacob Rieger, for respondent.

PER CURIAM. Judgment affirmed, with costs and 10 per cent. damages, under section 8251 of the Code of Civil Procedure.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

BROOKS, Respondent, v. ERIE FIRE INS. CO., Appellant. (Court of Appeals of New

York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (76 App. Div. 275, 78 N. Y. Supp. 748), entered November 21, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Louis L. Babcock, for appellant. T. E. Courtney, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

PARKER, O. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

BUCHHOLZ et al., Respondents, v. NEW YORK, L. E. & W. R. CO., Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (71 App. Div. 452, 75 N. Y. Supp. 824), entered November 20, 1902, modifying, and affirming as modified, a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term. Henry Bacon and Joseph Merritt, for appellant. Frank Lybolt and John W. Lyon, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, and WERNER, JJ., concur. HAIGHT, J., absent. VANN, J., not sitting.

BURHORN, Respondent, v. LOCKWOOD et al., Appellants. (Court of Appeals of New York. Dec. 18, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (71 App. Div. 801, 75 N. Y. Supp. 828), entered May 19, 1902, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon the report of a referee. Clarence L. Barber and James A. Deering, for appellants. Walter L. McCoy, for respondent.

PER CURIAM. Appeal dismissed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur.

BURHORN, Respondent, v. LOCKWOOD et al., Appellants. (Court of Appeals of New York. Jan. 12, 1904.) No opinion. Motion for reargument denied, with \$10 costs. See 177 N. Y. —, supra.

BUTLER, Appellant, v. BAUDOUINE et al., Respondents. (Court of Appeals of New York. Dec. 15, 1903.) Appeal from a judgment entered in favor of defendants, July 8, 1903, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (84 App. Div. 215, 82 N. Y. Supp. 773), which reversed an interlocutory judgment of Special Term overruling a demurrer to the complaint, and sustaining such demurrer. Robert A. Paddock, James Cochran, and Edward Van Ingen, for appellant. John A. Garver, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, and WERNER, JJ., concur. CULLEN, J., dissents. GRAY, J., absent.

In re CARMAN. (Court of Appeals of New York. Jan. 26, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (88 App. Div. 614, 84 N. Y. Supp. 1120), entered December 8, 1903, which affirmed an order of Special Term granting a motion to vacate an order giving leave to petitioner to bring an action for the dissolution of the New York Phonograph Company. Laurence Arnold Tanzer, for appellant. Louis Hicks, for respondent.

PER CURIAM. Appeal dismissed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

CASTLE BROS., Respondents, v. GRAHAM, Appellant. (Court of Appeals of New York. Feb. 18, 1904.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (87 App. Div. 97, 84 N. Y. Supp. 120), entered October 26, 1903, affirming a judgment in favor of plaintiffs entered upon a decision of the court at a trial term without a jury. The motion was made upon the ground that permission to appeal had not been granted by the Appellate Division, nor by a judge of the Court of Appeals. Frank A. Doyle, for the motion. Richard Krause, opposed. No opinion. Motion denied, with \$10 costs.

CITY OF ROCHESTER, Respondent, v. KAPPELL, Appellant, et al. (Court of Appeals of New York. Dec. 18, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (86 App. Div. 224, 83 N. Y. Supp. 640), entered July 16, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. J. P. Varum, for appellant. William A. Sutherland, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

GRAY, O'BRIEN, MARTIN, and WERNER, JJ., concur. PARKER, C. J., and BARTLETT and CULLEN, JJ., not voting.

In re COOLIDGE et al. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (85 App. Div. 295, 83 N. Y. Supp. 299), entered July 3, 1903, which affirmed a decree of the Warren county Surrogate's Court settling the accounts of Jonathan M. Coolidge and Louis M. Brown, as executors of George W. Lee, deceased. Edward M. Angell, for appellants. C. H. Sturges, for respondent.

PER CURIAM. Order affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. HAIGHT, J., absent.

COPELAND, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (78 App. Div. 418, 79 N. Y. Supp. 1054), entered January 31, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Charles F. Brown, Bayard H. Ames and Henry A. Robinson, for appellant. M. P. O'Connor and J. Brownson Ker, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur. GRAY, J., not sitting.

CULLEN et al., Respondents, v. SHIPWAY et al., Appellants. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (78 App. Div. 130, 79 N. Y. Supp. 627), entered January 14, 1903, which affirmed a judgment of Special Term setting aside an award of arbitrators in favor of defendants. Frederick Hulse and Ernest F. Eidlitz, for appellants. Charles J. Hardy, for respondents.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and WERNER, JJ., concur. **VANN, J.,** not voting.

CULLINAN, Excise Com'r, v. PARKER et al. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (84 App. Div. 296, 82 N. Y. Supp. 827), entered July 15, 1903, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial. Charles C. Nadal and Joseph L. Delaney, for appellant. Herbert H. Kellogg and William E. Schenck, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinions below.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. **O'BRIEN, J.,** not voting.

CULLINAN, Excise Com'r, v. STEIN et al. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (84 App. Div. 292, 82 N. Y. Supp. 695), entered August 29, 1903, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial. Charles C. Nadal and Joseph L. Delaney, for appellant. William E. Schenck, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, and WERNER, JJ., concur. **MARTIN and VANN, JJ.,** absent.

CUNNINGHAM, Respondent, v. HEWITT, Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (84 App. Div. 114, 81 N. Y. Supp. 1102), entered May 13, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Nash Rockwood and George R. Salisbury, for appellant. Edgar T. Brackett and William D. McNulty, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. **HAIGHT, J.,** absent.

CUTTING et al., Appellants, v. BALTIMORE & O. R. CO. et al., Respondents. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment entered June 2, 1902, in favor of defendants upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (65 App. Div. 414, 73 N. Y. Supp. 21), which affirmed an interlocutory judgment of Special Term directing that the complaint be dismissed, unless the plaintiffs

pay a certain sum of money into court. Edward L. Andrews, for appellants. Carl A. de Gersdorff, William D. Guthrie, and R. R. Rogers, for respondents.

PER CURIAM. Appeal dismissed, with costs.

PARKER, C. J., and BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. **GRAY, J.,** not sitting. **HAIGHT, J.,** absent.

DAVENPORT, Appellant, v. ANGELO et al., Respondents. (Court of Appeals of New York. Dec. 18, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (83 App. Div. 636, 82 N. Y. Supp. 1099), entered June 20, 1903, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. Roger S. Baldwin and Theron G. Strong, for appellant. Louis H. Hall, Henry B. Twombly, and John R. Kuhn, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur.

In re DELANO'S ESTATE. (Court of Appeals of New York. Dec. 18, 1903.) No opinion. Motion for reargument denied, with \$10 costs. See 176 N. Y. 486, 68 N. E. 871.

DONNELLY, Respondent, v. BURNHAM, Appellant (CATHOLIC MUT. BEN. ASS'N, Interpleader). (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (86 App. Div. 226, 83 N. Y. Supp. 659), entered July 17, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the court at a trial term and an order denying a motion for a new trial. Eugene W. Harrington, for appellant. Thomas H. Dowd, for respondent.

PER CURIAM. Judgment affirmed, with costs and 10 per cent. additional, under section 3251 of the Code of Civil Procedure.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. **HAIGHT, J.,** absent.

DONNELLY, Appellant, v. CITY OF ROCHESTER, Respondent, et al. (Court of Appeals of New York. Dec. 15, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (84 App. Div. 632, 82 N. Y. Supp. 1099), entered July 16, 1903, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial. George H. Harris and John S. Keenan, for appellant. W. A. Sutherland, Corp. Counsel (John M. Stull, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. **GRAY, J.,** absent. **WERNER, J.,** not sitting.

DU BOIS, Respondent, v. ERIE R. CO., Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (80 App. Div. 640, 81 N. Y. Supp. 1125), entered March 27, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Henry Bacon and Jo-

seph Merritt, for appellant. Thomas Watta, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, and WERNER, JJ., concur. HAIGHT, J., absent. VANN, J., not sitting.

EARLEY, Appellant, v. MCKINNY, Respondent. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (84 App. Div. 642, 82 N. Y. Supp. 1100), entered July 29, 1903, which affirmed an order of Special Term denying a motion for an order requiring Alexander McKinny, as receiver of Lawrence V. Mulry, to pay to the petitioner the amount of a judgment recovered by him against the said Lawrence V. Mulry. Thomas J. O'Neill and Cornelius J. Earley, for appellant. William L. Snyder, for respondent.

PER CURIAM. Appeal dismissed, with costs.

O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., absent.

FIDELITY & DEPOSIT CO. OF MARYLAND v. STEVENS. (Court of Appeals of New York. Jan. 19, 1904.) Appeal by permission, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (87 App. Div. 609, 84 N. Y. Supp. 1125), entered September 15, 1903, which affirmed an order of Special Term denying the application of petitioner for leave to commence an action against the respondent herein. The following questions were certified: "(1) As between the sureties on all the bonds mentioned in the record, was the appellant first and primarily liable on the last appeal bond? (2) The appellant being surety on the appeal bonds, can it require contribution from sureties on the original bond of the committee, or from the estates of such persons, even if the amount paid by the appellant was in form paid on the bond given by the committee, as such, and not on the appeal bonds?" J. Murray Downs, for appellant. Peter A. Delaney, for respondent.

PER CURIAM. Order affirmed, with costs. First question certified answered in the affirmative, and second question in the negative.

PARKER, C. J., and BARTLETT, MARTIN, VANN, and CULLEN, JJ., concur. O'BRIEN and WERNER, JJ., absent.

FORSATTI, Respondent, v. POYET, Appellant. (Court of Appeals of New York. Dec. 18, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (82 App. Div. 635, 81 N. Y. Supp. 1126), entered April 21, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Frank Verner Johnson, for appellant. Gilbert Ray Hawes, for respondent.

PER CURIAM. Judgment affirmed, with costs.

GRAY, BARTLETT, MARTIN, and WERNER, JJ., concur. PARKER, C. J., and O'BRIEN and CULLEN, JJ., dissent.

GEARY, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York. Dec. 18, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (84 App. Div. 514, 82 N. Y. Supp. 1016), entered July 1, 1903, affirming a judgment in fa-

vor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Bayard H. Ames, Charles F. Brown, and Henry A. Robinson, for appellant. John C. Robinson and A. S. Gilbert, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur. GRAY, J., not sitting.

GIBBS, Respondent, v. HERMAN, Sheriff, Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (85 App. Div. 619, 82 N. Y. Supp. 1101), entered June 17, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Henry Bacon and Joseph Merritt, for appellant. John C. R. Taylor, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. HAIGHT, J., absent.

In re GORMAN'S WILL. (Court of Appeals of New York. Dec. 8, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (80 App. Div. 640, 81 N. Y. Supp. 1127), entered March 6, 1903, which affirmed a decree of the Kings county Surrogate's Court admitting to probate the will of Edward Gorman, deceased. John R. Kuhn, for appellant. Herbert T. Ketcham and Joseph E. Owens, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

GRANGER, Respondent, v. LOCKWOOD et al., Appellants. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (76 App. Div. 612, 78 N. Y. Supp. 1117), entered November 13, 1902, modifying and affirming as modified a judgment in favor of plaintiff entered upon the report of a referee. Clarence L. Barber and James A. Deering, for appellants. Walter I. McCoy, for respondent.

PER CURIAM. Appeal dismissed, with costs.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. HAIGHT, J., absent.

GREEN, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York. Dec. 8, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (84 App. Div. 642, 82 N. Y. Supp. 1101), entered June 27, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Charles F. Brown and Henry A. Robinson, for appellant. Frank S. Black, Franklin Pierce, and Abraham Gruber, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur. GRAY, J., not sitting.

HALLERAN, Appellant, v. BELL TELEPHONE CO. OF BUFFALO, Respondent. (Court of Appeals of New York. Dec. 18, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (64 App. Div. 41, 71 N. Y. Supp. 685), entered August 13, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a trial term without a jury. Arthur E. Clark, for appellant. John G. Milburn and Frank E. Whaley, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur.

HAMILTON, Appellant, v. FIDELITY MUT. LIFE ASS'N OF PHILADELPHIA, Respondent. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (75 App. Div. 609, 77 N. Y. Supp. 1128), entered November 11, 1902, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial. Moses Shire, for appellant. Wilber E. Hout, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for defendant on the stipulation, with costs, on the ground that the exceptions to the charge presented error justifying the reversal by the Appellate Division.

BARTLETT, HAIGHT, VANN and WERNER, JJ., concur. PARKER, C. J., concurs in result. GRAY and CULLEN, JJ., absent.

HARVEY, Appellant, v. KENNEDY et al., Respondents. (Court of Appeals of New York. Jan. 12, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (81 App. Div. 261, 80 N. Y. Supp. 878), entered April 13, 1903, in favor of defendant upon the submission of a controversy under section 1279 of the Code of Civil Procedure. W. J. Welsh and F. W. Welsh, for appellant. Jerome De Witt, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HAIGHT, VANN, CULLEN and WERNER, JJ., concur. PARKER, C. J., and O'BRIEN and BARTLETT, JJ., dissent.

HARVEY, Appellant, v. McCONCHIE, Respondent. (Court of Appeals of New York. Jan. 29, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (77 App. Div. 361, 79 N. Y. Supp. 241), entered January 13, 1903, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial. Theodore B. Chancellor and Abraham Gruber, for appellant. Joseph Fettretch, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. HAIGHT, J., absent.

HAUSMAN, Appellant, v. HERDTFELDER, Respondent. (Court of Appeals of New York. Jan. 26, 1904.) Motion to withdraw an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (81 App. Div. 46, 80 N. Y. Supp. 1039), entered

March 23, 1903, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial, and granted a new trial. The motion was made on the ground that the order appealed from failed to state that the reversal by the Appellate Division was upon the law, and not upon the facts. Benjamin F. Feiner, for the motion. I. Newton Williams and Charles Caldwell, opposed. No opinion. Motion granted, upon payment of costs in this court, including an argument fee.

HIRSHBACH, Appellant, v. KETCHUM, Respondent. (Court of Appeals of New York. Feb. 16, 1904.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (84 App. Div. 258, 82 N. Y. Supp. 739), entered June 13, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at Special Term. The motion was made upon the grounds that the Court of Appeals had no jurisdiction to entertain the appeal, the exceptions being frivolous, and there being no question of law to review. William F. Maloney, for the motion. Samuel H. Guggenheimer, opposed. No opinion. Motion denied, with \$10 costs.

HITCHCOCK, Appellant, v. BURCHELL, Respondent. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (74 App. Div. 622, 76 N. Y. Supp. 812), entered June 11, 1902, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial. Charles Capron Marsh, Daniel De Wolf Wever, and Jacob Marx, for appellant. Ralston Fleming and Woodville Flemming, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur.

HUBNER, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York. Dec. 8, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (77 App. Div. 290, 79 N. Y. Supp. 153), entered December 20, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Charles F. Brown, Bayard H. Ames, and Henry A. Robinson, for appellant. John Quinn, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

HUEBNER, Appellant, v. HAMMOND et al., Respondents. (Court of Appeals of New York. Dec. 13, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (80 App. Div. 122, 80 N. Y. Supp. 295), entered April 13, 1903, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term. Perry D. Trafford, for appellant. Frank C. Avery and Mark M. Schlesinger, for respondents.

PER CURIAM. Judgment affirmed, with costs, on the ground that there was no proof of negligence to submit to the jury.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur.

KANE et al. v. ROSE et al. (Court of Appeals of New York. Jan. 19, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (87 App. Div. 101, 84 N. Y. Supp. 111), entered October 27, 1903, which affirmed an order of Special Term directing the plaintiffs to pay a certain sum of money to the respondent herein. Martin T. Manton, for appellants. Thomas G. Frost, for respondent.

PER CURIAM. Order affirmed, with costs.

BARTLETT, MARTIN, VANN, CULLEN, and **WERNER, JJ.**, concur. **PARKER, C. J.**, votes for dismissal. **O'BRIEN, J.**, absent.

KEISER et al., Appellants, v. SHAFER, Respondent. (Court of Appeals of New York. Feb. 16, 1904.) Appeal from a judgment, entered November 15, 1902, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (75 App. Div. 630, 78 N. Y. Supp. 1121), overruling plaintiff's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial, and directing judgment for the defendant. Moses Shire and Edward L. Jellinek, for appellants. Charles Diebold, Jr., for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J. and **GRAY, BARTLETT, HAIGHT, VANN, CULLEN,** and **WERNER, JJ.**, concur.

KILKIN, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Court of Appeals of New York. Jan. 26, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (76 App. Div. 529, 78 N. Y. Supp. 568), entered December 5, 1902, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial, and granted a new trial. George McGowan, for appellant. Frank Hiscock, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for defendant on the stipulation, with costs.

PARKER, C. J., and **O'BRIEN, BARTLETT, HAIGHT, MARTIN,** and **CULLEN, JJ.**, concur. **GRAY, J.**, not sitting.

KINSEY, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Jan. 29, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (75 App. Div. 262, 78 N. Y. Supp. 160), entered October 14, 1902, affirming a judgment in favor of plaintiff entered upon a verdict. George Wallace, for appellant. George L. Rives, Corp. Counsel (James D. Bell and James McKean, of counsel), for respondent.

PER CURIAM. Judgment reversed, and new trial granted, costs to abide event, on authority of *Reisert v. City of New York*, 174 N. Y. 196, 68 N. E. 731.

PARKER, C. J., and **GRAY, BARTLETT, HAIGHT, MARTIN,** and **CULLEN, JJ.**, concur. **O'BRIEN, J.**, not voting.

KNICKERBOCKER ICE CO., Appellant, v. FORTY-SECOND ST. & G. ST. FERRY R. CO. et al., Respondents. (Court of Appeals of New York. Dec. 8, 1903.) No opinion. Motion for reargument denied, with \$10 costs. See 176 N. Y. 408, 68 N. E. 864.

LENNAN, Respondent, v. HAMBURG-AMERICAN S. S. CO., Appellant. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (86 App. Div. 623, 83 N. Y. Supp. 1109), entered July 16, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Everett P. Wheeler, for appellant. William Lindsay and J. Culbert Palmer, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and **GRAY, O'BRIEN, BARTLETT, MARTIN, VANN,** and **WERNER, JJ.**, concur.

LEVINE, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York. Dec. 8, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (78 App. Div. 426, 80 N. Y. Supp. 48), entered February 3, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Charles F. Brown, Arthur Ofner, and Henry A. Robinson, for appellant. Louis Marshall and Maurice Untermyer, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and **BARTLETT, HAIGHT, VANN, CULLEN,** and **WERNER, JJ.**, concur. **GRAY, J.**, not sitting.

LIBBY, Appellant, v. VAN DERZEE et al., Respondents. (Court of Appeals of New York. Jan. 26, 1904.) No opinion. Motion for reargument denied, with \$10 costs. See 176 N. Y. 591, 68 N. E. 1119.

LISNER v. TOPLITZ. (Court of Appeals of New York. Jan. 19, 1904.) Appeal by permission from an order of the Appellate Division of the Supreme Court in the First Judicial Department (86 App. Div. 1, 83 N. Y. Supp. 423), entered July 7, 1903, which affirmed an order of Special Term denying a motion to vacate an order for the examination of a judgment debtor in supplementary proceedings and an order appointing a receiver therein. The following question was certified: "Where, on the application of a judgment creditor, an order for the examination of a judgment debtor in proceedings supplementary to execution, instituted under subdivision 1 of section 2432 of the Code of Civil Procedure, is made by a justice of the Supreme Court on the 13th day of March, 1902, which order recites that it has been shown to the satisfaction of the court that the execution has been duly issued and returned unsatisfied, and, after the examination of the judgment debtor on the next day disclosing property applicable to the payment of the judgment, a receiver is appointed in the proceeding without objection to the proceedings by the judgment debtor, and where it appears, on motion to vacate the order for the examination of the judgment debtor and the order appointing the receiver subsequently made by another judgment creditor, whose judgment was obtained on the day the receiver was appointed, upon which judgment execution was issued the same day, but not returned unsatisfied until the following month, after which time he also obtained an order for the examination of the judgment debtor under the same subdivision of said section of the Code, that the deputy sheriff who had charge of the first execution made an entry in the records of executions, of which he had charge in the sheriff's office, of the return of this execution unsatisfied on said 13th day of March,

and indorsed upon it that no property was found, but that, according to a general custom in the sheriff's office to make entries in the main docket in that office of the return of executions and to return them the morning after they are so returned by the deputy having charge thereof, the entry of the return of this execution was made in said main docket and the execution was returned to the county clerk as unsatisfied on the morning of the 14th day of March, is the junior judgment creditor entitled to have the motion granted as matter of right?" Charles Blandy, Charles T. B. Rowe and Frederick A. Card, for appellant. C. A. Brodek and Herbert A. Heyn, for respondent.

PER CURIAM. Order affirmed, with costs, and question certified answered in the negative.

BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., dissents. O'BRIEN, J., absent.

LITCHFIELD, Respondent, v. INTERNATIONAL PAPER CO. et al., Appellants. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (67 App. Div. 628, 74 N. Y. Supp. 1135), entered February 3, 1902, affirming a judgment in favor of plaintiff entered upon the report of a referee. A. X. Parker and Frank L. Bell, for appellants. Hamilton Wallis, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, and MARTIN, JJ., concur. HAIGHT and CULLEN, JJ., absent.

LORD v. SEYMOUR et al. (Court of Appeals of New York. Dec. 8, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (85 App. Div. 617, 83 N. Y. Supp. 88), entered June 17, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. John P. Murray, for appellants. George W. Wingate, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

McALLASTER et al., Respondents, v. BRITTON, Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (67 App. Div. 627, 73 N. Y. Supp. 1140), entered February 11, 1902, affirming a judgment in favor of plaintiffs entered upon the report of a referee. Joseph George, for appellant. John F. Cook, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and MARTIN, JJ., concur. CULLEN, J., absent.

In re McCABE. (Court of Appeals of New York. Feb. 23, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (84 App. Div. 145, 82 N. Y. Supp. 180), entered May 6, 1903, which reversed an order of the Broome county Surrogate's Court denying an application for the revocation of letters of administration of the estate of James A. McCabe, deceased, and directed the revocation of such letters of administration. Jerome De Witt, Theodore R.

Tuthill, and W. D. B. Ainey, for appellant. Winthrop D. Painter, for respondent.

PER CURIAM. Order affirmed, with costs. PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, VANN, and CULLEN, JJ., concur.

McPHILLIPS, Respondent, v. FITZGERALD, Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (76 App. Div. 15, 78 N. Y. Supp. 631), entered January 6, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Herbert C. Smyth, Sumner B. Stiles, and Isaac Fromme, for appellant. Charles Strauss and Edward Browne, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. HAIGHT, J., absent.

McSHANE, Appellant, v. MURPHY, Mayor, Respondent. (Court of Appeals of New York. Dec. 15, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (86 App. Div. 566, 83 N. Y. Supp. 1018), entered September 26, 1903, which affirmed an order of Special Term denying a motion for an order requiring defendant to appoint Democratic election officials for the city of Cohoes from a list filed with him by complainant, as chairman of the Democratic general committee of that city. Walter H. Wertime and Mark Cohn, for appellant. Peter A. Delaney and Henry A. Strong, for respondent.

PER CURIAM. Order affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

MANHATTAN FIRE INS. CO. OF CITY OF NEW YORK et al., Appellants, v. FOX et al., Respondents. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (74 App. Div. 271, 77 N. Y. Supp. 657), entered July 23, 1902, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term. George Edwin Joseph, John A. Nichols, and G. D. B. Hasbrouck, for appellants. Otto Horwitz and William H. Blain, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

METZGER et al. v. MARTIN et al. (Court of Appeals of New York. Jan. 26, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (87 App. Div. 572, 84 N. Y. Supp. 494), entered November 20, 1903, which affirmed an order of Special Term denying an application of the appellant herein to be relieved from taking title to certain property purchased by him at partition sale. H. T. Dykman, for appellant. Grenville T. Emmet and Maurice Dillon, for respondents.

PER CURIAM. Order affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

M. GROH'S SONS, Appellants, v. GROH, Respondent. (Court of Appeals of New York. Jan. 12, 1904.) No opinion. Motion for reargument denied, with \$10 costs. See 177 N. Y. S. 68 N. E. 992.

In re MILLARD. (Court of Appeals of New York. Feb. 23, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (81 App. Div. 655, 81 N. Y. Supp. 1136), entered March 17, 1903, which affirmed an order of the Lewis County Court confirming the report of commissioners in proceedings to lay out a highway. **W. A. Matteson and E. Merriam Baggs**, for appellants. **Hiram H. Ryel**, for respondent.

PER CURIAM. Order affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, VANN, and CULLEN, JJ., concur.

In re MILLS' ESTATE. (Court of Appeals of New York. Jan. 28, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (86 App. Div. 555, 87 N. Y. Supp. 956, 84 N. Y. Supp. 1135), entered July 24, 1903, which affirmed an order of the Westchester County Surrogate's Court directing the assessment of a transfer tax upon the estate of Maria F. Mills, deceased. **Grenville T. Emmet and Maurice Dillon**, for appellant. **Frank M. Buck**, for respondent.

PER CURIAM. Order affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

In re MITCHELL. (Court of Appeals of New York. Jan. 19, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (85 App. Div. 277, 83 N. Y. Supp. 211), entered July 21, 1903, which affirmed an order of the Tompkins County Court confirming the report of commissioners appointed to determine the necessity of a highway and to assess the damages therefor. **Myron N. Tompkins**, for appellant town of Ithaca. **F. E. Tibbetts**, for appellant **Lehigh Valley R. Co.** **James L. Baker and Samuel D. Halliday**, for respondent.

PER CURIAM. Order affirmed, with costs.

PARKER, C. J., and BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. O'BRIEN, J., absent.

MOORE, Respondent, v. STANTON, Appellant, et al. (Court of Appeals of New York. Feb. 18, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (80 App. Div. 295, 80 N. Y. Supp. 244), entered February 16, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. **Edward P. Mowton**, for appellant. **Edward J. McCrossin**, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion of **Jenks, J., below.**

PARKER, C. J., and BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur. GRAY, J., absent.

MORAN, Respondent, v. MORRILL, Appellant. (Court of Appeals of New York. Jan. 26, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (78 App. Div. 440, 80 N. Y. Supp. 120), entered February 24, 1903, which

reversed a judgment of nonsuit and an order denying a motion for the entry of a general verdict in favor of plaintiff on a special verdict, and directed judgment for plaintiff. **James Harold Warner and Charles C. Reiley**, for appellant. **Theodore Sutro**, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. CULLEN, J., dissents.

MORRELL, Appellant, v. BOSTON & M. R. R., Respondent. (Court of Appeals of New York. Dec. 15, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (85 App. Div. 622, 83 N. Y. Supp. 1111), entered July 3, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. **Robert H. Barnett**, for appellant. **T. F. Hamilton**, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur. GRAY, J., absent.

MULLER, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York. Jan. 28, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (77 App. Div. 221, 78 N. Y. Supp. 1069), entered December 17, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. **Charles F. Brown, Bayard H. Ames, and Henry A. Robinson**, for appellant. **Maurice B. Blumenthal**, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

MUZZY, Respondent, v. GULICK et al., Appellants. (Court of Appeals of New York. Jan. 12, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (77 App. Div. 632, 79 N. Y. Supp. 1189), entered November 22, 1902, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. **Myer Nussbaum**, for appellants. **Elon R. Brown**, for respondent.

PER CURIAM. Judgment affirmed, with costs.

GRAY, BARTLETT, HAIGHT, and WERNER, JJ., concur. CULLEN, J., dissents on the ground that the deposition of the grantor in supplementary proceedings was improperly admitted in evidence as against grantee. **PARKER, C. J., and VANN, J., not voting.**

NEW YORK CENT. & H. R. R. CO., Respondent, v. STATE, Appellant. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (80 N. Y. Supp. 1144), entered January 28, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the Court of Claims. **John Cunneen, Atty. Gen. (William H. Wood, on the brief)**, for the State. **Charles E. Snyder**, for respondent.

HAIGHT, J. We think the claimant is entitled to recover from the state the damages sustained on account of the acts complained of, for the reason stated in the opinion of **Merwin, J.**

(37 App. Div. 57, 55 N. Y. Supp. 685). But we think that the claimant should not be allowed interest, prior to the entry of judgment herein, upon the item of \$60,000 awarded as damages for the permanent restoration of the railroad embankment, or upon the item of \$24,017.50 awarded for such restoration in case the proper authorities of the state consent that the claimant may restore the embankment by extending the same into the reservoir upon the lands of the state, as provided for in the judgment. Immediately after the railroad embankment was washed away, there was a temporary trestle constructed across the break, at an expense of \$11,572.37, which sum, with the interest thereon, has been allowed as damages to the claimant. The permanent embankment had not been constructed at the time of the entry of judgment herein, and consequently the claimant had not been required to pay therefor. The temporary structure has been used by the railroad company in the meantime, and consequently it has operated to save the claimant the use of the money required for the construction of the permanent embankment. We think, therefore, that the judgment should be modified by deducting the interest allowed upon the item of damages awarded for permanent restoration of the embankment, and, as so modified, affirmed, without costs in this court to either party. Judgment accordingly.

PARKER, C. J., and BARTLETT, VANN, CULLEN, and WERNER, JJ., concur. GRAY, J., not sitting.

NEW YORK SECURITY & TRUST CO. et al. v. SCHOENBERG et al. (Court of Appeals of New York. Jan. 19, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (87 App. Div. 262, 84 N. Y. Supp. 359), entered November 20, 1903, which reversed an order of Special Term directing the respondent herein to complete its purchase of certain premises. Frederic R. Coudert, Lorenzo Semple, and Howard Thayer Kingsbury, for appellants New York Security & Trust Co. and others. Harold Nathan, for appellants Schoenberg and others. Harold Swain and N. B. Sanborn, for respondent.

PER CURIAM. Order affirmed, with costs, on opinion below.

PARKER, C. J., and BARTLETT, MARTIN, VANN, and CULLEN, JJ., concur. O'BRIEN and WERNER, JJ., absent.

In re NEW YORK & N. S. RY. CO. (Court of Appeals of New York. Feb. 23, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (88 App. Div. 614, 84 N. Y. Supp. 1137), entered November 18, 1903, which affirmed an order of Special Term granting a peremptory writ of mandamus to compel defendants to issue to petitioner a permit to erect poles and string wires necessary for the operation of its railway upon the Jamaica and Hempstead Turnpike in the city of New York. John J. Delany, Corp. Counsel (James D. Bell, of counsel), for appellants. George F. Hickey and William E. Stewart, for respondent.

PER CURIAM. Order affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, and MARTIN, JJ., concur. VANN and CULLEN, JJ., not voting.

NIEWENHOUS, Respondent, v. NEW YORK & H. R. CO. et al., Appellants. (Court of Appeals of New York. Jan. 26, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (76 App. Div. 618, 79 N. Y. Supp.

1140), entered November 14, 1902, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. Ira A. Place and Thomas Emery, for appellants. Pliny W. Williamson and George C. Lay, for respondent.

PER CURIAM. Judgment reversed, and final judgment ordered in favor of defendants, dismissing the plaintiff's complaint, without costs; the remittitur to be in the form of that in the case of *Kriete v. New York & Harlem Railroad Company*, 175 N. Y. 484, 67 N. E. 1084.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur. GRAY, J., not sitting.

NIMS, Respondent, v. MERRITT et al., Appellants. (Court of Appeals of New York. Feb. 16, 1904.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (84 App. Div. 632, 82 N. Y. Supp. 1108), entered May 29, 1903, affirming a judgment in favor of plaintiff entered upon the report of a referee. The motion was made upon the grounds that the Court of Appeals had no jurisdiction to entertain the appeal, that no question of law was involved, that the exceptions were frivolous, that the appeal was taken for the purpose of delay, that the decision of the Appellate Division was unanimous, and no leave to appeal had been granted. Henry Purcell, for the motion. Lowen E. Ginn, opposed. No opinion. Motion denied, with \$10 costs.

O'BRIEN, Appellant, v. FLECKENSTEIN et al., Respondents. (Court of Appeals of New York. Jan. 12, 1904.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (86 App. Div. 140, 83 N. Y. Supp. 409), entered July 20, 1903, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial. The motion was made upon the grounds that the appeal was unauthorized, and that the Court of Appeals had no jurisdiction to review an order of the Appellate Division reversing a judgment upon the law and the facts. John P. Morse, for the motion. Hugh J. O'Brien, opposed. No opinion. Motion denied, with \$10 costs.

OLMSTEAD, Appellant, v. OLIMSTEAD, Respondent, et al. (Court of Appeals of New York. Feb. 16, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (76 App. Div. 582, 79 N. Y. Supp. 86), entered November 29, 1902, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term. Frank W. Saunders, for appellant. Eugene M. Bartlett, for respondent Gertrude Olmstead.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, VANN, and WERNER, JJ., concur. HAIGHT and CULLEN, JJ., not voting.

OSBORNE, Respondent, v. OCORR & RUGG CO., Appellant. (Court of Appeals of New York. Dec. 18, 1903.) Appeal from a judgment, entered July 23, 1903, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (86 App. Div. 628, 83 N. Y. Supp. 1112), overruling defendant's exceptions ordered to be heard in the first instance by the Appellate Division and denying a motion for a new trial. William A.

Sutherland, for appellant. Merton E. Lewis, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur.

PARISH et al. v. PARISH et al. (Court of Appeals of New York. Dec. 8, 1908.) No opinion. Motion to amend remittitur denied, with \$10 costs. See 175 N. Y. 181, 67 N. E. 298.

In re PECK (two cases). (Court of Appeals of New York. Dec. 18, 1903.) Cross-appeals from orders of the Appellate Division of the Supreme Court in the Third Judicial Department (79 App. Div. 296, 80 N. Y. Supp. 76), entered March 2, 1903, which modified, and affirmed as modified, decrees of the Essex county Surrogate's Court settling the accounts of George W. Peck, as executor of George W. Banker, deceased, and as executor of Henrietta M. Banker, deceased. James O. Foley, Cornelius P. McLaughlin, and Gustave Hurlimann, for Bert A. Banker and others. Philip Carpenter, for National Woman's Suffrage Ass'n.

PER CURIAM. Orders affirmed, without costs to either party.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur.

PEOPLE ex rel. DEERING, Appellant, v. GROUT, Comptroller, et al., Respondents. (Court of Appeals of New York. Feb. 23, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (89 App. Div. 614, 85 N. Y. Supp. 1142), entered December 31, 1903, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel defendants to accept a certain sum in full settlement of an assessment for a local improvement. Joel J. Squier and James A. Deering, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly, George L. Sterling, and John F. O'Brien, of counsel), for respondents.

PER CURIAM. Appeal dismissed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, VANN, and CULLEN, JJ., concur.

PEOPLE ex rel. LEWISOHN v. O'BRIEN, Sheriff, et al. SAME v. WYATT, Justice of Court of Special Sessions. (Court of Appeals of New York. Jan. 12, 1904.) No opinion. Motion to amend remittitur, by striking therefrom so much as awards costs to the respondent, granted. See 176 N. Y. 253, 68 N. E. 353.

PEOPLE ex rel. MCGEE, Appellant, v. PARTRIDGE, Police Com'r, Respondent. (Court of Appeals of New York. Jan. 26, 1904.) No opinion. Motion for reargument denied, with \$10 costs. See 176 N. Y. 605, 68 N. E. 1122.

PEOPLE ex rel. NEW YORK CENT. & H. R. R. CO., Appellant, v. MILLER, Comptroller, Respondent (two cases). (Court of Appeals of New York. Feb. 23, 1904.) Appeals from orders of the Appellate Division of the Supreme Court in the Third Judicial Department (89 App. Div. 127, 84 N. Y. Supp. 1088), entered December 10, 1903, which affirmed determina-

tions of the defendant in imposing a tax upon the relator for the years 1900 and 1901 under section 182 of the tax law (Laws 1896, p. 856, c. 908). Ira A. Place and Thomas Emery, for appellant. John Cunneen, Atty. Gen. (William H. Wood, on the brief), for respondent.

PER CURIAM. Orders affirmed, with costs, on opinion in People ex rel. N. Y. C. & H. R. R. R. Co. v. Knight, 173 N. Y. 255, 65 N. E. 1102.

PARKER, C. J., and HAIGHT, MARTIN, VANN, and CULLEN, JJ., concur. GRAY, J., not sitting. O'BRIEN, J., not voting.

PEOPLE et rel. WILLIAMS, Appellant, v. McDONOUGH, Secretary of State, et al., Respondents. (Court of Appeals of New York. Dec. 15, 1903.) No opinion. Motion to amend remittitur. See 176 N. Y. 606, 68 N. E. 1123. Motion granted, and remittitur amended, so as to read "with \$50 costs and disbursements."

In re PIERCE. (Court of Appeals of New York. Jan. 26, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (88 App. Div. 620, 84 N. Y. Supp. 1141), entered December 2, 1903, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the respondents to reinstate the relator as a principal of public schools in the city of Rochester. John A. Barhite, for appellant. William A. Sutherland, for respondents.

PER CURIAM. Order affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

POLAND, Respondent, v. UNITED TRACTION CO., Appellant. (Court of Appeals of New York. Jan. 19, 1904.) Appeal by permission from an order of the Appellate Division of the Supreme Court of the Third Judicial Department (88 App. Div. 281, 85 N. Y. Supp. 7), entered November 13, 1903, which affirmed an order of Special Term denying a motion for a change of venue. The following question was certified: "Is the county of Rensselaer a proper county for the trial of this action upon the facts as disclosed in the record on appeal herein?" Patrick O. Dugan, for appellant. G. B. Wellington, for respondent.

PER CURIAM. Order affirmed, with costs, and question certified answered in the affirmative, on opinion below.

PARKER, C. J., and BARTLETT, MARTIN, VANN, and CULLEN, JJ., concur. O'BRIEN and WERNER, JJ., absent.

POWELL, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. Dec. 15, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (86 App. Div. 629, 83 N. Y. Supp. 1115), entered July 22, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. A. H. Cowie, for appellant. William Kennedy, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur. GRAY, J., not sitting.

RAMSON, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of

New York. Feb. 13, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (78 App. Div. 101, 79 N. Y. Supp. 588), entered January 29, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Charles F. Brown, Bayard H. Ames, and Henry A. Robinson, for appellant. George F. Elliott and Henry Escher, Jr., for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur. GRAY, J., not sitting.

REILLY, Respondent, v. ERIE R. CO., Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (72 App. Div. 476, 76 N. Y. Supp. 620), entered August 8, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Henry Bacon and Joseph Merritt, for appellant. Cornelius J. Barley, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, and WERNER, JJ., concur. HAIGHT, J., absent. VANN, J., not sitting.

ROBINSON, Respondent, v. NEW YORK & T. S. S. Co., Appellant. (Court of Appeals of New York. Jan. 26, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (75 App. Div. 431, 78 N. Y. Supp. 359), entered November 25, 1902, affirming a judgment in favor of plaintiff entered upon a decision of the court at a trial term without a jury. Thomas B. Hewitt and George W. Wingate, for appellant. Charles E. Hughes, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion below and opinion in the same case in 63 App. Div. 211, 71 N. Y. Supp. 424.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur.

ROBINSON, Respondent, v. SUPREME COMMANDERY, UNITED ORDER OF GOLDEN CROSS OF THE WORLD, Appellant. (Court of Appeals of New York. Jan. 26, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (77 App. Div. 215, 79 N. Y. Supp. 13), entered December 18, 1902, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial. Alfred B. Cruikshank, Henry G. Atwater, and J. C. Thomson, for appellant. Charles Blandy and Edmund L. Mooney, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

SACHS et al., Respondents, v. AMERICAN SURETY CO. OF NEW YORK, Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment entered June 11, 1902, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (72 App. Div. 60, 76 N. Y. Supp. 335),

overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, and directing judgment in favor of plaintiffs. Charles De Hart Brower and Henry O. Willcox, for appellant. George W. Wickersham, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. HAIGHT, J., absent.

SAMMIS, Respondent, v. STANDARD OIL CO. OF NEW YORK, Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (76 App. Div. 629, 79 N. Y. Supp. 1145), entered November 24, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. John Brooks Leavitt, for appellant. James C. Cropsey and F. W. Catlin, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. HAIGHT, J., absent.

SCHUCHTER, Appellant, v. MEINKEN et al., Respondents. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (84 App. Div. 641, 82 N. Y. Supp. 1114), entered June 14, 1903, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a trial term without a jury. William L. Mathot and Joseph Martin, for appellant. H. H. Glass, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. HAIGHT, J., absent.

SCHEIR, Appellant, v. QUIRIN, Respondent. (Court of Appeals of New York. Jan. 29, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (77 App. Div. 624, 78 N. Y. Supp. 956), entered December 2, 1902, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Willis L. Parker, for appellant. Fred L. Eaton, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for defendant, on the stipulation, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur.

SCHMARDER, Respondent, v. MIX et al., Appellants. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (79 App. Div. 645, 80 N. Y. Supp. 1147), entered October 19, 1901, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Charles G. Baldwin, for appellants. Walter Welch, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

SHERMAN, Appellant, v. ALLISON, Respondent. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (77 App. Div. 49, 80 N. Y. Supp. 148), entered December 4, 1902, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term. George McGowan, for appellant. Leonard C. Crouch, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, CULLEN, and WERNER, JJ., concur. VANN, J., not sitting.

SIMONS et al., Appellants, v. STEELE, Respondent. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (82 App. Div. 202, 81 N. Y. Supp. 737), entered April 28, 1903, affirming a judgment in favor of plaintiffs entered upon the report of a referee. Isaac N. Miller, for appellants. Charles H. Otis, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. HAIGHT, J., absent.

SMITH, Appellant, v. PROSKEY, Respondent. (Court of Appeals of New York. Dec. 8, 1903.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (82 App. Div. 19, 81 N. Y. Supp. 424), entered April 14, 1903, which reversed a judgment of Special Term sustaining a demurrer to the answer and directed that the complaint be dismissed. Henry B. Closson, for appellant. Abram I. Elkus, James C. McEachen, and Joseph M. Proskauer, for respondent.

PER CURIAM. Order reversed, and judgment of Special Term affirmed, with costs in all courts, upon opinion of PATTERSON, J., below.

PARKER, C. J., and GRAY, O'BRIEN, and MARTIN, JJ., concur. HAIGHT, VANN, and WERNER, JJ., dissent.

SPENCER, Appellant, v. TOWN OF SARDINIA, Respondent. (Court of Appeals of New York. Dec. 15, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (85 App. Div. 624, 82 N. Y. Supp. 1116), entered June 22, 1903, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial. Willard H. Ticknor and George E. Pierce, for appellant. John Cunnene, for respondent.

PER CURIAM. Judgment reversed, and new trial granted, costs to abide event, on the ground that the question of contributory negligence was for the jury.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur. GRAY, J., dissents.

In re STEWART. (Court of Appeals of New York. Jan. 19, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (86 App. Div. 627, 83 N. Y. Supp. 1117), entered July 13, 1903, which affirmed an order of Special Term

vacating an order for the examination of a third party in proceedings supplementary to execution, and an order denying a motion to set aside such order of vacation. Charles Blandy and Edmund L. Mooney, for appellant. George Burnham, Jr., for respondent.

PER CURIAM. Order affirmed, with costs. **PARKER, C. J., and BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. O'BRIEN, J., absent.**

STAATS et al., Appellants, v. STORM et al., Respondents. (Court of Appeals of New York. Feb. 9, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (76 App. Div. 627, 80 N. Y. Supp. 306), entered December 10, 1902, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term. Edward A. Alexander, for appellants. Melvin Palliser, Hector M. Hitchings, and George C. Case, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

STAFFORD v. STAFFORD. (Court of Appeals of New York. Feb. 16, 1904.) Cross-appeals from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (79 App. Div. 644, 80 N. Y. Supp. 1148), entered February 18, 1903, affirming a judgment in favor of plaintiff entered upon the report of a referee. Moses Shire, for plaintiff. John L. Romer, for defendant.

PER CURIAM. Judgment affirmed, without costs to either party as against the other.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

SULLIVAN, Respondent, v. UNION RY. CO. OF NEW YORK CITY, Appellant. (Court of Appeals of New York. Dec. 8, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (81 App. Div. 596, 81 N. Y. Supp. 449), entered April 25, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Charles F. Brown and Henry A. Robinson, for appellant. Stephen C. Baldwin, for respondent.

PER CURIAM. Judgment affirmed, with costs.

BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., and GRAY, J., dissent.

SWART, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Court of Appeals of New York. Dec. 15, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (81 App. Div. 402, 80 N. Y. Supp. 906), entered March 19, 1903, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial. William S. Jenney, for appellant. Albert H. Harris, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, CULLEN, and WERNER, JJ., concur. MARTIN, J., dissents. GRAY, J., not sitting.

SWEET, Respondent, v. HENRY et al., Appellants. (Court of Appeals of New York. Feb. 16, 1904.) Motion to amend remittitur. See 176 N. Y. 268, 67 N. E. 574. No opinion. Motion granted, remittitur to be amended so as to award costs to defendants in all courts.

TOMPKINS v. McGAY et al. (Court of Appeals of New York. Jan. 29, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (78 App. Div. 620, 79 N. Y. Supp. 1149), entered December 20, 1902, affirming a judgment in favor of respondents entered upon the report of a referee. Charles De Hart Brower and Seth B. Robinson, for appellants. Frederick H. Man and Thomas J. Sanson, for respondent Tompkins. O. P. Metcalf, James Anderson Hawes, and Felix Jellenik, for other respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. **HAIGHT, J.,** absent.

TOMPKINS COUNTY v. INGERSOLL et al. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (81 App. Div. 844, 81 N. Y. Supp. 242), entered April 10, 1903, reversing a judgment in favor of plaintiff and defendants other than the respondent herein, entered upon a decision of the court on trial at Special Term and granting a new trial. E. A. Denton, for appellants. Randolph Horton and George S. Tarbell, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for respondent, on the stipulation, with costs, on opinion below.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. **HAIGHT, J.,** absent.

TRIPP et al., Respondents, v. HUNT, Appellant, et al. (Court of Appeals of New York. Dec. 18, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (85 App. Div. 623, 83 N. Y. Supp. 1118), entered July 10, 1903, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term. Thomas E. Courtney, for appellant. David W. Van Hoesen, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur.

UPTON et al., Respondents, v. SCOTTISH UNION & NATIONAL INS. CO., Appellant. (Court of Appeals of New York. Feb. 16, 1904.) Appeal from a judgment entered December 30, 1902, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (77 App. Div. 633, 80 N. Y. Supp. 1150), overruling defendant's exceptions ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for plaintiffs upon the verdict. Horace McGuire, for appellant. Elbridge L. Adams, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

VAN GAASBEEK, Respondent, v. STAPLES, Appellant, et al. (Court of Appeals of New York. Dec. 8, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (85 App. Div. 271, 83 N. Y. Supp. 225), entered July 17, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. G. R. Adams, for appellant. Chandler A. Oakes, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

VINCENT, Respondent, v. ALDEN, Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (75 App. Div. 615, 77 N. Y. Supp. 1142), entered July 14, 1902, affirming a judgment in favor of plaintiff entered upon a verdict. T. B. Cotter, for appellant. L. L. Shedden, for respondent.

PER CURIAM. Judgment affirmed, with costs.

O'BRIEN, BARTLETT, MARTIN, and CULLEN, JJ., concur. **PARKER, C. J., and GRAY, J.,** dissent. **HAIGHT, J.,** absent.

VOUGHT, Respondent, v. EASTERN BUILDING & LOAN ASS'N OF SYRACUSE, Appellant. (Court of Appeals of New York. Jan. 5, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (85 App. Div. 624, 82 N. Y. Supp. 1117), entered June 20, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. William Hepburn Russell, William Beverly Winslow, and Daniel A. Pierce, for appellant. Charles S. Kent, for respondent.

PER CURIAM. Judgment affirmed, with costs, on authority of same case in 172 N. Y. 503, 65 N. E. 496, 92 Am. St. Rep. 761.

GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. **PARKER, C. J.,** not voting. **HAIGHT, J.,** absent.

WARD, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Court of Appeals of New York. Dec. 8, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (78 App. Div. 402, 80 N. Y. Supp. 161), entered March 4, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. George W. Bristol and Woolsey Carmalt, for appellant. Robert A. Kutschback and Charles C. Paulding, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and O'BRIEN, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

WEBB et al., Respondents, v. NILES, Appellant. (Court of Appeals of New York. Dec. 8, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (75 App. Div. 451, 78 N. Y. Supp. 440), entered November 15, 1902, affirming a judgment in favor of plaintiffs entered upon a decision of the court at Trial Term without a jury. Robert E. Whalen, Marston Niles, and John N. Drake, for appellant. Fred-

eric R. Coudert, Jr., and Charles B. Samuels, for respondents.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

WESTPHAL et al., Appellants, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Jan. 29, 1904.) Motion for reargument denied, with \$10 costs. See 177 N. Y. 140, 69 N. E. 369.

WILLIAMS, Respondent, v. DELAWARE, L. & W. R. CO., Appellant. (Court of Appeals of New York. Jan. 28, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (81 App. Div. 444, 80 N. Y. Supp. 945), entered March 18, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. William Kernan, for appellant. P. C. J. De Angelis, for respondent.

PER CURIAM. Judgment affirmed, with costs.

PARKER, C. J., and BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur. O'BRIEN, J., not voting.

WILLIAMS, Appellant, v. MAGEE et al., Respondents. (Court of Appeals of New York. Dec. 18, 1903.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (76 App. Div. 512, 78 N. Y. Supp. 550) entered November 25, 1902, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. William S. Jenney, for appellant. Frank Hiscock, for respondents.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur.

BOWYER v. PEOPLE ex rel. HANBERG, County Treasurer. (Supreme Court of Illinois. Dec. 16, 1903.) Appeal from Cook County Court; O. N. Carter, Judge. Action by the people, on the relation of John J. Hanberg, county treasurer, against L. F. Bowyer. Judgment for relator. Defendant appeals. Reversed. Taylor & Martin, for appellant. James H. Wilkerson, Co. Atty., William F. Struckmann, Asst. Co. Atty., and Frank L. Shepard, for appellee.

PER CURIAM. This case was consolidated in this court with the case of Crozer v. People ex rel., 69 N. E. 489. It involves the same question that is involved in that case and was submitted upon the same briefs, and is controlled by the decision in that case. The judgment of the county court, therefore, will be reversed, and the cause remanded to that court, with directions to enter a judgment sustaining the objections filed by the objector in that court. Reversed and remanded, with directions.

DONOHUE et al. v. PEOPLE ex rel. HANBERG, County Treasurer. (Supreme Court of Illinois. Dec. 16, 1903.) Appeal from Cook County Court; O. N. Carter, Judge. Action by the people, on the relation of John J. Hanberg, county treasurer, against M. A. Donohue and others. Judgment for relator. Defendants appeal. Reversed. Taylor & Martin, for appel-

lants. James H. Wilkerson, Co. Atty., William F. Struckmann, Asst. Co. Atty., and Frank L. Shepard, for appellee.

PER CURIAM. This case was consolidated in this court with the case of Crozer v. People ex rel., 69 N. E. 489. It involves the same question that is involved in that case and was submitted upon the same briefs, and is controlled by the decision in that case. The judgment of the county court, therefore, will be reversed, and the cause remanded to that court, with directions to enter a judgment sustaining the objections filed by the objector in that court. Reversed and remanded, with directions.

GAFF et al. v. PEOPLE ex rel. HANBERG, County Treasurer.* (Supreme Court of Illinois. Dec. 16, 1903.) Appeal from Cook County Court; O. N. Carter, Judge. Action by the people, on the relation of John J. Hanberg, county treasurer, against Thomas T. Gaff and others. From a judgment for relator, defendants appeal. Reversed. Taylor & Martin, for appellants. James H. Wilkerson, Co. Atty., William F. Struckmann, Asst. Co. Atty., and Frank L. Shepard, for appellee.

PER CURIAM. This case was consolidated in this court with the case of Crozer v. People ex rel., 69 N. E. 489. It involves the same question that is involved in that case, and was submitted upon the same briefs, and is controlled by the decision in that case. The judgment of the county court, therefore, will be reversed, and the cause remanded to that court, with directions to enter a judgment sustaining the objections filed by the objector in that court. Reversed and remanded, with directions.

GAGE v. PEOPLE ex rel. HANBERG, County Treasurer. (Supreme Court of Illinois. Dec. 16, 1903.) Appeal from Cook County Court; L. C. Ruth, Judge. Application by the people, on the relation of John J. Hanberg, county treasurer, for judgment for delinquent special assessments against Henry H. Gage. From a judgment in favor of petitioner, defendant appeals. Reversed. F. W. Becker, for appellant. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

PER CURIAM. The questions involved in this case are the same as the questions decided in the case of Gage v. People ex rel., 69 N. E. 635. The decision in that case governs and controls the decision in this case. The judgment of the county court will be reversed, and the cause remanded, with directions to that court to enter a judgment in compliance with section 191, c. 120, Hurd's Rev. St. 1901. Reversed and remanded, with directions.

GAGE v. PEOPLE ex rel. HANBERG, County Treasurer (three cases). (Supreme Court of Illinois. Dec. 16, 1903.) Appeal from Cook County Court; L. C. Ruth, Judge. Consolidated actions by the people, on the relation of John J. Hanberg, county treasurer, against Henry H. Gage. From judgments in favor of plaintiff, defendant appeals. Reversed. F. W. Becker, for appellant. Robert Redfield and William M. Pindell, for appellee.

PER CURIAM. These three cases were consolidated for convenience in presentation for decision. They were applications of the collector of Cook county to the county court of that county for judgment against lands belonging to the appellant for delinquent special assessments. Judgments were entered in each case against the property of the appellant. The objections to the judgments are the same as in the consolidated case of Gage and McChesney v. Peo-

*Rehearing denied February 2, 1904.

ple ex rel. (No. 3,282) 69 N. E. 81, which was consolidated with certain other appeals presented by this appellant to reverse the judgments entered against the lands of the appellant in those cases under the same application of the collector of Cook county. These three cases were submitted on the briefs filed in the said case of Gage and McChesney v. People ex rel., supra, and the points for decision are the same as in that case. Our investigation of the points involved in that case disclosed that there was error in the record, and judgment was entered reversing the judgment of the county court, and remanding the cause for further proceedings in accordance with the views of the court expressed in the opinion there rendered. Gage and McChesney v. People ex rel., supra. The same order will therefore be entered in each of these cases. Reversed and remanded.

PIKE v. PEOPLE ex rel. **HANBERG**, County Treasurer. (Supreme Court of Illinois. Dec. 16, 1903.) Appeal from Cook County Court; O. N. Carter, Judge. Action by the people, on the relation of John J. Hanberg, county treasurer, against E. S. Pike. Judgment for plaintiff, and defendant brings error. Reversed. Taylor & Martin, for appellant. James H. Wilkerson, Co. Atty., William F. Struckman, Asst. Co. Atty., and Frank L. Shepard, for appellee.

PER CURIAM. This case was consolidated in this court with the case of Crozer v. People ex rel., 69 N. E. 489. It involves the same question that is involved in that case, and was submitted upon the same briefs, and is controlled by the decision in that case. The judgment of the county court, therefore, will be reversed, and the cause remanded to that court, with directions to enter a judgment sustaining the objections filed by the objector in that court. Reversed and remanded, with directions.

MURDOCK v. LOGANSPOUT, R. & N. TRACTION CO. et al. (Supreme Court of Indiana. Jan. 28, 1904.) Appeal from Circuit Court, Cass County; Joseph M. Robb, Special Judge. Action between Andrew J. Murdock and the Logansport, Rochester & Northern Traction Company and others. From a judgment for the latter, the former appeals. Affirmed. M. Winfield and G. C. Taber, for appellant. A. W. Brady, Holman & Stephenson, and McConnell, Jenkins, Jenkins & Stuart, for appellees.

GILLET, C. J. The facts involved in this case are in all essential respects identical with those in *Boyd v. Logansport, etc., Traction Co.* (No. 19,960, at this term) 69 N. E. 398; and upon the authority of that case it is ordered that the judgment of the court below in the case now before us be affirmed.

OIL WELL SUPPLY CO. v. STRANAHAN. (Supreme Court of Indiana. Jan. 12, 1904.) Appeal from Superior Court, Grant County, Hiram Brownlee, Judge. Petition by the Oil Well Supply Company against Benjamin J. Stranahan, receiver. From a judgment for defendant, plaintiff appeals. Transferred from the Appellate Court, under section 1337u, Burns' Rev. St. 1901. Affirmed. Manley & Strickler, for appellant. Elliott & Elliott, for appellee.

JORDAN, J. Appellant sold and furnished material and machinery to the oil and gas companies of which appellee is the receiver, when said companies were going concerns. The material and machinery so sold and furnished were used by the companies in and about the construction of certain gas and oil wells owned by them, and which were situated on leased premises in Grant county, Ind. Both of these

companies, at the time the material and machinery in question were furnished, were in failing circumstances and insolvent. Appellant unsuccessfully sought by petition in the lower court to have its claims for such material and machinery declared preferred debts, under the provisions of section 7255, Burns' Rev. St. 1901, without having filed any notice of its intention to hold a lien, as required by section 7257, Id. The question, and the sole one, presented in this case, is the same as that involved in the appeal of National Supply Company v. Benjamin J. Stranahan, Receiver, etc. (decided at this term) 69 N. E. 447. Under the decision in that case, the judgment in the case at bar is affirmed.

BALTES LAND, STONE & OIL CO. v. SPAULDING. (Appellate Court of Indiana, Division No. 1. Dec. 9, 1903.) Appeal from Circuit Court, Blackford County; H. J. Paulus, Special Judge. Action between the Baltes Land, Stone & Oil Company and others and George W. W. Spaulding. From a judgment for Spaulding, the company appeals. Affirmed. Cantwell & Simmons, W. & E. Leonard, and R. B. Dreibelbiss, for appellant. Dailey, Simmons & Dailey and Pierce & Bonham, for appellee.

HENLEY, C. J. The questions involved in this appeal are in all respects similar to those presented and decided in the case of Baltes Land, Stone & Oil Company v. James M. Sutton (No. 4,489, decided at the present term) 69 N. E. 179. The judgment is, upon the authority of the case cited, affirmed.

BALTES LAND, STONE & OIL CO. v. SUTTON. (No. 4,474.) (Appellate Court of Indiana, Division No. 1. Dec. 9, 1903.) Appeal from Circuit Court, Blackford County; H. J. Paulus, Special Judge. Action between the Baltes Land, Stone & Oil Company and others and James M. Sutton. From a judgment for Sutton, the company appeals. Affirmed. Cantwell & Simmons, W. & E. Leonard, and R. B. Dreibelbiss, for appellant. Hindman & Powell, for appellee.

HENLEY, C. J. The questions involved in this appeal are in all respects similar to those presented and decided in the case of Baltes Land, Stone & Oil Company v. James M. Sutton (No. 4,489, decided at the present term) 69 N. E. 179. The judgment is, upon the authority of the case cited, affirmed.

BALTES LAND, STONE & OIL CO. et al. v. SUTTON. (No. 4,475.) (Appellate Court of Indiana, Division No. 1. Dec. 9, 1903.) Appeal from Circuit Court, Blackford County. H. J. Paulus, Special Judge. Action between the Baltes Land, Stone & Oil Company and others and James M. Sutton. From a judgment for Sutton, the company appeals. Affirmed. Cantwell & Simmons, W. & E. Leonard, and R. B. Dreibelbiss, for appellant. Hindman & Powell, for appellee.

HENLEY, C. J. The questions involved in this appeal are in all respects similar to those presented and decided in the case of Baltes Land, Stone & Oil Company v. James M. Sutton (No. 4,489, decided at the present term) 69 N. E. 179. The judgment is, upon the authority of the case cited, affirmed.

BOSWORTH v. CITY OF ANDERSON et al. (Appellate Court of Indiana. Division No. 1. Feb. 3, 1904.) Appeal from Circuit Court, Madison County; John F. McClure, Judge. Action between Isaac D. Bosworth and the city of Anderson and others. From a judg-

ment for the city and others, Bosworth appeals. Reversed. F. E. Holloway and E. R. Call, for appellant. B. H. Campbell and Chipman, Keltner & Hendee, for appellees.

BLACK, J. The record of this cause presents, in the same manner, the same questions as were involved in *Spring Steel Fence & Wire Company v. City of Anderson* (No. 4,795, decided by this court January 7, 1904) 69 N. E. 404; and upon the authority of that decision the judgment herein is reversed.

CRAWFORD v. STATE. (Appellate Court of Indiana. Jan. 8, 1904.) Appeal from Circuit Court, Sullivan County; O. B. Harris, Judge. Seth Crawford was convicted of crime, and appeals. Affirmed. C. D. Hunt, S. R. Hamill, John W. Lindley, and Bays & Bays, for appellant. C. W. Miller, Atty. Gen., C. C. Hadley, L. G. Rothschild, and W. C. Geake, for the State.

PER CURIAM. The questions involved in this appeal are decided adversely to appellant in *West v. State* (January 7, 1904) 69 N. E. 465, by this court; and upon the authority of that case the judgment is affirmed.

NORTHWESTERN MUT. LIFE INS. CO. v. McKEEN et al.¹ (Appellate Court of Indiana, Division No. 2. Dec. 11, 1903.) Appeal from Circuit Court, Vigo County; James E. Piety, Judge. Action between the Northwestern Mutual Life Insurance Company and William R. McKeen and others. From a judgment for the latter, the former appeals. Affirmed. B. V. Marshall and Baker & Daniels, for appellant. McNutt & McNutt, for appellees.

ROBY, J. The facts involved herein are parallel with those considered in *N. W. M. L. Ins. Co. v. Kate Kidder* (Dec. 10, 1903) 69 N. E. 204; the principal difference being that suit is brought upon four checks, of \$5,000 each, made by appellant to Kate Kidder, and by her indorsed to appellees, instead of, as in that case, upon one check, made to and sued upon by said Kate Kidder. So long as appellant's liability was evidenced only by the insurance policy, an assignee thereof would stand in no better position than the beneficiary, Kate Kidder. A

wholly different issue is now presented. Neither is the liability the same that it was upon the policy, excluding any question of assignment. There are many possible defenses to an action brought upon an insurance policy, which are not available when the action is based upon bank checks. Upon the authority of the case cited, the judgment herein rendered is affirmed.

LEWIS, County Auditor, v. STATE ex rel. HARRIS. (Supreme Court of Ohio. Feb. 2, 1904.) Error to Circuit Court, Hamilton County. Application by the state, on the relation of one Harris, executor, for writ of mandamus to one Lewis, auditor of Hamilton county. From an order granting the writ, defendant brings error. Reversed.

PER CURIAM. This case was heard and submitted with the preceding case (No. 8,425) 69 N. E. 980. In the circuit court the parties agreed upon the facts, which show that Harris owned two lots, with separate buildings thereon, and that each of these properties was changed, remodeled, and improved in the year 1899, and that the improvements were as radical and substantial as in the preceding case. The annual assessor for the year 1900 added \$1,000 to the valuation of one property because of its improvements, and \$750 to the other, and so made his return to the auditor. The annual board of equalization confirmed the addition, and ordered it placed on the duplicate, which was done. The owner received no notice of the increased valuation, under section 2804, Rev. St. 1892. For the reasons given in the principal case (8,425), and which we need not repeat here, the judgment of the circuit court is reversed, and the petition of relator dismissed. Judgment reversed.

SPEAR, DAVIS, SHAUCK and CREW, JJ., concur. BURKET, C. J., not sitting.

MANHATTAN LIFE INS. CO. v. BURKE. (No. 7,720.) (Supreme Court of Ohio. March 24, 1903.) Error to Circuit Court, Fairfield County. Maxwell & Ramsey, for plaintiff in error. M. A. Daugherty, for defendant in error.

PER CURIAM. Judgment affirmed.

BURKET, C. J., and SPEAR and PRIOR, JJ., concur.

¹Transferred to Supreme Court. See 70 N. E. 1112.

